

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

**COLONEL FINANCIAL MANAGEMENT
OFFICER, *et al.*,**

Plaintiffs,

v.

LLOYD AUSTIN, in his official capacity as
Secretary of the United States Department of
Defense, *et al.*,

Defendants.

Case No. 8:22-cv-1275 (SDM/TGW)

**DEFENDANTS' MOTION FOR AN ORDER TO SHOW CAUSE WHETHER
CHIEF WARRANT OFFICER 3 SHOULD BE DISMISSED FOR FAILURE TO
PROSECUTE AND LACK OF JURISDICTION**

Pursuant to Local Rule 3.10, and Federal Rules of Civil Procedure 37(d), 41(b), and 12(h)(3), Defendants respectfully request that the Court issue an order to show cause why claims of Plaintiff Chief Warrant Officer 3 should not be dismissed from this action. Chief Warrant Officer 3 ("CWO3") has failed to participate in discovery, and lacks standing to bring this action.

When CWO3 failed to respond to discovery, Defendants investigated and determined that he was fully vaccinated in December 2021, before joining the litigation and filing an affidavit to the contrary. Disciplinary action was never initiated with respect to CWO3; instead, he was promoted to Captain on February 1, 2022; and he is currently stationed in Japan. Plaintiff CWO3 verified the allegations in the first, second and third amended complaints on Feb. 7, 2022 and June 29, 2022, including the statements that CWO3's "faith did not allow him to receive a COVID vaccination" and "[n]ow, nothing stands between him and immediate punitive consequences,

except the Court's intervention." 3d Am. Compl., ¶ 34, ECF No. 198 ("TAC"); see also ECF No. 75 ¶ 50; ECF No. 105 ¶ 50. But Defendants have since discovered that at the time of those verifications, he had already been fully vaccinated, and did not arguably face any punitive consequences. In fact, by the time of the TAC, he had promoted to Captain and was no longer a CWO3. Class counsel represented that they have been unable to contact him since June, and he has not responded to written discovery. As part of the meet and confer, Plaintiffs have taken no position on the motion, other than to state that they have not had contact with him since June 30, 2022.

As a fully vaccinated service member, CWO3 also lacks standing to bring this action and continue as class representative. This Court cannot redress his any alleged injury. Accordingly, the Court should dismiss him from this action for failure to prosecute and/or for lack of standing.

BACKGROUND

Defendants have previously set forth the background on the COVID-19 pandemic, the Food and Drug Administration's ("FDA") regulation of and guidance concerning COVID-19 vaccines, and the DoD COVID-19 vaccination directive in prior briefing in this matter, and respectfully refer the Court to that background. *See* ECF No. 23, at 2–6, ECF No. 205, at 3-4.

As initially pled on October 15, 2021, and then as first amended on February 2, 2022, this action asserted claims on behalf of service members, federal employees, and federal contractors, regarding different requirements to vaccinate against COVID-19.

ECF Nos. 1, 75. CWO3 was not a party in the first complaint. Compl., ECF No. 1. The first amended complaint was verified by CWO3 on Feb. 7, 2022, and Plaintiff's counsel noted they retained a copy of his original signature. *See* Am. Compl., at p.169, ECF No. 75. Specifically, CWO3 stated that "[t]he statements and allegations that pertain to me or which I make in this FIRST AMENDED VERIFIED CLASS ACTION COMPLAINT are true and correct, and based upon my personal knowledge (unless otherwise indicated)." *Id.* Allegations pertaining to CWO3 included the statement that "CHIEF WARRANT OFFICER 3 was given a January 7, 2022 deadline for being fully vaccinated, despite his religious beliefs. His faith did not allow him to receive a COVID vaccination[.] Now, nothing stands between him and immediate punitive consequences, except the Court's intervention." *Id.* ¶ 50. The Court severed the non-service member plaintiffs and their claims from this action and ordered that a new pleading be filed in this case "on behalf of the service members only." ECF No. 89. On Feb. 18, 2022, Plaintiffs filed that second amended pleading on behalf of 32 service members across the Armed Forces, with the same verification, dated Feb. 7, 2022, and identical factual language. 2d Am. Compl., ¶ 50 & p. 149, ECF No. 105. In Defendants' Motion to Dismiss, Defendants noted that CWO3's appeal had been denied in November, *see* ECF No. 139-5, and explained that Plaintiffs had not otherwise exhausted remedies, *see* ECF No. 139, at 7-10.

The Court then severed the service member claims by military Service, with this action deemed "The United States Marine Corps Action," and ordered the action stayed "pending an amendment of the complaint to include a service member in the

Marine Corps for whom venue is proper in the Middle District of Florida.” ECF No. 194, at 6–7. Plaintiffs filed the TAC on June 30, 2022, on behalf of 15 members of the Marine Corps and a putative class of “military servicemembers who have been denied religious exemption” from the DoD directive. TAC ¶¶ 25–39, 157–166. The TAC contained identical language about CWO3, including that “[n]ow, nothing stands between him and immediate punitive consequences, except the Court’s intervention.” *Id.* ¶¶ 34, 108. The verification was updated to reflect a new date of June 29, 2022, and notes that counsel retains the original signature. *Id.* at p. 107. Defendants moved to dismiss on July 14, 2022, relying on the allegations in the TAC to argue that Plaintiffs (including CWO3) had failed to exhaust administrative remedies. ECF No. 205, at 13-19. On August 18, 2022, the Court denied that motion, and granted Plaintiffs’ motion for class certification and a classwide preliminary injunction. ECF Nos. 229, 230.

Defendants served written discovery requests on CWO3, on July 29, 2022 and August 1, 2022. *See* Exs. 2-4. By email dated Sept. 13, 2022, Plaintiffs’ counsel represented that they “have been unable to make contact with Plaintiff Chief Warrant Officer 3 . . . , and therefore were unable to prepare discovery responses on his behalf” and informed Defendants they were “considering options in the event we are unsuccessful.” *See* Ex. 5. Because CWO3 is a class representative, Defendants have continued searching for and producing documents related to his religious accommodation request and responsive to Plaintiffs’ discovery requests.

The parties discussed CWO3’s apparent unavailability further by telephone and

email on several occasions, and Defendants investigated his status. Although initially believing that the last contact with CWO3 may have been April 2022, class counsel later claimed a last contact with CWO3 in June 2022, when he verified the allegations in the TAC (even though he was vaccinated and promoted already). *See* Ex. 6 (relevant portions highlighted). On September 26, 2022, the Government informed class counsel that CWO3 had been fully vaccinated since last winter, and has since promoted and been re-stationed to Japan, and that the Government had concerns about his sworn verification. *See id.* In fact, the Government can now confirm that CWO3 was vaccinated on December 19, 2021, before his deadline to be vaccinated, was not subject to discipline, and promoted to the rank of Captain on February 1, 2022. *See* Ex. 1, Decl. of Col. Brett Allison ¶¶ 4-7. In January 2022, he received orders to relocate to Japan, where he reported on July 12, 2022. *Id.* & Ex.

Defendants confirmed each of these facts to class counsel via phone and email. *See* Ex. 6. Counsel discussed options for dealing with CWO3's unavailability. Class counsel were unable to take a position on the proposed motion for an order to show cause because they cannot communicate with their client.

ARGUMENT

I. The Court Should Issue an Order to Show Cause Why CWO3 Should Not be Dismissed From this Action for Failure to Prosecute.

Federal Rule of Civil Procedure 41(b) allows for the involuntary dismissal of a plaintiff's claim where he or she has failed to prosecute the claim. Local Rule 3.10 provides that "A plaintiff's failure to prosecute diligently can result in dismissal if the

plaintiff in response to an order to show cause fails to demonstrate due diligence and just cause for delay.” Additionally, a district court’s “power to dismiss is an inherent aspect of its authority to enforce its orders and ensure prompt disposition of lawsuits.” *Brown v. Tallahassee Police Dep’t*, 205 F. App’x 802, 802 (11th Cir. 2006) (quoting *Jones v. Graham*, 709 F.2d 1457, 1458 (11th Cir. 1983)). While dismissal with prejudice for failure to prosecute is a “sanction . . . to be utilized only in extreme situations” and requires that a court “(1) conclud[e] a clear record of delay or willful contempt exists; and (2) mak[e] an implicit or explicit finding that lesser sanctions would not suffice,” *Thomas v. Montgomery Cnty. Bd. of Educ.*, 170 F. App’x 623, 625–26 (11th Cir. 2006) (quoting *Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass’n*, 62 F.3d 1356, 1366 (11th Cir. 1995)), dismissal without prejudice for failure to prosecute is not an adjudication on the merits, and, therefore, courts are afforded greater discretion in dismissing claims in this manner. *Taylor v. Spaziano*, 251 F. App’x 616, 619 (11th Cir. 2007). Failure to respond to discovery at all is an appropriate basis for such dismissal. *See, e.g., Gurgel v. Boss Rain Forest Pet Resort, Inc.*, No. 16-62819-CIV, 2017 WL 7796319, at *1 (S.D. Fla. Mar. 13, 2017) (“given Plaintiff’s complete failure to respond to numerous communications from her attorney and to comply with her discovery obligations in this case, Plaintiff has failed to diligently prosecute her claims and that dismissal without prejudice is therefore proper.”); *Beckworth v. Senior Home Care, Inc.*, No. 3:12-cv-351/MCR/EMT, 2014 WL 4185124, at *8 (N.D. Fla. Aug. 22, 2014) (dismissing without prejudice plaintiffs’ claims based upon, inter alia, plaintiffs’ failure to respond to discovery requests and failure to communicate with their counsel or the

court); *Steiner-Out v. Lone Palm Golf Club, LLC*, No. 8:10-cv-2248-T-24TBM, 2011 WL 2694559, at *2 (M.D. Fla. June 24, 2011) (dismissing plaintiff who failed to respond to discovery or court orders), report and recommendation adopted, No. 8:10-CV-2248-T-24, 2011 WL 2694291 (M.D. Fla. July 12, 2011).

The Court may also dismiss claims as a discovery sanction under Fed. R. Civ. P. 37(d)(3), which permits sanctions, including dismissal, for failure to respond to discovery requests. “District courts have broad authority and discretion to fashion sanctions against parties who fail to engage in discovery . . . or otherwise disobey court orders.” *United States v. Twenty-Nine Pre-Columbian And Colonial Artifacts From Peru*, 695 F. App’x 461, 466 (11th Cir. 2017) (unpublished); *see also Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987); *Mayan v. Mayan*, 6:15-cv-2183-Orl-18TBS, 2017 WL 3328195, at *5 (M.D. Fla. July 10, 2017), report and recommendation adopted, 2017 WL 3332227 (M.D. Fla. Aug. 3, 2017). “The decision to dismiss a claim or enter default judgment ‘ought to be a last resort—ordered only if noncompliance with discovery orders is due to willful or bad faith disregard for those orders.’” *United States v. Certain Real Prop. Located at Route 1, Bryant, Ala.*, 126 F.3d 1314, 1317 (11th Cir. 1997). “In imposing sanctions, the court may consider ‘the unsuitability of another remedy, the intransigence of a party, and the absence of an excuse.’” *Bernath v. Seavey*, No. 2:15-CV-358-FTM-99CM, 2017 WL 564941, at *4 (M.D. Fla. Feb. 13, 2017).

CWO3 has failed to respond to three sets of written discovery and is no longer in communication with his counsel. Class counsel represented that they have repeatedly attempted to reach him. Defendants are therefore unable to schedule

CWO3's deposition through class counsel or obtain any information about why he chose to be vaccinated. The evidence supports a finding that his failure to cooperate in discovery is willful, given the recent discovery that his sworn statements in this matter inaccurately allege a need for prospective relief. While his relocation to Japan may provide some explanation for lapses or delays in communication with class counsel, it does not explain the inaccuracy in his affidavits or months of non-communication, especially given that he was aware of the impending relocation when the Amended Complaint was filed in February. Class counsel has disclaimed any knowledge as to how he came to submit the affidavits and have provided no explanation to date, other than that they spoke to him as recently as June 2022. There is no excuse for his failures to date, and no reason to keep him in this action, where he cannot adequately serve as class representative.

Moreover, Defendants are prejudiced by Plaintiff CWO3 remaining in the case, and lesser sanctions would not suffice. He is a class representative who does not appear to have any injury, much less a typical one, who cannot be deposed, and who declines to respond to discovery, all while Defendants continue to expend resources investigating his claims, and searching for and producing documents concerning him, without knowing if he may re-appear at some point before trial. Defendants cannot effectively seek information from him that might be relevant and helpful to Defendants, such as information about his decision to be vaccinated, nor can Defendants be certain whether he will show up at or before trial with potentially harmful information that has not been subject to discovery. Accordingly, Plaintiff

CWO3 remaining in the case while the parties prepare this matter for trial, in short order, is prejudicial to Defendants.¹

II. The Court Should Dismiss Claims of Plaintiff CWO3 Because He Lacks Standing to Seek Any Individual Relief.

“‘Federal courts are courts of limited jurisdiction’ and ‘possess only that power authorized by Constitution and statute.’” *Bishop v. Reno*, 210 F.3d 1295, 1298 (11th Cir. 2000) (quoting *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)). Where plaintiffs fail to demonstrate a court’s subject-matter jurisdiction, dismissal is appropriate pursuant to Federal Rule of Civil Procedure 12(h)(3). The Court may consider facts beyond the four corners of the pleading that are relevant to the question of subject matter jurisdiction. *Corbett v. TSA*, 930 F.3d 1225, 1228 (11th Cir. 2019).

“[T]he ‘irreducible constitutional minimum’ of standing under Article III consists of three elements: an actual or imminent injury, causation, and redressability.” *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The second element of standing requires that a plaintiff allege a “causal connection between the [alleged] injury and the conduct complained of,” meaning “the injury has to be fairly . . . trace[able] to the challenged action of the defendant.” *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). As to the third element of standing, “[t]o establish redressability, ‘it must be likely, as

¹ In the absence of CWO3’s participation in response to this motion, it is hard to see how CWO3 remaining a plaintiff is in his interest either. He would obtain no relief even from a class victory, and there are obvious drawbacks to remaining as a Plaintiff.

opposed to merely speculative, that the injury will be redressed by a favorable decision.’’ *Kawa Orthodontics, LLP v. Sec’y, U.S. Dep’t of the Treasury*, 773 F.3d 243, 247 (11th Cir. 2014) (quoting *Lujan*, 504 U.S. at 561).

The Supreme Court has repeatedly stated that “standing is not dispensed in gross.” *See, e.g., Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650–51 (2017) (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008)). A plaintiff “must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” *Davis*, 554 U.S. at 734 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). To demonstrate standing for prospective relief, the injury must be “certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 413 (2013).

CWO3 does not have standing to pursue any of the relief described in the TAC. The complaint primarily seeks prospective relief, such as an injunction against enforcement of the mandate or reforming the religious accommodation process. *See* TAC, Prayer for Relief ¶ A. CWO3 was fully vaccinated in December 2021, before his deadline to be vaccinated, and was not subject to disciplinary action for failure to be vaccinated. Allison Decl. ¶¶ 4-7. He thus has no “certainly impending” future injury with respect to the mandate or the religious accommodation process. Because he has no further obligations under the challenged mandate and no need to go through the religious accommodation process, none of the equitable relief sought arguably could apply to him. To the extent the TAC seeks retrospective relief, neither the TAC nor any other filing in this court identifies any past injury that is redressable by this Court, and there is no waiver of sovereign immunity that would permit a damages award

against the Government in any event. *See Davila v. Gladden*, 777 F.3d 1198, 1210 (11th Cir. 2015) (“RFRA does not therefore authorize suits for money damages against officers in their official capacities.”).² In short, CWO3 fulfilled the directive of the mandate and has not identified any injury traceable to the Defendants and redressable by this Court. He is not a proper class representative, and lacks standing to seek any relevant relief in this action.

CONCLUSION

For the foregoing reasons, the Court should issue an order to show cause under Local Rule 3.10 as to why the Court should not dismiss the claims of Chief Warrant Officer 3.

LOCAL RULE 3.01(g) CERTIFICATION

In October 2022, undersigned counsel conferred via email with Plaintiffs’ counsel about CWO3’s unavailability and the relief sought in this motion. Plaintiffs’ counsel authorized the Government to represent that Plaintiffs take no position on the motion, other than to state that they have not had contact with him since June 30, 2022.

² The Supreme Court later held that RFRA permits certain damages claims to proceed against federal officials sued in their individual capacity. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 493 (2020). No such individual capacity claims exist in this action, which would be subject to obvious additional jurisdictional hurdles.

Dated: October 13, 2022

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney
General

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director

Respectfully submitted,

/s/ Amy E. Powell
ANDREW E. CARMICHAEL
AMY E. POWELL
STUART ROBINSON
Senior Trial Counsel
LIAM HOLLAND
CATHERINE M. YANG
CASSANDRA SNYDER
MICHAEL CLENDENEN
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (919)856-4013
Email: Amy.Powell@usdoj.gov
Counsel for Defendants

**TABLE OF EXHIBITS IN SUPPORT OF
DEFENDANTS' MOTION FOR AN ORDER TO SHOW CAUSE**

EX No.	Exhibit Description
1	Declaration of Col. Brett Allison and Attachment (REDACTED)
2	Defendants' 1 st Set of Interrogatories for CWO3
3	Defendants 1 st Set of Requests for Production for CWO3
4	Defendants' 1 st Set of Requests for Admission for CWO3
5	Email from R. Gannam dated Sept. 13, 2022 (REDACTED)
6	Email Thread between A. Powell and Roger Gannam (highlighted)

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

COLONEL FINANCIAL MANAGEMENT
OFFICER, *et al.*

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official
capacity as Secretary of U.S. Dep't of Defense, *et al.*,

Defendants.

Case No. 8:22-cv-01275-SDM-TGW

DECLARATION OF BRETT A. ALLISON

I, Brett A. Allison, hereby state and declare as follows:

1. I am a Colonel in the United States Marine Corps (USMC), currently acting as Chief of Staff for the 1st Marine Aircraft Wing (MAW). I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I am currently the 1st MAW Assistant Chief of Staff, G-5 and acting Chief of Staff. Prior to assuming my current position at the 1st MAW, I was the Deputy Executive Officer to the Commander, United States Central Command. As part of my current duties as the acting Chief of Staff, I assist the 1st MAW Commanding General with personnel management, strategic planning, and operational readiness across the 1st MAW.

3. The MRRS is the Navy, Marine Corps and Coast Guard's tool designed to record and track Individual Medical Readiness (IMR) elements to include immunizations, dental status, laboratory tests, and physical exams such as periodic health assessments, deployment health status, pregnancies, illnesses, and injuries. MRRS is a web-based, real-time application

with a central aggregating database, which links with existing authoritative data systems for personnel tracking including the Navy Standard Integrated Personnel System (NSIPS) and Marine Corps Total Force System (MCTFS). MRRS gives headquarters staffs and leadership a real-time view of Force Medical Readiness and immunization status.

4. On December 19, 2021, Plaintiff CWO3 was vaccinated with a single dose of the Johnson & Johnson's Janssen (J&J/Janssen) viral vector COVID-19 vaccine. This information is reflected in Plaintiff CWO3's immunization status profile in MRRS.

5. Exhibit A, attached, contains a copy of Plaintiff CWO3's current orders. Exhibit A demonstrates that Plaintiff CWO3 reported to Marine Wing Headquarters Squadron 1 in Okinawa, Japan on 13 July 2022.

6. Plaintiff CWO3 has not been subject to any disciplinary action as a result of his immunization status.

7. On February 1, 2022, Plaintiff CWO3 promoted to the rank of O-3/Captain in the USMC.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of October 2022.


B. A. ALLISON



MARINE CORPS BASIC ORDER

RANK: CWO3

NAME: [REDACTED]

EDIPI: [REDACTED]

PMOS: 6004

FROM MCC: MDT

PRESENT COMMAND: [REDACTED]

HQMC ORDER DETAILS - 20220123

FMCC:

145

FUTURE COMMAND:

1STMAW OKINAWA JAPAN

TOUR:

36 MONTHS, ACCOMPANIED (ROTATIONAL-
FROM/WITHIN CONUS)

ESTIMATED DETACH DATE:

20220701

REPORT NO LATER THAN:

20220731

BILLET:

6004, O3

THIS IS AN INVOLUNTARY ASSIGNMENT.

YOU ARE REQUIRED TO OBTAIN A NO-FEE: OFFICIAL (MAROON) PASSPORT FOR THIS ASSIGNMENT.

YOUR DEPENDENTS ARE REQUIRED TO OBTAIN A NO-FEE: REGULAR (BLUE) PASSPORT FOR THIS ASSIGNMENT.

20220123 - Original Order

"PCS CONUS TO OCONUS (OKI) (ACCOMP) (TOUR LENGTH 36 MONTHS)

1. DIR SNO RPT NLT 31 JUL 2022 TO 1STMAW OKINAWA JAPAN (MCC 145) FOR DUTY.
2. FROM THE DATE OF ISSUANCE OF THESE ORDERS, YOU ARE REQUIRED TO INITIATE OVERSEAS SCREENING FOR YOURSELF AND ALL DEPENDENTS WITHIN TEN DAYS. THE OVERSEAS SCREENING PROCESS MAY TAKE UP TO 60 DAYS TO COMPLETE. THE IMPORTANCE OF COMPLETE AND TIMELY SCREENING CANNOT BE OVER-EMPHASIZED.
3. ENSURE THOROUGH OVERSEAS SCREENING IS COMPLETED FOR ALL FAMILY MEMBERS IAW MCO 1000.6. FAMILY MEMBERS ARE REQUIRED TO HAVE COMPLETED A PHYSICAL EXAMINATION PRIOR TO DEPARTURE FROM CONUS AND RESULTS INDICATED BY ENDORSEMENT.
4. FAILURE TO COMPLETE OCONUS SCREENING WITHIN 60 DAYS OF ORDERS ISSUANCE MAY RESULT IN YOUR ORDERS BEING MODIFIED TO UNACCOMPANIED/DEPENDENT-RESTRICTED (IF APPLICABLE).
5. IF YOU RECEIVE INFORMATION THAT CALLS INTO QUESTION YOUR SUITABILITY FOR OVERSEAS ASSIGNMENT, YOU WILL NOTIFY YOUR MONITOR WITHIN 5 DAYS. ADDITIONALLY, YOU ARE REQUIRED TO INFORM YOUR MONITOR BY EMAIL AND PHONE IF YOU HAVE NOT COMPLETED OCONUS SCREENING WITHIN 60 DAYS OF ORDERS ISSUANCE.
6. INCLUDE IN ORDERS: MCO 1300.8 PRESCRIBES THE STANDARD TOUR OF DUTY FOR THIS ASSIGNMENT AS 36 MONTHS (ACCOMPANIED BY DEPENDENTS). HQMC HAS ESTABLISHED THIS TCF TO INDICATE THE ANTICIPATED TOUR LENGTH FOR SNO AT 1STMAW OKINAWA JAPAN BUT IS SUBJECT TO CHANGE (WITHOUT NOTIFICATION TO THE SERVICE MEMBER) BASED UPON THE NEEDS OF THE MARINE CORPS. ANY QUESTIONS REGARDING TOUR LENGTH SHOULD BE DIRECTED TO THE PMOS MONITOR.
7. ENSURE THAT BASIC ORDERS OR ENDORSEMENTS THERETO SHOW FULL NAMES AND RELATIONSHIP OF ALL FAMILY MEMBERS WHO ACCOMPANY SNO. AREA CLEARANCE FOR FAMILY MEMBERS IS REQUIRED PER ACTSMAN PAR 4121.4. IT IS THE RESP OF THE CMD TO ENSURE THAT ALL PERS TRAVELING OCONUS RECEIVE ANTI-TERRORISM TRNG IAW MCO P3302.1. COMPLETION OF THIS TRAINING WILL BE ANNOTATED ON SNOS OQR

PAGE 11. ADVANCE APPLICATION FOR ASSIGNMENT TO HOUSING IS REQUIRED. MARINES MUST SEND A COPY OF THEIR ORDERS AND A COMPLETED DD FORM 1746 (REQ FOR HOUSING ASG), WHICH CAN BE MAILED, FAXED, OR EMAILED TO THEIR GAINING COMMAND FAMILY HOUSING OFFICE. HOUSING INTERNET ADDRESSE: HTTP://WWW.OKINAWAMFH.COM/. INFORMATION CONCERNING IMPORTING PETS: HTTP://WWW.MCCSOKINAWA.COM/WELCOMEABOARD/.

8. DELAY AUTH IAW MCO 1050.3 PAR 2009. CURRENT EDITIONS OF MCO P1000.6 PAR, MCO 1300.8, MCO 4650.30, MCO 5512.4 AND BUMEDINST 6230.1 APPLY. FAMILY MEMBER TRANSFER; JTR PAR 5166 APPLIES. MOVE HOUSEHOLD GOODS IAW JTR PAR 5232, 5315-B AND 5264. POV TRANSPORT OR STORAGE IAW JTR 5320 OCONUS CONSIGNMENT GUIDE.

9. AMC-PE USAGE, IF AVAILABLE, IS DIRECTED FOR ALL UNIFORMED PERSONNEL. YOU ARE ALSO REMINDED THAT ARRANGEMENT OF ALL OFFICIAL TRANSPORTATION THROUGH AN AVAILABLE COMMERCIAL TRAVEL OFFICE (CTO)/DISTRIBUTION MANAGEMENT OFFICE (DMO) IS MANDATORY.

10. THE NATURE OF DUTIES TO BE PERFORMED BY SNO REQUIRES ISSUANCE OF OFFICIAL PASSPORT FOR PCS TRAVEL TO JAPAN AND PROJECTED TAD TRAVEL TO KOREA, THAILAND, PHILIPPINES, AUSTRALIA, SINGAPORE, MALAYSIA, BURMA, AND INDONESIA. IMMEDIATE APPL FOR NO FEE PASSPORT REQ FOR DEPNS IAW MCO 5512.4.

11. MARINES ARE ENCOURAGED TO ACCESS THE MOST CURRENT INFORMATION ON FAMILY MEMBER TRICARE PRIME AND TRANSFER ENROLLMENT TO THE NEW REGION VIA THE ONLINE WEBSITE AT WWW.TRICARE.MIL/ENROLLMENT.

IN ACCORDANCE WITH USTRANSCOM GENADMIN TO THE JOINT FORCE UPDATING COVID-19 TRAVEL REQUIREMENTS IN RESPONSE TO FORCE HEALTH PROTECTION SUPPLEMENT 14, ALL TRAVELERS ON OFFICIAL OVERSEAS ORDERS WILL ARRIVE AT THE TERMINAL WITH HARDCOPY PROOF OF A NEGATIVE COVID-19 TEST CONDUCTED WITHIN THREE DAYS PRIOR TO ARRIVAL AT THE AERIAL PORT OF EMBARKATION, UNLESS THE HOST NATION SPECIFIES A TYPE OF TEST OR TESTING TIMELINE. A NOTE FROM A DOCTOR WILL NOT MEET THIS REQUIREMENT. TRAVELERS DIAGNOSED AS COVID-19 POSITIVE AND HAVE RECOVERED REQUIRE MEDICAL CLEARANCE DOCUMENTATION WITHIN 90 DAYS PRIOR TO OFFICIAL OVERSEAS MOVEMENT. PRE-TRAVEL TESTING MAY BE WAIVED IF TESTING IS UNAVAILABLE. COORDINATE THE WAIVER WITH THE RECEIVING COMMAND. TRAVELERS SHALL PRESENT WAIVER DOCUMENTATION AT THE TERMINAL UPON REQUEST.

ATTENTION: DOD CIVILIANS, THEIR ELIGIBLE FAMILY MEMBERS AND ELIGIBLE MILITARY FAMILY MEMBERS ON OFFICIAL TRAVEL MUST HAVE EITHER A SPECIAL ISSUANCE PASSPORT (SIP) OR, AS A TEMPORARY MEASURE, A MEMORANDUM FROM A DOD PASSPORT AGENT STATING THE SIP APPLICATION WAS SUBMITTED PRIOR TO DEPARTURE FROM THE POINT OF ORIGIN. FOR A LIMITED TIME, BOARDING A FLIGHT WHILE ON OFFICIAL TRAVEL STATUS WITH A REGULAR (BLUE TOURIST) PASSPORT IS PERMISSIBLE ONLY WITH SUCH A MEMO, WHICH IS TO BE PRESENTED TO BOARDING OFFICIALS, UPON REQUEST.

NOTE: THIS TEMPORARY EXCEPTION, I.E., ALLOWING OFFICIAL TRAVEL ON A REGULAR PASSPORT WITH MEMORANDUM (IN LIEU OF A SIP), WILL EXPIRE ON 30 SEPTEMBER 2021. EFFECTIVE 01 OCTOBER 2021, OFFICIAL TRAVEL MUST BE CONDUCTED WITH A SIP.

TRAVEL FUNDING DETAILS

Customer Identification Code: [REDACTED]

TITLE	TAC	ACRN	DC	FY	APPN	SUBH	OCC	BCN	AAA	TTC	PAA	COST CODE	SDN
Travel		AA	17	2	1105	0000	210	41690	044320	2D	000000	000000000000	M7000222CT B7JGL

Household Goods	M5O2	AA	17	2	1105	0000	220	41690	044320	2D	000000	M5O200000000	M7000122C B0M5O2
Non-Temp Storage	M832	AA	17	2	1105	0000	257	41690	044320	2D	000000	M83200000000	M7000122C B0M832
POV Storage	M252	AA	17	2	1105	0000	257	41690	044320	2D	000000	M25200000000	M7000122C B0M252
POV Shipment	M5R2	AA	17	2	1105	0000	220	41690	044320	2D	000000	M5R200000000	M7000122C B0M5R2

FAMILY MEMBER DETAILS

THIS INFORMATION WAS LOADED DIRECTLY FROM MCTFS AT THE TIME THE ORDER WAS CREATED OR LAST MODIFIED. ONLY DEPENDENTS AUTHORIZED TRAVEL AND TRANSPORTATION ENTITLEMENTS ARE DISPLAYED. CONTACT YOUR SUPPORTING ADMIN OFFICE FOR ANY NECESSARY CORRECTIONS TO YOUR RECORD.

NAME	DATE OF BIRTH	GAIN DATE	LOCATION



UNITED STATES MARINE CORPS

MWHS-1 HQTRS 1ST MAW
UNIT 37121
CAMP FOSTER, JAPAN 96373

1320
IBI
17 Jul 22

REPORTING ENDORSEMENT on CMC Washington DC Basic Orders of 21 Jan 22

From: Command Approver

To: Captain [REDACTED] USMC

Subj: REPORTING ENDORSEMENT (Travel SDN: M7000222CTB7JGL)

1. You reported to this command on 12 July 2022 for duty with MWHS-1 HQTRS 1ST MAW (RUC 01027) (MCC 145).
2. The Marine has not been assigned single type government quarters (barracks).
3. Messing has not been directed due to Marine's rank of GySgt and above.

Digitally signed for authenticity with a trusted DOD Certificate
on behalf of:
2ndLt Buker, Zachary S. (EDIP: 1543645806)
Sun Jul 17 22:05:29 CDT 2022

Z. S. BUKER

Exhibit 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

**COLONEL FINANCIAL MANAGEMENT
OFFICER, *et al.*,**

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official
capacity as Secretary of U.S. Dep't of Defense,
et al.,

Defendants.

Case No. 8:22-cv-01275-SDM-TGW

**DEFENDANTS' FIRST SET OF INTERROGATORIES TO CHIEF
WARRANT OFFICER 3**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, by and through their undersigned counsel, hereby respectfully propound their first set of interrogatories upon Plaintiff Chief Warrant Officer 3.

INSTRUCTIONS

1. When asked to answer an interrogatory, the request is for information within your actual or constructive control. Your answers must therefore include not only information available to you, but also that is available to your attorneys, associates, employees, representatives, agents, and all other persons acting under, by, or through you, or subject to your control or supervision, or acting on your behalf.

2. If you cannot fully and completely answer an interrogatory, please provide the facts you rely upon in support of your contention that you cannot do so. To the extent an interrogatory is not answered because of an assertion of privilege,

please state the specific privilege relied upon and support the claim of privilege with a statement of particulars sufficient to enable the Court to assess its validity consistent with Federal Rule of Civil Procedure 26. If you object to answering only part of an interrogatory, please answer that part you do not object to answering and indicate what portion of the interrogatory to which your assertion of privilege extends.

3. If, in response to one or more of the interrogatories, you produce or identify any document(s) pursuant to Federal Rule of Civil Procedure 33(d), please identify the document(s) with specificity and indicate to which interrogatory or part thereof the document responds.

4. These interrogatories are to be deemed continuing to the full extent allowed by law.

5. Pursuant to Federal Rule of Civil Procedure 33(b), you must sign a declaration affirming the accuracy of your answers to the interrogatories.

5. Please forward the answers to undersigned counsel at the address below no later than thirty (30) days from date of service.

DEFINITIONS

For purposes of these interrogatories, the following definitions apply:

1. “**Document**” or “**record**” means the original and any draft or copy of any written, recorded or graphic materials of any type and in any form (including those maintained in electronic form, including on any social media accounts) in your possession, custody, knowledge, or control, including your attorneys, agents, and representatives.
2. “COVID-19 vaccine” refers to the Pfizer, Moderna, Johnson & Johnson, and Novavax COVID-19 vaccines, as well as the vaccines in the World Health Organization’s Emergency Use Listing, *see* World Health Organization, *COVID-19 Vaccines with WHO Emergency Use Listing*, <https://perma.cc/S3UU-98RN>.
3. “**Individual**,” “**person**,” “**organization**,” or “**entity**” means any natural person, corporation, unincorporated association, partnership, sole proprietorship, business, or other organization or entity.
4. “**Unit**” means the military command you were assigned to on the date you submitted your request to be exempted from DoD’s and the Marine Corps’ COVID-19 vaccination requirement based on your religious beliefs.
5. “**Identify**” or “**identifies**” or “**identification**” when used in reference to an individual means to give, to the extent known, the person’s name,

present or last known address and telephone number, and the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting identification of that person.

6. “**Identify**” or “**identifies**” or “**identification**” when used in reference to a document means to give, to the extent known, the
 - a. type of document;
 - b. general subject matter;
 - c. date of the document; and
 - d. author(s), addressee(s), and recipient(s).
7. “**Interrogatory**” or “**interrogatories**” refers to Defendants’ interrogatories to Plaintiffs in this action.
8. “**You**,” “**your**,” “**Plaintiff**,” (without specific designation) for the purposes of these interrogatories shall mean Plaintiff CHIEF WARRANT OFFICER 3.
9. “**Plaintiffs**” (without specific designation) shall mean the individuals identified as Plaintiffs as the currently operative complaint in this action: COLONEL FINANCIAL MANAGEMENT OFFICER, LIEUTENANT COLONEL 1, RESERVE LIEUTENANT COLONEL, CAPTAIN, CAPTAIN 2, CAPTAIN 3, FIRST

LIEUTENANT, SECOND LIEUTENANT, CHIEF WARRANT
OFFICER 4, CHIEF WARRANT OFFICER 3, LANCE
CORPORAL 1, LANCE CORPORAL 2, LANCE CORPORAL 3,
MIDSHIPMAN 2/C, GUNNERY SERGEANT.

10. **“And”** and **“or”** shall be construed conjunctively and disjunctively.
11. **“Each”** means each and every.
12. **“Date”** means day, month, and year.
13. **“This action”** shall refer to *Colonel Financial Management Officer, et al., v. Austin, et al.*, No. 4:21-cv-1236 (M.D. Fla.), and includes filings originally entered on the previous docket prior to severance: *Navy Seal 1, et al., v. Austin*, No. 8:21-cv-2429 (M.D. Fla.).
14. **“Complaint”** or **“Compl.”** shall refer to the Third Amended Verified Class Action Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Relief, and Damages, filed at Dkt. No. 198 in this action.
15. **“Healthcare Provider”** means any entity or person that provided services for medical, psychological, physical, or emotional ailments or limitations, including without limitation any physician, endocrinologist,

physician's assistant, nurse, osteopath, holistic healer, therapist, psychologist, psychiatrist, counselor, hospital, clinic, pharmacist or medical institution.

16. The singular form of any word shall also be construed as the plural, and vice versa. Verbs shall be construed as though they were in the past tense, the present and the future tense, and vice versa.

INTERROGATORIES

INTERROGATORY NO. 1:

Please identify each individual who has assisted you in preparing your responses to these interrogatories.

INTERROGATORY NO. 2:

Please identify all documents that you consulted in preparing your responses to these interrogatories.

INTERROGATORY NO. 3:

Please describe in detail the nature of your religious beliefs, how and when you began to subscribe or adhere to these religious beliefs, and how you practice these beliefs in your daily life. Your response should include, in particular, how you identify and avoid the use, consumption, or ingestion of, or vaccination with, prod-

ucts (e.g., foods, consumer goods, cosmetics, prescription or over-the-counter medications, or vaccines other than the COVID-19 vaccine) containing, manufactured or developed with, and/or tested using aborted fetal tissue or cells; and products that “will or may produce adverse consequences” as alleged in paragraph 78 of the Complaint.

INTERROGATORY NO. 4:

Please identify each individual who you consulted in preparing your request to be exempted from DoD’s and the Marine Corps’ COVID-19 vaccination requirement based on your religious beliefs.

INTERROGATORY NO. 5:

Please identify all documents that you consulted in preparing your request to be exempted from DoD’s and the Marine Corps’ COVID-19 vaccination requirement based on your religious beliefs.

INTERROGATORY NO. 6:

Please describe in detail each and every reason why you believe receiving a COVID-19 vaccine (including the Pfizer, Moderna, Johnson & Johnson, Novavax vaccines, and the vaccines with World Health Organization emergency use listing) is contrary to your religious beliefs.

INTERROGATORY NO. 7:

Please describe in detail each and every reason why you believe DoD and the Marine Corps' COVID-19 vaccination requirement substantially burdens your religious beliefs.

INTERROGATORY NO. 8:

Please describe in detail all research, inquiry and other methods you used to determine that DoD and the Marine Corps' COVID-19 vaccination requirement is contrary to your religious beliefs, including identification of all sources consulted (including written, recorded, or digital material, authorities, experts, or individuals, as well as verbal sources), the dates of consultation, and the substance of the information consulted.

INTERROGATORY NO. 9:

Please explain in detail each and every reason why you believe DoD and the Marine Corps do not have a compelling government interest in ensuring you receive a COVID-19 vaccination.

INTERROGATORY NO. 10:

Please describe in detail each and every adverse consequence you claim to have suffered as a result of your request for religious accommodation, including the

reasons why you believe it to be a result of the request for religious accommodation.

With respect to each alleged consequence, identify at least relevant dates, documents, witnesses, and events.

INTERROGATORY NO. 11:

Please describe in detail each and every means available to prevent you from being infected or ill with COVID-19 that you believe are less restrictive than the COVID-19 vaccine, and why you believe those means are effective.

INTERROGATORY NO. 12:

Please describe in detail each and every means available to prevent the spread of COVID-19 within your unit that you believe are less restrictive than the COVID-19 vaccine, and why you believe those means are effective.

INTERROGATORY NO. 13:

Please identify each and every Healthcare Provider from whom you have received medical evaluation, treatment, care, or medication, at any time within the last five years, and the nature of the medical evaluation, treatment, care, or medication sought and provided.

INTERROGATORY NO.14:

If you are unwilling to receive the Novavax COVID-19 vaccine in order to satisfy the COVID-19 vaccination requirements, please describe in detail the reasons why not, including identification of all sources consulted in coming to that conclusion.

INTERROGATORY NO. 15:

If you are unwilling to travel to another country to receive a COVID-19 vaccination that is approved by the World Health Organization and which did not use fetal cells in testing or production, please describe in detail all reasons that you are unwilling to do so, including identification of all sources consulted in coming to that conclusion.

INTERROGATORY NO. 16:

Please describe in detail each and every effort you have made or are making to obtain FDA-licensed vaccines, including any occasion on which you were denied administration of an FDA-licensed vaccine. This includes identification of relevant dates, documents, witnesses, and the substance of the efforts.

INTERROGATORY NO. 17:

Please describe in detail each and every reason for your belief that “[s]everal vaccines do not use fetal cells like Sinopharm vaccine” and describe any efforts you have made to research and obtain Sinopharm vaccine. *See* ECF No. 206-7, at pdfp.7. This includes identification of any relevant documents or witnesses.

INTERROGATORY NO. 18:

Please describe in detail each and every fact that supports your allegation that you have natural immunity from COVID-19, including the date, duration, and severity of your infection. *See* ECF No. 206-7, at pdfp.8. This includes identification of any relevant documents or witnesses.

Dated: July 29, 2022

BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director

Respectfully submitted,

/s/ Amy E. Powell
ANDREW E. CARMICHAEL
AMY E. POWELL
Senior Trial Counsel
ZACHARY A. AVALLONE
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (919) 856-4013
Email: amy.powell@usdoj.gov
Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that I electronically served the foregoing document on Plaintiffs' counsel via electronic mail on July 29, 2022.

/s/ Amy E. Powell
AMY E. POWELL
Senior Trial Counsel
U.S. Department of Justice

Exhibit 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

**COLONEL FINANCIAL MANAGEMENT
OFFICER, *et al.*,**

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official
capacity as Secretary of U.S. Dep't of Defense,
et al.,

Defendants.

Case No. 8:22-cv-01275-SDM-TGW

**DEFENDANTS' FIRST SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS TO CHIEF WARRANT OFFICER 3**

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants, by and through their undersigned counsel, hereby respectfully propound their first set of requests for production of documents upon Plaintiff Chief Warrant Officer 3.

INSTRUCTIONS

1. When asked to produce a document, the request is for information within your actual or constructive control. Your answers must therefore include not only information available to you, but also that is available to your attorneys, associates, employees, representatives, agents, and all other persons acting under, by, or through you, or subject to your control or supervision, or acting on your behalf.
2. If you cannot produce a requested document (including, *inter alia*, because it was lost or destroyed), please provide the facts you rely upon in support of your contention that you cannot do so. To the extent a document is not produced

because of an assertion of privilege, please state the specific privilege relied upon and support the claim of privilege with a statement of particulars sufficient to enable the Court to assess its validity consistent with Federal Rule of Civil Procedure 26. If you object to producing only part of a requested document, please produce that portion of the document you do not object to producing and indicate what portion you have withheld based on an assertion of privilege.

3. These document production requests are to be deemed continuing to the full extent allowed by law.

4. Unless specified otherwise in a specific Request, the time period for these Requests is August 23, 2021 to the present.

5. Please forward the documents to undersigned counsel at the address below no later than thirty (30) days from date of service.

DEFINITIONS

For purposes of these requests for production, the following definitions apply:

1. “**Document**” or “**record**” means the original and any draft or copy of any written, recorded or graphic materials of any type and in any form (including those maintained in electronic form, such as (but not limited to) text messages, email, posts on social media, and posts on blogs, internet message boards, chat rooms, or other public fora) in your possession, custody, knowledge, or control, including your attorneys, agents, and representatives.

2. “**Individual**,” “**person**,” “**organization**,” or “**entity**” means any natural person, corporation, unincorporated association, partnership, sole proprietorship,

business, or other organization or entity.

3. “COVID-19 vaccine” refers to the Pfizer, Moderna, Johnson & Johnson, and Novavax COVID-19 vaccines, as well as the vaccines in the World Health Organization’s Emergency Use Listing, *see* World Health Organization, *COVID-19 Vaccines with WHO Emergency Use Listing*, <https://perma.cc/S3UU-98RN>.

4. “**Identify**” or “**identifies**” when used in reference to an individual means to give, to the extent known, the person’s name, present or last known address and telephone number, and the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting identification of that person.

5. “**Identify**” or “**identifies**” when used in reference to a document means to give, to the extent known, the

- a. type of document;
- b. general subject matter;
- c. date of the document; and
- d. author(s), addressee(s), and recipient(s).

6. “**Interrogatory**” or “**interrogatories**” refers to Defendants’ interrogatories to Plaintiff CHIEF WARRANT OFFICER 3 in this action, including those served concurrently with this set of requests for production.

7. “**You**,” “**your**,” “**Plaintiff**,” (without specific designation) for the

purposes of these interrogatories shall mean Plaintiff CHIEF WARRANT OFFICER 3.

8. **“Plaintiffs’”** (without specific designation) shall mean the individuals identified as Plaintiffs as the currently operative complaint in this action: COLONEL FINANCIAL MANAGEMENT OFFICER, LIEUTENANT COLONEL 1, RESERVE LIEUTENANT COLONEL, CAPTAIN, CAPTAIN 2, CAPTAIN 3, FIRST LIEUTENANT, SECOND LIEUTENANT, CHIEF WARRANT OFFICER 4, CHIEF WARRANT OFFICER 3, LANCE CORPORAL 1, LANCE CORPORAL 2, LANCE CORPORAL 3, MIDSHIPMAN 2/C, GUNNERY SERGEANT.

9. **“And”** and **“or”** shall be construed conjunctively and disjunctively.

10. **“Each”** means each and every.

11. **“Date”** means day, month, and year.

12. **“Known to you”** and **“knowledge of”** mean all matters known to you, your attorneys, agents, representatives, employees, or to anyone subject to your control or supervision, or acting on your behalf.

13. **“This action”** shall refer to *Colonel Financial Management Officer, et al., v. Austin, et al.*, No. 4:21-cv-1236 (M.D. Fla.), and includes filings originally entered on the previous docket prior to severance: *Navy Seal 1, et al., v. Austin*, No. 8:21-cv-2429 (M.D. Fla.).

14. **“Complaint”** **“Complaint”** or **“Compl.”** shall refer to the Third

Amended Verified Class Action Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Relief, and Damages, filed at Dkt. No. 198 in this action.

15. **“Healthcare Provider”** means any entity or person that provided services for medical, psychological, physical, or emotion ailments or limitations, including without limitation any physician, endocrinologist, physician’s assistant, nurse, osteopath, holistic healer, therapist, psychologist, psychiatrist, counselor, hospital, clinic, pharmacist or medical institution.

16. The singular form of any word shall also be construed as the plural, and vice versa. Verbs shall be construed as though they were in the past tense, the present and the future tense, and vice versa.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

Any and all documents identified in Plaintiffs’ initial disclosures in this action, without regard to date limitations.

REQUEST FOR PRODUCTION NO. 2:

Any and all documents used, consulted or referred to in preparing any and all of the declarations or verifications you have submitted in this action, including but not limited to declarations or verifications submitted in connection with the

Complaint or any prior complaints, and any declarations or verifications submitted in connection with a Motion for a Preliminary Injunction or a Motion for a Temporary Restraining Order.

REQUEST FOR PRODUCTION NO. 3:

Any and all documents identified in your response to Defendants' interrogatories in this action.

REQUEST FOR PRODUCTION NO. 4:

Any and all documents used, consulted or referred to in responding to Defendants' interrogatories to you in this action.

REQUEST FOR PRODUCTION NO. 5:

Any and all documents used or consulted in forming your religious beliefs regarding the COVID-19 vaccination, including, but not limited to, correspondence with religious leaders or organizations, and with persons or organizations opposed to COVID-19 vaccination.

REQUEST FOR PRODUCTION NO. 6

To the extent not included in your request for religious accommodation or appeal, any and all documents that describe, relate, refer to, reflect, or support the

allegations in the Complaint regarding your sincerely held religious beliefs from the time period August 1, 2019 to the present.

REQUEST FOR PRODUCTION NO. 7:

To the extent not included in your request for religious accommodation or appeal, any and all documents that describe, relate, refer to, reflect, or support the allegations in the Complaint regarding the substantial burden posed by DoD and the Marine Corps' COVID-19 vaccination requirement on your sincerely held religious beliefs. This includes, but is not limited to, all documents related to adverse consequences you claim to have received as a result of not being vaccinated.

REQUEST FOR PRODUCTION NO. 8:

Any and all documents that describe, relate, refer to, or reflect any posts you have made on social media (e.g., Facebook, Twitter, Instagram, LinkedIn, YouTube, TikTok, Parler, Gab, Gettr, Truth Social), blogs, internet message boards, chat rooms, or other public forums online regarding your religious beliefs, the COVID-19 vaccines, or DoD's or the Marine Corps' COVID-19 vaccination requirement.

REQUEST FOR PRODUCTION NO. 9:

Please produce each and every document that refers to, reflects, or relates to your medical evaluation, treatment, care, or medication by a Healthcare Provider, at

any time within the last five years, including all medical records of such care, and all medical records reflecting your receipt of vaccinations (without regard to date).

REQUEST FOR PRODUCTION NO. 10:

In lieu of producing medical records described in RFP 9 that are held by a DoD component, you may produce a fully executed DD Form 2870 authorizing release of the requested records to Government counsel in this action. The DD Form 2870 can be found here:

<https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2870.pdf>

REQUEST FOR PRODUCTION NO. 11:

Please produce each and every document that refers to, reflects, or relates to any belief or contention that you have natural immunity to COVID-19. This includes, but is not limited to, COVID-19 test results, antibody test results, medical advice, and other sources consulted.

REQUEST FOR PRODUCTION NO. 12:

Please produce each and every document that refers to, reflects, or relates to efforts you have made to inquire about the availability of FDA-licensed COVID-19 vaccines, efforts you have made to obtain such vaccines, or complaints you have made about the unavailability of such vaccines. This includes, but is not limited to,

all such communications you have made to any entity or person, any responses received, and any documentation, description of, or reference to such communications contained in any document.

Dated: August 1, 2022

BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director

Respectfully submitted,

/s/ Amy E. Powell
ANDREW E. CARMICHAEL
AMY E. POWELL
Senior Trial Counsel
ZACHARY A. AVALLONE
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (919) 856-4013
Email: amy.powell@usdoj.gov
Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that I electronically served the foregoing document on Plaintiffs' counsel via electronic mail on August 1, 2022.

/s/ Amy E. Powell
AMY E. POWELL
Trial Attorney
U.S. Department of Justice

Exhibit 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

**COLONEL FINANCIAL MANAGEMENT
OFFICER, *et al.*,**

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official
capacity as Secretary of U.S. Dep't of Defense,
et al.,

Defendants.

Case No. 8:22-cv-01275-SDM-TGW

**DEFENDANTS' FIRST SET OF REQUESTS FOR ADMISSIONS TO CHIEF
WARRANT OFFICER 3**

Pursuant to Federal Rules of Civil Procedure 26 and 36, Defendants, by and through their undersigned counsel, hereby respectfully propound their first set of requests for admission upon Plaintiff Chief Warrant Officer 3.

INSTRUCTIONS

1. When asked to respond to a request for an admission, the request is for information within your actual or constructive control. Your answers must therefore include not only information available to you, but also that is available to your attorneys, associates, employees, representatives, agents, and all other persons acting under, by, or through you, or subject to your control or supervision, or acting on your behalf.

2. If you cannot fully and completely answer a request for an admission, please provide the facts you rely upon in support of your contention that you cannot

do so. To the extent a request for admission is not answered because of an assertion of privilege, please state the specific privilege relied upon and support the claim of privilege with a statement of particulars sufficient to enable the Court to assess its validity consistent with Federal Rule of Civil Procedure 26. If you object to answering only part of a request, please answer that part you do not object to answering and indicate what portion of the request to which your assertion of privilege extends.

3. These requests are to be deemed continuing to the full extent allowed by law.

4. Please forward the answers to undersigned counsel at the address or email address below no later than thirty (30) days from date of service.

DEFINITIONS

For purposes of these requests for admission, the following definitions apply:

1. **“You,” “your,” or “Plaintiff,”** (without specific designation) for the purposes of these requests shall mean Plaintiff CHIEF WARRANT OFFICER 3.
2. **“Plaintiffs”** (without specific designation) shall mean the individuals identified as Plaintiffs as the currently operative complaint in this action: COLONEL FINANCIAL MANAGEMENT OFFICER, LIEUTENANT COLONEL 1, RESERVE LIEUTENANT

COLONEL, CAPTAIN, CAPTAIN 2, CAPTAIN 3, FIRST LIEUTENANT, SECOND LIEUTENANT, CHIEF WARRANT OFFICER 4, CHIEF WARRANT OFFICER 3, LANCE CORPORAL 1, LANCE CORPORAL 2, LANCE CORPORAL 3, MIDSHIPMAN 2/C, GUNNERY SERGEANT.

3. “**And**” and “**or**” shall be construed conjunctively and disjunctively.
4. “**Each**” means each and every.
5. “**Date**” means day, month, and year.
6. “**This action**” shall refer to *Colonel Financial Management Officer, et al., v. Austin, et al.*, No. 4:21-cv-1236 (M.D. Fla.), and includes filings originally entered on the previous docket prior to severance: *Navy Seal 1, et al., v. Austin*, No. 8:21-cv-2429 (M.D. Fla.).
7. “**Complaint**” or “**Compl.**” shall refer to the Third Amended Verified Class Action Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Relief, and Damages, filed at Dkt. No. 198 in this action.
8. “**The Novavax COVID-19 vaccine**” refers the COVID-19 vaccine developed by the company Novavax, which was listed by the World Health Organization on December 20, 2021 and which was authorized by the Federal Food and Drug Administration on July 13, 2022 pursuant to an Emergency Use Authorization. See <https://perma.cc/C7X9->

MXXE. Novavax asserts that that fetal cell lines were not used in the production or testing of this vaccine.

9. **“World Health Organization-listed COVID-19 vaccine”** is used here to refer to those vaccines under a World Health Organization Emergency Use Listing, and includes The Pfizer/BioNTech Comirnaty vaccine (listed 31 December 2020); The SII/COVISHIELD and AstraZeneca/AZD1222 vaccines (listed 16 February 2021); The Janssen/Ad26.COV 2.S vaccine developed by Johnson & Johnson (listed 12 March 2021); The Moderna COVID-19 vaccine (mRNA 1273) (listed 30 April 2021); The Sinopharm COVID-19 vaccine (listed 7 May 2021); The Sinovac-CoronaVac vaccine (listed 1 June 2021); The Bharat Biotech BBV152 COVAXIN vaccine (listed 3 November 2021); The Covovax (NVX-CoV2373) vaccine (listed 17 December 2021); The Nuvaxovid (NVX-CoV2373) vaccine (listed 20 December 2021).
10. **“BLA-compliant doses of the Pfizer/BioNTech COVID-19 vaccine”** are those described in the FDA’s Summary Basis for Regulatory Action, and in the Dear HCP Letter available on the Pfizer website. *See* Summary Basis for Regulatory Action, at p.27 (Nov. 8, 2021), <https://www.fda.gov/media/151733/download>; HCP Lot Letter & Additional Lot Details, <https://www.cvdvaccine-us.com/16-up-yearsold/resources> (under “Important Lot Information”); Declaration of Peter Marks, ECF No. 23-14.

11. The singular form of any word shall also be construed as the plural, and vice versa. Verbs shall be construed as though they were in the past tense, the present and the future tense, and vice versa.

REQUESTS

1. Admit that you are unwilling to receive the Novavax COVID-19 vaccine.
2. Admit that you are unwilling to receive the Pfizer/BioNTech COVID-19 vaccine that is FDA-licensed and labeled “Comirnaty.”
3. Admit that you are unwilling to receive BLA-compliant doses of the Pfizer/BioNTech COVID-19 vaccine.
4. Admit that you have not sought and been denied administration of the Pfizer/BioNTech COVID-19 vaccine that is FDA-licensed and labeled “Comirnaty.”
5. Admit that you have not sought and been denied administration of BLA-compliant doses of the Pfizer/BioNTech COVID-19 vaccine.
6. Admit that you are unwilling to receive any World Health Organization-listed COVID-19 vaccine that was developed without use of fetal cell lines.
7. Admit that you do not know whether particular fetal cell lines that you allege were used in connection with the Pfizer, Moderna, or Johnson & Johnson COVID-19 vaccines resulted from an elective abortion.
8. Admit that you have received the rubella vaccine.
9. Admit that you have received the varicella (chickenpox) vaccine.

10. Admit that you have received the Hepatitis A vaccine.
11. Admit that you have taken ibuprofen within the last five years.
12. Admit that you have taken aspirin within the last five years.
13. Admit that you have taken Tylenol within the last five years.
14. Admit that in your request for religious accommodation dated October 2, 2021, you stated that several vaccines do not use fetal cells like Sinopharm vaccine.
15. Admit that you are willing to receive the Sinopharm vaccine.

Dated: August 1, 2022

BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director

Respectfully submitted,

/s/ Amy E. Powell
ANDREW E. CARMICHAEL
AMY E. POWELL
Senior Trial Counsel
ZACHARY A. AVALLONE
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (919) 856-4013
Email: amy.powell@usdoj.gov
Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that I electronically served the foregoing document on Plaintiffs' counsel via electronic mail on August 1, 2022.

/s/ Amy E. Powell
AMY E. POWELL
Senior Trial Counsel
U.S. Department of Justice

Exhibit 5

From: [Roger Gannam](#)
To: [Powell, Amy \(CIV\)](#)
Cc: [Carmichael, Andrew E. \(CIV\)](#); [Avallone, Zachary A. \(CIV\)](#); [Enlow, Courtney D. \(CIV\)](#); [Merritt, Robert C. \(CIV\)](#); [Horatio Mihet](#); [Richard Mast](#); [Daniel Schmid](#); [Jill M. Schmid](#); [Lana Chambers](#)
Subject: [EXTERNAL] Marines v. Austin - Plaintiff Chief Warrant Officer 3
Date: Tuesday, September 13, 2022 12:19:25 AM

Amy--

Plaintiffs' counsel have been unable to make contact with Plaintiff Chief Warrant Officer 3 [REDACTED] and therefore were unable to prepare discovery responses on his behalf. We will continue to attempt to contact him, and are considering options in the event we are unsuccessful. Please let me know if you would like to discuss further.

RKG

Roger K. Gannam, Esq.*
Assistant Vice President of Legal Affairs
Liberty Counsel
PO Box 540774
Orlando, FL 32854
(407) 875-1776 phone
(407) 875-0770 fax
[LC.org](#)
Offices in DC, FL, and VA
*Licensed in Florida

This message and any attachment are intended for the person to whom it is addressed. If you are not the intended recipient, notify us immediately by replying to this message and deleting it from your computer, because any distribution of this message by you is strictly prohibited. Email cannot be guaranteed secure or error-free. We do not accept responsibility for errors that result from email transmissions. Opinions expressed in this email are solely those of the author and do not necessarily represent those of the organization.

Exhibit 6

From: [Powell, Amy \(CIV\)](#)
To: [Roger Gannam](#)
Cc: [Carmichael, Andrew E. \(CIV\)](#); [Yang, Catherine M \(CIV\)](#); [Snyder, Cassandra M \(CIV\)](#); [Holland, Liam C. \(CIV\)](#); [Robinson, Stuart J. \(CIV\)](#); [Clendenen, Michael P. \(CIV\)](#); [Horatio Mihet](#); [Richard Mast](#); [Daniel Schmid](#); [Jill M. Schmid](#); [Lana Chambers](#)
Subject: RE: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up
Date: Thursday, October 06, 2022 3:51:00 PM

Roger:

To follow up on our conversations about CWO3, we have resolved on a course of action in light of his continued unavailability and apparent lack of standing. USMC records reflect a vaccination date of Dec. 19, 2021. He promoted Feb. 1, 2022. And he reported to Japan on July 11, 2022. Defendants intend to file a motion for an order to show cause why he should not be dismissed under LR 3.10 for failure to prosecute and failure to participate in discovery, as well as for lack of standing. The order to show cause seems to be an expected procedure under the local rules. Please let me know how to describe Plaintiffs' position on the motion, and I am available to discuss if necessary. (I continue to have phone issues; so please shoot me an email if we need to set up a call and I'll circulate a call-in.) We would like to file the motion early next week at the latest.

Amy

Amy Elizabeth Powell
Senior Trial Counsel, Federal Programs Branch
Civil Division, Department of Justice
150 Fayetteville St, Suite 2100
Raleigh, NC 27601
Phone: 919-856-4013
Email: amy.powell@usdoj.gov

From: Powell, Amy (CIV)
Sent: Tuesday, October 04, 2022 1:24 PM
To: Roger Gannam <rgannam@lc.org>
Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>; Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>
Subject: RE: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up

Roger:

This email is intended to memorialize our call today, and I have attached the supplemental disclosure I mentioned on the phone. Please let me know if I have omitted or misstated anything.

I identified Lt. Gen Ottignon as our likely senior Marine Corps witness. See attached disclosure. In addition to Gen. Ottignon, we are working on identifying availability and dates for depositions of a senior DoD witness, Batz, and a witness we expect to identify for the RARB. I said we hoped to propose dates for depositions in early to mid-November for these witnesses, to the extent possible, and asked you to let us know if you have unavailability before we nail down dates. We also expect to make expert disclosures on or before Nov. 1, as previously discussed, for any experts (and there will probably be at least a couple).

You were amenable to the consolidated deposition for Col Rans, and thought it might make sense to schedule for up to 10 hours, suggesting perhaps 7 on the first day and reserve 3 hours for the next day. While I think that generally sounds reasonable, we are tentatively scheduled for 10/10 now; so we don't want to run over to the next day (which is Veterans Day). What would you think about keeping it all on one very long day? Or maybe reserving a few hours the following week? Or I suppose we can see if the group of involved counsel can look for a new date.

You were also open to coordinating depositions of other witnesses who may cross cases. We will try to highlight those for you as they are identified.

With respect to Plaintiffs' depositions, we agreed that we can take more of the depositions remotely. As a global compromise, we proposed that if the Florida and Hawaii witnesses can all be deposed in Tampa (on consecutive days), we would be willing to do all of the other Plaintiffs' depositions remotely. You seemed generally amenable to that approach and were going to check with your Plaintiffs. If you can propose dates in mid to late October for doing those depositions back-to-back, I would appreciate it. These are deponents we would like to depose in Tampa: Col FMO, CWO4, Gunnery Sergeant, Lance Corporal 3. If that doesn't work for some reason, let me know why and we can touch base again. I suggested we go ahead and get moving with the remote depositions, and asked if you could propose deponents for next week on Wednesday, Thursday, Friday (10/12-14), preferably deponents for whom we can resolve outstanding written discovery issues quickly. You indicated an intent to respond soon on the written discovery issues, and to see who you might have available for late next week. (We'll need the names with sufficient time to prepare, ideally today or tomorrow).

You proposed limiting the time of depositions or starting them back-to-back so as to get them done more quickly. We are unwilling, at this point, to agree to less than 7 hours. That may change after we have done a few and get a sense of how long they take. I proposed scheduling simultaneous depositions instead – We have enough attorneys that we could schedule 2 depositions (or even sometimes 3) on a day, assuming we can find the court reporters. You weren't sure you have staffing to accommodate that solution. So, for now, I think we are stuck scheduling 1/day.

I asked you about the mention of 10 depositions in your email, and emphasized that we want to depose all the plaintiffs and anyone you are going to rely on at trial, and asked you to identify any such witnesses. You indicated that you were not planning on insisting on only 10 depositions at this point, and I gathered you understood the request to identify anyone else you plan to rely on. I realize you only expect to identify experts in rebuttal. If there is anyone else, please let us know

(and preferably sooner rather than later to facilitate scheduling).

Finally, we touched on Chief Warrant Officer 3 (now a Captain). We confirmed he was vaccinated in December 2021 and promoted in February, and is currently stationed in Japan. You still have not been able to reach him, and don't have further explanation at this time. I indicated that we will likely move to dismiss him from the action and will send a separate meet and confer email, understanding that you likely may not be able to consent if you cannot speak with him. You asked if we could provide current contact information. I have some contact information for him, although I am not sure how current it is, and I will send it under separate email, as that information is likely covered by the Privacy Act protective order.

Amy Elizabeth Powell
Senior Trial Counsel, Federal Programs Branch
Civil Division, Department of Justice
150 Fayetteville St, Suite 2100
Raleigh, NC 27601
Phone: 919-856-4013
Email: amy.powell@usdoj.gov

From: Roger Gannam <rgannam@lc.org>
Sent: Monday, October 03, 2022 11:52 AM
To: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>
Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>; Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>
Subject: Re: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up

I can do that.

Roger K. Gannam, Esq.
Assistant Vice President of Legal Affairs
Liberty Counsel

This message and any attachment are intended for the person to whom it is addressed. If you are not the intended recipient, notify us immediately by replying to this message and deleting it from your computer, because any distribution of this message by you is strictly prohibited. Email cannot be guaranteed secure or error-free. We do not accept responsibility for errors that result from email transmissions. Opinions expressed in this email are solely those of the author and do not necessarily represent those of the organization.

From: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>
Sent: Monday, October 3, 2022 9:07 AM

To: Roger Gannam <rgannam@lc.org>

Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>; Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>

Subject: RE: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up

Roger:

I think it might be useful to talk through some of this. Can we schedule a call for 930am tomorrow?

Amy

From: Roger Gannam <rgannam@lc.org>

Sent: Friday, September 30, 2022 5:52 PM

To: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>; Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>

Subject: Re: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up

Amy--

Thank you for the proposal for taking Plaintiffs' depositions. Before moving forward, however, there are a couple of issues we need to address:

- You propose taking the vast majority of Plaintiffs' depositions in person, which is a significant departure from your prior indication that you "might specify some." (Sep. 26 e-mail.) As proposed--a full day for each Plaintiff with travel to California, DC, and Tampa--it will take at least a month to complete the schedule assuming no depositions of Defendant's witnesses (or other obligations) in between.
- We gave you our proposed deponents on August 23. In your response on August 31, you made several objections and said you would propose several alternatives--including identifying "two or more fairly senior officials" by September 9. We still don't have those names, and our ability to plan our depositions is severely hampered.

Obviously, under normal circumstances, Defendants would be entitled to take all Plaintiffs in person (within the 10-deposition limit) for up to 7 hours each. Under the accelerated schedule of this case, however, your proposal is not reasonable, especially given your prior indications regarding remote depositions and apparent expectation that we significantly reduce our

deponent list (not to mention your request that we coordinate our Rans deposition with the plaintiffs in the other class actions). Moreover, we made our proposal first, and have not pressed you on scheduling our proposed deponents in good faith reliance on your providing counterproposals that would lead to an acceptable compromise. This needs to be a two-way street.

In continued anticipation of being able to resolve the outstanding issues, we request the following:

1. Provide a new proposal for remote depositions of most Plaintiffs during the weeks of October 10 and 17 (with perhaps 2 or 3 in person if necessary), allowing for multiple Plaintiffs per day. Although we do not ask you to commit to taking less than 7 hours for each Plaintiff, we do not anticipate your needing that long with most of the Plaintiffs. Thus, we should schedule Plaintiffs' depositions seriatim, such that we can begin the next Plaintiff's deposition during any part of a day remaining with the understanding that some Plaintiffs started later on one day may have to carry over into the next.
2. Identify all of the alternative witnesses and other proposals you indicated in your e-mail of September 1, including without limitation (a) the "two or more fairly senior officials" you suggested as alternatives to General Smith and Lt. Gen. Ottignon (and possibly others), the subjects on which they can testify (including information which could substitute for the unique personal knowledge of Smith, Ottignon, and others), and their availability for deposition beginning the week of October 24; (b) your proposed alternative(s) to Plaintiffs' deposing the members of the RARB for vaccination exemptions, proposed subject matter (including substitutes for unique knowledge of RARB members), and availability from October 24; and (c) the availability of Captain Raymond Reed Batz from October 24, and proposed subject matter which can substitute for the unique personal knowledge and RARB input of Rear Admiral Hancock. (We are open to some coordination of common witnesses with the Navy and Air Force class actions for the sake of efficiency, but not a 7-hour combined limit.)

We cannot begin lining up Plaintiffs for deposition until we resolve the fundamental issues of format and scheduling approach, and we are prepared to seek the Court's intervention if necessary to ensure all Plaintiffs' depositions can be completed in a reasonable amount of time under the current schedule.

RKG

Roger K. Gannam, Esq.
Assistant Vice President of Legal Affairs
Liberty Counsel

This message and any attachment are intended for the person to whom it is addressed. If you are not the intended recipient, notify us immediately by replying to this message and deleting it from your computer, because any distribution of this message by you is strictly prohibited. Email cannot be guaranteed secure or error-free. We do not accept responsibility for errors that result from email transmissions. Opinions expressed in this email are solely those of the author and do not necessarily represent those of the organization.

From: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Sent: Wednesday, September 28, 2022 9:51 AM

To: Roger Gannam <rgannam@lc.org>

Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>; Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>

Subject: RE: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up

Roger:

We would, as I mentioned, like to begin scheduling depositions of Plaintiffs as soon practicable (assuming we can amicably resolve the issues we raised regarding Plaintiffs' discovery responses in a timely manner). I tried to check on current locations of Plaintiffs, but please let me know if I am mistaken about any of these. Tentatively, we propose conducting those depositions as follows:

- The following Plaintiffs are in Hawaii, and we would like to propose that they be deposed in Tampa on consecutive days: Col FMO, CWO4
- The following Plaintiffs are in Tampa, and if we are doing the HI plaintiffs in Tampa, we might as well do these individuals on the same trip on consecutive days: Gunnery Sergeant, Lance Corporal 3. Realizing that it may take time to plan travel for the HI plaintiffs, I assume these Tampa-based depositions may be towards the end of the others (especially because we do not yet have discovery responses for CWO4).
- If CWO3 still cannot be reached, I suppose we could notice his deposition for Tampa anyway? If he were available and wished to be deposed remotely from Japan, I suspect we could make that work, although I would probably request we just deal with doing it on East Coast time. I am willing to hold off on that a little longer while the parties decide what to do.
- The following Plaintiffs are within 100 miles of DC, and we would like to depose them at our DC office: Captain 2, Captain 3, 2d Lt. We could do these as early as the week of 10/10, assuming we have resolved the discovery responses issue.
- We would prefer to depose the CA plaintiffs in person, and I assume either the base or the USAO could provide a location for it: 1st Lt and Lance Corporal 1. As noted, the discovery responses for 1st Lt require supplementation, but assuming that is complete soon, we could do these as soon as 10/13 and 10/14, I think.
- I am not certain of Reserve Lt. Col.'s location. Assuming it is not within 100 miles of DC, Tampa or Oceanside area, we would do that one remotely. Please let us know availability starting around mid-October.
- The remainder we prefer to depose remotely: LTC1, Captain 1, Lance Corporal 2, Midshipman. Please let us know availability starting around mid-October or earlier.

The court reporter companies we are considering provide software and a shared drive for handling documents in remote depositions. To make things easier for the witness, to the extent possible given time constraints, we would also like to ship a copy of the exhibits in a sealed envelope in

advance of the depositions, assuming both witness and counsel agree that the sealed envelope cannot and will not be opened in advance of the deposition. Given the need to ship ahead of time, I cannot guarantee that every document will make it into the shipment, but we find it easier for the witness (and therefore all attorneys) to have a hard copy in front of them.

Given Plaintiffs' request to designate prior live testimony as trial testimony, it seems likely that Plaintiffs intend to offer at trial the testimony (whether live or otherwise) of prior witnesses. If there are any such witnesses other than the Plaintiffs themselves, please let me know so that we can schedule their depositions as well.

Please note that if Plaintiffs would prefer the parties each limit themselves to the 10 depositions automatically permitted by the Federal Rules, we are willing to discuss how to winnow this list down, but we need to know that ahead of time, before we start taking depositions. Right now, we are planning on deposing the Plaintiffs, any Plaintiffs' expert, and any other witnesses Plaintiffs whose testimony Plaintiffs will rely on at trial.

Amy Elizabeth Powell
Senior Trial Counsel, Federal Programs Branch
Civil Division, Department of Justice
150 Fayetteville St, Suite 2100
Raleigh, NC 27601
Phone: 919-856-4013
Email: amy.powell@usdoj.gov

From: Powell, Amy (CIV)
Sent: Tuesday, September 27, 2022 5:01 PM
To: Roger Gannam <rgannam@lc.org>
Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>; Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>
Subject: RE: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up

Thanks, Roger. I will follow up with an email tomorrow morning proposing locations and approximate order, along with some questions about Plaintiffs' discovery responses.

Amy

From: Roger Gannam <rgannam@lc.org>
Sent: Tuesday, September 27, 2022 4:48 PM

To: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>; Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>

Subject: Re: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up

We are ready to line up Plaintiffs for deposition the weeks of October 10 and 17. It will help us determine availability if you could give us an estimate of how long you will need with each witness. Also, we will need to know which Plaintiffs, if any, you want to depose in person.

Roger K. Gannam, Esq.
Assistant Vice President of Legal Affairs
Liberty Counsel

This message and any attachment are intended for the person to whom it is addressed. If you are not the intended recipient, notify us immediately by replying to this message and deleting it from your computer, because any distribution of this message by you is strictly prohibited. Email cannot be guaranteed secure or error-free. We do not accept responsibility for errors that result from email transmissions. Opinions expressed in this email are solely those of the author and do not necessarily represent those of the organization.

From: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>

Sent: Monday, September 26, 2022 8:52 AM

To: Roger Gannam <rgannam@lc.org>

Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>; Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>

Subject: Re: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up

Assuming we can agree on some procedures for handling exhibits, etc., I think we are happy to do most of them remotely. I'm consulting with some court reporters this week about whether they can accommodate our remote needs and the various time zones involved.

I might specify some that we would like to do in-person. I'll give you a list this week.

Sent from my iPhone

On Sep 26, 2022, at 8:40 AM, Roger Gannam <rgannam@lc.org> wrote:

Do you contemplate taking the Plaintiffs' depositions remotely or in person?

Roger K. Gannam, Esq.
Assistant Vice President of Legal Affairs
Liberty Counsel

This message and any attachment are intended for the person to whom it is addressed. If you are not the intended recipient, notify us immediately by replying to this message and deleting it from your computer, because any distribution of this message by you is strictly prohibited. Email cannot be guaranteed secure or error-free. We do not accept responsibility for errors that result from email transmissions. Opinions expressed in this email are solely those of the author and do not necessarily represent those of the organization.

From: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>
Sent: Monday, September 26, 2022 8:20 AM
To: Roger Gannam <rgannam@lc.org>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>
Cc: Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>
Subject: RE: Marines v. Austin - Phone Conference Follow Up

Also, I would love to start getting some Plaintiffs' depositions lined up as you suggest. Let's touch base by Wednesday or Thursday and get several of those on the calendar. Several people on my team have availability the weeks of Oct. 10 and Oct. 17, and I would love to get as many as possible done in there.

Amy

Amy Elizabeth Powell
Senior Trial Counsel, Federal Programs Branch
Civil Division, Department of Justice
150 Fayetteville St, Suite 2100
Raleigh, NC 27601
Phone: 919-856-4013
Email: amy.powell@usdoj.gov

From: Powell, Amy (CIV)
Sent: Monday, September 26, 2022 8:05 AM
To: Roger Gannam <rgannam@lc.org>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>
Cc: Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>

Subject: RE: Marines v. Austin - Phone Conference Follow Up

Roger:

Sorry for the delay in responding.

1. We are generally amenable, and will make best efforts to meet the schedule for expert disclosures you have outlined.
2. At this point, we are objecting to designation of prior live testimony as part of the record. That could change in the future after we have conducted depositions of anyone whose testimony you might use. If there are particular witnesses whose testimony you would like to designate as part of the trial record, that might guide our choice of depositions.
3. We are still working on identifying senior witnesses. Apologies for the delay; I am pushing hard to make a witness supplement to our initial disclosures ASAP with these key names.
4. We are still discussing what to do about CWO3 but I can provide some information. I learned that he was fully vaccinated, promoted, and re-stationed in Japan. On further investigation, we learned that he actually has been fully vaccinated since last winter. I am therefore somewhat concerned about his verification in June. We are still discussing next steps.

Amy

Amy Elizabeth Powell
Senior Trial Counsel, Federal Programs Branch
Civil Division, Department of Justice
150 Fayetteville St, Suite 2100
Raleigh, NC 27601
Phone: 919-856-4013
Email: amy.powell@usdoj.gov

From: Powell, Amy (CIV)

Sent: Tuesday, September 20, 2022 9:20 AM

To: Roger Gannam <rgannam@lc.org>; Carmichael, Andrew E. (CIV)

<Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV)

<Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV)

<Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV)

<Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>;

Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>

Cc: Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid

<daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>

Subject: RE: Marines v. Austin - Phone Conference Follow Up

I think we would likely object to including things like testimony of Navy Commander or LTC2 or Cadet or Theresa Long or the other physician witnesses, for example. As they

do not seem to have any bearing on the issues before the Court now? Are those things you are proposing be included as part of the trial record? If so, we would want to depose them at minimum before we agree to including their previous testimony in the trial record?

Amy

From: Roger Gannam <rgannam@lc.org>
Sent: Tuesday, September 20, 2022 9:12 AM
To: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>
Cc: Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>
Subject: [EXTERNAL] Re: Marines v. Austin - Phone Conference Follow Up

Re #2--we propose all live testimony be treated as part of the trial record, but not to the exclusion of deposing any of those witnesses before trial.

Re #4--as I said on the phone, I had not confirmed the date of last contact. I have now confirmed that our last contact was on June 30 when verifying the allegations of the Third Amended Complaint.

RKG

Roger K. Gannam, Esq.
Assistant Vice President of Legal Affairs
Liberty Counsel

This message and any attachment are intended for the person to whom it is addressed. If you are not the intended recipient, notify us immediately by replying to this message and deleting it from your computer, because any distribution of this message by you is strictly prohibited. Email cannot be guaranteed secure or error-free. We do not accept responsibility for errors that result from email transmissions. Opinions expressed in this email are solely those of the author and do not necessarily represent those of the organization.

From: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>
Sent: Monday, September 19, 2022 6:07 PM
To: Roger Gannam <rgannam@lc.org>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>

Cc: Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>

Subject: RE: Marines v. Austin - Phone Conference Follow Up

Thanks, Roger:

We are still considering overall but I have 2 questions and 1 correction.

On #2, what live testimony are you proposing to designate as "part of the trial record"? It is unlikely we would agree to such designation for a witness that we do not have the opportunity to depose or seek information from, for example?

On #3, to clarify, I am uncertain exactly how many such senior witnesses will be identified and whether they will all be USMC, or some will be DoD. I am pressing to identify those names as soon as practicable.

On #4, you said you thought counsel had not heard from CWO3 since April? But the Amended Complaint attached his verification dated June? Can you confirm or correct?

Amy

From: Roger Gannam <rgannam@lc.org>

Sent: Monday, September 19, 2022 5:57 PM

To: Powell, Amy (CIV) <Amy.Powell@usdoj.gov>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Yang, Catherine M (CIV) <Catherine.M.Yang@usdoj.gov>; Snyder, Cassandra M (CIV) <Cassandra.M.Snyder@usdoj.gov>; Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>; Robinson, Stuart J. (CIV) <Stuart.J.Robinson@usdoj.gov>; Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>

Cc: Horatio Mihet <hmihet@lc.org>; Richard Mast <RMast@LC.org>; Daniel Schmid <daniel@lc.org>; Jill M. Schmid <jill@lc.org>; Lana Chambers <lane@lc.org>

Subject: [EXTERNAL] Marines v. Austin - Phone Conference Follow Up

Amy--

Thank you for speaking with me on Friday. Following is a summary of points from our discussion. Please let me know if I have misunderstood or left out anything.

1. Experts. I advised you that if defendants do not call experts at trial, then Plaintiffs also will not call experts, and if Defendants do call experts, then Plaintiffs will limit their experts to rebuttal of Plaintiffs'. If experts will be testifying, we discussed the possibility of moving up Defendant's expert report deadline to Nov 1 and Plaintiffs' rebuttal report deadline to Nov 18 (dates approximate), leaving Dec 16 as the deadline for Defendants' rebuttal reports and *Daubert* motions. You will let me know Defendants'

position.

2. Record testimony. I proposed a stipulation that prior live witness testimony be considered part of the trial record. You will let me know Defendants' position.
3. Depositions. You advised, as you previously indicated in your August 31 e-mail, that Defendants will soon identify 2 senior Marine Corps officials to testify instead of some of the specific officials identified in my August 23 e-mail. When the officials are identified, I will let you know Plaintiffs' position.
4. Plaintiff Chief Warrant Officer 3. You will let me know what Defendants want to do about this Plaintiff's unavailability.

Please let me know Defendants' positions on the above points as soon as possible, or let me know your anticipated decision timing if it will be later than this Wednesday.

Also, regarding depositions of Plaintiffs, we are ready to start scheduling them beginning the week of October 10 (subject to witness availability) even as we continue to work on the deposition plan for Defendants' witnesses.

RKG

Roger K. Gannam, Esq.*

Assistant Vice President of Legal Affairs

Liberty Counsel

PO Box 540774

Orlando, FL 32854

(407) 875-1776 phone

(407) 875-0770 fax

LC.org

Offices in DC, FL, and VA

*Licensed in Florida

This message and any attachment are intended for the person to whom it is addressed. If you are not the intended recipient, notify us immediately by replying to this message and deleting it from your computer, because any distribution of this message by you is strictly prohibited. Email cannot be guaranteed secure or error-free. We do not accept responsibility for errors that result from email transmissions. Opinions expressed in this email are solely those of the author and do not necessarily represent those of the organization.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.