IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 5:24-CV-00176-BO

MICHAEL J. FORBES,
614 Northampton Rd.,
Fayetteville, N.C., 28310, *pro se*.

Plaintiff,

v.

THE UNITED STATES ARMY,
Christine E. Wormuth et al.,
101 Army Pentagon,
Washington, D.C., 20310

Defendant.

MEMORANDUM IN SUPPORT OF RESPONSE TO DEFENDANT MOTION TO DISMISS

This 1th day of July 2024.

Defendant has filed a MOTION TO DISMISS the Plaintiff's *pro se* Complaint, pertaining to the Privacy Act (1974) violations alleged by the Plaintiff's based on Fed.R.Civ.P 12(b)1 and 12(b)(6). First, the Defendant presented multiple mischaracterizations of specifics described of the Plaintiff's jurisdictional allegations and stance, while purporting mischaracterizations of other facts in evidence of the Plaintiff's case.[1] Second, the Plaintiff standing and jurisdiction is actual and based on the evidence and plausible pursuant to the sections of the Privacy Act provisions the Defendant violated, namely, the "Agency Requirements" (5 USC § 552a, (e)(1), (e)(2), (e)(3), (e)(4), (e)(5), (e)(7) & (e)(10) and the "Government Contractors" (5 USC § 552a, (m)(1)), which is codified by the inclusive clause found in its "Civil Remedies" (5 USC § 552a, (g)(1)(C) & (D)); the Plaintiff enjoins

[1] The Plaintiff will dispute contested issues at the appropriate time, with the exception of material evidence that directly supports the Plaintiff's standing before this court or this court's jurisdiction in Plaintiff's filings in response to the Defendant's Motion to Dismiss.

consideration of evidence of violations of Executive Orders m-10-22 & m-10-23 as well. Moreover, bringing suit is expressly supported by the Defendant's supervisory agency's (the Department of Defense's) Privacy Policy (DoD 5400.11-R).

STATEMENT OF FACTS

Having an established a *prima facie* case, the Plaintiff, using evidentiary submissions to the Court, and evidence previously on the record, as presented in a supplement,[2] as a more detailed statement of facts in chronological context of a subset of evidence for the Plaintiff's MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT, in accordance with FRCP 10 and Local rule 7.2.

Moreover, to streamline this complex case, the Plaintiff has chronologically enumerated the correlating claims submitted for imminent adjudication in the MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT [(ECF 17] under the heading STATEMENTS OF FACTS FOR PARTIAL SUMMARY JUDGMENT.

STATEMENTS OF FACTS IN OPPOSITION TO DEFENDANT'S ASSERTIONS

- The Plaintiff never "confronted a psychologist" nor "raised [his] voice." (for an evidentiary argument in opposition of this assertion see numbered points "3)" and "13)" in ECF 17-1.
- For a clinical diagnosis [ECF 1-46] of the Plaintiff demeanor that the Defendant refers to in the comment, "Plaintiff resisted a request to go to the hospital for an evaluation because his behavior had become increasingly erratic[,]" The clinician noted that the Plaintiff was being

[2] *See* Enclosure A01, SUPPLEMENT TO THE STATEMENT OF FACTS [(ECF 17-1)].

assessed "to r/o[3] potential safety concerns from observed behavior ***perceived as paranoid and erratic*** (emphasis added)." The clinician stated the following categorical assessments in his "MENTAL STATUS EXAM" [ECF 1-46, p. 10]: "Orientation [-] Alert and oriented in all domains[;]" "Attn/concentration [-] **WNL[4] and SM [Soldier Member] remained focused throughout interview**[;]" "Behavior [-] **Client was cooperative and calm. He appeared forthcoming with information**[;]" " Psychomotor [-] **WNL, no tics, tremors noted**[;]" "Speech [-] **WNL. Normal rate, rhythm, tone, and volume throughout the evaluation**[;]" "Thought Process [-] **No obsessions/compulsions; no delusions; no evidence of perceptual disturbances**[;]" and "Judgment [-] **Adequate, No evidence of impulsive or risky behavior**." Yet, even though the impetus for the clinical evaluation was ill-conceived and likely tainted, the results were ignored by everyone involved, including BG Ferguson, as the word "erratic" shows up in every retaliatory Personnel Action document [(e)(5)] that led to the Plaintiff's separation decision by the QMP Board. All of this is because of the unproven "perceived" behaviors of the Command Operational Psychologist (authorized the exam of the Plaintiff after an open investigation of the Plaintiff in which she was a complainant) [(e)(5)] and the Company Commander (ordered the exam of the Plaintiff).[(e)(5)] For more information please see the Plaintiff's other opposing evidentiary arguments in numbered point "12)"Of the Plaintiff's STATEMENT OF FACTS below.

- Plaintiff evidentiary arguments opposing the following statement, "the Army issued finding about Plaintiff's leadership and misconduct, concluding he had engaged in disrespectful behavior" towards Major Racaza and engaged in 'counterproductive leadership' by 'blaming others, [having] poor self-control (loses temper), unjustness, showing little or no respect,

[3] Medical abbreviation for "rule out," https://www.allacronyms.com/R%5CO/Rule_Out.

[4] Medical abbreviation for "within normal limits," https://www.allacronyms.com/WNL/medical.

talking down to others, and behaving erratically[,]'" can be found in whole or in part of every filing and enclosure in support of the Plaintiff's complaint. The driving force behind the Defendant's investigation it relies so heavily on, in opposition to the Plaintiff's case, becomes weak when the violations that preceded the investigation are considered in tandem with the Defendant's chosen defense of those violations. The Defendant simply attacked the Plaintiff for realizing its violations (it "blamed the carcass of the canary in the coal mine" for dying; it must have been a defective canary),[5] which indicates a defective culture.

- The Defendant asserted in its MOTION TO DISMISS that the February 23, 2023 Army issued memo "describing the HWP/BHA(sic) programs and related confidentiality protocols and provided an opt-out for any self-reported data," is incorrect on a few points: 1) the SDI program was never tied to the HPW Program, 2) the Commander's order did not state an opt-out and 3) the corporate agreements did not state an opt-out on behalf of the agency, 4) the February 23, 2023 memo was published nearly three months after the SDI order was completed, and; 5) the memo was produced after the Plaintiff had notified the appropriate agency to look into the matter. It is likely the February 23 memo was created because of the Plaintiff's protected communication with the Army Human Research Protection Office.
- The Defendant's assertion that Col. Brunson's "letter granting Plaintiff's request to not participate in the HPW/BHA programs" occurred on April 5, 2023, long after he launched an investigation about on the plaintiff, regarding the non-HPW program (SDI). The 'fix was in;' this point is moot. Notably, in that heavy slanted investigation, [(e)(5)] not a singular opposing fact in opposition of the allegations was entered into the investigative record. They did not even acknowledge the Plaintiff's pristine performance that was codified in his recent

[5] *See online at* "What Happened to the Canary in the Coal Mine? The Story of How the Real-Life Animal Helper Became Just a Metaphor," Smithsonian Magazine, March 27, 2024, https://www.smithsonianmag.com/smart-news/what-happened-canary-coal-mine-story-how-real-life-animal-helper-became-just-metaphor-180961570/.

evaluations under Col. Brunson that overlapped allegations used by the Investigating Officer. The Plaintiff was found guilty of counterproductive behaviors for events occurred during time periods that were previously codified in formal positive evaluations. Notably, a Centralized Board had already deemed the Plaintiff promotable to MSG. [(e)(5)]

- Every General rebuffed the Plaintiff's every request for "open door" meetings, in violation of their own mandated own "open door" policies.

ARGUMENT

I. Standard of Review

a. Fed.R.Civ.P 12(b)(1)

The Defendant has enjoined this court to consider their MOTION TO DISMISS under a specific provision of the Privacy Act, entitled "Conditions for Disclosure," and not the Plaintiff's stated general allegations cited and contained in his complaint of "Agency Requirements" and "Government Contractors" provisions.

Simply put, Privacy Act disclosure issues *are not* alleged as the Plaintiff was able to prevent the imminent disclosure violations embedded in Corestrengths "Terms of Service" [ECF 1- 21] and "Privacy Policy" [ECF 1- 22], that the order mandated, but only for himself; he had hoped to enjoin a different outcome by interacting with the Brigade Commander for other affected Soldiers whom unwittingly followed the Brigade Commander's unlawful order but he failed. The Plaintiff's evidence and allegations brought forth have not indicated or inferred any claims or violations of the Act's disclosure provisions.

Contrary to the Defendant's stance, the Plaintiff alleges evidentiary facts of non-compliance with provisions of the Privacy Act (1974) as defined by the inclusive and permissive "Civil Remedies" provision (g)(1)(D) of the statute, that states,

> *[w]henever any agency...fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection,"*[6]

This provision places jurisdiction in this District Court.

The Plaintiff has identified the categorical provisions upon which subject matter jurisdiction can be granted within the Act in his Complaint. Detailed cited claims can be found in the MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT that allege violations of the "Agency Requirements" (5 USC § 552a, (e)(1), (e)(2), (e)(3), (e)(4), (e)(5), (e)(7) & (e)(10) and the "Government Contractors" (5 USC § 552a, (m)(1)), provisions.

The Plaintiff's allegations of these violations are amplified by the Defendant's supervisory agency's (the Department of Defense) Privacy Program, which expressly authorizes a Soldier to bring suit. It clearly states:

> *An individual **may file a civil suit against a DoD Component, if the individual believes his or her rights under the Act have been violated** (See Section 552a(g) of Reference (b)).*[7]

And the DoD Privacy Program uniquely defines an "Individual' as the following:

> *A living person who is a citizen of the United States or an alien lawfully admitted for permanent residence.... **Members of the U.S. Armed Forces are "individuals."*** (emphasis added) [8]

---

[6] *See* 5 USC § 552a, (g)(1)(D)

[7] *See* DoD 5400.11-R, Department of Defense Privacy Program, May 14, 2007, https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/540011r.pdf

[8] *See* DoD 5400.11-R, Department of Defense Privacy Program, May 14, 2007, https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/540011r.pdf.

The Plaintiff further alleges that the Defendant, violated clearly established Privacy Act provisions and various Constitutional provisions that are designed to protect him. To address this, the Plaintiff brought forth *prima facie* evidence (the delivered orders) pertaining to the willful and intentional mandates that were delivered in a manner that contravened the Privacy Act, [(e)(1), (e)(2), (e)(3), (e)(4), (e)(7), (e)(10) and (m)(1)] as well as *prima facie* evidence of the causal retaliatory events [(e)(5)] that occurred subsequent to the Plaintiff's first attempts to remediate the Defendant's contravening orders. Therefore, the catalysts in support of this Court exercising jurisdiction are the unlawful orders ,[9] and the retaliation that ensued to obfuscate that unlawfulness, which places this case under this court's jurisdiction under the inclusive provision of (g)(1)(D).

Regarding the Plaintiff's declaratory relief requested, this court should exercise jurisdiction and adjudicate this *prima facie* case based on its merit and the persuasive authority of the USDC Dist. Col. whom "issue[d] a permanent injunction" for the benefit of parties not incident that case, due to the conduct of the U.S. Army as a stated Defendant and subordinate to the Department of Defense. In 2004, the Department of Defense lacked obtaining informed consent in this Anthrax case, and the District Court's Memorandum Opinion, opined as follows,

> *Having found that the vaccine's* ***use without informed consent or a Presidential waiver is unlawful,*** *this Court would be remiss to find that a conflict exists between service members who think that the DoD should be required to follow the law and those service members who think otherwise.* [Doe v. Rumsfeld, 341 F. Supp. 2d 1, 3 (D.D.C. 2004)] (emphasis added)

[9] These orders are evaluated for the court using case law with respect to Defendant's mischaracterization of their standing with respect to "injury-in-fact" and "willful and intentional" tests in the appropriate areas within this brief.

Moreover, binding authority supporting the same can be found in the appellate case in 1982 wherein the 4th Circuit court vacated the judgment of a District Court and remanded a discrimination case [Evans v. Harnett County Bd. Of Educ., 684 F.2d 304 (4th Cir. 1982)] under the following arguments brought by the Appellant (Evans) who alleged:

> *(1) the district court improperly failed to grant an injunction prohibiting an employment practice which it found to be unlawful; and*
> *(2) the district court erred in evaluating Evans's individual claim under the principles annunciated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).*

The 4th Circuit's opinion asserted the following,

> *We cannot accept the board's contention that injunctive relief is barred because Evans* ***neither certified this suit as a class action nor advanced a meritorious individual claim.*** (emphasis added)

and they found that,

> *[a]n* ***injunction warranted by a finding of unlawful discrimination is not prohibited merely because it confers benefits upon individuals who were not plaintiffs or members of a formally certified class****. See Sandford, 573 F.2d at 178. Nor is an injunction against discriminatory employment practices rendered inappropriate because the court dismissed Evans's claims for appointment and back pay.* (emphasis added)

This case can convince the Court to then exercise its authority to remediate the Plaintiff's alleged Privacy Act violations via the Plaintiff's declaratory relief requests, not only, for the Plaintiff, but also, if in its opinion, the court finds broader harm that warrants a public cause of action for all Service Members. This also serves in opposition to the Defendant's alleged failures of "third-party standing (Defendant para. II)."

Next, the Defendant moved the Court to "afford deference to the military when requested relief would entail review of internal military affairs…." This is easily refuted with a strikingly similar case cited earlier, [Doe v. Rumsfeld, 2004] wherein the Court stated,

> *Although FDA's **scientific expertise is due great deference, it is well within this Court's scope of authority to ensure that the agency adheres to its own procedural requirements**. See Service v. Dulles, 354 U.S. 363 (1957) (seminal case standing for the proposition that judicial review is available to ensure that agencies comply with their own voluntarily-promulgated regulations, even where Congress has given the agency "absolute discretion" over the administrative action in question). See also Rodway v. United States Dept. of Agric., 514 F.2d 809, 813-14*[10] (emphasis added)

In fact, the Plaintiff would be remiss if he did not add the following citations, regarding the same case [Doe v. Rumsfeld, 2004], wherein the court **rejected** the DoD's arguments,

> *...in seeking to prevent the DoD from inoculating them [via order], **Plaintiffs seek to undermine a key component of military readiness and defense....requiring compliance with informed consent would render it infeasible to continue** [Anthrax inoculations].... the harm to the public interest **would include disrupting the smooth functioning of the military, hampering military readiness** and reducing the military's ability to protect its service members."* (emphasis added)

Although this case was filed under the Administrative Procedure Act (APA) it was underpinned on the lack of informed consent protocols adhered to by the DoD in the ordering of Soldiers to receive Anthrax inoculations, which was ultimately deemed by the Court an investigative research program (much like the self-professed HPW program [ECF 1-24, p. 1, para. 1., 2.,3.a.,3.b.,3.c., 4. and 32 more]. In consideration of that case's Plaintiffs' requested injunction, the Court opined on the decision before it,

> *'There is no general requirement that an injunction affect only the parties in the suit. Where, as here, **an injunction is warranted by a finding of defendants' outrageous unlawful practices**, the injunction is not prohibited merely because it confers benefits upon individuals who were not named plaintiffs or members of a formally certified class."' McCargo v. Vaughn, 778 F. Supp. 1341, 1342 (E.D. Pa. 1991). **A district court***

[10] See Doe v. Rumsfeld 341 F. Supp. 2d 1 (D.D.C. 2004)

> ***has "broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past."*** *N.L.R.B. v. Express Publ'g Co., 312 U.S. 426, 435 (1941).* (emphasis added)

The District Court's Ruling correctly characterized the DoD's behavior as "outrageous unlawful practices," but as this Court should also note, the D.C. Court's order went on to indicate DoD's lack of requesting the informed consent provision of the law would be, "to the extent practicable,"[11] easy to comply with,

> ***the DoD is in violation of 10 U.S.C. § 1107, Executive Order 13139, and DoD Directive 6200.2.*** *Thus, because the plaintiffs are likely to prevail on the merits,* ***defendants will not face substantial harm by the imposition of an injunction****, the public interest is served, and plaintiffs face irreparable harm,* ***the Court finds that the plaintiffs meet the requirements for a Preliminary Injunction.***(emphasis added)

These similarities between this D.C. ruling on the DoD's informed consent failures near the turn of our century (in the Anthrax inoculation case) and the Army's Behavioral Health Research Program's failures of today (in the Plaintiff's case) are eerily similar, and moreover, the broad and deep requirements for written notification the FDA treatment informed consent requirements for experimental drugs would seem onerous compared to the Privacy Act's "Agency Requirements" provision; standing side-by-side it would look like 'Goliath and David.' On December 22, 2003, the court ruled and required the notifications, and even found the DoD at fault for violating an Executive Order and a DoD Directive.

Given that a compliance directive being sought by the Plaintiff regarding the Privacy Act would produce even less substantial harm to the Defendant, than the more in-depth clinical trial

---

[11] *See* AR 25-22, The Army Privacy and Civil Liberties Program, "Fair Information Practice Principals," Ch. 1-9, (f) f. "*Individual participation.* Involve the individual in the process of using PII and, to the extent practicable, seek individual consent for creating, collecting, using, processing, storing, maintaining, disseminating, or disclosing PII…."

consent form such as the Anthrax case, the Plaintiff respectfully requests this Court deny the Defendant's MOTION.

a. Fed.R.Civ.P 12(b)(6)
Standing

"The legality of a military order is a question of law…." [United States v. Sterling, 75 M.J. 407, 413–14 (C.A.A.F. 2016)]. A lawful order must "be clear, specific, and narrowly drawn." [United States v. Sterling, 75 M.J. 407, 413–14 (C.A.A.F. 2016)], "not conflict with statutory or constitutional rights of the person receiving the order,"[12] and "have a valid military purpose" Id.. Although the Brigade Commander's emailed order, on November 29, 2022, was reasonably specific, it conflicted with statutory [(e)(1), (e)(3), (e)(7) & (m)(1] provisions of the Privacy Act including: a) a violation of the requirements informed consent or an informed "ask" [(e)(3)]; b) a violation of every affected Soldiers' constitutional rights [(e)(7)]; c) a violation of not accomplishing an agency purpose as "it is not an 'Army' requirement,"[13] [(e)(1)] and; d) a violation of engaging in a contract on behalf of the Agency of a system of records whose reports were being provided back thru the government contractors to the Agency Officials [(m)(1)].

The Plaintiff has a genuine Article III stake in the outcome of the case because he has suffered and will suffer particularized (scheduled) and concrete injury that is caused by the follow-on punitive actions of the Defendant, on and through Agency officials, after November 30, 2022, that are connected, in an evidentiary manner, directly to the Plaintiff's attempt to remediate the unlawful order's violations on that date. Case law indicates the Plaintiff's standing is not only fit for judicial redress, but also, fit to redress to parties not named in this suit.

---

[12] *See* Enclosure A15, excerpt of Manual for Courts-Martial, commentary on UCMJ Article 90, found at page IV-24, in Appendix IV, Manual for Courts-Martial, 2024 [(ECF 17-15)].

[13] *See* Enclosure A11, email from Lt. Col. Howsden to the Plaintiff, December 6, 2022 at 4:44 p.m. (para. 1) [(ECF 17-15)].

The Defendant's MOTION under Fed.R.Civ.P. 12(b)(6) is not justified as "the purposes and intent of the statute, which is to let citizens know why and for what reasons the United States is asking them questions." Saunders v. Schweiker, 508 F. Supp. 305 (W.D.N.Y. 1981) Given the nature of the cited case, which addressed the issue from both a first-party, and third-party, vantage. That Court addressed viewpoints are enlightening, they found;

> *...the plain language of 5 U.S.C. § 552a(e)(3) does not in any way distinguish between first-party and third-party contacts....Given the potential for damage to a citizen's reputation when "the Government" starts to ask someone else questions about that citizen, the reasons for requiring a statement of the purpose for the inquiry would seem to be even more cogent than when the question is directed to the person who is the object of the inquiry.*

This fundamental third-party risk is also mentioned in the Plaintiff's MEMORANDUM IN SUPPORT OF MOTION FOR EMERGENCY INJUNCTIVE RELIEF (see "Golden Triangle"), as the Army is currently employing a program forcing supervisors to contact and hold conversations with family and friends of Soldiers. Notably, the Court found that because a third-party was not served a Privacy Notice about the information being gathered about the plaintiff of that case, they ruled on her Privacy Act claim under the Agency Requirements provision [(e)(3)] and found,

> *...plaintiff's Complaint accordingly states a facially valid claim for money damages and attorney's fees under the Privacy Act. Defendant's motion* [TO DISMISS]*must therefore be denied.*

Within days of the SDI order, another BHA was mandated via OPORD[14] [ECF 1-37] from the Brigade Commander through the Operations Section and it contained no information to suggest it fulfilled the "Agency Requirements" of the Privacy Act. The program included an embedded Psychological research baseline data-gathering application embedded within it also.

[14] An operational order sent via official documents and channels, in an email.

[(e)(3)] This order was for all Soldiers to participate in Health Performance and Wellness program [ECF 1-24], which supported the mandatory nature of the falsified OPORD. [(e)(1)]

In attempting to verify the statutory support and scope of this BHA, the Plaintiff discovered it was falsified [(e)(1)] [ECF 1-25]. In January of 2023, after the Plaintiff was accused of erratic behavior in a clandestine investigation and subsequently (while an unaware suspect) ordered to a nine-hour,[15] clinical (formal) emergency Command Directed Behavioral Health Evaluation (eCDBHE) [(e)(5)] [ECF 1-43 & 44] at Womack Army Medical Center Later, on February 23, 2023. [Argument and case law supporting jurisdiction re; Boards of inquiry, or investigations, is found in Mindes arguments below, *see* "Kassel"] This eCDBHE occurred after the plaintiff researched, identified and notified the appropriate Agency with oversight over the Program, the Army Human Research Protection Office; on February 23, 2023, the unit's Surgeon signed a new policy that had the spirit of the Privacy Act [(e)(3)] but still fell short of the law.

Furthermore, protected communications to remediate the issue with the Inspector General began immediately after the first (SDI) order [ECF 1-27] and continued until this lawsuit was filed. The Plaintiff expended every effort to rally assistance to include requesting General Officer "open doors," contacting other oversight agencies, contacting Congresspeople, and even self-reporting the Plaintiff's investigation to the Defense Counterintelligence and Security Agency to find one Agency or Officer to remediate what has occurred to the Plaintiff and other unwittingly affected Soldiers and has been put off everywhere to date. The Plaintiff's last resort to stave off the effects of the Brigade Commander's unlawful order and the subsequent violations of law that ensued, is our judicial system.

[15] The start time can be found on ECF [1-] nad the release time on the [xxx]

II. Defendant claims "Plaintiff Fails To Establish Standing For Any Privacy Act Claim Where His Allegations Demonstrate That None Of Plaintiff's Records Were Ever Disclosed."

Any opposition to "disclosure" violations is moot, as the Plaintiff did not allege any disclosure violation. Moreover, the Plaintiff did not ask for relief for any disclosure violation.

In fact, had it not been for the Plaintiff's knowledge and foresight to request the required information, he would have simply complied. That would have exposed his PII and PHI to potential release and future issues with the Defendant and Corestregnths. Moreover, the Plaintiff's Privacy protections in perpetuity, would be in effect with a company the Plaintiff wanted nothing to do with. The Plaintiff's actions obviated time-consuming issues the Plaintiff would have to remediate later with the Defendant and Corestregnths stemming from disclosure violations embedded in this order. Moreover, the direct authorization to litigation exposure of Privacy Act cases should provide some level of gratitude towards the Plaintiff for aptly identifying a potential high-cost error in judgment. The standing of this case is before the Court where it must be, for stakeholders on both sides.

a. <u>The Plaintiff has Article III standing pursuant to the "irreducible minimum requirements" that are applied in any case or controversy. They are by topic, as follows:</u>

<u>injury-in-fact</u> – The Plaintiff's damages related to the hiring of a Military Administrative Attorney, whom was paid for general daily consultation and to draft three significant legal briefs,[16] [ECF 1-8, ECF -17] thus far. More recently, the Plaintiff's paid-counsel has assisted him with other internal Army administrative procedures resulting directly from this Privacy Act

[16] *See* Enclosure A12, "Rebuttal of 2LT Tolston's findings and evidence" packet sent through legal counsel, SFC Michael Forbes and James M. Branum, Esq. (7 page cover brief to a 31-page rebuttal), June 16, 2023. [(ECF 17-12)]

violation, such as the rebuffed QMP memorandum, and currently (June 29, 2024), the provided correspondence to the NCOER appeals board, the DASEB and Army HRC.

There is a plethora of nonjusticiable determinations of cases wherein courts deem the Government immune regardless of the type of relief requested because the Plaintiff's injuries were incident to service. This is not the case here. The Plaintiff was immediately stripped of his 1st Amendment right to opt out of the unlawful ad hoc corporate behavioral assessment; *being stripped of the right to be informed,* is the injury-in-fact, as addressed in the following opinion [Doe v. Rumsfeld, 297 F. Supp. 2d 119 (D.D.C. 2003)

> *In the present case,* ***the government alleges that plaintiffs' claims of injury are purely speculative because adverse personnel actions against them for refusing inoculations may or may not occur****. However,* ***the Court agrees with plaintiffs*** *that the defendants' argument ignores the fact that when challenging an investigational drug under 10 U.S.C. § 1107 an inoculation* ***without informed consent or a presidential waiver is the injury.*** (emphasis added)

Immediately, the Plaintiff was reported when he asked for the agency required information. The retaliation that ensued, separated him from his role as a Personnel Security Manager, a position he excelled in over his career. Then, the Plaintiff was punished for alleged "disrespect" after the agency official failed to perform her duties.

That investigation led to the Plaintiff needing to hire a Military Administrative Attorney to submit briefs to the Commanders to encourage their remediation of the actions being unjustly thrust upon the Plaintiff, which has cost thousands of dollars plus this case's filing fee. Yet, the Plaintiff's Commanders ignored every communication and continued to follow through with personnel actions that led to the Plaintiff's scheduled separation on December 1, 2024. The

investigation has restricted[17] the Plaintiff from a promotable status that he earned to ascend to the rank of Master Sergeant on January 19, 2023, that could easily have been fulfilled by now (which would have been a boost in compensation). The Plaintiff was 684th of 1,212 upon selection and fell to 1274 out of 1292 after being "flagged"[18] [19]for separation. This termination of his contract will: cause the Plaintiff to pay back (in an Army recoupment) $4,571.40;[20] void the Servicemembers Civil Relief Act benefits while he is on active duty status;[21] nullify well over $100,000 in active duty compensation until retirement; and nullify millions in retirement and medical benefits thereafter. In summary, if the unlawful order hadn't occurred or if the order had been properly planned and executed, per the Privacy Act and internal agency regulations, there would have been no injuries and this case would have been unnecessary.

"actual or imminent" – The Plaintiff expounds upon the just argued injury by discounting conjectural and hypothetical to get to an actual and imminent understanding of the Brigade Commander's order. A standard for injury is stated in the aforementioned Anthrax case [Doe v. Rumsfeld (2004)],

> *The Court has recognized that in order to establish injury plaintiffs must demonstrate that they have taken, or have been ordered imminently to take, the anthrax vaccine. See Doe, 297 F. Supp. 2d at 130-31. While defendants argue that plaintiffs have presented no "specific facts" in support of these claims,* ***the Court accepts and credits the sworn***

[17] This restriction has been in place since the Co. Commander's "flag" delivered (and backdated by the Company Commander to January 12, 2023) to the Plaintiff that notified him he was a suspect of an investigation, on February 7, 2023.

[18] A "Flag" is a DA Form 268, entitled, "REPORT TO SUSPEND FAVORABLE PERSONNEL ACTIONS."

[19] *See* Enclosure A28, backdated to January 12, 2023, "Flag," DA Form 268, "REPORT TO SUSPEND FAVORABLE PERSONNEL ACTIONS," Cpt. David Korista, February 7, 2023.

[20] *See* Enclosure 34. Reenlistment Bonus contract between the U.S. Army and Michael J. Forbes, P. 3

[21] *See* Enclosure A13, *from* "Discover Card Customer Service."

affidavit of plaintiffs' counsel*. Thus, plaintiffs have standing to challenge the FDA's actions*[22]

That case proceeded on the sworn testimony (in that case) of Plaintiff's counsel, about an order he never heard! In contrast, the Plaintiff here has brought forth the actual Brigade Commander's order, and the corroboration of the Command Operational Psychologist's supporting emails (in her official Army capacity and the alternate capacity she asserted as a Certified Facilitator of the Corporation), and an abundance of corroborative discourses with agencies to remediate the Brigade Commander's failure to adhere to law and executive mandate. Moreover, the order's date and time was reinforced multiple times for the Plaintiff to attend the Group Session within mere days; there was nothing associated with this order, right down to the dress code, that was conjectural or hypothetical. This can be seen in the Brigade Commander's choice of words when he stated, "I will respect your request and excuse you…"[23] The Brigade Commander granted an exception to the Plaintiff of his direct order. Hypothetically, had it not been an order, there are myriad word combinations to indicate the Plaintiff had a choice or there existed an obvious voluntary nature of his order had it existed; it did not.

While the DC District Court credited sworn statements, this Court can view the actual orders to render an injury to the Plaintiff's statutory right to be informed and to opt out of the assessment pursuant the Privacy Act provisions. Therefore, the order is an injury in itself because, as delivered, the order's mere issuance stripped the Plaintiff of the protections afforded by provision (e)(3) and (e)(10) plus the Plaintiff's compliance with the coerced corporate

[22] *See* Doe v. Rumsfeld, 341 F. Supp. 2d 1, 3 (D.D.C. 2004).

[23] *See* Enclosure A23, emails between the Plaintiff and Col. Tavi Brunson, Brigade Commander, 528th Sustainment Brigade, December 1, 2022.

agreements would have removed any protections the Agency was required to adhere to in provision (m)(1).

The Plaintiff was assessed by the Army's Centralized Promotion Board when it was announced that he was to be promoted via Order of Merit list (he was 684 out of 1,212) on January 19, 2023. Although it would be speculative to determine the exact monetary damage done due to the Plaintiff being restricted from the promotion by the decisions of the Defendant's Brigade Commander and other Officials[24] [ECF 1-6][25] the difference in pay between Sergeant First Class and Master Sergeant for a 16+ year Soldier is between $412.20 per month in 2024.[26]

This further warrants the Plaintiff's emergency injunctive relief request to presented to this Court. It would enable him to have an opportunity to argue the merits of the *prima facie* case without adding to the damages in legal fees [ECF 1-8, ECF 1-61], financial loss of benefits of the Servicemembers Civil Relief Act on "9/18/2024,"[27,28] complete of promotion due to separation[29], diminished reputation, defamation, immediate recoup of unearned reenlistment bonus, and the scheduled loss of retirement benefits. At the time of his discharge, the Plaintiff will be only 2 months and 12 days prior to 10 USC § 1176 protections. Notably, this injunction is tethered with

---

[24] Col. Brunson; Com. Sgt. Maj. Vargas; Lt. Col. Robinson; Com. Sgt. Maj. Emekaekwue; 1st Sgt Deleon; and Lt. Col. 1st Lt. Jennes.

[25] Cap. Lowrie and L. Col. Furlow recommended the Relief-for-Cause, Non-Commisioned Officer Evaluation Report represented by ECF 1-6.

[26] *See* Enclosure 35, 2024, "Active Duty Pay," Military.com, (online information date not provided.)

[27] *See* Enclosure A13, Official notification of financial impact to loss of benefits of the SCRA on "9/18/2024", Discover Card Customer Service, June 18, 2024.

[28] A Privacy Act "Access" request is in process to identify what disclosure or "documentation [Discover] have on file" contains and to request for possible follow-on "Amendment. (for possible violations of (a)(7),(e)(4), if any, of the Privacy Act."

[29] *See* Enclosure A28, DA Form 4856, "A Flag is the temporary suspension of favorable personnel actions such as promotions or special duty assignments." Cpt. David Korista, Company Commander, February 7, 2023.

requests for the remittance of personal damages, legal and Military Administrative Attorney fees, administrative and declaratory relief as requested in the original pleading. All or part of which can be granted under the jurisdiction of the court per a writ of mandamus pursuant to 28 USC § 1361 or other judicial means.

causation – This legal controversy would have never occurred, had the Defendant complied with the Agency Requirements of the Privacy Act when its official, the Brigade Commander, ordered his Senior Staff to participate in SDI. The Plaintiff would have simply signed the form to opt out, made a copy of it, and then went back to work. The Plaintiff would have had no cause to contact the Inspector General or follow their guidance to request the unit Psychologist provide the requirements of the Act; the investigation would not have occurred; the relief for cause Non-Commissioned Officer Evaluation Report and GOMOR would not have been delivered; and the QMP would not have had any decision to make regarding the Plaintiff's career tenure; and so many man-hours of so many Agencies, some Congressman, the Inspector Generals, Attorneys, involved Soldiers would not have been necessary. Nor would the Plaintiff have actual administrative Attorney's fees and imminent material and significant future legal and retirement damages if injunctive relief is not granted.

Succinctly, this investigation was spawned by the Defendant's Officials, the Psychologist and the Brigade Commander, whose conduct stripped the Plaintiff's rights under the Privacy Act and causally resulted in the Plaintiff's pending December 1, 2024 administrative separation due to the investigation and the resulting Relief for Cause Evaluation Report and GOMOR, via the series of subset claims found in MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT [(ECF 17)]. The entire argument for causation is the bulk of the argument therein,

while the impetus for the case is evidentiary and provides jurisdiction and standing as previously argued above in Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

redressability –

The ability to redress this situation, squarely lies within the Federal Court venue as established in Fed.R.Civ.P. 12(b)(1) & 12(b)(6) arguments above. The Defendant has proven that it is not an objective actor given the ethical dilemma created by the Brigade commander's unlawful order that stripped the Plaintiff of his rights under the Privacy Act, crashing into the Plaintiff's avid protection of his thoughts, beliefs and motives. This clash between a directorial authority's unlawful mandate and onerous corporate contractual agreements that are argued in the MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT[(ECF- 17)] exposes a raw nerve with competing motives. Controversy is the raw material of justiciable claims. The claims having been defended, the Plaintiff awaits redress.

To have a cause of Action under the Privacy Act, the Plaintiff must show that disclosures...:

The Defendant has enjoined this court to consider its MOTION under a specific provision of the Privacy Act, entitled "Conditions for Disclosure," and not the Plaintiff's stated general allegations cited and contained in his complaint of "Agency Requirements" and "Government Contractors" provisions. As stated in the argument supporting 12(b)(1), a violation of the disclosure requirement was not alleged by the Plaintiff, hence, objection to jurisdiction based on this argument is moot.

a) the defendant violated the act;

The Plaintiff's MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT provides arguments regarding the claims of the violations tied to the first

behavioral assessment. That said, the HPW (not the initial ad hoc corporate assessment SDI) was implemented via a *prima facie* falsified order per the complaint. The evidence associated with this particular violation is clear and reasonable and needs no plausibility argument.

b) the Defendant committed the violation(s) willfully or intentionally and;

Regulations exist to ensure orders: 1) are lawful and, 2) are supported by Manual for Courts-Martial (MCM),[30] which plainly states, "[An] order must not conflict with the statutory or constitutional rights of the person receiving the order." Moreover, the Army Privacy Program states, "Improper government interference with the exercise of fundamental rights and freedoms violates the U.S. Constitution"[31] and all Service Members took an oath to "defend the Constitution." The Colonel, without proper guidance from the Command Operational Psychologist, gave the order. Therefore, any decision not constrained by the Officer's duty to comply with Regulations, and subsequently delivered to Soldiers, must be considered as a willful and intentional means to unlawfully accomplish a purported regulatory supported mission.[32]

After delivering an order forcing Soldiers to provide PII and PHI to a third-party Corporation to answer their Behavioral Assessment questions, the Command Operational Psychologist sent another email with the details of the group forum event[33] with the cognizant intent of having three-hour group professional development seminar in which they would be "reviewing our results" of those PII reports. Then the reports were to be shared back to the

---

[30] "(ii) Determination of lawfulness. The lawfulness of an order is a question of law to be determined by the military judge." – *from:* Commentary on UCMJ Article 90, found at page IV-24 in Appendix IV, *Manual for Courts-Martial, online at:* https://jsc.defense.gov/military-law/current-publications-and-updates/.

[31] *See* AR 25-22 (The Army Privacy and Civil Liberties Program) (September 30, 2022), *online at: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN38442-AR_25-22-001-WEB-2.pdf.*

[32] The 9th Circuit defines willful and intentional as "only somewhat greater than gross negligence." [See Covert v. Harrington 876 F.2d 751 (9th Cir. 1989)].

[33] See Enclosure A22, *email from* MAJ Racaza, Command Operational Psychologist, November 30, 2022.

"Customer," Col. Brunson and the "Facilitator" Maj. Racaza and retained by the Corporation for their use, at their discretion. This was the plan and was willful and intentionally implemented.

c) the violations adversely affected the Plaintiff.

As stated above, the Plaintiff has suffered actual and measurable damages, including the loss of a career that he loves and significant financial damages.

III. Defendant claims "Plaintiff Fails To Plausibly Allege Any Privacy Act Claim Where His Allegations Fail To Plausibly Demonstrate Any Action By Defendants That Was Either Willful Or Intentional."

Defendant's agents, the Brigade Commander and Command Operational Psychologist, violated two Privacy Act provisions that, in tandem, created the evidence of the willful and intentional nature of their planned group behavioral assessment. By failing to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of the records, they created through the Commander's order a third-party-owned system of records and failed to inform the Plaintiff of their absolute inability to "protect against any anticipated threats or hazards to their security or integrity which could result insubstantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained" in that outside database. In doing so, they violated their sworn duty to uphold, the 1st Amendment. The Commander's Soldiers had the right to say "no thank you" to this order as the Privacy Act makes clear, "inform each individual whom [the agency] asks to supply information." The fact this tasking was not presented in the form of a recommendation or a question and posited as an emailed order, shows the willful intent as the order violated not only the Plaintiff's 1st Amendment right to opt out and avoid participation, but also:

"Liability for damages is incurred only when an agency violates the Act in a willful or intentional manner, ... by... flagrantly disregarding others' rights under the Act. 5 U.S.C. § 552a(g) (4)." [Kassel v. US VETERANS'ADMIN., 709F. Supp. 1194 (D.N.H. 1989)].

When the Plaintiff exercised his 1st Amendment right and specifically asked for information that could have remediated the order, the willful intent was displayed again, as he was immediately reported to the Commander and punished for asking, a further violation of his 1st Amendment right. The willfulness never stopped, regardless of the Plaintiff's attempts to share his understanding that the injury in this case was levied on the Plaintiff and not on the Command Operational Psychologist, nor was it an affront to the Commander's authority. The Plaintiff simply wanted to protect his privacy.

IV. Defendant claims "There Is No Private Right of Action Under the Military Whistleblower Protection Act ("MWPA")."

Plaintiff has not requested adjudication of the Military Whistleblower Protection Act (MWPA) in his pleading, nor has the Plaintiff requested relief for the same, which renders this point moot. A larger argument is in V. immediately below.

V. Defendant claims "Plaintiff Cannot Show That His MWPA Claim Is Justiciable."

Any opposition to MWPA violations is moot, as the Plaintiff did not allege any MWPA violation as the grounds for requesting relief. Rather, the Plaintiff merely pointed out in his complaint that Congress erased the effectiveness of the Military Whistleblower Protection Act in its 2017 amendment to the law 10 USC 10 § 1034, which enables any Commander to investigate a Whistleblower for other actions not affiliated with the Whistleblower's protected communication. The Plaintiff was investigated a second time as a result of his Inspector General complaint as a suspect in his own complaint in accordance with the 2017 amendment. In our

directorially-authoritative Army culture, it can be posited that it is similar to an enormous human using a magnifying glass to fry the itty-bitty ant' that stood up and said something. This happened in the second clandestine investigation of the Plaintiff.

a. Defendant claims "Plaintiff Has Not Exhausted Intraservice Administrative Remedies For His MWPA Claim."

Exhaustion of Administrative Remedies - Any claim of failure to exhaust administrative remedies has been made moot under multiple analysis adopted in significant Court rulings, Diederich v. US Army, 878 F.2d 646 (2d Cir.1989) as discussed in the Plaintiff's Complaint [(ECF 1, *See* p.52, & footnote 253)]. Moreover, another 2nd Circuit Court ruling reinforced this by stating,

> *...because the Privacy Act explicitly provides for expedited review procedures that would be impeded by an exhaustion requirement, Diederich's holding is limited to Privacy Act claims, Guitard v. US Navy, 967 F.2d 737*

Notably, the Guitard case also listed the four exceptions to the exhaustion rule, id..; the plaintiff addressed how his case fits all four exceptions in his Complaint (*See* pages 4-5 & footnotes 25-34). This is reinforced by the bias demonstrated via a never-ending stonewalling campaign that the Plaintiff endured as he requested officials to address this Privacy Act complaint throughout the events that led to this case, which the Supreme Court noted: "exhaustion [of remedies] may not be required when the agency 'is shown to be biased or has otherwise predetermined the issue before it." [Schaeuble v. Reno, 87 F. Supp. 2d 383 (D. N.J. 2000) citing Gibson v. Berryhill, 411 U.S. 564, 575 n. 14, 93 S. Ct. 1689, 1696, n. 14 (1973).]

> *[The exhaustion rule] is based on the need to allow agencies to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by*

> *the agencies' own decisions. It also avoids duplicative proceedings, and often the agency's ultimate decision will obviate the need for judicial intervention.* [Schlesinger v. Councilman, 420 U.S. 757 (1975)]

That said, the Plaintiff has exhausted so many avenues for timely remediation of this case, but the Army has repeatedly demonstrated per the evidence and discussion in the Plaintiff's Complaint (See pages 8-12 & footnotes 45-61) and now through their administrative separation decision that has since transpired after this case filing.[34,35] that it desires not or will not remediate a Privacy Act violation. This pattern is of such length and breadth as to reasonably assume bias is prevalent and judicial intervention is relevant.

b. Defendant claims "Plaintiff Cannot Satisfy The Mendes Factors."

Despite the lack of precedent for this novel case, that can be succinctly described as "a lawful directorial authority who unlawfully coerced a captive vulnerable population into surrogate contracts to provide it with ill-gotten gains that are intended to be subjectively used for/against its subjects," the Plaintiff's *prima facie* case poses a significant breach of the intent of the Privacy Act and therefore, Federal Courts may "review matters of internal military affairs determine if an official has acted outside the scope of his powers." To that end, the Plaintiff must temporarily set aside the direct statutory and policy justification argued in the Fed.R.Civ.P. 12(b)(1) (Jurisdiction) argument response to fairly address the Defendant's Mindes factors it brought forth. The factors are herein addressed individually.

But first, in opposition to the Defendant's incorrect assertion of the Plaintiffs gravamen, the gravamen of the Plaintiff's case rests on an unreasonable investigation that was founded and

---

[34] *See* Enclosure A02. Cover memorandum supplied by the Plaintiff thru counsel to the Qualitative Management Board March 29, 2024.

[35] *See* Enclosure A33. QMP decision to involuntarily and administratively separate the Plaintiff from his service and contract, May 29, 2024.

conducted on the "false premise" [Kassel v. US VETERANS'ADMIN., 709F. Supp. 1194 (D.N.H. 1989)] of disrespect toward a superior commissioned officer after the officer failed thrice to provide the "Agency Required" information required before or with an unlawful order from the Plaintiff's Brigade Commander. Moreover, the Plaintiff has unwaveringly maintained the need for the information from the moment he was informed of the program by the Command Operational Psychologist the morning of November 28, 2022. It is clear that the Psychologist, (who alleged receiving the disrespect) did not maintain objectivity to balance her failed opportunity to guide the Commander prior to the order being given or to provide the information when asked for it, after the fact. Later, for an unknown reason, the Psychologist attempted to provide information that was not in compliance with the "Agency Requirements." Though "Objectivity is necessary in [her] role as a clinical Psychologist" [Kassel v. US VETERANS'ADMIN., (1989)], she never demonstrated it towards the Plaintiff on November 30 onward and never complied with the law, as demonstrable evidence in this case indicates.

The Plaintiff, after the order was delivered, had no opportunity to professionally and independently opt out without taking on the mantle of the "Agency Requirement" responsibility himself and attempting to get assistance from the Inspector General; who did nothing but redirect him to "go ask the Source," which he did. Maj. Racaza[36] whose objectivity was required to assist the Plaintiff in understanding the scope of the assessment, and that it was, in fact, voluntary (as it was not incident-to-service), instead, immediately treated him as an insubordinate and her complaint was integral in the Brigade Commander's decision to launch an investigation on the Plaintiff.

[36] Maj. Rhea Racaza, the Psychologist, is licensed with AZ BOPE (active license #PSY-004462 since January 14, 2014 and she is current as of this filing).

Factor 1: "<u>the nature and strength of the plaintiff's challenge to the military determination</u>" .....

Citing the Defendant's cited case:

> *Mindes v. Seaman requires a court contemplating review of an internal military determination first to determine whether the case involves an alleged violation of a constitutional right, applicable statute, or regulation, and whether intraservice remedies have been exhausted.* NeSmith v. Fulton, 615 F.2d 196 (5th Cir. 1980)

The Defendant's "challenge to a military determination" can be found in the impetus of this case; a blatant violation of law contained within an evidentiary order that lacked the equivalent of informed consent, and the Plaintiff's quick identification, communication and attempted remediation of it, resulted in the launch and massive propulsion of two slanted investigations of the Plaintiff, one of which resulted in his being scheduled for administrative separation. The undisputable nature of the Plaintiff's evidence does not require challenge inasmuch as it requires a review of *prima facie* evidence and whether the evidence is *prima facie* valid and caused by the Defendant's violation of law. To better exemplify this, the Plaintiff cites the following [Kassel v. US VETERANS'ADMIN., 709F. Supp. 1194 (D.N.H. 1989)]:

> *A review of the Board's* [of inquiry] *report suggests that* ***Dr. Kassel may be right****. The report included numerous statements of outrage and criticism,* ***but nothing reported in that document provided any other perspective. Dr. Kassel has presented letters and editorials which, unlike the comments cited in the Board's report, defend his conduct*** *and criticize the VA.*

Should it become necessary, the Plaintiff welcomes entering the entire investigation packet, provided to him by the Defendant, at its pleasure. The Plaintiff's decision not to proactively add this information is twofold: a) it is onerous and convoluted, and b) it will expose and possibly embarrass the Defendant. This case is a matter of public record and because of this, other Soldiers and their families may be able to retrieve and relate to the slanted manner this

investigation was conducted. This is ***not*** the Plaintiff's intent. Therefore, the Plaintiff would be amenable, if the Court deems it necessary, to include the entire investigation including the declarations of all involved, in a sealed manner for the record for the Court to adjudge for themselves the merit of the Plaintiff's use of the word "shabby" and "slanted" when addressing the internal investigation of himself. The Plaintiff's case is not without merit and relates to the cited case throughout this filing [Kassel, (1989)]. It is for these reasons that the Plaintiff's alleged Privacy Act provision (e)(5) violations should survive the Defendant's MOTION, as "a reasonable jury could find that the Board's report was inaccurate or incomplete." [Kassel v. US VETERANS'ADMIN., 709F. Supp. 1194 (D.N.H. 1989)]

Factor 2: <u>The potential injury to the plaintiff if review is refused</u>.

The Plaintiff is being denied in fulfilling a contractual obligation he willfully negotiated with the U.S. Army on January 16, 2020 when he received a $22,800 reenlistment bonus.[37] The contractual obligation started on December 3, 2020 and ends on December 2, 2025, which totals 1825 days. The number of days the Plaintiff will lose from December 1, 2024 to the end of the contract are 366. The pro rata share that the Plaintiff will be forced to repay upon leaving the Army is 20.05% of the signing bonus, or $4,571.40;[38] this amount is added to the thousands in attorney fees incurred by the Plaintiff to attempt to internally remediate the ramifications of the Brigade Commander's order and the Command Operational Psychologist's failures, and both of their displayed lack of competence and objectivity resulting in unfounded animus towards the Plaintiff. This is not to discount the increasing magnitude of any future claims, should this

[37] *See* Enclosure A34. Reenlistment Bonus contract between the U.S. Army and Michael J. Forbes, P. 3, January 16, 2020.

[38] Ibid. See p.3, 13., c., "Being Selected for the…(QMP), and subsequent separation (voluntary or involuntary) from service [contract] makes me subject to recoupment of the unearned portion of my incentive."

review fail; once separated, given the dualistic tort leanings of this case there may be other legal remedies the Plaintiff could pursue. The Plaintiff prefers the adjudication of this case as resolution of the controversy as it stands would be less expensive for both the Plaintiff and the Defendant. But if the Defendant's argument prevails, the following argument could answer at least this aspect of Mindes factors: The agency will be forcing the Plaintiff to pay back over $4,000 (the pro-rated portion of the reenlistment bonus) under a contract entered into with the Plaintiff, as well seeking to dodge the payment of retirement benefits (after almost 18 years meritorious service), due to the agency claiming the Plaintiff breached contract, when in fact the Plaintiff only sought to avoid signing a Terms of Service contract with a separate and outside corporation, that the agency ordered him to become affiliated with, but that was not in the best interests of the Plaintiff. These are significant damages that will require action under tort and federal claims law, if the court does not take action on this case.

Factor 3: <u>The type and degree of anticipated interference with the military function</u>.

The answer to this can be found throughout this argument's answers to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) challenges in section "I.," citing [*See* refs. (Doe v. Rumsfeld (2003))] [(Doe v. Rumsfeld (2004))]. The interference on a permanent injunction for the informational notifications of 5 USC § 552a, (e)(3) when asking for information would have been minimal to the Army and has been previously ordered.

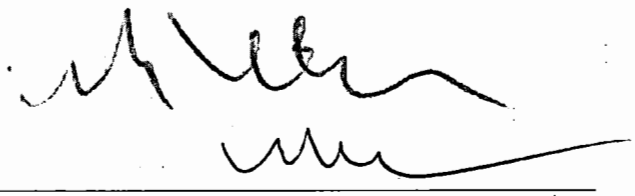
Factor 4: <u>The extent to which the exercise of military expertise or discretion is involved.</u>

The Defendant also asserted "Courts should defer to the 'superior knowledge and expertise of professionals' in matters such as promotions...." Def. cited [(Hrdlicka v. Toro, (2023))], however, the similarity of binding authority found in the Plaintiff's previous arguments

in relation to hiring practices of a school board [(Evans v. Harnett County Bd. Of Educ.(1982))]. Similar to the case of a school board, another Government military agency, or even any corporation, can violate statutory law and historical case law is replete with examples of experts who periodically failed in compliance with common tasks that every institution must comply with, like privacy issues. In fact, the financial industry, with which I am intimately familiar, has mandated that every institution have a "Compliance Officer," for constant monitoring. Separately, prior to the Plaintiff's promotion being restricted from him, the Army experts had already deemed him ready for ascension, but the Qualitative Management Board denied the Plaintiff's request to table consideration of his packet until the culmination of this lawsuit. The Plaintiff challenges that expertise as well as the causal factors of this case, making that decision ripe for review as well, as it is very rare for a serving service member to have a stated right to sue the Army.

CONCLUSION

The Plaintiff's *prima facie* evidence is *prima facie* valid as the Defendant offers no evidence to challenge or contradict the Plaintiff's *prima facie* claims. The Plaintiff preys in this venue for the Defendant to change its stance towards the Plaintiff's claims pursuant to the arguments presented throughout this filing. The Plaintiff further prays that the Court will deny the Defendant's MOTION TO DISMISS.

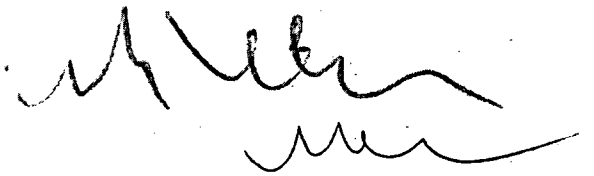


Michael J. Forbes, *pro se*

CERTIFICATE OF COMPLIANCE

This document complies with the page limit and word count of Local Rule 7.2, in that it is 30 pages long and contains 8372 words.

Dated: July 1, 2024



Michael J. Forbes, *pro se*