NO. _____

IN THE
Supreme Court of the United States

LUKE T. WEST,

PETITIONER,

V.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI

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[APPENDIX A: Decision Under Review]

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

LUKE T. WEST,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2019-2415

Appeal from the United States Court of Federal Claims in No. 1:17-cv-02052-LKG, Judge Lydia Kay Griggsby.

JUDGMENT

CLAIBORNE W. BROWN, Claiborne W. Brown, L.L.C., Mandeville, LA, argued for plaintiff-appellant.

WILLIAM PORTER RAYEL, Commercial Litigation Branch, Civil Division, United States Department of Jus-tice, Washington, DC, argued for defendant-appellee. Also represented by JEFFREY

B. CLARK, STEVEN JOHN GILLINGHAM, ROBERT EDWARD KIRSCHMAN, JR.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (MOORE, TARANTO, and HUGHES, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

May 10, 2021	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

[APPENDIX B: Excerpts of Petitioner's Original Brief to the United States Court of Appeals for the Federal Circuit, No. 19-2415, R. Doc. No. 65]

[19-2415, R. Doc. No. 65, p.12]

STATEMENT OF THE ISSUES

(1) Did the Trial Court err in applying the standard set forth in the case of *Matias v. United States*, 923 F.2d 831 (Fed. Cir. 1990) and *Bowling v. United States*, 713 F.2d 1558 (Fed. Cir. 1983), in its collateral review of the appellant's general court martial conviction instead of the more appropriate general standard of review for evaluating an agency decision under the Administrative Procedures Act?
(2) In the Alternative, assuming the Trial Court was correct in applying the *Matias/Bowling* Standard in collaterally review appellant's general court martial conviction, did the Trial Court err in not finding a fundamental violation under

[19-2415, R. Doc. No. 65, p.13]

Matias/Bowling to, at a minimum, justify the exercise of its jurisdiction to remand the matter under 28 U.S.C. § 1491(a)(2)?
(3) Did the Trial Court err in applying the doctrine of issue preclusion as to the issues of whether appellant was falsely accused of sexual harassment/and sexual assault, which application was then used as a basis for upholding appellant's general court martial conviction under *Matias/Bowling*?

(4) Did the Trial Court err in finding that the names of the appellant's accusers constituted protected information under the Privacy Act, 5 U.S.C. § 552a?

[19-2415, R. Doc. No. 65, p.38]

SUMMARY OF ARGUMENT

A) Assignment of Error/Issue for Review No. 1:

The Trial Court was erroneous in applying the standard provided in the cases of *Matias v. United States*, 923 F.2d 821 (Fed. Cir. 1990) and *Bowling v. United States*, 713 F.2d 1558 (Fed. Cir. 1983), ("*Matias/Bowling*") in its collateral review of appellant's general court martial conviction. In light of the fact that appellant's case did not undergo any judicial appellate review under Articles 66 and 67 of the U.C.M.J. and had only undergone administrative appellate review under Article 69, the Trial Court should have applied the general standard for reviewing agency actions under the Administrative Procedures Act. Under that standard, the decision of the OJAG USN to uphold the conviction should have been reversed on the grounds that the application of the "West Standard" in appellant's UCI motion and the supplementation of the appellant's record of trial was a violation of RCM 1106 were both contrary to law.

* * *

[19-2415, R. Doc. No. 65, p.39]

C) Assignment of Error/Issue for Review No. 3:

The Trial Court erred in granting summary judgment on the application of issue preclusion based upon the December 22, 2015 order in the case of *West v. Rieth*. First, the issue sought to be precluded, the falsity of the sexual assault/sexual harassment allegations against appellant, is an issue on the merits which cannot be precluded on a judgment pertaining to subject matter jurisdiction only. Additionally, as applying to an issue on the merits, the December 22, 2015 order did not afford procedural opportunities for determining such issues, such as the explicit denial of the appellant's allegations, the right for an evidentiary hearing, and absent such a hearing, allocation of the appropriate burden of proof upon the movant (summary judgment).

[19-2415, R. Doc. No. 65, p.40]

D) Assignment of Error/Issue for Review No. 4:

The Trial Court abused its discretion in holding that the identities of appellant's accusers constituted protected information under the Privacy Act and DoD/USMC SAPR Program procedure such that said information was subject to a protective order. First, neither the Privacy Act nor DoD/USMC SAPR Program procedures apply to information independently obtained at appellant's open and public trial. Further, the Trial Court's ruling on the Privacy Act is unduly broad and constitutes unconstitutional and potentially dangerous prior restraint.

* * *

[19-2415, R. Doc. No. 65, p.41]

ARGUMENT

* * *

[19-2415, R. Doc. No. 65, p.43]

Another significant consideration comes from the jurisdiction afforded to the court of claims by 28 U.S.C. § 1491(a)(2). Section 1491(a)(2) affords the court of claims in Tucker Act cases "the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." *Id.* Given the power of the service JAG to refer under U.C.M.J. Article 69 a court martial to the service courts of appeal for judicial appellate review; such an instruction by the court of claims accompanying the Section 1491(a)(2) remand would be "consistent with the statutory scheme" and would be a permissible exercise of the court's jurisdiction. *See Richey v. United States*, 322 F.3d 1317, 1323 (Fed. Cir. 2003). In any event, one can scarcely devise a more appropriate and less intrusive means of collaterally reviewing a court martial, limited to review under Article 69, than to remand said court martial to the service JAG with an order of referral to the service court of appeal, thereby removing the jurisdictional barrier to judicial appellate review and allowing that judicial appellate review to proceed under U.C.M.J. Articles 66 and 67.

* * *

[19-2415, R. Doc. No. 65, p.45]

This Court's review of the actions of OJAG USN as an agency under the standards above, while stringent, would be considerably less stringent (and less deferential) than the requirements as contemplated in a review of a court martial having undergone judicial appellate review under *Matias/Bowling*. Under this appropriate standard, appellant submits that setting aside his court martial conviction, or, at a minimum, remand of same to OJAG USN with instructions to refer said court martial to the NMCCA for judicial appellate review, is clearly warranted.

[APPENDIX C: Excerpts of Petitioner's Reply Brief to the United States Court of Appeals for the Federal Circuit, No. 19-2415, R. Doc. No. 66]

[19-2415, R. Doc. No. 66, p.8]

MAY IT PLEASE THE COURT:

In his Original Brief, Plaintiff-Appellant, Luke T. West, ("plaintiff") addressed four issues with respect to the Court of Claims decision to deny his motions, grant the Government's motions and dismiss his claims: 1) the Court of Claims erroneously ruled that the Privacy Act prevented plaintiff from identifying his accusers and their testimony; 2) that plaintiff was prevented heretofore from asserting that the sexual assault accusations against him were false under the doctrine of issue preclusion; 3) that the lower "arbitrary and capricious" standard was the proper standard in analyzing whether OJAG USN's U.C.M.J. Article 69 review of plaintiff's court martial conviction; and 4) that plaintiff was still entitled to have his court martial vacated even under the strict "*Matias/Bowling* Standard". As to issues two (doctrine of issue preclusion) and four (application of the "*Matias/Bowling* Standard"), plaintiff avers that the circumstances warrant vacating of his court martial conviction under even the strict "*Matias/Bowling* Standard" notwithstanding the Government's response. Further, the Government's arguments pertaining to the application of the doctrine of issue preclusion do not warrant a response from plaintiff herein. Plaintiff does, however, feel that further analysis is required as to issues one (application of the Privacy Act) and three

(application of "arbitrary and capricious" standard) and hereby provides the following arguments in reply.

* * *

[19-2415, R. Doc. No. 66, p.9]

ARGUMENT IN REPLY

* * *

[19-2415, R. Doc. No. 66, p.30]

III. As a Matter of Statutory Interpretation; the Collateral Review Standard of *Matias v. United States*, 923 F.2d 831 (Fed. Cir. 1990) and *Bowling v. United States*, 713 F.2d 1558 (Fed. Cir. 1983) do not apply and the Standard of Reviewing the Affirming of Plaintiff's General Court Martial Conviction is the Standard of General Agency Action Review Is Applicable in this Case.

In the Original Brief to this Court, plaintiff makes the argument that the appropriate standard of review of plaintiff's court martial conviction is the general standard of review for agency decisions and not the more rigorous standard of review under *Matias v. United States*, 923 F.2d 831 (Fed. Cir. 1990) and *Bowling v. United States*, 713 F.2d 1558 (Fed. Cir. 1983) ("the *Mattias/Bowling* Standard"). Plaintiff's argument is largely based upon the premise that, in plaintiff's case, jurisdictional restrictions under the U.C.M.J. prevented judicial appellate review under Articles 66 and 67 of the

U.C.M.J. and limited review to administrative agency review under Article 69. By contrast, the *Mattias/Bowling* Standard was applied in cases where the plaintiff's had been afforded the full appellate review of military tribunals under Articles 66 and 67. Additionally, plaintiff noted the remand jurisdiction of the Court of Claims under 28 U.S.C. §1491(a)(2), which, coupled with the referral power of OJAG USN to refer the case to the Navy Marine Corps Court of Criminal Appeals ("NMCCA") under Article 69 of the U.C.M.J., would allow the military tribunals, both NMCCA, and, if necessary, CAAF, to acquire appellate review jurisdiction over plaintiff's court martial. *See United States v. Arness*, 73 M.J. 454 (C.A.A.F. 2014). Under such circumstances, it would be out of place to impose essentially the same high burden of *Mattias/Bowling* to both 1) a scenario where a determination was being made merely to establish the jurisdiction of the military tribunals to permit appellate review; and 2) a scenario where, jurisdiction having been established, those same military tribunals had a full opportunity to conduct appellate review. Put differently, when considered in the context of the application of the remand power of 28 U.S.C. § 1491, independent of seeking collateral review of his court martial conviction by the Court of Claims at this point, plaintiff is alternatively seeking to establish the jurisdiction to permit continued direct appellate review by the military tribunals under the U.C.M.J. Clearly, the latter (mere jurisdictional establishment for military tribunal review) does not warrant the strict standards that govern the former (actual review of the decision of the military tribunal); especially where, as here, the plaintiff anticipates a strong possibility that he would be successful if those claims are presented to

the military tribunals on direct appellate review under U.C.M.J. Articles 66 and 67.

* * *

[19-2415, R. Doc. No. 66, p.33]

Finally, and most significantly, with respect to the Government's argument regarding the application of the finality provision of U.C.M.J. Article 76 (as per the cases of *Augenblick* under the standard of *Mattias/Bowling*); said finality provision does not apply in this instance as a matter of statutory construction.

* * *

[19-2415, R. Doc. No. 66, p.36]

CONCLUSION

Based on the arguments previously provided in his Original Brief and on the arguments in reply, above; appellant herein submits that the decision of the Trial Court, granting the Motion for Judgment on the Administrative Record and denying his Cross Motion for Judgment on the Administrative Record, should be reversed. Specifically, appellant is entitled to have his general court martial conviction set aside, or, at a minimum, to have, pursuant to 28 U.S.C. § 1491(a)(2) said general court martial conviction remanded to the OJAG USN with instructions that the OJAG USN refer, pursuant to its power under 10 U.S.C. § 869, the general court martial conviction to the Navy-Marine Corps Court of Criminal Appeals for appellate review.

[APPENDIX D: Opinion of the Court of Federal Claims]

LUKE T. WEST, Plaintiff,
v.
THE UNITED STATES, Defendant.

No. 17-2052C

United States Court of Federal Claims

Reissued: September 4, 2019[*]
July 26, 2019

Military Pay; Motion For Summary Judgment; RCFC 56; Motion For Judgment Upon The Administrative Record; RCFC 52.1; Motion For Relief From Protective Order; Collateral Estoppel.

Claiborne W. Brown, Counsel of Record, Mandeville, LA, for plaintiff.

Daniel S. Herzfeld, Trial Attorney, *Steven J. Gillingham*, Assistant Director, *Robert E. Kirschman, Jr.*, Director, *Joseph H. Hunt*, Assistant Attorney General, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC; *Lieutenant P. Tyson Marx*, Of Counsel, Judge Advocate General Corps, United States Navy, for defendant.

MEMORANDUM OPINION AND ORDER

GRIGGSBY, Judge

I. INTRODUCTION

In this Military Pay Action, plaintiff, Luke T. West, challenges his general court-martial sentence and conviction under Article 93 of the Uniform Code of Military Justice ("UCMJ") and subsequent

discharge from the military. *See generally* Am. Compl. As relief, plaintiff seeks, among other things: (1) to vacate the findings and sentence of his general court-martial; (2)

placement in retirement status; (3) the correction of his military records, back pay and other benefits; or, (4) alternatively, that the Court remand this motion to the Navy Office of the Judge Advocate General. Am. Compl. at Prayer for Relief; Pl. Mot. at 76.

The parties have filed cross-motions for judgment upon the administrative record on the issue of whether the United States Marine Corps committed errors during plaintiff's general court-martial and post-trial proceedings that would warrant vacating his general court-martial conviction. *See generally* Pl. Mot.; Def. Mot. The government has also moved for summary judgment on the issue of whether plaintiff is collaterally estopped from arguing that certain individuals colluded to falsely accuse him of sexual assault and sexual harassment during the general court-martial proceedings. Def. Mot. 18-22.

In addition, plaintiff has filed a motion for relief from the Protective Order entered in this matter on April 24, 2018. *See generally* Pl. Mot. for Relief. For the reasons set forth below, the Court: (1) **GRANTS** the government's motion for summary judgment; (2) **GRANTS** the government's motion for judgment upon the administrative record; (3) **DENIES** plaintiff's cross-motion for judgment upon the administrative record; (4) **DENIES** plaintiff's motion for relief from protective order; and (5) **DISMISSES** the amended complaint.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Factual Background

Plaintiff, Luke T. West, alleges that he was the victim of "a coordinated leveling of false allegations of sexual assault against" him while enlisted in the United States Marine Corps ("Marine Corps") and stationed at the Marine Forces Reserves located in New Orleans, LA. Am. Compl. at ¶ 17. Plaintiff also challenges his general court-martial conviction and sentence under Article 93 of the UCMJ and his subsequent discharge from the military. *See generally id*. As relief, plaintiff seeks, among other things: (1) to vacate the findings and sentence of his general

court-martial; (2) placement in retirement status; (3) the correction of his military records, back pay and other benefits; or, (4) alternatively, that the Court remand this motion to the Navy Office of the Judge Advocate General. Am. Compl. at Prayer for Relief; Pl. Mot. at 76.

1. The Marine Corps Investigation

As background, plaintiff enlisted in the Marine Corps on September 30, 1998. AR Tab 40 at 753. Prior to his general court-martial, which resulted in a reduction in rank to Lance Corporal, plaintiff rose to the rank of Gunnery Sergeant. AR Tab 1 at 6 (sentence included a reduction in rank to E-3, Lance Corporal).

In June 2013, the Finance Office at Marine Forces Reserve received formal equal opportunity complaints and unrestricted sexual assault and

prevention response ("SAPR") complaints against plaintiff from Sergeant ("Sgt.") E[* * *] P[* * *]; Staff Sgt. R[* * *] A[* * *]; Lance Corporal B[* * *] H[* * *]; and Staff Sgt. C[* * *] R[* * *]. AR Tabs 23-25, 34-35. These sexual assault and sexual harassment complaints were referred to the Naval Criminal Investigative Service ("NCIS") for investigation. AR Tab 85 at 1741; *see generally* AR Tabs 16-16.2.

After the Article 32 investigating officer found probable cause existed to send many of the charges against plaintiff to a general court-martial, the Marine Corps Convening Authority ("Convening Authority") referred plaintiff to a general court-martial on December 23, 2013, and charged plaintiff with, among other things, sexual assault and various violations based upon indecent language. AR Tab 16.1 at 341, 343-48; AR Tab 155.1 at 3459. On February 20, 2014, one of the witnesses against plaintiff, Staff Sgt. A[* * *], was approached by Master Gunnery Sgt. Thomas, who handed her 140-pages of text messages between Staff Sgt. A[* * *] and plaintiff and stated that she would be embarrassed if these text messages came out at trial. AR Tab 16 at 328. Staff Sgt. A[* * *] subsequently testified that she felt pressure was being put on her to testify in a specific manner in connection with plaintiff's general court-martial. *Id*. And so, the NCIS opened a new investigation into plaintiff for obstruction of justice on February 26, 2014. AR tab 155.1 at 3565-66; *see also* AR Tab 96 at 2298-99; AR Tab 155.1 at 3530.

On April 23, 2014, the Convening Authority withdrew and dismissed the initial charges brought against plaintiff without prejudice, based upon the new investigation. AR Tab 16.1 at

349; AR Tab 155.1 at 3459-60. In July 2014, the Marine Corps conducted a second investigation of plaintiff's conduct, which resulted in new violations of Articles 81 and 134 involving obstruction of justice and conspiracy to obstruct justice. AR Tab 16 at 324-30 ("The new charges are Charge I [81 UCMJ: conspiracy to obstruct justice] and . . . specification 3 under Charge VI [134 UCMJ: bringing discredit to the armed forces and obstruction of justice]."); *see also* AR Tab 85 at 1498-1501. The investigating officer determined that there was probable cause to move forward on the new charges against plaintiff. AR Tab 16 at 325.

2. The General Court-Martial

On August 21, 2014, the Convening Authority referred the new case against plaintiff to a general court-martial, charging plaintiff with five violations of the UCMJ, namely: (1) conspiring to obstruct justice regarding the testimony of Staff Sgt. A[* * *] in violation of UCMJ Article 81; (2) three specifications of failing to obey lawful regulations in violation of UCMJ Article 92; (3) four specifications of maltreating subordinate Marines in violation of UCMJ Article 93; (4) four specifications of assault in violation of UCMJ Article 128; and (5) three specifications of prejudicing good order and discipline and bringing discredit to the armed forces, including obstruction of justice, in violation of UCMJ Article 134. AR Tab 17 at 371-76; AR Tab 155.1 at 4261. Specifically relevant to this dispute, plaintiff raised several evidentiary and other objections prior to, and during, the general court-martial proceedings related

to the investigation and those proceedings. Am. Compl. at ¶¶ 42-49.

a. Plaintiff's Unlawful Command Influence Motion

First, prior to the general court-martial trial, plaintiff moved to dismiss the criminal charges filed against him based upon an actual or apparent unlawful command influence ("UCI"). *See* Am. Compl. at ¶ 42; *see generally* AR Tab 85. Specifically, plaintiff raised four "interrelated factors" that he argued demonstrated actual or apparent UCI, namely, that:

> (1) The Marine Corps Commandant's 2012 public statements (the "Marine Corps Heritage Brief") regarding the frequency of sexual assaults in the military had created a political environment presuming plaintiff's guilt instead of innocence;
> (2) The Department of Defense Instruction and Marine Corps Order regarding the SAPR program effectively required the Convening Authority to presume plaintiff's guilt instead of innocence, because those regulations include protections to encourage sexual assault victims to

> report without fear of reprisal, actions taken under these regulations resulted in the Convening Authority presuming plaintiff's guilt, and the sexual assault training improperly influences witnesses and members venire (*i.e.* the jury);
> (3) The Convening Authority ignored

> alleged, criminally false statements made by the four victims and disparately investigated and charged plaintiff instead of the four victims that accused plaintiff; and
>
> (4) The members venire of the court-martial would notice the disparities in the investigation that resulted in ignoring the alleged criminally false statements of the victims and how plaintiff was investigated and charged despite the asserted lack of merit to the charges against plaintiff.

See AR Tab 85 at 1502, 1534-1545.

On September 26, 2014, the military judge held a pre-trial hearing regarding plaintiff's motion to dismiss for UCI. AR Tab 155.1 at 3519. During the hearing, the two NCIS investigators who investigated the criminal charges brought against plaintiff independently testified that they felt no pressure to conduct the investigation. *Id.* at 3530, 3535-36. And so, the military judge denied plaintiff's motion to dismiss. *Id.* at 3541-42.

b. Plaintiff's Motion To Suppress Text Messages

Second, plaintiff unsuccessfully moved to suppress certain text messages between himself and Master Gunnery Sgt. Thomas upon the ground that NCIS had obtained the text messages based upon an unlawful search and seizure. *See* Am. Compl. at ¶ 48(a); *see generally* AR Tab 81. After holding oral argument on plaintiff's motion to suppress, the military judge concluded that the authorization that plaintiff gave to NCIS to search his cell phone "was

limited by the agreement brokered between the parties and by the court" to authenticate text messages between plaintiff and Staff Sgt. A[* * *]. AR Tab 106 at 2560. But, the military judge concluded that, NCIS had acted in good faith in conducting the search and would have inevitably discovered this evidence because NCIS Special Agent ("SA") Moss was actively pursuing leads that would have led to these texts being uncovered. *Id*. at 2562; AR Tab 155.1 at 3586-89. And so, the military judge found the text messages to be admissible. AR Tab 155.1 at 3589.

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c. *Voir Dire* Questions Regarding Sexual Assault

Third, plaintiff objected to the military judge's exclusion of his proposed *voir dire* questions regarding sexual assault. AR Tab 155.1 at 3611-12; *see also* Am. Compl. at ¶ 48(c). During the *voir dire*, the military judge instructed the members venire that "[i]t is not a sexual assault case," but "there is a slight hint of that in the record" because "some of the assaults that are charged is touching somebody's leg in a way you all might perceive as a type of sexual connotation." AR Tab 155.1 at 3637-38. The military judge also addressed the Marine Corps Heritage Brief which addresses sexual assault. *Id*. at 3638. The military judge informed the prospective members venire that the Marine Corps Commandant had specifically reiterated that, even in cases of sexual assault, there is a "presumption of innocence unless proven otherwise" and "whether or not a Marine committed an offense and what shall happen, will be determined on the facts presented to the

court-martial." *Id*. at 3638-39. And so, the prospective members venire affirmatively responded that they would follow the judge's instructions to fairly weigh the facts in this case and presume plaintiff innocent until proven guilty. *Id*. at 3639.

d. Admission Of Text Messages

Fourth, plaintiff objected to the exclusion of certain text messages between plaintiff and Staff Sgt. A[* * *] during the general court-martial proceedings. Am. Compl. at ¶ 48(d). During the testimony of Staff Sgt. A[* * *], the prosecution introduced several text messages between plaintiff and Staff Sgt. A[* * *] as evidence of plaintiff's maltreatment and obstruction of justice. AR Tab 155.1 at 3870-71, 3911-15; *see also* AR Tab 20 at 484 (providing the text messages as an exhibit). Plaintiff also sought to offer into evidence an excerpt of six pages of text messages between plaintiff and Staff Sgt. A[* * *] to show that plaintiff had not maltreated Staff Sgt. A[* * *]. Tab 155.1 at 4016-22; *see generally* AR Tab 45. The military judge denied plaintiff's request, finding that the six pages of text messages that plaintiff sought to introduce were either not relevant under Military Rule of Evidence 401, or "confusing, misleading, or wasting time" under Military Rule of Evidence 403. AR Tab 155.1 at 3998, 4016-23.

Plaintiff was allowed however, to use the subject text messages to attempt to refresh the recollection of Staff Sgt. A[* * *] during the general court-martial proceedings. *Id*. at 3932. But, plaintiff did not move to have the entire 140-pages of text messages entered into evidence

during those proceedings. *Id*. at 4208 ("Of the 140 pages of these text messages, [plaintiff's counsel] sought admission to this court-martial of six pages.").

e. Redaction Of Privacy Act Covered Statements

Fifth, plaintiff also unsuccessfully attempted to admit the unredacted request mast statements of Lance Corporal H[* * *] and Staff Sgt. R[* * *] to show bias during the general court-martial. *Id*. at 4009-15; AR Tabs 41, 43-44 (providing the unredacted statements as defense exhibits D, E, and H); *see also* Am. Compl. at ¶ 48(e). During the general court-martial proceedings, the military judge requested that plaintiff use redacted versions of these request mast statements that do not include certain personal identifiable information and information about "other people in the command" that were irrelevant to plaintiff's general court-martial. AR Tab 155.1 at 4010, 4015-16. And so, the military judge admitted the redacted versions of these statements into evidence. AR Tab 17 at 443; *see generally* AR Tabs 34-35 (providing defense exhibits OO and PP).

f. Relevance Objections

Sixth, plaintiff faced relevance objections to his questioning regarding an interview conducted by NCIS investigator SA Jeffrey Norton involving Gunnery Sgt. Cesar Villegas. Am. Compl. at ¶¶ 48(g)-(h). During the pre-trial hearing regarding plaintiff's motion to dismiss for UCI, plaintiff's counsel questioned SA Norton regarding Gunnery Sgt. Villegas. AR Tab 155.1 at 3521-30. The military judge sustained a relevance objection to request that

plaintiff's questioning stay within the topic of UCI. *Id*. at 3529; *see also id*. at 3525-27.

g. Closing Argument

Lastly, plaintiff objected to several matters related to the closing arguments. Am. Compl. at ¶48(i)-(k). During the closing arguments, the military judge interrupted plaintiff's counsel on three occasions in response to objections by the government and/or to clarify the facts in evidence. AR Tab 155.1 at 4192-209. First, after the prosecution objected to counsel for plaintiff's statement that a witness "got up on that stand, looked you in the eye, and they lied to you," the military judge sustained the government's objection to this statement because the "credibility of these witnesses is a matter for these members and not for" defense counsel. *Id*. at 4193.

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Second, plaintiff's counsel argued during closing arguments that plaintiff could not have discredited the Marine Corps and been guilty of maltreatment by making certain statements at a basketball game, because no one at the basketball game was in uniform. *Id*. at 4205. Thereafter, the military judge gave a curative instruction at the close of the argument to the members that:

> There's no requirement for the government to prove that members of the public observed the conduct per se and there's certainly no requirement that people are in uniform. But simply that the conduct was of a nature to bring discredit upon the armed forces.

Id. at 4211-12; *see also id*. at 4205.

As a final matter, when plaintiff's counsel referenced the 140-pages of text messages between plaintiff and Staff Sgt. A[* * *], by stating that "[he had] looked at those text messages. You haven't but I have" and later referenced "[a]ll 140 pages" of the text messages, the military judge interrupted and ruled "[t]hat is [an] improper argument." *Id*. at 4191, 4208. The military judge also noted that plaintiff sought to admit only six pages of the 140-pages of text messages during the trial, and the military judge only admitted two pages of text messages into evidence. *Id*. at 4208-09.

At the conclusion of the trial, the members venire found plaintiff guilty of: (1) conspiracy to commit obstruction of justice under UCMJ Article 81; (2) maltreatment of Staff Sgt. A[* * *] under UCMJ 93; (3) indecent language to Staff Sgt. A[* * *] based on the same statement under UCMJ Article 134; and (4) obstruction of justice under UCMJ Article 134. *Id*. at 4261. And so, the members sentenced plaintiff to a reprimand, reduction in paygrade to E-3, and 30-days confinement. *Id*. at 4379.

On February 13, 2015, the Marine Corp Staff Judge Advocate recommended that the Convening Authority approve the sentence adjudged. AR Tab 13 at 313. On February 20, 2015, the Marine Corp Staff Judge Advocate served plaintiff with the recommendation. AR Tab 4 at 12.

3. Plaintiff's Clemency Petition

On March 2, 2015, plaintiff submitted a clemency petition under the Military Rules for

Courts-Martial ("R.C.M.") 1105, asserting, among other things, that: (1) a verbatim transcript of

the general court-martial should have been created; (2) he had largely prevailed in demonstrating that the witnesses against him had "coordinated leveling of false allegations of sexual assault;" and (3) the military judge's exclusion of the 140-pages of text messages between plaintiff and Staff Sgt. A[* * *] was improper. AR Tab 6 at 14-23. On March 3, 2015, the Staff Judge Advocate forwarded the clemency petition and an addendum to the Convening Authority recommendation that the Convening Authority issue the action implementing the adjudged sentence. AR Tab 3 at 10-11. And so, on March 5, 2015, the Convening Authority approved the verdict and sentence. AR Tab 1 at 6-7 (Art. 65(a) of the UCMJ requires the record to be transmitted to the Judge Advocate General when a service member is found guilty).

4. Plaintiff's District Court Litigation

On July 9, 2015, plaintiff brought a civil action against the witnesses that testified against him at his general court-martial—Staff Sgt. A[* * *], Sgt. E[* * *] P[* * *], Staff Sgt. R[* * *]—and Sgt. K[* * *] J[* * *], in the United States District Court for the Eastern District of Louisiana. *See West v. Rieth*, 152 F. Supp. 3d 538 (E.D. La. 2015), *aff'*d 705 F. App'x 211, 212 (5th Cir. 2017), *cert. denied* 138 S. Ct. 1546, 1547 (2018). In the district court litigation, plaintiff alleged that these service members "conspired to lodge false complaints and accusations of sexual harassment and sexual assault against him." *West v. Rieth*, 152 F. Supp. 3d 538, 541 (E.D. La. 2015), *aff'd*,

705 Fed. App'x 211 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1546, 1547 (2018). The United States intervened in the case to substitute the United States as the named defendant pursuant to 28 U.S.C. § 2679 (the "Westfall Act."). *Id.* at 542, 544-46.

The district court held that plaintiff failed to prove that the defendants' conduct was not within the scope of their employment and later denied plaintiff's motion for reconsideration. *Id.* at 544-46; *West v. Rieth*, No. 15-2512, 2016 WL 952253, at *2 (E.D. La. Mar. 14, 2016). And so, the district court dismissed the named individual defendants and substituted the United States as the party defendant in this case. *Rieth*, 152 F. Supp. 3d at 549. In doing so, the district court noted that "[Mr.] West has not submitted sufficient evidence to meet th[e] burden" to establish that, as a factual matter, the allegations against him were false. *Id.* at 545. The United States Court of Appeals for the Fifth Circuit subsequently affirmed the district court's decision to dismiss plaintiff's claims. *See Rieth*, 705 F. App'x. at 213-14. On April 16, 2018, the Supreme Court denied plaintiff's petition for certiorari. *West v. Rieth*, 138 S. Ct. 1546, 1547 (2018).

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5. The Article 69(a) Proceedings

On July 18, 2016, plaintiff requested appellate review of his general court-martial sentence and conviction by the Navy's Office of Judge Advocate General, pursuant to UCMJ Article 69(a). AR Tabs 144-145; s*ee also* 10 U.S.C. § 869. In that appeal, plaintiff raised 11 challenges, namely, that: (1) there were missing items from the record of trial; (2) his request for a verbatim transcript of the court-martial

proceedings was denied; (3) the Convening Authority issued the action improperly, because it allegedly did so before the Staff Judge Advocate had an opportunity to submit the addendum to its original recommendation related to plaintiff's clemency petition; (4) the military judge improperly excluded the text messages between plaintiff and Staff Sgt. A[* * *]; (5) the military judge gave prejudicial instruction regarding those text messages; (6) the military judge gave improper jury instructions regarding the obstruction of justice charge; (7) there was insufficient evidence to support the obstruction of justice conviction; (8) there were improper instructions during plaintiff's closing argument regarding the indecent language charge; (9) plaintiff met his burden of proof on his motions to dismiss for UCI; (10) the military judge exacerbated UCI by finding many of plaintiff's questions and arguments regarding sexual assault to be irrelevant; and (11) there was new evidence demonstrating UCI. AR Tab 144 at 2800-08; *see also* AR Tab 145 at 3168-79.

In December 2016, the Navy's Office of Judge Advocate General determined that a verbatim transcript of plaintiff's general court-martial proceedings was necessary to evaluate plaintiff's assignments of error. AR Tab 147 at 3216. On February 27, 2017, plaintiff filed a mandamus case against the Navy's Office of Judge Advocate General to prohibit the Navy from preparing a verbatim transcript. AR Tab 151.1.

On March 29, 2017. the Navy provided plaintiff with a copy of the verbatim transcript of the general court-martial proceedings and advised that plaintiff and his counsel had 10 days to review the transcript. *See* AR Tab 152 at 3448; AR Tab 153 at 3451. Shortly

thereafter, the district court dismissed plaintiff's mandamus case on April 6, 2017. AR Tabs 157.9-10. On May 2, 2017, the Navy informed plaintiff that the verbatim transcript had been authenticated and that the military judge had certified the transcript for addition to the record of trial. AR Tab 155. Thereafter, on June 9, 2017, the Office of the Judge Advocate General denied plaintiff's Article 69 request for relief. AR Tab 156.

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B. Procedural Background

Plaintiff commenced this Military Pay Action on January 16, 2018. *See generally* Am. Compl. On April 24, 2018, the Court entered a Protective Order in this matter. *See generally* Protective Order.

The government filed the administrative record on April 30, 2018. *See generally* AR. On May 14, 2018, plaintiff filed motions to supplement the administrative record and to strike portions of the administrative record. *See generally* Pl. Mot. to Supp. and Strike AR. On May 18, 2018, plaintiff filed a supplemental appendix to his motions to supplement and to strike portions of the administrative record by leave of the Court. *See generally* Pl. App'x.

On June 1, 2018, the government filed a response and opposition to plaintiff's motions to supplement and to strike portions of the administrative record. *See generally* Def. Resp. to Mot. to Supp. and Strike AR. On June 8, 2018, plaintiff filed a reply in support of his motions to supplement and to strike portions of the administrative record. *See generally* Pl. Reply to Mot. to Supp. and Strike AR.

On September 7, 2018, the government filed a motion for judgment upon the administrative record and a motion for summary judgment. *See generally* Def. Mot. On October 19, 2018, plaintiff filed a motion for relief from the Protective Order. *See generally* Pl. Mot. for Relief. On November 5, 2018, plaintiff filed a cross-motion for judgment upon the administrative record and a response in opposition to the government's motion for judgment upon the administrative record and motion for summary judgment. *See generally* Pl. Mot.

On December 17, 2018, the government filed a response and opposition to plaintiff's cross-motion for judgment upon the administrative record and a reply in support of its motion for judgment upon the administrative record and motion for summary judgment. *See generally* Def. Resp. On February 8, 2019, plaintiff filed a reply in support of his cross-motion for judgment upon the administrative record. *See generally* Pl. Reply.

On February 28, 2019, the government filed a response in opposition to plaintiff's motion for relief from the protective order. *See generally* Def. Resp. to Mot. for Relief. On March 15, 2019, plaintiff filed a reply in support of his motion for relief from the protective order. *See generally* Pl. Reply to Mot. for Relief.

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On April 16, 2019, the Court issued a memorandum opinion and order granting-in-part and denying-in part plaintiff's motions to supplement and to strike portions of the administrative record. *See generally West v. United States*, 142 Fed. Cl. 717 (2019). On May 17, 2019, the government

supplemented the administrative record. *See generally* AR.

These matters being fully-briefed, the Court resolves the pending motions.

III. LEGAL STANDARDS

A. Jurisdiction And Military Pay Cases

The Military Pay Act is a money-mandating source of law that provides the Court with jurisdiction under the Tucker Act. *See Bias v. United States*, 131 Fed. Cl. 350, 354 (2017), *aff'd in part and rev'd in part on other grounds*, 722 F. App'x 1009 (Fed. Cir. 2018) (citations omitted) ("[T]he Military Pay Act . . . is a money-mandating source of law that provides the court with jurisdiction."); *see also* 37 U.S.C. § 204. And so, the United States Court of Appeals for the Federal Circuit has held that the Military Pay Act is typically the applicable money-mandating statute to be invoked in the context of military discharge cases. *See Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) ("In the context of military discharge cases, the applicable 'money-mandating' statute that is generally invoked is the Military Pay Act, 37 U.S.C. § 204.").

The Federal Circuit has also held that, when reviewing challenges to a court-martial conviction, this Court possesses a "'narrow window of collateral attack review'" and a servicemember must "'demonstrate convincingly that in the court-martial proceedings there has been such a deprivation of fundamental fairness as to impair due process.'" *Matias v. United States*, 923 F.2d 821, 826 (Fed. Cir. 1990) (quoting *Matias v. United States*, 19 Cl. Ct. 635, 641 (1990), and *Bowling v. United States*, 713

F.2d 1558, 1561 (Fed. Cir. 1983)). In this regard, "the constitutional claims made must be serious ones to support an exception to the rule of finality." *Bowling*, 713 F.2d at 1561. And so, absent an allegation of an express constitutional violation, a plaintiff must demonstrate that the court-martial constituted a "constitutionally unfair trial." *United States v. Augenblick*, 393 U.S. 348, 356 (1969). In this regard, the Supreme Court has held that, "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or

forgotten . . . that the proceeding is more a spectacle or trial by ordeal than a disciplined contest." *Id.* (internal citations omitted).

This Court weighs constitutional claims related to the challenge of court-martial proceedings with the "limited function" of determining "whether the military tribunal gave fair consideration" to each claim. *Matias*, 923 F.2d at 826 (citing *Burns v. Wilson*, 346 U.S. 137, 144 (1953)); *Matias*, 19 Cl. Ct. at 646 ("When an issue has been briefed and argued before a military court, it has received full and fair consideration, even if that court disposes of the claim summarily with a statement that it did not consider the issue meritorious or requiring discussion."). The Court "does not have the authority to retry the facts of a court-martial proceeding nor to act as a reviewing court of the decision of the court-martial tribunal." *See Flute v. United States*, 535 F.2d 624, 626 (Ct. Cl. 1976). Given this, merely contesting whether the court-martial judge erred or acted

contrary to law is insufficient, if the challenge does "not rise to the constitutional magnitude required for review." *Tindle v. United States*, 56 Fed. Cl. 337, 342 (2003). And so, the Court may review court-martial convictions only where the alleged infirmities at the court-martial rise to a constitutional level. *Flute*, 535 F.2d at 626.

B. RCFC 56

Pursuant to RCFC 56, a party is entitled to summary judgment when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Biery v. United States*, 753 F.3d 1279, 1286 (Fed. Cir. 2014). A dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. A fact is "material" if it could "affect the outcome of the suit under the governing law." *Id.* The mere existence of an alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment if there is no genuine issue of material fact. *Id.* at 247-48.

The moving party bears the burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). And so, "'the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Elec. Indus. Co., Ltd. v.*

Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)).

In making a summary judgment determination, the Court does not weigh the evidence presented, but instead must "determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249; *see also Am. Ins. Co. v. United States*, 62 Fed. Cl. 151, 154 (2004); *Agosto v. INS*, 436 U.S. 748, 756, 98 S. Ct. 2081, 56 L. Ed. 2d 677 (1978) ("[A trial] court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented . . . .") (citations omitted). The Court may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party . . . ." *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 587. The same standard applies when the Court considers cross-motions for summary judgment. *Principal Life Ins. Co. & Subs. v. United States*, 116 Fed. Cl. 82, 89 (2014); *see also Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 40 (1st Cir. 2010). And so, when both parties move for summary judgment, "'the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.'" *Abbey v. United States*, 99 Fed. Cl. 430, 436 (2011) (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987)).

C. RCFC 52.1

Unlike a summary judgment motion under RCFC 56, the existence of genuine issues of material fact do not preclude a grant of judgment upon the

administrative record under RCFC 52.1. *Tech. Sys., Inc. v. United States*, 98 Fed. Cl. 228, 242 (2011). Rather, the Court's inquiry is whether, "given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record." *A&D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126, 131 (2006); *see also Bannum v. United States*, 404 F.3d 1346, 1355-56 (Fed. Cir. 2005).

D. Collateral Estoppel And Justiciability

The Federal Circuit has recognized that "[t]he doctrine of res judicata involves the related concepts of claim preclusion and issue preclusion." *Phillips/May Corp. v. United States*, 524 F.3d 1264, 1267 (Fed. Cir. 2008). The doctrine of collateral estoppel—or issue preclusion—protects litigants from the burden of relitigating an identical issue with the same party and promotes judicial economy by preventing needless litigation. *Parklane Hosiery, Inc. v. Shore*,

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439 U.S. 322, 327 (1979); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-329 (1971). A party asking the Court to apply collateral estoppel must establish that: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Dana v. E.S. Originals, Inc.*, 342 F.3d. 1320, 1323 (Fed. Cir. 2003) (internal quotation marks omitted) (quoting *Pleming*

v. Universal-Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998)); *Banner v. United States*, 238 F.3d 1348, 1354 (Fed. Cir. 2001) (citing *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1365-66 (Fed. Cir. 2000)).

In addition, this Court has held that a claim must be justiciable to survive a motion to dismiss. *See Houghtling v. United States*, 114 Fed. Cl. 149, 156-57 (2013). In this regard, the United States Supreme Court has held that justiciability depends upon "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr*, 369 U.S. 186, 198 (1962); *see also Murphy v. United States*, 993 F.2d 871, 872 (Fed. Cir. 1993). And so, a controversy is justiciable only if "it is 'one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence.'" *Voge v. United States*, 844 F.2d 776, 780 (Fed. Cir. 1988) (quoting *Greene v. McElroy*, 254 F.2d 944, 953 (D.C. Cir. 1958)); *see also Antonellis v. United States*, 723 F.3d 1328, 1334 (Fed. Cir. 2013); *Adkins v. United States*, 68 F.3d 1317, 1322 (Fed. Cir. 1995).

The question of justiciability is frequently at issue when courts review military activities, and courts have often held that decisions made by the military are "beyond the institutional competence of courts to review." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("Because 'decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments,' the substance of such decisions, like many other judgments committed to the discretion of

government officials, is frequently beyond the institutional competence of courts to review.") (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) ("[J]udges are not given the task of running the Army."); *see also Murphy*, 993 F.2d at 872; *Voge*, 844 F.2d at 780. But, even when the merits of a military personnel decision are nonjusticiable, the process by which the decision

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has been made may be subject to judicial review. *Adkins*, 68 F.3d at 1323 ("[A] challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy.") (emphasis original); *Murphy*, 993 F.2d at 873. And so, if the military chooses to introduce its own procedural regulations, the Court may review any violations of such regulations even if the underlying decision is nonjusticiable. *Murphy*, 993 F.2d at 873. In such circumstances, the Court "merely determines whether the procedures were followed by applying the facts to the statutory or regulatory standard." *Id.*

IV. LEGAL ANALYSIS

The parties have filed several motions that require resolution by the Court. First, the government seeks summary judgment in its favor on the issue of whether certain witnesses at plaintiff's general court-martial trial conspired to falsely accuse him of sexual assault and sexual harassment, upon the ground that plaintiff is collaterally estopped from relitigating this issue. Def. Mot. 18-22. The parties have also filed cross-motions for judgment upon the administrative record on the issues of: (1) whether the United States Marine Corps committed errors

during plaintiff's general court-martial and post-trial proceedings, that would warrant vacating plaintiff's general court-martial conviction and sentence; and (2) whether this matter should be remanded to the Navy's Judge Advocate General. *See generally* Pl. Mot.; Def. Mot. Lastly, plaintiff has moved for relief from the Protective Order entered in this matter on April 24, 2018. *See generally* Pl. Mot. for Relief.

For the reasons set forth below, plaintiff is collaterally estopped from relitigating whether certain witnesses falsely accused him of sexual assault and sexual harassment and plaintiff has not shown that his general court-martial and post-trial proceedings were fundamentally unfair. And so, the Court: (1) **GRANTS** the government's motion for summary judgment; (2) **GRANTS** the government's motion for judgment upon the administrative record; (3) **DENIES** plaintiff's cross-motion for judgment upon the administrative record; (4) **DENIES** plaintiff's motion for relief from protective order; and (5) **DISMISSES** the complaint.

A. Plaintiff Is Precluded From Re-Litigating Whether Certain Witnesses Falsely Accused Him During The Court-Martial Proceedings

As an initial matter, while not dispositive of this case, the undisputed material facts in this case make clear that plaintiff is precluded from re-litigating the issue of whether certain

witnesses at his general court-martial conspired to falsely accuse him of sexual assault and sexual harassment. And so, the Court **GRANTS** the

government's motion for summary judgment with respect to this issue. RCFC 56.

In its motion for summary judgment, the government persuasively argues that plaintiff is precluded from litigating the issue of whether certain servicemembers coordinated to falsely accuse him of sexual assault and sexual harassment, because plaintiff previously litigated this issue before the United States District Court for the Eastern District of Louisiana. Def. Mot. at 18-19. It is well-established that the doctrine of collateral estoppel—or issue preclusion—protects litigants from the burden of relitigating an identical issue with the same party and promotes judicial economy by preventing needless litigation. *Parklane Hosiery, Inc. v. Shore*, 439 U.S. 322, 331 (1979); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-329 (1971). To establish that plaintiff is collaterally estopped from relitigating whether certain witnesses conspired to falsely accuse him of sexual assault and sexual harassment, the government must show that: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the first action; and (4) plaintiff had a full and fair opportunity to litigate the issue in the prior proceeding. *Dana v. E.S. Originals, Inc.*, 342 F.3d. 1320, 1323 (Fed. Cir. 2003) (internal quotation marks omitted) (quoting *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359 (11th Cir. 1998)); *Banner v. United States*, 238 F.3d 1348, 1354 (Fed. Cir. 2001) (citing *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1365-66 (Fed. Cir.

2000)). The government has shown that each of these elements is satisfied here.

First, there can be no genuine dispute that the issue of whether certain witnesses conspired to falsely accuse plaintiff of sexual assault and sexual harassment during his general court-martial is identical to the issue involved in plaintiff's prior litigation before the United States District Court of the Eastern District of Louisiana. In the district court litigation, plaintiff alleged that four servicemembers—Staff Sgt. A[* * *], Sgt. P[* * *], Staff Sgt. R[* * *], and Sgt. J[* * *]— "conspired to lodge false complaints and accusations of sexual harassment and sexual assault against him." *Rieth*, 152 F. Supp. 3d at 541. The amended complaint in this action similarly alleges that these same four individuals made "false sexual assault claims" against plaintiff during his general court-martial. Am. Compl. at ¶ 42(b). A review of the docket for

plaintiff's district court litigation also shows that the issue of whether the aforementioned servicemembers conspired to falsely accuse plaintiff of sexual assault and sexual harassment was fully briefed by the parties to that case and that the district court determined that plaintiff failed to show that the allegations lodged against him were false. *Rieth*, 152 F. Supp. 3d at 545. Given this, the undisputed material facts show that the issue of whether certain servicemembers conspired to falsely accuse plaintiff of sexual assault and sexual harassment is identical to the issue that plaintiff previously litigated before the district court. *Corrigan v. United States*, 82 Fed. Cl. 301, 307 (2008) (quoting *United States v. Moser*,

266 U.S. 236, 241 (1924)) (explaining that, to determine whether the issue is identical, this Court must decide "'whether the point or question presented for determination in the subsequent action is the same as that litigated and determined in the original action.'").

Second, the undisputed material facts also make clear that the parties to the district court litigation actually litigated the issue of whether certain servicemembers conspired to falsely accuse plaintiff of sexual assault and sexual harassment. As discussed above, plaintiff alleged in the district court litigation that Staff Sgt. A[* * *], Sgt. P[* * *], Staff Sgt. R[* * *] and Sgt. J[* * *] "conspired to lodge false complaints and accusations of sexual harassment and sexual assault against him." *Rieth*, 152 F. Supp. 3d at 541. The government addressed this issue in its motion to dismiss and to substitute the United States as the defendant in that action. *Id*. at 542. A review of the district court's decision on the government's motion also shows that the issue of whether certain servicemembers conspired to falsely accuse plaintiff of sexual assault and sexual harassment was resolved by the district court. Notably, the district court held that "[Mr.] West has the burden to establish that, as a factual matter, the allegations against him were false" and the district court ultimately concluded that plaintiff "has not . . . [met] this burden." *Id*. at 545.

Plaintiff's argument that this issue was not actually litigated before the district court is also misguided. Pl. Mot. at 73-74. While plaintiff correctly observes that the district court did not conduct an evidentiary hearing before granting the government's motion to dismiss and to substitute, it

is well-established that an issue can be litigated and decided by a court on a dispositive motion without the need to hold an evidentiary hearing. *See*, *e.g.*, *Stephen Slesinger*, *Inc. v. Disney Enters.*, *Inc.*, 702 F.3d 640, 645-46 (Fed. Cir. 2012) (affirming the Trademark Trial and Appeal Board's dismissal for collateral estoppel based in reliance on a district court order for summary judgment in the previous court action). The docket for plaintiff's district

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court litigation also shows that the district court dismissed plaintiff's *Bivens* complaint against the accused servicemembers with prejudice, again, making clear that the issue of whether these servicemembers falsely accused plaintiff of sexual assault and sexual harassment was actually litigated before the district court. *West v. Rieth*, No. 15-2512, 2016 WL 3459883, at *7 (E.D. La. June 24, 2016). Given this, the Court concludes that the second element of issue preclusion has also been satisfied in this case. *Corrigan*, 82 Fed. Cl. at 309 (holding that an issue is actually litigated if the issue was: (1) appropriately raised, by the pleadings or otherwise; (2) submitted for determination; and (3) determined by the court).

The government has also shown that the district court's determination regarding whether certain servicemembers conspired to falsely accuse plaintiff of sexual assault and sexual harassment was a critical and necessary part of the court's judgment in the district court litigation. Plaintiff correctly argues that the district court addressed issues related to scope of employment and certification under the Westfall Act during the

district court litigation. Pl. Mot. at 70; *see Rieth*, 152 F. Supp. 3d at 546. But, the district court also specifically addressed and determined the veracity of the accusers' sexual assault and sexual harassment claims against plaintiff, before reaching a decision regarding the Westfall Act certification. *Rieth*, 152 F. Supp. 3d at 544 ("The Certification and the Alleged Falsity of the Allegations"). Notably, the district court held that, "to challenge the certification, . . . [Mr.] West has the burden to establish that, as a factual matter, the allegations against him were false." *Id*. at 545 (emphasis omitted). Given this, the Court agrees with the government that the issue of whether certain servicemembers conspired to falsely accuse plaintiff of sexual assault and sexual harassment was a critical and necessary part of the district court's decision.

Lastly, the undisputed material facts also make clear that plaintiff had a full and fair opportunity to litigate the issue of whether certain servicemembers conspired to falsely accuse him of sexual assault and sexual harassment during the district court litigation. Plaintiff and the government fully briefed this issue in connection with the government's motion to dismiss and to substitute. *Id*. at 542 n.11. Plaintiff was also represented by counsel during the district court litigation and he currently retains the same counsel in this case. *Id*. at 541. In addition, plaintiff fails to show that he suffered any significant procedural limitations during the district court litigation. Pl. Mot. at 74-76. And so, the final element of collateral estoppel—that plaintiff was afforded a full and fair opportunity to litigate the issue—has also been satisfied in this case.

Corrigan, 82 Fed. Cl. at 311 (holding that, to determine whether plaintiff has had a "full and fair" opportunity to litigate the issue, the Court must look at: (1) whether there were significant procedural limitations in the prior proceeding; (2) whether the party had an incentive to litigate fully the issue; and (3) whether effective litigation was limited by the nature or relationship of the parties).

Because the undisputed material facts in this case make clear that plaintiff is collaterally estopped from relitigating the issue of whether certain witnesses at his general court-martial trial conspired to falsely accuse him of sexual assault and sexual harassment, the Court **GRANTS** the government's motion for summary judgment on this issue. RCFC 56.

B. Plaintiff Has Not Shown That Any Of The Alleged Errors During The Court-Martial And Post-Trial Proceedings Constitute Such A Deprivation Of Fundamental Fairness As To Impair His Constitutional Due Process Rights

Turning to the merits of the parties' cross-motions for judgment upon the administrative record, the record evidence in this case shows that any errors that occurred during plaintiff's general court-martial and post-trial proceedings did not constitute such a deprivation of fundamental fairness as to impair plaintiff's constitutional due process rights. And so, the Court **GRANTS** the government's motion for judgment upon the administrative record and **DENIES** plaintiff's cross-motion for judgment upon the administrative record on this issue. RCFC 52.1.

In his cross-motion for judgment upon the administrative record, plaintiff identifies several alleged errors during his general court-martial and post-trial proceedings that he contends show that these proceedings involved such a deprivation of fundamental fairness as to impair his due process rights. Pl. Mot. at 43-54. Specifically, plaintiff alleges: (1) pervasive witness tampering; (2) concealment of exculpatory evidence; (3) the "obdurate refusal" of the military judge to acknowledge an obvious UCI; (4) the articulation of an erroneous legal standard for evaluating UCI; (5) prejudicial comments during closing arguments; (6) the charging of a frivolous case; and (7) the existence of an apparent attempt to prevent review of plaintiff's UCI claim. Pl. Mot. at 43-53. Plaintiff also alleges that the Marine Corps and the Navy failed to give full and fair consideration to his UCI claims during the post-trial review and Article 69 appeal process and that the Navy failed to afford him appellate review by the Navy-Marine Corps Court of Criminal Appeals. *Id.* at 54-61. And so, plaintiff requests that: (1) the Court vacate the

findings and sentence of his general court-martial; (2) placement in retirement status; (3) the correction of his military records, back pay and other benefits; or, (4) alternatively, that the Court remand this motion to the Navy Office of the Judge Advocate General. *Id.* at 76; Am. Compl. at Prayer for Relief.

The government counters in its motion for judgment upon the administrative record that the Court should deny plaintiff's claims because plaintiff has not demonstrated that any of the errors alleged

in this case constitute such a deprivation of fundamental fairness as to impair his constitutional due process rights. Def. Mot at 22-38. The government also argues that plaintiff's request for reinstatement in the military is non-justiciable and that plaintiff's claim for back pay must be limited to the term of his enlistment. *Id*. at 39-40. And so, the government requests that the Court deny all of plaintiff's claims and dismiss this matter. *Id*. at 40.

It is well-established that this Court weighs constitutional claims related to plaintiff's challenge of his general court-martial and post-trial proceedings with the "limited function" of determining "whether the military tribunal gave fair consideration" to each claim. *Matias*, 923 F.2d at 826 (citing *Burns v. Wilson*, 346 U.S. 137, 144 (1953)); *Matias*, 19 Cl. Ct. at 646. In so doing, the Court "does not have the authority to retry the facts of a court-martial proceeding nor to act as a reviewing court of the decision of the court-martial tribunal." *See Flute v. United States*, 535 F.2d 624, 626 (Ct. Cl. 1976). And so, plaintiff must show that that the alleged infirmities during his general court-martial and post-trial proceedings rise to a constitutional level for the Court to review his court-martial sentence and conviction. *Id*. For the reasons set forth below, plaintiff makes no such showing in this case.

1. Plaintiff Received Full And Fair Consideration Of His Motion To Dismiss For Unlawful Command Influence

As an initial matter, the administrative record in this matter shows that the Marine Corps gave full and fair consideration of plaintiff's motion to dismiss

the general court-martial due to an actual or apparent UCI. *See Matias*, 923 F.2d at 826.

In his motion for judgment upon the administrative record, plaintiff argues that the presence of UCI during his general court-martial proceedings constitutes "fundamental errors" in those proceedings that warrant vacating his conviction for seven reasons. Pl. Mot. at 43-54. Specifically, plaintiff argues that: (1) the Marine Corps engaged in witness tampering; (2) the

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Marine Corps concealed exculpatory evidence; (3) the military judge refused to acknowledge an obvious UCI; (4) the military judge articulated an erroneous legal standard for UCI; (5) there were prejudicial comments during the closing arguments; (6) the Marine Corps filed a frivolous case against plaintiff; and (7) there was an apparent attempt to prevent review of plaintiff's UCI claims. *Id*. But, as shown below, none of the errors alleged by plaintiff related to his motion to dismiss for UCI are substantiated by the evidentiary record in this case. And so, the Court must deny this claim.

a. Plaintiff Has Not Shown Evidence Of Witness Tampering

First, plaintiff's claim that the administrative record "is replete with evidence of witness tampering" and witnesses "being coerced to testify falsely against [him]" is belied by the record evidence. *Id*. at 45. Plaintiff argues that witness tampering occurred in connection with his general court-martial proceedings because two of the witnesses against him —Staff Sgt. A[* * *] and Gunnery Sgt. Villegas— "were potential targets of

[an] obstruction of justice investigation[]." *Id*. Plaintiff also argues that Staff Sgt. A[* * *] met with the Marine Corps SAPR office before making formal allegations of sexual harassment and obstruction of justice against plaintiff. *Id*.

To support these allegations, plaintiff points to, among other things, the testimony and witness statements of Staff Sgt. A[* * *] and Gunnery Sgt. Villegas during the NCIS's investigation of plaintiff's conduct and during the general court-martial trial. *Id*.; *see* AR Tab 59 at 1246-50 (Staff Sgt. A[* * *] testimony); AR Tab 85 at 2021-22 (Staff Sgt. A[* * *] statement to NCIS); AR 85 at 2032 (Gunnery Sgt. Villegas statement to NCIS). But, plaintiff's allegations of witness tampering are not substantiated by this evidence.

A careful review of the record evidence does not reveal any evidence to support plaintiff's claim that the Marine Corps tampered with any of the witnesses that testified against plaintiff during the general court-martial proceedings. *See* AR Tab 52 at 1066-67 (Lance Corporal H[* * *] explaining her interactions with Sgt. P[* * *] and Staff Sgt. A[* * *] after the Halloween incident occurred); AR Tab 59 at 1246-50 (Staff Sgt. A[* * *] detailing her conversations with the SAPR office); AR Tab 155.1 at 3528-30 (SA Norton explaining that Gunnery Sgt. Villegas was not under investigation for obstruction of justice). Rather, the witness testimony cited by plaintiff shows that Staff Sgt. A[* * *] and Gunnery Sgt. Villegas

provided voluntary and truthful statements to NCIS in connection with the investigation of the sexual

assault and sexual harassment claims lodged against plaintiff. *See*, *e.g.*, AR Tab 85 at 2032; *see generally* AR Tab 56.

Plaintiff's allegation that witnesses were "coerced into testifying falsely against [him]" during the general court-martial proceedings is also unsubstantiated. Pl. Mot. at 45. As discussed above, the United States District Court for the Eastern District of Louisiana has previously determined that plaintiff failed to show that any of the witnesses against him during the general court-martial proceedings falsely accused him of sexual assault and sexual harassment. *Rieth*, 152 F. Supp. 3d at 545. And so, plaintiff has not shown that witness tampering occurred in connection with his general court-martial proceedings.

b. Plaintiff Has Not Shown That The Marine Corps Concealed Exculpatory Evidence

Plaintiff's allegations that the NCIS agents involved in the investigation that led to his general court-martial concealed witness statements that would have exonerated him is similarly unsubstantiated. Pl. Mot. at 46. Specifically, plaintiff alleges that NCIS SA Jeffrey Norton "falsely attributed inculpatory statements [regarding the sexual assault and sexual harassment allegations against plaintiff] to two . . . witnesses, Jacob Coby and Jessica Geddies." *Id*. But, a review of the statements and trial testimony of these witnesses shows that Mr. Coby and Ms. Geddies provided generally consistent testimony regarding whether they saw plaintiff dancing with one of his accusers. *Compare* AR Tab 144.13 at 3055 (SA Norton interview summary with Mr. Coby) *with* AR Tab 17.2

at 421-23 (Summary of Mr. Coby's court-martial testimony) *and* AR Tab 64 at 1284 (Mr. Coby's statement to defense counsel); *compare* AR Tab 144.14 at 3056 (SA Norton interview summary with Ms. Geddies), *with* AR Tab 64 at 1283, (Ms. Geddies' statement to defense counsel) *and* AR Tab 17.2 at 434-36 (Summary of Ms. Geddies court-martial testimony), AR Tab 155.1 at 4057 ("I don't recall making th[e] statement [that I observed [plaintiff trying to dance with H[* * *]].").

Plaintiff's claim that the Marine Forces Reserve prosecutor improperly blocked SA Norton from re-interviewing another witness —Mr. James Rieth— regarding certain text messages between himself and plaintiff similarly lacks evidentiary support. Pl. Mot. at 46. The record evidence shows that, during the general court martial proceedings, SA Norton testified

that he was told by a supervisor that it was "not necessary" for him to re-interview Mr. Rieth regarding the subject text messages. AR Tab 144.12 at 3040-41; AR Tab 155.1 at 3524-25. But, SA Norton and the other special agent involved in the NCIS investigation also testified that they did not feel any pressure from the Marine Corps to conduct the investigation in a certain manner. AR Tab 155.1 at 3530, 3535-36.

Plaintiff's claim that the SAPR office prevented Staff Sgt. A[* * *] from being re-interviewed by NCIS regarding the text messages between herself and plaintiff is also unsubstantiated. Pl. Mot. at 46. The administrative record shows that SA Norton testified that he did pursue another interview with Staff Sgt.

A[* * *] because she declined his requests for a second interview. AR Tab 155.1 at 4070-1 ("If they declined to be interviewed, they declined to be interviewed. I mean the Court can order them to testify."). A review of the witness statements that plaintiff identifies as being exculpatory and concealed by the Marine Corps also reveals that these statements pertain to charges for which plaintiff was found not guilty.[2] AR Tab 1 at 2-4; AR Tabs 64-65; AR Tab 144.13 at 3055-56. Given this, the Court finds it difficult to conclude that the alleged concealment of these statements could have led to a "fundamental deprivation" of plaintiff's due process rights. *Matias*, 923 F.2d at 826. And so, plaintiff has not shown that the Marine Corps concealed evidence during his general court-martial proceedings.

c. Plaintiff Has Not Shown That The Marine Corps' Case Was Frivolous

The Court is also not persuaded by plaintiff's argument that his general court-martial involved a frivolous case. Pl. Mot. at 52-53. In his cross-motion, plaintiff argues that the reason the sexual assault and sexual harassment charges brought against him were dropped by the Marine Corps was to avoid the consequences of his motion to dismiss for UCI. *Id*. But, as the government observes in its motion for judgment upon the administrative record, the Marine Corps' decision to drop the sexual assault and sexual harassment charges brought against plaintiff was a prosecution decision that fell within the discretion of the military prosecutor. Def. Resp. at 17-18 (citing *United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F 1997)). The record

evidence also makes clear that the case brought against plaintiff was not frivolous. While plaintiff correctly observes that he was found not guilty of the majority of the charges lodged against him during the general court-martial proceedings, it is undisputed that plaintiff was convicted of service discrediting conduct related to comments that he made at a basketball game and certain text messages that plaintiff sent to Staff Sgt. A[* * *]. AR Tab 1 at 3-5. Plaintiff was also convicted of attempting to obstruct justice in connection with the investigation that led to his general court-martial. *Id.* And so, plaintiff simply has not shown that the charges brought against him were frivolous.

d. The Military Judge Applied The Correct UCI Legal Standard

Plaintiff's claim that a fundamental error occurred during the general court-martial proceedings because the military judge applied the wrong legal standard to resolve his motion to dismiss for UCI is equally unavailing. Pl. Mot. at 47-48. To support this claim, plaintiff points to the following statement made by the military judge during the general court-martial proceedings:

> And that whenever I or any court these days consider UCI motions, we are really focused on three factors: Was the CA acting in response to some type of pressures from superiors and acting with something other than a completely pure heart? Of course, that's my language. That's certainly not case law language. Secondly, is there any evidence at all that

> access to witnesses has been inhibited or that witnesses are, because of command influence, unwilling to testify for or cooperate with the defense? And, thirdly, are the members free from bias?

AR Tab 155.1 at 3520; Pl. Mot. at 48.

As plaintiff and the government both acknowledge, the proper legal standard for evaluating plaintiff's motion to dismiss for UCI is that plaintiff must meet an initial showing of UCI and then the burden shifts to the government to refute the UCI beyond a reasonable doubt. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006) (citing *United States v. Biagese*, 50 M.J. 143, 150-51 (C.A.A.F. 1999)); Def. Resp. at 8-13; *see* Pl. Mot. at 47-48. And so, to successfully pursue a UCI claim, plaintiff must show "more than mere 'command influence in the air' or speculation." *United States v. Harvey*, 64 M.J, 13, 18 (C.A.A.F. 2006) (quoting *United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000)).

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In this case, the record evidence shows the military judge correctly applied the aforementioned legal standard and decided to deny plaintiff's motion to dismiss for UCI. The military judge determined that plaintiff "failed to meet the threshold for raising [the UCI issue], which is. . . more than mere allegation or speculation under *Biagese*, 50 M.J. 143, . . ." AR Tab 155.1 at 3541. And so, the military judge concluded that "[the] defense has failed to meet their initial *Biagese* burden [in this case]" and the military judge denied plaintiff's motion to dismiss for UCI. *Id.*

at 3541-42. The Court finds no legal error in this decision.

e. The Military Judge Did Not Refuse To Recognize UCI

Plaintiff's argument that he has been prejudiced by the military judge's "obdurate refusal" to acknowledge an actual or apparent UCI in connection with his general court-martial also lacks persuasion. Pl. Mot. at 46-47. To support this argument, plaintiff argues that he presented "uncontested evidence" of UCI during the general court-martial proceedings and that the military judge improperly refused to acknowledge this evidence. *Id*. at 47. But, the Court agrees with the government that plaintiff's claim raises a question of fact regarding the evidence that was before the military judge and that such questions of fact cannot be resolved by this Court. *See Matias*, 923 F.2d at 826 ("[Q]uestions of fact resolved by military courts are not subject to collateral attack."); Def. Resp. at 13.

Because the administrative record makes clear that plaintiff received full and fair consideration of his motion to dismiss for UCI during the general court-martial proceedings, the Court will not set aside his general court-martial sentence and conviction based upon an alleged or apparent UCI. *Matias*, 923 F.2d at 826.

f. Plaintiff Has Not Shown That The Military Judge Erred During The Closing Arguments

Plaintiff's claim that fundamental errors permeated his general court-martial proceedings, because the military judge made prejudicial

comments during the closing arguments, is also unsubstantiated by the record evidence. Pl. Mot. at 48-51. In this regard, plaintiff argues that the military judge improperly admonished his counsel for: (1) asserting that witnesses lied to the jury; (2) making inferences related to certain text messages between plaintiff and Staff Sgt. A[* * *]; and (3) arguing plaintiff could not have discredited the Marine Corps because he was not in uniform. *Id.*; Am. Compl. at ¶ 48(i)-(k). But, again, the record evidence neither supports

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plaintiff's claims, nor demonstrates that the general court-martial proceedings were fundamentally unfair. Most significantly, courts have long recognized that an "erroneous instruction does not deprive the accused of a constitutionally fair trial." *See e.g.*, *Herring v. New York*, 422 U.S. 853, 862 (1975). And so, to the extent that the military judge erred in admonishing plaintiff's counsel, these errors do not constitute a deprivation of plaintiff's due process rights. It is also well-established that military judges have "broad discretion" in controlling the scope of closing summations. *Flute*, 535 F.2d at 626-27. And so, again, the errors alleged by plaintiff simply do not rise to the level of rendering his general court-martial proceedings fundamentally unfair.[3]

g. Plaintiff Has Not Shown That The Marine Corps Attempted To Prevent Review Of His UCI Claim

Lastly, plaintiff's claim that the Marine Corps attempted to prevent the review of his UCI claim during the clemency petition proceedings is equally

unfounded. Pl. Mot. at 53-54. Plaintiff correctly observes that the summarized transcript of his general court-martial proceedings only briefly mentions his UCI claim and that the record of trial before the Staff Judge Advocate during the clemency process did not contain the briefs relevant to his motion to dismiss for UCI. *Id*. But, the Military Rules for Courts-Martial do not require that the Convening Authority consider the record of trial before acting on a plaintiff's clemency petition. R.C.M. 1109(d)(3)(B). And so, the Court agrees with the government that any errors contained in the record of trial for the general court-martial proceedings would not, alone, render the proceedings related to plaintiff's clemency petition fundamentally unfair.[4] *See* Def. Mot. at 36.

Indeed, at bottom, the administrative record in this matter shows that that the errors alleged by plaintiff related to his motion to dismiss the general court-martial proceedings for UCI

are largely unsubstantiated and that the Marine Corps and the Navy afforded plaintiff's UCI claim full and fair consideration. Given this, plaintiff has not shown that his general court-martial proceedings were fundamentally unfair due to an actual or apparent unlawful command influence. And so, the Court **GRANTS** the government's motion for judgment on the administrative record and **DENIES** plaintiff's cross-motion for judgment on the administrative record on this issue.

2. The Other Errors Alleged By Plaintiff Do Not Show That His General Court-Martial Was Fundamentally Unfair

The administrative record also makes clear that the four remaining errors that plaintiff alleges occurred during his general court-martial proceedings do not show that these proceedings were fundamentally unfair. Def. Mot. at 25-31; *see also* Am. Compl. at ¶¶ 48(a), (c)-(e), (g), (h).

First, while not addressed in plaintiff's cross-motion for judgment upon the administrative record, the government persuasively argues that plaintiff received full and fair consideration of his motion to suppress evidence regarding certain text messages between plaintiff and Master Gunnery Sgt. Thomas. Def. Mot. at 25-27. Plaintiff alleges in the complaint that the military judge's decision to deny this motion was a prejudicial ruling. Am. Compl. at ¶ 48(a); *see also* AR Tab 144.8. But, the record evidence shows that the military judge afforded plaintiff full and fair consideration of his motion to suppress evidence during the general court-martial proceedings. Notably, the parties to the general court-martial proceedings fully briefed plaintiff's motion to suppress evidence and the military judge held an Article 39(a) hearing on plaintiff's motion before denying the motion. AR Tab 155.1 at 3589; Mil. R. Evid. 311(c)(2); *see generally* AR Tabs 93, 106, 144.8. The Court appreciates that plaintiff disagrees with the military judge's decision to deny this motion. But, plaintiff has not shown how he has been prejudiced by this decision. *See generally* Pl. Mot. And so, record evidence does not support plaintiff's claim. *Matias*, 923 F.2d at 826.

Plaintiff also has not shown that he has been prejudiced by the exclusion of certain *voir dire* questions related to sexual assault and sexual harassment during the general court-martial

proceedings. Am. Compl. at ¶ 48(c); Def. Mot. at 27. The administrative record substantiates plaintiff's claim that the military judge excluded some of his *voir dire* questions during the general court-martial proceedings. AR Tab 155.1 at 3611-14. But, the administrative record

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also makes clear that the military judge took steps to ensure that plaintiff was not prejudiced during the *voir dire* process. Notably, the record evidence shows that that the military judge: (1) discussed which *voir dire* questions would be allowed with counsel for both parties; (2) discussed the Marine Corps Heritage Brief, which addresses the issue of sexual assault within the Marine Corps, with the prospective members venire; and (3) also advised the prospective members venire that plaintiff was "presumed innocent" despite the sexual nature of the charges brought against him. *Id.* at 3611-14, 3637-3639; *see also id.* at 3628, 3635, 4159. In addition, the administrative record makes clear that plaintiff has been afforded a full and fair opportunity to pursue his objections to the military judge's decision to exclude some of his *voir dire* questions, because plaintiff raised this claim during his unsuccessful Article 69(a) appeal. AR Tab 144 at 2806; AR Tab 156 at 4383. Given this, plaintiff has not shown that the *voir dire* process during his general court-martial involved "a clear abuse of discretion." *United States v. Smith*, 27 M.J. 25, 28 (C.M.A. 1988) (quoting *United States v. Parker*, 19 C.M.R. 400, 406 (C.M.A. 1955)) (emphasis removed) (explaining that courts have recognized that "wide discretion is vested in trial judges as to questions which must be answered by jurors on *voir dire*.").

Plaintiff's claim that he has been prejudiced by the military judge's decision to not admit all of the text messages between himself and Staff Sgt. A[* * *] into evidence during the general court-martial proceedings is equally unavailing. Am. Compl. at ¶ 48(d). Even if the military judge erred in this regard, the "mere error in admitting or excluding evidence does not make a court-martial constitutionally unfair." *Flute*, 535 F.2d at 627. The administrative record also makes clear that the military judge held a hearing on this issue and that plaintiff raised an objection to the exclusion of the subject text messages in connection with his unsuccessful clemency petition and Article 69(a) appeal. AR Tab 155.1 at 4016-23; *see* AR Tab 6 at 20; AR Tab 144 at 2802; AR Tab 156 at 4383. And so, again, the evidentiary record shows that plaintiff has had a full and fair opportunity to challenge the exclusion of the subject text messages and that plaintiff has not shown that he has been prejudiced by the exclusion of this evidence.

Lastly, plaintiff's challenges to the exclusion of the entire text of Staff Sgt. C[* * *] R[* * *]'s request mast application and to certain comments made by the military judge during the general court-martial proceedings are also unfounded. Am. Compl. at ¶ 48(e), (g)-(h). As discussed above, even if plaintiff is correct in arguing that the military judge erred by

excluding Staff Sgt. C[* * *] R[* * *]'s request mast application, such an error does not render plaintiff's general court-martial proceedings constitutionally unfair. *Flute*, 535 F.2d at 627. The record evidence also shows that plaintiff has had a full and fair

opportunity to pursue his objection to certain comments made by the military judge during the general court-martial proceedings in connection with his unsuccessful Article 69(a) appeal. AR Tab 145 at 3166; AR Tab 156 at 4383. And so, plaintiff has not shown that he has been prejudiced by these alleged errors.[5] AR Tab 145 at 3166; AR Tab 156 at 4383.

Because plaintiff has not shown that any of the aforementioned alleged errors during his general court-martial proceeding constitute such a deprivation of fundamental fairness as to impede his constitutional due process rights, the Court **GRANTS** the government's motion for judgment upon the administrative record and **DENIES** plaintiff's cross-motion for judgment upon the administrative record with respect to these issues. *Matias*, 923 F.2d at 826; RCFC 52.1.

2. Plaintiff Has Not Shown That The Post-Trial Proceedings Were Fundamentally Unfair

Lastly, plaintiff also fails to show that the post-trial proceedings related to his general court-martial were fundamentally unfair. In his cross-motion, plaintiff raises several objections to the post-trial review of his UCI claim and to his general court-martial sentence and conviction. Pl. Mot. at 53-61; Pl. Reply 10-22. For the reasons discussed below, the record evidence shows that plaintiff has had a full and fair opportunity to address these alleged errors. And so, the Court **GRANTS** the government's motion for judgment upon the administrative record and **DENIES** plaintiff's cross-motion for judgment upon the administrative record regarding these post-trial matters.

a. Plaintiff Has Not Shown That The Proceedings Related To His Clemency Petition Were Fundamentally Unfair

First, plaintiff's claim that the Marine Corps committed errors during the review of his clemency petition are largely substantiated by the administrative record. But, plaintiff argues without persuasion that these errors caused the clemency process to be constitutionally unfair.

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Pl. Mot. at 56. While plaintiff correctly observes that the Staff Judge Advocate did not have a copy of his motion to dismiss for UCI during the preparation of the initial recommendation related to his clemency petition, the administrative record shows that plaintiff attached this motion to his clemency petition and that the Staff Judge Advocate reviewed the motion in connection with the preparation of the addendum to that recommendation. AR Tab 6 at 202-287; AR Tab 3 at 10-11. And so, plaintiff has not shown that the Staff Judge Advocate was unaware of, or disregarded, the grounds for plaintiff's motion to dismiss for UCI during the clemency process.

Plaintiff also has not shown that he has been prejudiced by the Staff Judge Advocate's failure to timely serve him with copies of the recommendation and supplemental addendum related to his clemency petition, as required by R.C.M. 1106(f). Pl. Mot. at 58. Plaintiff correctly observes that the Staff Judge Advocate did not serve his counsel with a copy of the recommendation and addendum before sending these documents to the Convening Authority, as required by R.C.M. 1106(f).[6] AR Tabs 4, 13. But, the record evidence makes clear that plaintiff was not

prejudiced by these errors. In this regard, the record evidence shows that plaintiff was given the opportunity to review the Staff judge Advocate's recommendation before submitting his clemency petition. AR Tab 6. The record evidence also shows that, after plaintiff submitted his clemency petition, the Staff Judge Advocate prepared and submitted an addendum to his recommendation to the Convening Authority that solely addressed the legal issues raised by plaintiff in that petition. AR Tab 3. Given this evidence, the record evidence shows that plaintiff had the opportunity to review the Staff Judge Advocate's recommendation and that the Marine Corps fully and fairly considered his clemency petition.

Lastly, plaintiff's claim that his right to submit matters to the Convening Authority "has been fundamentally violated," because the Staff Judge Advocate did not have a verbatim transcript of the general court-martial proceedings during the preparation of the recommendation and addendum related to his clemency petition, is equally unavailing. Pl. Mot. at 56-57; *see* AR

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Tab 8. Again, the record evidence substantiates plaintiff's claim that the Staff Judge Advocate did not have a verbatim transcript of the general court-martial proceedings when he prepared the recommendation and addendum. Pl. Mot. at 56-57; *see* AR Tabs 9, 10. But, plaintiff has not shown how he has been prejudiced by the lack of a verbatim transcript at that stage of the clemency process. Notably, the Military Rules for Courts-Martial in effect at the time that plaintiff submitted his

clemency petition required the preparation of a verbatim transcript of court-martial proceedings only in circumstances where the sentence involves a confinement for at least six months, or when a discharge from the military based upon bad conduct has been adjudged.[7] R.C.M. 1103(b)(2)(B) (2012). But, neither of these circumstances is present here. Plaintiff received a sentence of 30-days confinement, a reprimand and a reduction in pay grade. AR Tab 1 at 6. Given this, the Court agrees with the government that the absence of a verbatim transcript at the time when the Staff Judge Advocate prepared the recommendation and addendum related to plaintiff's clemency petition did not violate R.C.M. 1103 or deprive plaintiff of a full and fair opportunity to pursue his clemency petition.

b. Plaintiff Received Full And Fair Consideration Of His Claims During The Article 69 Appeal

Plaintiff's claim that the proceedings related to his Article 69(a) appeal were fundamentally unfair and warrant vacating his sentence and conviction are also not persuasive. Pl. Mot. at 58-60. Plaintiff's objection to the Article 69(a) proceedings centers upon the Navy's decision to supplement the record of trial for the general court-martial with a verbatim trial transcript. *Id.*; Pl. Reply at 14-15. Specifically, plaintiff argues that the Navy Judge Advocate

General violated R.C.M. 1104 by failing to modify or set aside the general court-martial findings and/or sentence, and to remand the matter to the Convening Authority, when the Navy suspended the review of the summarized record of trial so that the

record of trial could be supplemented with a verbatim transcript. Pl. Mot. at 59.

But, as the government explains in its motion for judgment upon the administrative record, the Judge Advocate General is afforded broad discretion in deciding whether to modify and set aside general court-martial findings, or to remand a matter to the Convening Authority. Def. Mot. at 38. Specifically, R.C.M. 1104(d) provides that the Judge Advocate General "may" set aside a record of trial if it is incomplete, defective, or otherwise inaccurate and return it to the Convening Authority. R.C.M. 1104(d). Given the broad discretion afforded to the Judge Advocate General in this regard, plaintiff has not shown that the Judge Advocate General violated R.C.M. 1104 by declining to modify or set aside the general court-martial findings and to remand the matter to the Convening Authority in this case. R.C.M. 1104(d)(1); *see also United States v. Mosley*, 35 M.J. 693, 695 (N.M.C.M.R. 1992).

Plaintiff's argument that the Navy's authentication procedures during his Article 69(a) appeal violated R.C.M. 1104(d)(2) is also unconvincing.[8] Pl. Mot. at 59-60. Plaintiff argues that he was not afforded a reasonable opportunity to review a certificate of correction of the record of trial prior to the authentication of the supplemented record of trial for his general court-martial

proceedings after the Navy added the verbatim transcript of the general court-martial proceedings. *Id.* at 60. But, the administrative record makes clear that the Navy afforded plaintiff sufficient time to review the certificate of correction prior to the

authentication of the supplemented record of trial. Specifically, the administrative record shows that the Office of the Judge Advocate General notified plaintiff that the Navy was preparing a verbatim transcript of the general court-martial proceedings on December 1, 2016. AR Tab 147. Thereafter, plaintiff received a copy of the verbatim transcript of the court-martial proceedings on March 29, 2017, and the Navy afforded plaintiff 15 days-until April 13, 2017-to review the verbatim transcript, consistent with R.C.M. 1104(d)(2). AR Tabs 152-53. Given this, the administrative record shows that the Navy complied with the R.C.M. in authenticating the supplemented record of trial and that plaintiff received full and fair consideration of the legal errors that he alleged occurred during the Article 69(a) appeal.

c. Plaintiff Has Not Shown That The Judge Advocate General Erred By Declining To Refer His Case For Appellate Review

Lastly, plaintiff has not shown that his post-trial proceedings were fundamentally unfair because the Navy Judge Advocate General declined to refer his case for appellate review by the Navy-Marine Corps Court of Criminal Appeals. Pl. Mot. at 60-61; Pl. Reply 10-22. The Judge Advocate General is afforded discretion in determining whether a case should be referred to the Navy-Marine Corps Court of Criminal Appeals. Notably, R.C.M. 1201(b)(1) provides that "*[i]f* the Judge Advocate General so directs, the record shall be reviewed by a Court of Criminal Appeals . . ." R.C.M. 1201(b)(1) (emphasis supplied); *see also* 10 U.S.C. § 869(d) (providing that a Court of Criminal Appeals may only review cases sent to the Court by

the order of the Judge Advocate General). Plaintiff points to no evidence in the administrative record to show that the Judge Advocate General abused that discretion here. Pl. Mot. at 60-61; Pl. Reply at 17-19. And so, plaintiff has not shown that the Judge Advocate General violated R.C.M. 1105, or abused his discretion in declining to refer plaintiff's case for appellate review.[9]

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C. Relief From The Court's Protective Order Is Not Warranted

As a final matter, plaintiff has not shown that he is entitled to relief from the Protective Order entered in this matter on April 24, 2018.[10] In his motion for relief from protective order, plaintiff seeks to publicly disclose the identities of several witnesses who testified against him during his general court-martial. *See generally* Pl. Mot. for Relief. In support of this motion, plaintiff argues that the Privacy Act and the United States Department of Defense's ("DoD") SAPR Program do not prohibit the public disclosure of information about the identities of these witnesses, because he previously obtained this information during public proceedings associated with his general court-martial proceedings. Pl. Mot. for Relief at 12-14. Plaintiff also argues that the subject witnesses have waived any protections afforded to them under the Privacy Act, because plaintiff publicly disclosed their identities during his district court litigation. *Id.* at 14-18. And so, plaintiff contends that the public interest in disclosing this information outweighs the privacy interests of these witnesses. *Id.*

The government counters that the identities of the subject witnesses and their witness statements are protected from disclosure under the Privacy Act, the SAPR Program and applicable DoD regulations. Def. Opp. to Mot. for Relief at 7-10. The government also argues that relief from the Court's Protective Order is not warranted in this case, because plaintiff has not shown that the redactions to the administrative record to protect the confidentiality of this information have prevented him from obtaining due process in this case, or deprived the public of needed information. *See generally* Def. Opp. to Mot. for Relief.

For the reasons set forth below, plaintiff has not shown that relief from the Protective Order is warranted. And so, the Court **DENIES** plaintiff's motion for relief from protective order.

First, the government persuasively argues that the statements of the witnesses at issue are protected from disclosure under the DoD's SAPR Program. Def. Opp. to Mot. for Relief at 7-8.

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The government explains that DoD has covered reported sexual assault incidents as part of a Privacy Act "system of records." Def. Opp. to Mot. at 7; Privacy Act of 1974; System of Records, 80 Fed. Reg. 68,302 (Nov. 4, 2015); *see also Sexual Assault Prevention & Response Program Procedures*, DoD Instruction No. 6495.02, Encl. 4, ¶ 3.b, 4.b(2) (Mar. 28, 2013). Because there is no dispute that the statements of the subject witnesses are contained in the DoD SAPR Program reports, the Court agrees with the government that these witness statements are subject to the Privacy Act and that the identity of

the subject witnesses and their statements should not be publicly disclosed in connection with this litigation. *See* 80 Fed. Reg. at 68,302-03.

Plaintiff also has not shown that the release of information about the identities of the subject witnesses to him in connection with his general court-martial proceedings requires that the Court make this information public in connection with this litigation. It is undisputed that the Marine Corps previously released information about the identities of the subject witnesses to plaintiff in connection with the preparation of plaintiff's clemency petition. Def. Opp. to Mot. for Relief at 9; AR Tab 10 at 292 (stating that a summarized report and transcript of the proceedings will be served on plaintiff); *see also* AR Tabs 17-17.5 (summarized report and transcript of the proceedings). But, plaintiff has not shown that the prior release of this information for the purpose of preparing his clemency petition justifies the public release of this information in connection with this case. Indeed, as the government observes in its response and opposition to plaintiff's motion for relief, the privacy rights of the subject witnesses—alleged victims of sexual assault and sexual harassment—weighs heavily in favor of protecting their identities and statements from public disclosure. Def. Opp. to Mot. at 8-9.

In addition, plaintiff has not shown how allowing the Protective Order to remain in place with respect to the identities of the subject witnesses would prevent him from obtaining due process in this case. Pl. Mot. for Relief at 12-14. Pursuant to the terms of the Court's Protective Order, both plaintiff and his counsel have access to the identities of the subject witnesses and to their statements. *See*

Protective Order, dated April 23, 2018 at 3. Plaintiff also fails to identify any public interest that would be served by publicly disclosing the identities and statements of these witnesses. Pl. Mot. at 16-18.

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Indeed, as the government observes in its opposition to plaintiff's motion for relief, the Protective Order entered in this case carefully balances plaintiff's legitimate need to access confidential information regarding the witnesses that testified against him during the general court-martial proceedings, while safeguarding the government's legitimate need to protect the privacy rights of these witnesses. Def. Opp. to Mot. at 10-12. Plaintiff simply has not explained how the public disclosure of information about the identities of these witnesses will aid him in the litigation of this dispute. Nor has plaintiff explained how such a disclosure would advance the public's understanding of this case. Given this, plaintiff has not met his burden to show that relief from the Court's Protective Order is warranted in this case. And so, the Court **DENIES** plaintiff's motion for relief from protective order.

V. CONCLUSION

In sum, the undisputed material facts in this matter show that plaintiff is collaterally estopped from relitigating the issue of whether certain witnesses conspired to falsely accuse him of sexual assault and sexual harassment during his general court-martial proceedings. The administrative record in this matter also shows that any infirmities during plaintiff's general court-martial and post-trial proceedings did not rise to a constitutional level or,

constitute a proceeding that is more a spectacle on trial by ordeal. Lastly, plaintiff has not shown that he is entitled to relief from the Protective Order entered in this case.

And so, for the foregoing reasons, the Court:

1. **GRANTS** the government's motion for summary judgment;

2. **GRANTS** the government's motion for judgment upon the administrative record;

3. **DENIES** plaintiff's cross-motion for judgment upon the administrative record;

4. **DENIES** plaintiff's motion for relief from protective order; and

5. **DISMISSES** the complaint.

The Clerk shall enter judgment accordingly.

Each party to bear its own costs.

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Some of the information contained in this Memorandum Opinion and Order may be considered protected information subject to the Protective Order entered in this matter on April 24, 2018. This Memorandum Opinion and Order shall therefore be filed **UNDER SEAL.** The parties shall review the Memorandum Opinion and Order to determine whether, in their view, any information should be redacted in accordance with the terms of the Protective Order prior to publication. The parties shall **FILE** a joint status report identifying the information, if any, that they contend should be redacted, together with an explanation of the basis for each proposed redaction on or before **September 3**, **2019.**

IT IS SO ORDERED.

s/ Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
Judge

Footnotes:

[*] This Memorandum Opinion and Order was originally filed under seal on July 26, 2019 (docket entry no. 79). The parties were given an opportunity to advise the Court of their views with respect to what information, if any, should be redacted from the Memorandum Opinion and Order. The parties filed a joint status report on September 3, 2019 (docket entry no. 84) proposing certain redactions which the Court has adopted. And so, the Court is reissuing its Memorandum Opinion and Order, dated June 21, 2019, with the agreed-upon redactions indicated by three consecutive asterisks within brackets ([* * *]).

[1] The facts recited in this Memorandum Opinion and Order are taken from the administrative record ("AR"); the amended complaint ("Am. Compl."); the government's motion for judgment upon the administrative record and motion for summary judgment ("Def. Mot."); and plaintiff's cross-motion for judgment upon the administrative record ("Pl. Mot."). Except where otherwise noted, all facts recited herein are undisputed.

[2] Plaintiff correctly observes that the administrative record reveals some inconsistencies in the statements given by Jacob Coby and Jessica Geddies, such as whether or not Ms. Geddies saw plaintiff and Lance Corporal H[* * *] dancing together. *Compare* AR Tab 144.13 at 3055-56, *with* AR Tabs 64-65. But, the Court does not find these inconsistencies to show that the Marine Corps tampered with these witnesses.

[3] The record evidence shows that the military judge followed the commentary for the Military Rules for Courts-Martial in admonishing plaintiff's counsel for asserting that certain witnesses lied to the jury. The commentary provides that counsel should not express a personal belief or

opinion as to the truth or falsity of any testimony. Def. Mot. at 33-34; R.C.M. 919(b) cmt. (2016).

4. While plaintiff also correctly observes that the digital copy of the record of trial for his general court-martial proceedings did not contain the briefs related to his motion to dismiss for UCI, the record evidence shows that these documents were attached to his clemency petition and considered by the Convening Authority. Pl. Mot. at 53. Def. Mot. at 36; *see generally* AR Tab 6 at 202-287. The record evidence also shows that the briefs related to plaintiff's motion to dismiss for UCI were attached to plaintiff's Article 69(a) appeal. AR Tabs 144-144.11.

5. At the end of the court-martial, plaintiff acknowledged that his court-martial was a fair trial. AR Tab 155.1 at 4297 ("I finally realize that the judicial system is fair . . . the truth came out this week.").

6. R.C.M. 1106(f)(1) requires that the Staff Judge Advocate shall "cause a copy of the recommendation to be served on the counsel for the accused," before the Staff Judge Advocate's recommendation and the record of trial is sent to the Convening Authority. R.C.M. 1106(f)(1). R.C.M 1106(f)(7) requires that the Staff Judge Advocate serve "the accused and counsel . . . with the new matter and give[] 10 days from service of the addendum in which to submit matters." *See also* R.C.M. 1106(f)(7) discussion.

7. R.C.M. 1103(b)(2)(B) provides that:

> (B) *Verbatim transcript required*. Except as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim transcript of all sessions except sessions closed for deliberations and voting when:
>
> > (i) Any part of the sentence adjudged exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial; or

> (ii) A bad conduct discharge has been adjudged.

R.C.M. 1103(b)(2)(B) (2012).

[8.] R.C.M. 1104(d) provides, in relevant part, that:

> (d) *Correction of record after authentication; certificate of correction*.
>
> > (1) *In general*. A record of trial found to be incomplete or defective after authentication may be corrected to make it accurate. A record of trial may be returned to the convening authority by superior competent authority for correction under this rule.
> >
> > (2) *Procedure*. An authenticated record of trial believed to be incomplete or defective may be returned to the military judge or summary court-martial for a certificate of correction. The military judge or summary court-martial shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction before authenticating the certificate of correction. All parties shall be given reasonable access to any original reporter's notes or tapes of the proceedings.

R.C.M. 1104(d)(1)-(2).

[9.] Because the Court concludes that plaintiff has not shown that any of the alleged errors during the general court-martial and post-trial proceedings constitute such a deprivation of fundamental fairness as to impair his constitutional due process rights, the Court does not reach the remaining issues raised in the government's motion for judgment upon the administrative record.

[10.] The Court's Protective Order provides that the Court has "determined that certain information to be filed in connection with the Military Pay Act matter may be covered by the Privacy Act, 5 U.S.C. § 552a." Protective Order at 1. The Court has authorized the government to disclose this information to plaintiff and his counsel in connection with this litigation, subject to certain restrictions, including that the information be used solely for purpose of this litigation. *Id*. at 3.

[APPENDIX E: Excerpts of Petitioner's Cross Motion and Memoranda in Opposition to Motions filed with the United States Court of Federal Claims in the Proceedings Below]

[Fed. Cir. Appx140]

UNITED STATES COURT OF FEDERAL CLAIMS

LUKE T. WEST	*	**DOCKET NO.: 1:17-cv-02052**
	*	
Plaintiff	*	
	*	
Versus	*	**SECTION: "C"**
	*	**JUDGE: Lydia Kay Griggsby**
UNITED STATES OF AMERICA	*	
	*	
	*	
Defendant	*	
	*	

*** * * * * * * * * * * * * * * * ***

PLAINTIFF'S CROSS MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD; MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD; ALTERNATIVE MOTION FOR REMAND PURSUANT TO 28 U.S.C. § 1491(A)(2); MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

Plaintiff, **Luke T. West,** (hereinafter, "plaintiff" or "Mr. West") submits this Cross Motion for Judgment on the Administrative Record Pursuant to RCFC 52.1, averring that the Administrative Record in this Matter establishes that plaintiff's general court martial conviction should be vacated as per the principles established in the case of *Matias v. United States*, 923 F.2d 831 (Fed. Cir. 1990). Similarly, this Cross Motion also serves as a Memorandum in Opposition to the Motion for Judgment on the Administrative Record filed by the defendant, the United States of America ("the defendant" or "the Government"), which asserts that said Administrative Record shows that the plaintiff's general court martial conviction should be upheld under *Matias*. In the alternative, should this Court find that the Administrative Record does not sufficiently establish plaintiff's general court martial conviction should be vacated, plaintiff avers that the Administrative Record is sufficient to establish a basis for this Court to exercise its power of remand, pursuant to 28 U.S.C. § 1491(a)(2), to the Office of the Judge

[Fed. Cir. Appx141]

Advocate General for the United States Navy ("OJAG USN") with further direction to OJAG USN to refer review of plaintiff's general court martial conviction to the Navy Marine Corps Court of Criminal Appeals ("NMCCA") pursuant to 10 U.S.C. § 869(d)(2) and to provide any and all further relief to which plaintiff may be entitled as a result of said referral and pending said review.

Additionally, plaintiff submits this Memorandum in Opposition to the Motion for

Summary Judgment of the Government. Specifically, the Government asserts that it is entitled to a motion for summary judgment on the issue of whether plaintiff's accusers in his underlying general court martial "conspired to falsely accuse him of sexual assault and sexual harassment", due to the purported preclusive effects of a December 22, 2015 ruling in the case of *West v. Rieth, et al.*, 15-cv-2512 (E.D. La. 7/12/16). For the reasons more fully discussed below, the Government's Motion for Summary Judgment should likewise be denied.

STATEMENT OF THE ISSUES

(1) Is plaintiff entitled to judgment on the Administrative Record vacating his general court martial conviction vacated under the principles established in the case of *Matias v. United States*, 923 F.2d 831 (Fed. Cir. 1990)?
(2) Is the Government entitled to a judgment on the Administrative Record upholding plaintiff's general court martial conviction under the principles established in the case of *Matias v. United States*, 923 F.2d 831 (Fed. Cir. 1990)?
(3) In the alternative, is plaintiff entitled to remand by this Court, pursuant to its authority under 28 U.S.C. §1491(a)(2) of his general court martial conviction to OJAG USN with further direction to OJAG USN to refer said review of said general court martial conviction to the NMCCA under 10 U.S.C. §869?

[Fed. Cir. Appx142]

(4) Is plaintiff estopped from raising the issue of whether his accusers in his general court martial

conspired to falsely accuse plaintiff of sexual assault and sexual harassment under the doctrine of Issue Preclusion (Collateral Estoppel) by virtue of a December 22, 2015 ruling in the case of *West v. Rieth, et al.*, 15-cv-2512 (E.D. La. 7/12/16)?

STATEMENT OF THE CASE

On May 5, 2017, plaintiff initially filed this suit for collateral review, pursuant to the United States Supreme Court case of *Schlesinger v. Councilman*, 420 U.S. 738, 753 95 S. Ct. 1300 (1975), of his November 21, 2014 general court martial conviction in the case of *United States v. West*, which case was transferred to this Court and converted into a Tucker Act claim for wrongful discharge from the United States Marine Corps resulting from said wrongful conviction.

Plaintiff's general court martial at issue in this case occurred within the context of a coordinated leveling of false allegations of sexual assault by several individuals against the plaintiff while plaintiff was an active duty Marine stationed at Marine Forces Reserves ("MFR") in New Orleans, Louisiana. The coordinated false allegations of the accusers were designed to take general advantage of the political climate surrounding the handling of such allegations in the military and specific advantage of certain benefits under the Department of Defense (DoD) and Marine Corps (USMC) Sexual Assault Prevention and Response (SAPR) Program (collectively referred to as "DoD/USMC SAPR Program") and the Marine Corps Equal Opportunity (EO) Program. Despite the overwhelming evidence of the baseless nature of the allegations, motives and opportunities to make such false allegations;

accusers' allegations received virtually no scrutiny and resulted in a general court martial being convened against plaintiff, due in large part to the continued pervasive and wrongful influence exerted by MFR SAPR Office personnel over

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the investigation of Naval Criminal Investigative Services ("NCIS") and over military prosecutors. That notwithstanding, plaintiff was acquitted of all charges stemming from the false allegations of sexual assault.

However, plaintiff was wrongfully convicted of other non-sexual assault/sexual harassment charges. Specifically, plaintiff was convicted of the charges of violation of Article 81, Conspiracy to Obstruct Justice; Article 93, Maltreatment; Article 134 (Obstructing Justice); and Article 134 (Indecent language). AR at 1-6. As a result of this wrongful prosecution, which spanned from June 2013 through November 2014, plaintiff was reduced in rank to Lance Corporal, incarcerated for 30 days and was prevented from re-enlisting in the Marine Corps. AR at 6. Plaintiff was discharged from the Marine Corps in March of 2015 with a general under honorable conditions characterization of service.

Subsequent to plaintiff's conviction on November 21, 2014; plaintiff's general court martial has undergone post trial review under Rules for Courts Martial (RCM) 1101, *et seq.* and U.C.M.J. Article 69. On March 5, 2015, the Convening Authority for MFR approved the findings and sentence of the general court martial. AR at 1-9. On December 1, 2016, the Office of the Judge Advocate General for the United States Navy (OJAG USN)

specifically found that it could not make a determination as to the legal sufficiency of the record of trial (ROT) of plaintiff's general court martial without a verbatim transcript of the proceedings. AR at 3216. Subsequent to that time, a verbatim transcript of plaintiff's general court martial was prepared and provided to plaintiff on March 29, 2017. AR at 3451. On June 9, 2017, after failing to follow any semblance of proper procedure regarding supplementation of plaintiff's ROT, OJAG USN summarily supplemented plaintiff's ROT and affirmed the findings and sentence of plaintiff's general court martial based on the purported ROT at that time. AR at 3448-55, 4383.

[Fed. Cir. Appx144]

Plaintiff, in the initial collateral review filed in the Eastern District of Louisiana and in this pending action, has specifically challenged the wrongfulness of his conviction at general court martial, the MFR Convening Authority's post trial review under RCM 1101, *et seq.* and the OJAG USN appellate review under U.C.M.J. Article 69.

Within the complaint in this matter, plaintiff has alleged that his general court martial proceedings were tainted by numerous and pervasive acts of unlawful command influence in violation of U.C.M.J. Article 37 and settled military law, which required that the proceedings be "cured" from the effects of such unlawful command influence. These alleged and asserted pervasive acts include, but are not limited to coordinated false allegations of sexual assault, facilitation and coercion of allegations of sexual assault and sexual harassment, which directly resulted in the wrongful preferral and

referral of charges, and the conduct of a general court martial, in violation of plaintiff's rights of Due Process under the U.S. Constitution. These pervasive instances specifically included witness intimidation and tampering by NCIS and MFR SAPR Office personnel; agents from NCIS being wrongfully prevented from questioning witnesses and being pressured to credit the veracity of the sexual assault accusations. As specifically acknowledged by the Government, these issues of unlawful command influence were raised to the trial court, but were not, in any way, remediated.

A) Context: the Marine Corps Sexual Assault Prevention and Response Program:

As the plaintiff's general court martial was prosecuted within the context of the "DoD/USMC SAPR Program", a brief synopsis of the SAPR Program is appropriate here. For the past few years, considerable public interest has emerged regarding the substantial problem with instances of unreported sexual assault, creating a particularly highly charged environment surrounding such cases. AR at 2814-2870. In an effort to address this problem, the Department

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of Defense, as well as the various services, including the United States Marine Corps, have implemented various policies and procedures for addressing, processing, and prosecuting instances of accusations of sexual assault in the military. *Id.* These particular policies are DoDI 6495.02 and MCO

1752.5B, which are titled "Sexual Assault Prevention and Response Procedures" and "Sexual Assault Prevention and Response Program", respectively (the "SAPR Program"). AR at 759-837, 1570-1734. Both DoDI 6495.02 and MCO 1752.5B are comprehensive in that they explain the reporting options for accusers, which includes a confidential (or restrictive) or non-confidential (unrestrictive) report; the types of command support and assistance available for accusers, such as having a military protective order placed on the accused and the granting of an expedited transfer for the accuser; and discusses the responsibilities of the commanders, and the prosecution of such cases. *Id.*

As with the specific duties of the commanding officer, both DoDI 6495.02 and MCO 1752.5B provide for various means of assisting the accusers in cases where accusers make unrestrictive reports of sexual assault. AR at 1664-1675. A significant means of assistance provided by the SAPR program is the expedited transfer process. AR at 1672-75. The expedited transfer process, which is explained in enclosure 5 of DoDI 6495.02 and MCO 1752.5B, enclosure 1, Chapter 3(9), allows for an accuser who files an unrestricted report of sexual assault to request a transfer to another unit or another section within a unit, and to have that request be determined by the commanding officer within 72 hours of receipt of the request by the commanding officer. *Id.*

In addition to establishing policies and procedures, the SAPR Program designates various civilian and uniformed personnel to administer the SAPR Program. At the unit level, the SAPR program personnel include the "Sexual Assault Response Coordinator" ("SARC"), civilian

"Victim Advocates" ("SAPR VA"), and "Uniformed Victim Advocates" ("SAPR UVA") (collectively, the "SAPR Office personnel"). AR at 1679-87, 1690-95. Specifically, the SAPR Program provides that each sexual assault accuser is assigned a VA or UVA who then provides assistance in all areas of the reporting process, which assistance also includes assistance regarding the legal process taken against an alleged offender. *Id*.

Pertaining to prosecutions of unrestricted reports of sexual assault, The DoD Instruction and the MCO also make various pronouncements with regards to the duties of SARCs and VAs working within the SAPR Program and provide these individuals with unprecedented access to the details and conduct of any criminal sexual assault investigation conducted by NCIS. In particular, the DoD and MFR SAPR Programs require monthly meetings, known as "Case Management Group" meetings, between the SARCs, members of the command leadership, command legal personnel (SJA), and NCIS, where all active unrestricted reports of sexual assault are discussed and briefed. AR at 1688-89. The discussion includes the status of investigations and are attended by VAs assigned to individual accusers. *Id.* Finally, communications between purported victims of sexual assault and VAs are considered privileged communications and are not subject to disclosure under Military Rules of Evidence Rule 514. M.R.E. 514.

B) Plaintiff's General Court Martial Conviction:

On June 20, 2013, Ms. R[******] A[****] ("Ms. A[****]") accused plaintiff of sexual harassment, alleging that she was made "uncomfortable" around him and felt "scared" by him. AR at 411, 414, 498-501. In her allegations, she referred to two specific alleged incidents: (1) a text message conversation on 16 January 2013 in which sexually suggestive comments were

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made; and (2) a sexually suggestive, but ambiguous comment made at an off duty event (attendance at a professional basketball game) on 27 March 2013. AR at 500.

Prior to the allegations, Ms. A[****] was actually (or seemingly to plaintiff) a close personal friend of plaintiff, as indicated by daily text message communications between them, which were 140 pages in length, detailing almost daily interactions between Plaintiff and Ms. A[****] that included the timeframes of both purported comments. SAR at 2:1-2:140. The entirety of the text message conversations, both specifically and generally, clearly demonstrate that the purported comments had no impact whatsoever; that Ms. A[****] was not, in any way, "scared" by plaintiff; and that any accusation of harassment, intimidation or "maltreatment" of Ms. A[****] by plaintiff was completely and utterly false. *See, e.g.*, SAR at 2:3, 2:102, 2:116, 2:123-25, 2:129-30, 2:139-40.

The convictions for obstructing justice and conspiracy to obstruct justice stemmed from plaintiff's attempt on February 20, 2014, with the assistance of MGySgt Larry Thomas ("Mr. Thomas"),

a former supervisor and mentor to both plaintiff and Ms. A[****], to confront Ms. A[****] with an accurate copy of the 140 pages of text message conversations between defendant Ms. A[****] and plaintiff. AR at 416, 424, 426, 1240, 1246, 3917-19, 3932. The evidence in this matter was uncontroverted that this was done in an effort to discourage Ms. A[****] from committing what could unquestionably be considered as perjury by testifying consistent with her harassment allegations. *Id.* On November 21, 2014, plaintiff was convicted of the charges of violation of Article 81, Conspiracy to Obstruct Justice; Article 93, Maltreatment (specification as to defendant A[****] only); Article 134 (Obstructing Justice); and Article 134 (Indecent language)(specification as to Defendant A[****] only). AR at 1-7. As a result of this wrongful prosecution, which spanned from

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June 2013 through November 2014, plaintiff was reduced in rank to Lance Corporal, incarcerated for 30 days and was prevented from re-enlisting in the Marine Corps. *Id.*

Of considerable significance is that, at no time during this process, did Ms. A[****] did make an allegation of sexual assault under the SAPR Program, nor was she considered a "victim" under the SAPR program, nor did she obtain the services of a VA under the SAPR Program. AR at 415, 438, 1155-56, 1247.

C) Conjoined Sexual Assault Prosecution and Context:

In conjunction with the allegations of Ms. A[****], on June 20 and 21, 2013, three other accusers, Ms. C[*****] R[****] ("Ms. R[****]"), Ms. E[***] P[******] ("Ms. P[******]"), and Ms. B[******] H[*****] ("Ms. H[*****]"), filed unrestricted reports of sexual assault under the SAPR Program against plaintiff. AR at 489-94. These accusers also filed equal opportunity complaints and requests masts applications against plaintiff. AR at 495-97, 755-58, 838-842.

The allegations of Ms. R[****] and Ms. P[******] involved two separate alleged incidents occurring at the same event, the 2011 MFR Marine Corps Ball. Ms. R[****] alleged that plaintiff had sexually assaulted her at the November of 2011 Marine Corps Ball by massaging her thigh at the leadership table, during dinner, for approximately 2 minutes while nine other individuals, including her husband, sat at the table. AR at 399-401, 406, 1069-71. Ms. P[******] alleged that plaintiff sexually assaulted her by grabbing her and attempting to kiss her in two specific instances, first in the hallway of a hotel and then in a hotel bathroom at the 2011 MFR Ball. AR at 392-94, 1051-58.

LCpl H[*****]'s allegation involved a Halloween party, held in late October 2012 exclusively held for Staff Non-Commissioned Officers (SNCOs) and Civilian Employees within the Finance Section which she and two other junior Marines attended without permission. AR at

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386-88, 1062-68. During the party, Ms. H[*****] had danced briefly with plaintiff, and had also later danced with other SNCOs at the party. *Id.* The

incident was of note to the Finance Office leadership based on the respective ranks of plaintiff and Ms. H[*****], though Ms. H[*****] did not raise any issue with the incident until meeting with the other accusers just prior to 20 June 2013. AR at 441. This notwithstanding, Ms. H[*****] specifically accused plaintiff of "rubbing his genitals" on her leg while dancing. AR at 387, 1063-64. Ms. H[*****] also alleged that plaintiff, along with "another SNCO [Staff Non Commissioned Officer"] coerced her not to come forward with her allegations, whom she later identified as GySgt Cesar Villegas ("Mr. Villegas"). AR at 840, 1066-67.

At the outset, the allegations of the sexual assault accusers, made on 20-21 June 2013 were were clearly suspicious. First, the allegations of the sexual assault accusers were involved public places with many potential witnesses. However, with the exception of Ms. A[****] "corroborating" the accusations of Ms. P[******], none of the other allegations were corroborated by any other witnesses.[1] *See* AR at 399-401, 406, 422, 431, 435-36, 442, 1069-71, 1114-18, 1160, 1280-84, 1746-47.

Second, all three sexual assault accusers had conspicuous personal motives to make false accusations against plaintiff. On April 17, 2013, Ms. P[******] had made a request for a PCS transfer from

[1] Ms. A[****] attempted to corroborate the allegation of Ms. P[******]. However, P[******] and A[****] failed to properly coordinate their stories prior to Ms. A[****] providing her statement to NCIS. Ms. A[****]'s version contained a material inconsistency in that she stated that, while she witnesses the assault in the hotel bathroom, she did not witness the assault in the hallway despite physically being in the hallway with plaintiff and Ms. P[******]. *Compare* AR at 1051-58, 1079-81, 1111-13, *with* AR at 1059-62, 1159-60.

MFR. AR at 395, 502-504, 2010-13. Her request for PCS transfer was denied by MFR on May 8, 2013, just over one month prior to her sexual assault allegations. AR at 395-96, 504, 489-90, 1134-36, 2012-13. Coincidently, in conjunction with her unrestricted report of sexual assault,

[Fed. Cir. Appx150]

Ms. Parrot also made a request for an expedited PCS transfer under the SAPR program on June 21, 2013, which was granted. AR at 397, 489-90, 505-06, 1134-36. Likewise, Ms. H[*****] had stated in her request mast a litany of problems, completely unrelated to her sexual assault allegations, that she had with the finance office and used her sexual assault allegation to successfully acquire a transfer to another section of MFR under the expedited transfer process of the SAPR program. AR at 390, 838-42, 860.

Ms. R[****], likewise, (in a particularly striking Request Mast Application) unequivocally stated her displeasure (unrelated to her sexual assault allegations) with "being treated unfairly" and being "micromanaged" and "put down" by both GySgt West and his supervisor, MSgt, now Mr. Jorge Janneau ("Mr. Janneau"). AR at 755-58. This notwithstanding, she admitted to seeking Mr. West's assistance with physical training in preparation for Warrant Officer Basic School and further admitted to working out with GySgt West 2-3 times per week for several months, without incident, immediately prior to her making her June 2013 allegations. AR at 402, 1224. Not wanting a transfer under the expedited transfer process of the SAPR program, Ms. R[****] leveraged her sexual assault allegation with a request mast application in which she successfully had both plaintiff and Mr.

Janneau removed from the Finance Office. AR at 402, 756.

Third, the sexual assault accusers, R[****], P[******] and H[*****], admitted to having multiple meetings amongst themselves, prior to coordinating their June 20 and 21 reports of sexual assault. AR at 388, 390, 395, 403, 1055, 1070-71. Significantly, Ms. A[****] was also present at these meetings, after which she made her sexual harassment claims against plaintiff, as well as attempted to corroborate Ms. P[******]'s sexual assault allegations. *Id.* Also of significance is that, in addition to showing the true nature of the relationship between Ms. A[****] and Mr. West, the 140 pages of text messages also indicates that Ms. A[****] involvement as potentially the other

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"SNCO" in the meeting with Ms. H[*****] and Mr. West where she alleges that she was coerced into not reporting the alleged sexual assault at the October 2012 Halloween party (potentially exposing Ms. A[****] to criminal liability). SAR at 2:125.

Finally, and most significantly, is the context in which the MFR SAPR Office was involved with Ms. A[****], who, again, did not make a sexual assault report and was not considered a victim under the SAPR Program, in Mr. West's court martial process. AR at 415, 438, 1155-56, 1246-47. First of all, SAPR personnel were in attendance at the pre-accusation meetings between Ms. R[****], Ms. P[******], and Ms. H[*****]. AR at 395, 403. Ms. A[****], also, was in attendance at those meetings despite specifically not making any report of sexual assault and not being considered a "victim" under the

SAPR Program. *Compare* AR at 1155-58, *with* AR at 388, 390, 395, 403. More significantly, just prior to the initiation of the obstructing justice investigation against plaintiff, Ms. A[****] had two separate meetings with SAPR personnel in the MFR SAPR Office, one meeting on February 21, 2014 and again on February 24, 2014, prior to Ms. A[****] meeting with NCIS on November 26, 2014 to report the purported instance of obstructing justice. AR at 1246-50, 1452, 2021-22.

A particularly stark illustration of the false allegations is the comparison between the October 23, 2013 statement of Mr. James R[****], the husband of Ms. R[****], and the text messages between Mr. R[****] and plaintiff. In his October 23, 2013 statement, Mr. James R[****], like the other individuals at the table, did not observed the alleged sexual assault, despite being seated at the table right next to Ms. R[****]. He further stated as follows:

> The morning of Nov 6 my wife informed me that (at the time) SSgt West had touched her leg last night, under the table, inappropriately. She then proceeded to inform me that he was groping and fondling her leg under the table while we were sitting with SSgt West, his date, she also had informed me that she was sorry for not telling me this sooner, but she was scared and felt

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> alone because no one was ever there for her before and she felt no one would ever believe her.

AR at 1072.

This statement is flatly contradicted by the text message conversations between Mr. R[****] and plaintiff which commence on 27 May 2012 and continue through 22 May 2013. While the entirety of the text message are *ipse dixit* regarding the inconsistency of a man who would communicate with another man he knew had sexually assaulted his wife; the initial 27 May 2012 text (6 months after learning of the alleged sexual assault against his wife) is very telling:

> James R[****]: Hey Luke, its James. C[*****]'s water just broke and I am taking her in. We are packing up stuff now. I will keep u informed. As soon as I know more like room number and all I will call u or text u. Be blessed James
>
> James R[****]: [*******] [***] R[****] is here. 803am. 7lb 14oz. Everyone is great.
>
> Hey bud. This is James. We are at west Jefferson. They are moving us to 3111 on the third floor. Just letting u know.

SAR at 1:1:192.[2]

D) The Investigation Interference and Bias:

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[2] Defense Exhibit "N", within which this message is contained, appears to be missing from the Administrative Record.

As required by the MCO SAPR Program and the EO Program, MFR HQBn referred the investigation of the sexual assault reports to Naval Criminal Investigative Services ("NCIS"). The NCIS investigation was referred to SA Jeffrey Norton. AR at 437. In addition, pursuant to the EOM, on 9 July 2013, the MFR HQBN CO appointed the 4th Marine Logistics Group (MLG) Deputy SJA to conduct a command investigation into the sexual harassment claims of the four accusers against GySgt West. AR at 1753. Ms. P[******]'s previous attempted and denied PCS transfer, her successful expedited transfer under the SAPR Program, both Request Mast

[Fed. Cir. Appx153]

Applications of Ms. R[****] and Ms. H[*****]; were all available to both the NCIS and command investigators at the outset of their investigations.

On November 6, 2013 and again on January 10, 2014, Mr. West's defense team provided NCIS with a complete copy of the 140 pages of text messages between Mr. West and Ms. A[****], as well as a complete copy of the text messages between Mr. West and Mr. R[****], starting with Mr. R[****]'s announcement to "Luke" of the birth of his and Ms. R[****]'s child approximately six months after the alleged assault and otherwise completely contradicting Mr. R[****]'s October 24, 2013 statement to NCIS. AR at 2023, 3089, 3483-85.

Throughout December 2013 and January 2014, the Defense obtained statements from four witnesses contradicting LCpl H[*****]'s testimony as to what allegedly occurred at the Halloween party in

October 2012. These statements were, likewise, provided to the prosecutor at MFR on February 6, 2014. AR at 1280-84, 2026.

Despite the receipt of these exculpatory items, NCIS did absolutely no follow up investigation on these items. Instead, NCIS admitted to the following. First, NCIS Special Agent Jeffrey Norton admitted to conducting what could be characterized as an obstructing justice investigation against GySgt Cesar Villegas, a SNCO initially accused by Ms. H[*****] of participating with plaintiff to prevent her from making her allegations. AR at 2032, 3528. This investigation took place on January 22, 2014, on or shortly after defense counsel was seen obtaining the exculpatory statements from several witnesses at the Halloween party that Ms. H[*****] claimed she was assaulted. AR at 1280-84, 1452. SA Norton's actions towards Mr. Villegas are particularly suspicious in light of the fact that two of the witnesses from which statements were taken at that time were Mr. Jacob Coby and Ms. Jessica Geddies, to whom SA

[Fed. Cir. Appx154]

Norton had falsely attributed inculpatory statements in his investigation in September of 2013. *Compare*, AR at 3055, 3056, *with* 421-22, 434-36, 1283-84, 4057-60.

Second, NCIS Special Agent Jeffrey Norton, the lead investigator on plaintiff's case, admitted in testimony on February 19, 2014 that, in general, he felt outside pressure to unduly assign credibility to the statement of sexual assault accusers, and that pressure materially impacted his ability to conduct his investigation. AR at 3029-31.

SA Norton's testimony was not limited to vague generalizations, as he further testified that he was specifically instructed, by the MFR SJA's Office, that investigation of evidence materially favorable to the plaintiff (the conflicting October 24, 2013 statement and text messages of Mr. James R[****]) was "not necessary". AR at 3040-41, 3524-25. SA Norton's admissions, beyond general interference in his investigation to the plaintiff's detriment, constitutes a which, at a minimum constitutes a potential violation of the SAPR Program (Chapter 3(3)(a) of Enclosure (1) to MCO 1752.5B).[3]

[Fed. Cir. Appx155]

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[3] MCO 1752.5B, Enclosure 1, Chapter 3, Paragraph 3(a), provides, in pertinent part:

> All CGs [commanding generals] and COs [commanding officers] *shall immediately report all Unrestricted Reports of sexual assault to NCIS or the supporting Military Criminal Investigative Organization* (MCIO) per reference (a) [the DoD SAPR Program, designated as DoD Instruction 6495.02]. This includes assaults disclosed directly by victims or by third parties, even if a Restricted Report of the assault has been filed. *Commanders will not conduct an independent command inquiry or investigation of an alleged sexual assault.* After a formal criminal investigation and consultation with SJA, the SA-IDA (SPMCA in the grade of O-6 or higher)[the Commander of MFR in this instance] shall determine the disposition of the incident. Disposition information shall be provided to the SARC [sexual assault response coordinator].

AR at 785 (emphasis added).

Finally, SA Norton admitted that he himself had attempted to do the very thing for which plaintiff ultimately was tried and convicted: confront Ms. A[****] with a copy of the text message conversations between herself and plaintiff. In testifying to multiple attempts, he testified that his latest attempt was prevented by Ms. A[****]'s "victim advocate" (who, again, was not supposed to be involved because Ms. A[****] was not a sexual assault "victim" under the MFR SAPR Program). *Compare*, AR at AR at 415, 438, 1247, *with* AR at 4070.

E) Pre Trial Procedure: Preferral and Referral:

On October 16, 2013, charges were initially preferred against plaintiff. AR at 343-48. In preferring charges, among the allegations made were that plaintiff "wrongfully massaging the leg" of Ms. R[****] "from her knee to her groin"; that plaintiff "rubb[ed] his genitalia on" Ms. H[*****]'s leg; and that plaintiff "ma[de] repeated sexually suggestive comments" to Ms. A[****]. *Id.* Based on those allegations, the government preferred the following charges: violations of Article 92, Violation of a Lawful General Order (Navy Regulations Paragraphs 1165 prohibiting fraternization and 1166 prohibiting sexual harassment); Article 93, Maltreatment of a Subordinate; Article 120, Sexual Assault; Article 128, Assault; Article 129, Burglary; Article 134, General Articles, (Indecent Language). *Id.*

Charges were referred to general court martial (*West I*) on December 23, 2013. *Id.* MFR withdrew

and dismissed the charges on April 23, 2014. AR at 349. Without changing any of the charges with respect to the accusers, R[****], P[******], H[*****] and A[****], MFR re-preferred charges on May 13, 2013 to accommodate additional charges of violations of UCMJ Articles 134 (Obstructing Justice) and Article 81, Conspiracy to commit a violation of UCMJ Article 134 (Obstructing Justice), against plaintiff for his and MGySgt Thomas' actions of providing Ms. A[****] with accurate copies of her text message conversations with GySgt West. AR at 370-76.

[Fed. Cir. Appx156]

Charges were re-referred to general court martial (*West II*)on August 21, 2014, though the government deleted all charges and specifications of violations of Article 120, as well as all specifications of violations of Article 92 as they related to violations of Paragraph 1166 of U.S. Navy Regulations involving prohibited Sexual Harassment. AR at 322-24, 370-76. Strikingly, MFR did not delete the factual allegations that initially supported the preferred Article 120, Sexual Assault or Article 92, Violation of Lawful General Orders (Navy Regulations Paragraph 1166 prohibiting sexual harassment). *Id.*

F) Unlawful Command Influence Motion:

On September 12, 2014, plaintiff filed his Motion to Dismiss for Unlawful Command Influence ("UCI"). The plaintiff's UCI motion focused on the political environment that created pressure to obtain a conviction for sexual assault, a detailed description of the DoD/MCO SAPR Program and the abuse of

same by the accusers, as well as several instances of NCIS and MFR actively concealing or directing to be concealed evidence that indicated that the allegations in the plaintiff's case were false and were made with the intent to abuse the SAPR process for the personal gain of the accusers. AR at 2800-01, 2922-2967.

In response, the Government attempted to argue that because it had not charged any violations of Article 120, Sexual Assault, the case against plaintiff was not a "sexual assault case" and none of the political environment concerns were relevant. AR at 2987-92. Additionally, the Government argued that the evidence of wrongful manipulation of witnesses and evidence by NCIS and MFR were more properly suited for trial on the merits. *Id.*

In a reply memorandum, plaintiff asserted as follows:

> For reasons more fully set forth in its previous submission to the Court; the Defense takes the position that, given the current political climate, no potential court martial member anywhere in the United States Marine Corps can be asked to sit in judgment in

[Fed. Cir. Appx157]

> this case and can be expected to render a verdict of not guilty without being concerned that such a verdict will amount to a finding that a three star general officer level command, in accordance with the political leanings of higher military and civilian leadership,

> concealed evidence and aided and abetted the accusers in this case in making false allegations. The Defense further submits that no potential court martial member can be expected to be free from considerable duress in answering, under oath, if such a finding of not guilty would raise reasonable concerns about the potential impact of such a finding on said court martial member's career. As such, the Defense submits that, from the standpoint of apparent UCI, which is a sufficient predicate for a dismissal, with prejudice, there is no need to defer such a ruling until after voir dire in this case.

AR at 3022.

On September 26, 2014, a hearing on plaintiff's UCI motion was held. AR at 3519-3542. Prior to the hearing on the UCI motion, the Military Judge in the Case advised that she was "detailed to this court-martial by [herself] as the Chief Judge of the Navy-Marine Corps Trial Judiciary." AR at 3474. During that hearing, the military judge articulated the following standard for evaluating the presence of unlawful command influence:

> And I – we talked about that a little bit in the 802 [pre-trial conference per R.C.M. Rule 802] last week and again today. And I expressed the Court's resolve that we are not trying this case in the course of the unlawful command influence motion. And that whenever I or any court these days consider UCI

> motions, we are really focused on three factors: Was the CA acting in response to some type of pressures from superiors and acting with something other than a completely pure heart? *Of course, that's my language. That's certainly not case law language.* Secondly, is there any evidence at all that access to witnesses has been inhibited or that witness are, because of command influence, unwilling to testify or cooperate with the defense? And, thirdly, are the members [jury] free from bias?
>
> But I asked the defense counsel both last Friday and again before becoming [sic] on the record to focus his presentation evidence to meet his initial burden here on – within the bounds of established UCI case law and that would be typically on those three factors;

[Fed. Cir. Appx158]

> *convening authority, access to witnesses, and potential taint of members pool.*

AR at 3519-20 (emphasis added). This purported standard, hereinafter referred to by undersigned counsel as "the West Standard", is wholly unsupported by any law, and stands in stark contrast to the standard as articulated by the Court of Appeals for the Armed Forces in the case of *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006), which provides, in pertinent part:

> We focus upon the perception of fairness in the military justice system as viewed *through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.*
>
> To find that the appearance of command influence has been ameliorated and made harmless beyond a reasonable doubt, the Government must convince us that the disinterested public would now believe [the accused] received a trial free from the effects of unlawful command influence.

Lewis, 63 M.J. at 415. (citations omitted)(emphasis added).[4]

In fact, prior to being the Chief Judge of the Navy-Marine Corps Trial Judiciary, this particular Military Judge was the Chief Judge of the Navy-

[4] The case of *Lewis* did not involve "convening authority, access to witnesses, and potential taint of the jury pool", but involved a staff judge advocate and a prosecutor attempting to improperly use the *voir dire* process to manufacture personal prejudice, and ultimate removal, of a detailed military judge whom the staff judge advocate and prosecutor perceived would be favorable to the defense. *Id.* at 407-411, 414. The court not only found that these actions constituted unlawful command influence, but were of such a nature that they could not be cured and required dismissal, with prejudice, of the charges against defendant. *Id.*

Marine Corps Court of Criminal Appeals ("NMCCA"). Approximately four months prior to her articulation of "the West Standard", the same Military Judge authored the opinion in the case of *United States v. Howell*, NMCCA 201200264, 2014 CCA Lexis 321 (N-M. Ct. Crim. App. May 22, 2014), which case involved UCI and the impact of the political environment surrounding sexual assault cases as

[Fed. Cir. Appx159]

related to the Commandant of the Marine Corps's "Heritage Brief". NMCCA 201200264, 2014 CCA Lexis 321 at **1-4. In that case, the military judge cited, verbatim, the *Lewis* standard for apparent UCI, and applied same in several instances: no mention or reference to the relatively restrictive "West Standard. *Howell*, NMCCA 201200264, 2014 CCA Lexis at ** 27-28, 32-33, 35.

> Upon our *de novo* review of this entire record, we find an appearance of unlawful command influence. An objective, disinterested observer, fully informed of all these facts and circumstances, would harbor a significant doubt as to the fairness of these proceedings in which members of the panel appear influenced by the CMC's [Commandant of the Marine Corps'] brief, [the initial military judge] *ruled erroneously on the UCI motion and failed to shift the burden to the Government*, and successor judges failed to cure that taint. In our view, this

> fosters the " 'intolerable strain on public perception' of the military justice system which the proscription against unlawful command influence . . . guards against."

NMCCA 201200264, 2014 CCA Lexis at *35 (emphasis added).

Additionally, the Military Judge in *Howell*, in addition to correctly stating the *Lewis* standard for evaluating apparent UCI, also correctly stated the accused's initial burden of proof in UCI cases:

> "Thus, the initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation." As at trial, the quantum of evidence required on appeal to raise UCI is "some evidence."

NMCCA 201200264, 2014 CCA Lexis at *26. Most significantly, the Military Judge in *Howell* not only explicitly recognized, correctly, that the "some evidence" initial burden of proof applied to the *Lewis* Standard for evaluating apparent UCI, *see U.S. v. Salyer*, 72 M.J. 415, 425 (C.A.A.F. 2013), but explicitly noted an additional area of potential UCI not included within "the West Standard":

[Fed. Cir. Appx160]

> Without reference to the *Biagase* standard and without addressing this argument, [the military judge] again denied the motion, with the curiously inaccurate explanation that most of the

> challenges he granted the evening before had little or nothing to do with the Heritage Brief or related issues. Upon our review, *this obdurate refusal to acknowledge what was obvious – that the defense had met its low threshold burden* – and his mischaracterization of the challenges and excusals only exacerbates the troublesome appearance of UCI.

Howell, NMCCA 201200264, 2014 CCA Lexis at *30 (emphasis added). The significance of this provision in *Howell*, by the Military Judge cannot be overstated: not only does the Military Judge directly contradict herself as to a material point of law with respect to her articulation of "the West Standard"; but, as a duly constituted panel of the Navy-Marine Corps Court of Criminal Appeals, the court in *Howell* explicitly recognized that the actions of the trial military judge himself/herself in failing to properly apply the standards of UCI, could itself be an actionable element of UCI. As a member of that panel and the author of the opinion, it is likely that the Military Judge in plaintiff's case was at least cognizant of this provisions in the *Howell* case.

Notwithstanding her own statements as to the proper standard for evaluating apparent UCI (in fact, in apparent complete disregard for her own opinion in *Howell* authored four months earlier), the Military Judge made the following statement with regard to plaintiff's questioning of NCIS SA Norton pertaining to his obstruction of justice investigation against Mr. Villegas:

MJ: Special Agent Norton has left the room. I'm just trying to understand where you are going with this. Is it your point that they did not -- they were subject to unlawful command pressure not to pursue certain leads?

CDC: That is our –

MJ: Okay. Then you have to ask that question, Mr. Brown. We are not going to go through all the different problems with this case and why they haven't followed up on all the leads that you might

[Fed. Cir. Appx161]

have gotten. That's all great material for you to work with when Special Agent Norton is on the stand at court-martial on probably about the 18th on November. I expect that the members going to hear all about it, and I will too. That's not what we are here for. What we are here for is an unlawful command influence. Did somebody in any way direct him or pressure him not to pursue a normal investigation into this matter? That's all the court cares about on the UCI motion. Not about the strengths or weaknesses of the government's case and whether they may have pursued every lead offered by every text message. Just whether there's some kind of an unlawful

> command influence on the investigation and I'm going to ask you to – *and maybe that their investigation is inadequate. It may be that it's not the investigation you would have conducted*, but that's not within the purview of the UCI motion. Okay. So it's all perfectly grist for the mill of this court-martial in the middle of November, it's just not within the scope of a UCI motion. So what you need to establish with Special Agent Norton or Moss is whether they were subject to any pressures from the command or up the chain of command from the special or general court-martial convening authority to in some way misrepresent evidence and not pursue leads. That would be UCI.

AR at 3526-27 (emphasis added).

Later in the questioning, SA Norton admitted to conducting what could be characterized as an investigation into Mr. Villegas for obstructing justice for preventing Ms. H[*****] from making her false allegations. AR at 3528. As of that time in the testimony, the record of the UCI motion contained evidence that: 1) SA Norton's questioning of Mr. Villegas occurred on January 22, 2014, AR at 2032; 2) Plaintiff's defense team had obtained statements during that timeframe (January 22, 2014) from four potential witnesses to Ms. H[*****]'s allegations against plaintiff surrounding the Halloween party, none of whom corroborated Ms. H[*****]'s allegations, AR at 1280-84; 3); plaintiff's defense attorney (undersigned counsel) was seen by Ms. A[****] interviewing the witnesses during the

January 22, 2014 timeframe, AR at 1452; 4) SA Norton's report of investigation contained witness statement summaries in which he falsely attributed inculpatory statements to Mr. Coby and Ms. Geddies, directly contradicting their written

[Fed. Cir. Appx162]

statements, *compare*, AR at 3055, 3056, *with* 421-22, 434-36, 1283-84, 4057-60; 5) Mr. Villegas had also been listed by Ms. A[****] as a corroborating witness to her allegations against plaintiff regarding his comments made at the March 25, 2013 basketball game, AR at 500. Furthermore, Mr. Villegas ultimately testified against plaintiff in the upcoming court martial, supporting the charges for which plaintiff was ultimately convicted. AR at 418-21. As such, the evidence presented by plaintiff in the UCI motion and hearing was "some evidence" of attempted witness tampering against Mr. Coby and Ms. Geddies (and potential successful witness tampering on the part of Mr. Villegas) by SA Norton. Despite this, the Military Judge obdurately refused to acknowledge this and denied the plaintiff's UCI motion. AR at 3529, 3542.

G) Trial of Plaintiff's General Court Martial:

Trial of plaintiff's general court martial was conducted on November 17 through 21, 2014. Among some of the more prejudicial comments made by the Military Judge in that case was her characterization to the court martial members (jury), that the case was not "a sexual assault case". AR at 3637-38. As particularly feared by the plaintiff and specifically

raised by in his UCI motion reply, plaintiff was forced to place the unfairness of the process, and the undue assistance to the accusers, at issue in plaintiff's trial. The Military Judge's characterization that the case was not a sexual assault case, contradicting the actual charges in the matter involving the "wrongfully massaging the leg" of Ms. R[****] "from her knee to her groin" and "rubbing [of plaintiff's] genitalia on" Ms. H[*****]'s leg; implicitly reinforced to the members that MFR doubted the veracity of the case to the members and that they were implicitly expected to return some verdict of guilty. This powerful impression was not cured by the insufficiently sterile reading of the Commandant's "White Letter 3-12." *See* AR at 3638.

[Fed. Cir. Appx163]

With regard to the charges upon which GySgt West was convicted, in addition to the patently erroneous statements of law noted above; the allegations and assertions of Mr. West also include several materially prejudicial statements of the military judge, particularly with regards to direct instructions to the court martial members (jury) during closing argument. Significantly, although physically not admitted as evidence, two witnesses explicitly testified to the text messages between Mr. West and Ms. A[****], that said text messages were "140 pages" in length, and said 140 pages were acknowledged as authentic as a defense exhibit in front of the members. AR at 412, 413, 438, 3876, 3917-19, 3932, 4070. This notwithstanding, the military judge interrupted, *sue sponte*, Mr. West's counsel during closing argument, made a highly prejudicial, gratuitous and misleading attack on

counsel's credibility to the members and wrongfully instructed the members not to consider, for any purpose, the fact that the text messages between Mr. West and Ms. A[****] were 140 pages in length:

> MJ: Mr. Brown, I want to interrupt you.
>
> CDC: Yes, ma'am.
>
> MJ: Members, I going to advise you that Mr. Brown has made repeated references both in the beginning – I was going to bring this up at the end of his remarks, but I'm compelled to do it now. He's made repeated references to these 140 pages of text messages. Earlier on, he made references to having read them himself and you have not. That is improper argument. Of the 140 pages of these text messages, *Mr. Brown sought admission to this court-martial of six pages.* One had previously been admitted as a prosecution exhibit. You'll get that. Of the remaining five pages, I admitted one. *The other four pages had nothing to do with this court-martial.* So references to these 140 pages of texts as though they contain evidence material to this court-martial that has not admitted before you is improper argument**.** *I am instructing you to completely disregard references to the 140 pages.* With regard to the content of them as though those pages hold matters relevant and material to

> this court-martial, their admission has not been sought with very minor exceptions. *You may not consider that for any purpose*

[Fed. Cir. Appx164]

> *whatsoever*. You have to cast that argument and references to that out of your mind, and decide this case solely on the evidence that properly comes before you.
>
> Is there any member who cannot follow this instruction?

4208-09 (emphasis added). [5]

Additionally, at the very end of Mr. West's counsel's closing argument, the Military Judge made another highly prejudicial and inaccurate comment regarding purported "misstatement of the law" by Mr. West's counsel. Prior to closing arguments, the

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[5] Plaintiff submits that the comments regarding counsel's attempt to admit only 6 of the 140 pages of text messages is particularly misleading, as counsel did attempt to initially admit the entire 140 pages of text messages as "Defense Exhibit L for Identification". AR at 3932. Plaintiff submits that, similar to the military judge's instructions pertaining to Defense Exhibits D and E, as reflected in pages 554-558 of the verbatim transcript, the military judge instructed counsel to redact and resubmit Defense Exhibit L for admission. AR at 4010-15. The discussions and ruling regarding Defense Exhibit L are not reflected in the verbatim transcript. In any event, plaintiff takes particular exception to the appropriateness of such a comment by the military judge to the members under any circumstances and is prepared to litigate that particular issue before this Court in the above captioned matter.

Military Judge gave the members instructions on the law regarding the particular charges and specifications. AR at 4133-4161. In particular, the Military Judge instructed the members as to the determination of "service discrediting conduct", a necessary element as to several specifications charged, defining same as "conduct that tends to harm the reputation of the service or lower it in public esteem." AR 4145. The military judge further instructed that the members "should consider all the relevant facts and circumstances." AR 4145-46. Pursuant to this instruction, Mr. West's counsel made the following argument with respect the fact that neither Mr. West, nor Ms. A[****], nor anyone else at the basketball game on March 25, 2013 were in uniform, and that, because there was no evidence that anyone was in uniform, there was no evidence that anyone knew that plaintiff or his party was in the military, even if the offensive comment was made, effectively preventing a finding of "service discrediting conduct". AR at 4205. Despite this

[Fed. Cir. Appx165]

completely proper argument, the Military Judge, again *sue sponte*, to the opportunity immediately after Mr. West's counsel completed his closing argument to make this prejudicial statement:

> MJ: Members . . . . Let me correct one misstatement of the law that defense counsel made. Defense counsel in discussing the offenses under Charge V in referencing the service discrediting, he talked about a uniform requirement. That's a misstatement of the law.

> Under Article 134 offenses or charges, either conduct to the prejudice and good order and discipline or of a nature to bring discredit upon the armed forces. There's no requirement for the government to prove that members of the public observed the conduct per se and there's certainly no requirement that people are in uniform. But simply that the conduct was of a nature to bring discredit upon the armed forces. So, again, I will remind the members that when there is a conflict between what counsel say the law is and what the court has provided you as instructions, you have to go with the latter and follow the court's instructions on the law.

AR at 4211-12.

Finally, while specifically not being considered a "sexual assault case", as per the plaintiff's UCI motion and as specifically communicated to the members, the MFR SAPR personnel maintained a particularly conspicuous presence and involvement in plaintiff's case. Despite MFR's decision not to pursue any charges of sexual assault, the MFR SAPR Office (beyond that already mentioned) maintained an inordinate level of involvement in plaintiff's case. First, the MFR SAPR Office kept monthly track of plaintiff's case in its CMG meetings, which meetings began shortly after the accusations occurred and continued through the adjournment of his court martial in November of 2014 (notwithstanding the referral decision of August 2014 declining to charge any violations of UCMJ Article 120, Sexual Assault).

AR at 2222-2257. Second, the MFR SARC, Ms. Peggy Cuevas, was conspicuously present in the courtroom, in full view of the court martial members, every day of the proceedings from

[Fed. Cir. Appx166]

November 17 through adjournment on November 21, 2014. AR at 3145. Finally, again, despite not being "a sexual assault case", Ms. Cuevas saw fit to correspond with the prosecutors at plaintiff's general court martial on November 24, 2014 after the conclusion same, as follows:

> Thank you, Major. I think you and Major Hodge were great and we are getting better with each trial. I appreciate your hard work and congratulate you on an excellent job.

AR at 3106.

[APPENDIX F: Excerpts of Unlawful Command Influence Motion Hearing of February 19, 2014 in the Case of United States v. West]

[Fed. Cir. Appx13024; AR 3024]

Special Agent Jeffrey Norton was called as a witness by the defense, was sworn, and testified as follows:

* * *

Questions by the defense counsel:

* * *

[Fed. Cir. Appx13028; AR 3028]

Q. Okay. You mentioned the sexual assault response coordinator and the victim advocate. Have you had many cases where the sexual assault response coordinator have opened a case with NCIS?

A. Yeah. I am not familiar with how they report or how they open their cases or what have you, but they do ask me for information regarding my cases for their reporting requirements. So I do believe they *[sic]* something, a tracking system in place. I am just not familiar with it.

Q. Okay. I think you mentioned before. I just want to make sure I have this clear. You talked about open pending

[Fed. Cir. Appx13029; AR 3029]

cases where the *[sic]* contact you, and we will get to that in a minute, but I want us to talk with initiation of a case. In other words the first person you hear from with respect to a sexual assault case, has it ever been the sexual assault response coordinator or a victim advocate?

A. Yes, it has.

Q. About how often does that happen?

A. I am not – I could not come up with a number. A lot of times, it all kind of comes together at the same point in time. When I receive notification, I immediately with a sexual assault case will attempt to get a statement from the victim in the presence of a victim advocate.

Q. All right. Well let me go – another general question in terms of investigating – and I am trying to do this as general as you can – when you interview a witness, do you just believe what they tell you?

A. Not on the surface. I mean, there is a reason why there is an investigation. I have got to try and get supporting evidence.

Q. So in other words, there are times when you are interviewing a witness and you are not, you know, the witness tells you – says this happened or I did not do it. You just believe them, write the report and close the investigation. Correct?

A. No.

Q. Okay. And sometimes you have an opportunity that you need to assess credibility. Is that right?
A. Yes.

Q. Okay. And what are some factors as an investigator that you look into in terms of assessing credibility of a witness when you are interviewing them?
A. There is just – some things just do not sound right; some things do not add up. It is kind of hard dealing with sexual assault victims, especially in the presence of victim advocates and – to where you are expecting not to just automatically assume that anything they are saying is possibly invalid. So I mean it is just different – it has been different in 15 years since when I got hired on to where it is now. There is just an atmosphere in dealing with witnesses and victims in sexual assault cases.

[Fed. Cir. Appx13030; AR 3030]

Q. Okay. You said a lot of very important things there and I need to go back and touch on a couple of things. You mentioned first off that it is very different with interviewing a witness in the presence of a victim advocate. Please expound on that.
A. Well I would not say victim advocate. The interviews themselves have evolved where they do not want you to – I guess what I am trying to say is accuse them of making things up.

Q. Okay.

A. So I will be direct about that.

Q. Absolutely. I understand. In other words, you know, what you are telling me – and please correct me if I am wrong – that in the atmosphere that you have currently in general when you are investigating a sexual assault victim in the presence of a victim advocate, you feel you need to be careful about accusing that victim of making the allegations up. Is that a fair statement?

A. That is correct.

Q. And where would you say that – and I am calling it fear. If that is an inaccurate description, please let me know. Where would that – or that concern come from, where is that coming from? Is that coming from any particular individual or is that in general?

A. That is just general.

Q. Based on what?

A. It would be hard to say. It does not make me want to believe them any more or less, you know. I do not really, you know, discourage them from some of the things that I question in terms of getting into a statement and things like that. Everything in the end is going to speak for itself. That is why we have a court. But again, sometimes I feel uncomfortable asking particular questions regarding what they are telling me just because it just does not sound particularly right.

Q. Okay.

A. It is hard to explain, but I think you understand.

Q. Yeah. No, I understand, but again, I think I understand but I have got to get this for the record. This is very important. And you are talking about sometimes there are certain things that are being said and you are feeling

[Fed. Cir. Appx13031; AR 3031]

uncomfortable. It is, you know – is it a worry that the particular individual that is with the victim is going to have a problem with your questioning? Is that a concern?

A. I am not really understanding what you are asking.

Q. Well you said there are times when you are questioning or whet the victim is saying – and correct me if I am wrong – does not make sense or does not add up and you feel uncomfortable with what I imagine is a normal follow up; well what about this or what about that. Are you tracking with me so far?

A. If it is something that is going to lead to, you know, more leads or what have you, I am still going to ask the question. But in a lot of ways, what I am told is reported. I am not putting things in that, you know, one way or another. So if I think they are lying to me, I am just going to take it because it is obvious to somebody, you know, down the line that certain things are being said or what have you that just do not sound right. But I am not going to sit there and accuse a victim that is

reporting an assault – like sitting there and me just calling them a liar.

Q. And I understand.
A. So again, I am going to let it go on the record because if it is the truth, it should be, you know –

Q. And I understand and I think I have got some questions and we will cover that. I think – we will ferret that out a little more later. You kind of gave me – you kind of walked me into my next question. Is there, in a sexual assault allegation in your experience, are there reasons for a – and I will call them an accuser – to make up an allegation in your mind?
A. Absolutely.

Q. What are those reasons?

TC: I apologize for the interruption. Again, the government would request some sort of reasoning and some sort of determination on how this line of questioning is relevant with regard to UCI and with regard to the motion at hand.

DC: Your Honor, we have –

MJ: Defense, if I read your motion correctly, defense, what part of your motion is it you are attacking the entire

[Fed. Cir. Appx13032; AR 3032]

system by saying that because of the political climate, people like this special agent cannot do their job because they have got to be pussyfooting around these alleged victims and therefore he has bet to believe everybody and therefore a proper investigation cannot be done. Is that your theory?

DC: I would say, Your Honor, that that is close. I would say that but I would also say that that concern, that fear, was present in this case. And that is where I am going with this line of questioning to try and establish not so much that no investigation could ever be done, but in this particular case based upon the climate and the orders and what the evidence is showing that this was a problem in this case and it was from the very onset. I am trying to lay that foundation.

TC: Sir –

MJ: The objection is overruled. Government, you can keep objecting, please, at any time, but he has styled his motion in such a fashion that he has made an attack on the entire system as it is set up now on the reporting, on the SAPR, at issues, et cetera.

TC: Sir, I –

MJ: So he is going to – go ahead.

TC: The government would want the court to note is regardless of how the initial investigation occurred, how is that UCI? They are arguing

that their merits case is so strong that this should never have gone to court-martial. That argument would be proper in an improper referral. But a UCI motion, if they are not alleging that the charges have improperly referred because some sort of faultiness or some sort of lack of investigation at the Article 32, that would be a proper argument. But with regards to UCI, I do not see how the convening authority or any other members of the court-martial, be it the military judge, the witnesses, the defense counsel, the members, or the convening authority, again, how they were improperly influenced here. Now again, if he is alleging that the 32 was improper, I look to the court to see *United States v. Von Bergman* case which I have previously provided to the court just during the recess here in which the Article 32 proceedings are superseded by the trial procedures. So if he is arguing

[Fed. Cir. Appx13033; AR 3033]

that somehow the IO was wrong and the preponderance of the evidence was not established, then a proper trial will then result in an acquittal. But the connection between UCI and the SAPR program or Special Agent Norton's lack of proper investigation techniques or anything like that, there is not nexus there. There is not meeting there. Even if the government stipulates that an investigation was done faulty by Special Agent Norton, it still was – there still was a command investigation done and then there

was still an Article 32 investigation done. That supersedes all these things.

MJ: I understand your objection and I agree with much of what you said. I other words, when the defense filed this motion along with the other ones it seems like, but particularly this motion, they stopped to attack the Article as somehow being deficient or from Lieutenant Colonel C all the evidence he did not hear, they sought to attack a lot of different aspects and which could have been brought in another motion that they did not draft. I agree. Improper referral, reopen the Article 32, none of those motions were made. We are past that.

However, by the same token, I do need to let him draw this connection if he says to somehow because of the system that is set up. The investigation in this case cannot even be conducted properly by the people who are supposed to do it, NCIS, due to the political climate, et cetera, then I understand how there is a connection to UCI. So I am giving the defense a leash, albeit a short one as though I will let you call any witness you want, defense, but government please object because 90 percent of what you just said, government, I agree with. I do not care about the Article 32 and whether it was done properly or not. There is a command investigation, there is an Article 32 that has occurred. We are at court-martial in this case.

But at the same token, I do not want to shut the door on any evidence that can even

tangentially relate to UCI. If I do that, the appellate court will shut me down and say, UCI never dies. Why did not you deal with this at the trial level, judge? So assuming we can keep defense in the box, Mr. Brown, get to the point with this witness along with every other witness and specifically how it ties to UCI, then I will shut you down. So government, object as often as you want. At this point, the last thing I heard

[Fed. Cir. Appx13024; AR 3034]

from Mr. Brown was, I am going to tie it to this case and explain how they could not do a proper investigation in this case because of UCI. Well that is important evidence that I need to hear if that is true. So that is where we are going next. So Mr. Brown, please go ahead.

DC: Yes, Your Honor. And I will move quickly.

Questions by the defense counsel continued:

* * *

[Fed. Cir. Appx13038; AR 3038]

Q. Did you – you mentioned you took the statements. Did you ask for any other materials? Did they give you any text messages or anything of that nature?

A. No.

Q. Okay. Did you get any other documentary evidence?

A. Not that I recall.

Q. Did you talk to anybody else other than the accusers in your investigation?
A. Yes.

Q. Who?
A. I would have to see my case file. I was asked about a couple of people, but again, I cannot remember everybody I talked to.

Q. Okay. Well when you talk about a couple of people, do you have a general recollection of what their role was in the investigation?
A. Witnesses to a degree I would say. And some of it was just clearing up things that were said in the statements that some things turned out to be true, some things did not turn out to be exactly the way they were put together. But I did not see anything significant.

Q. Okay.

TC: Sir, and I hate to interrupt again, it seems to the government that the defense counsel is using this for an on-the-record discovery inquiry into what Special Agent Norton has investigated. The question is not what he has investigated, but whether or not he was somehow influenced by the political climate as to his investigation technique. So at this point, the government would again object that the relevancy of this line of questioning or really any line of questioning with Special Agent Norton.

[Fed. Cir. Appx13039; AR 3039]

MJ: Government, I am going to sustain your objection because I am thinking exactly the same thing. You do not get a free interview here, defense counsel. It is not your chance to do discovery or try to catch him on something and hope to use it at a later proceeding. Get to the point. If you have something to prove about UCI, get to the point. Ask a leading question if you need to. I am failing to see where we are going now. This UCI in this particular case and if this agent can give you testimony of it. What are you doing?

DC: Yes, Your Honor, I will narrow it down.

Questions by the defense counsel continued:

Q. Special Agent Norton, on November 6th of 2013, do you recall receiving copies of text messages in the Gunnery Sergeant West case?
A. I got copies from, I believe you provided them.

Q. But you did get copies of those text messages. And in those copies of the text messages, do you recall receiving specifically copies of text messages between Staff Sergeant – Mr. James Rieth and Gunnery Sergeant Luke West?
A. Yes.

Q. And do you recall having taken a statement from Mr. James Rieth just prior to receiving those statements?
A. Before taking – before receiving the texts?

Q. Before receiving, yes.
A. Yes.

Q. Okay. Now do you recall at any time myself requesting that you conduct a follow-on interview with Mr. Rieth regarding the contents of the statement that he made to you on October 24th, 2013?
A. Yes.

Q. And as a result of that, did you have an opportunity to look at Mr. Rieth's statement and compare those with the text messages?
A. What do you mean?

DC: Your Honor, may I approach?

TC: Your Honor, I object to, again, this is him using an on-the-record discovery. Regardless of whether or not Special

[Fed. Cir. Appx13040; AR 3040]

Agent Norton looked at the texts and compared the texts, the case – the court-marital *[sic]* was already down the road. If anything, this is something that the defense can use on the merits, not at an UCI motion hearing.

MJ: Okay, defense. Last chance. I am happy to give you leeway to prove your motion here, but just like you wrote in the motion, most of the things you argue the motion about, the flimsy evidence and all the other things in your motions are comments about the merits of the

case. Not particularly interesting to me as I have to rule on the motions. Now what are you doing and why are we going this route again?

DC: Again, Your Honor, I was just questioning Special Agent Norton as to what he did with – well for lack of a better term, I found something that is completely inconsistent. The text messages would seem to be completely inconsistent with what his testimony was in his statement. And certainly, would ask the court for a bit of leeway for the investigating agent to either explain why this was not followed up on or if anything was done with regard to clear a discrepancy.

MJ: Okay. Who cares? Let us say he did a lousy investigation, and I am not saying he did. Who cares: What does that have to do with UCI? I do not care if he did not review the texts. I do not care about any of the police work in this case for the purposes of this motion. I would like to know if there is an actual or apparent UCI against your client in this case, not whether this investigator did a completely shoddy, great –

DC: I understand, Your Honor. Just one moment. I may be done with this witness.

Questions by the defense counsel continued:

Q. All right. Special Agent Norton, why did you not conduct a follow-on interview of James Rieth?

A. At that point in time, it was already going through the judicial proceedings. Obviously, you were hired. And I was coordinating with Captain Mason as to what you were requesting me to do and what I was actually doing.

Q. And what were you actually doing?

[Fed. Cir. Appx13041; AR 3041]

A. I was actually going to interview James Rieth and I asked Captain Mason and he told me that was not necessary.

Q. You mentioned that – were you doing anything else with regards to any kind of investigation?

A. There were a couple of follow-up interviews that were identified by, for lack of a better word, an inspection by my parent office. They will go through my case files and point out things they thought could be done that were not done, but nothing fruitful came out of those.

Q. Okay. Were you conducting any interviews of any witnesses for potential obstruction of justice for convincing these –

TC: Again, objection.

Q. --witnesses not to testify – or choosing not to report an allegation of sexual assault?

TC: Again, the government submits its objection.

MJ: Go ahead government.

TC: The government submits again the objection on how Special Agent Norton's investigation – how is that anywhere in the realm of UCI on what he did or did not do?

MJ: The objection is sustained. Defense, you are done questioning. Government, do you have any cross-examination?

TC: No, sir.

[APPENDIX G: Excerpts of Unlawful Command Influence Motion Hearing of September 26, 2014 in the Case of *United States v. West*: SUMMARIZED TRANSCRIPT]

[Fed. Cir. Appx10379; AR 379]

The Article 39(a) session was called to order at 0918, 26 September 2014.

* * *

The defense counsel made a motion to dismiss for unlawful command influence, marked as Appellate Exhibit XV. The defense counsel argued their motion. The trial counsel called Special Agent Norton and Special Agent Moss to testify as evidence on the motion. The trial counsel argued on the motion. The military judge stated that the defense failed to meet its initial burden. The military judge denied the motion.

* * *

The Article 39(a) session recessed at 1154, 26 September 2014.

[APPENDIX H: Excerpts of Unlawful Command Influence Motion Hearing of September 26, 2014 in the Case of *United States v. West*: VERBATIM TRANSCRIPT]

[Fed. Cir. Appx13519; AR 3519]

[The Article 39(a) session recessed at 1046, 26 September 2014.]

[The Article 39(a) session was called to order at 1106, 26 September 2014.]

MJ: The 39(a) session will come to order. All parties present when we recessed are again present. We just held a brief 802 here in the courtroom, in the presence of the accused as well as counsel, on the issue of the next motion up, which is Appellate Exhibit XV, the defense's motion to dismiss for unlawful command influence.

In our earlier 802 of last Friday, I voiced the Court's concern that the defense's motion is -- one word I used, I think was "sprawling." It's sort of a motion of many parts. Part of it to be what I would consider now to be a classic UCI motion, brought in more typically in sexual assault cases, having to do with political pressures coming to bear on the court-martial.

Secondly, the motion raises concerns about how the potential members -- or the identified members would be influenced and, again, that's a pretty typical or traditional UCI motion in these current days. But a different part of the motion appears to just be litigating the merits of the case. In that, the defense appears to be trying to -- and this concern I voiced last Friday -- establish that the

case is so weak that there is no explanation for the command going forward but for UCI. And I -- we talked about that a little bit in the 802 last week and

[Fed. Cir. Appx13520; AR 3520]

again today. And I expressed the Court's resolve that we are not trying this case in the course of the unlawful command influence motion. And that whenever I or any court these days consider UCI motions, we are really focused on three factors: Was the CA acting in response to some type of pressures from superiors and acting with something other than a completely pure heart? Of course, that's my language. That's certainly not case law language. Secondly, is there any evidence at all that access to witnesses has been inhibited or that witnesses are, because of command influence, unwilling to testify for or cooperate with the defense? And, thirdly, are the members free from bias? With regard to the third and very important part of this, I think we know that best when we meet the members on 17 November. After voir dire, we are going to be able to ensure that we have the members panel that is free from bias.

But I asked the defense counsel both last Friday and again before becoming on the record to focus his presentation evidence to meet his initial burden here on -- within the bounds of established UCI case law and that would be typically on those three factors; convening authority, access to witnesses, and potential taint of members pool.

With that, Mr. Brown, you may proceed.

CDC: Yes, ma'am. At this time, defense calls Special Agent Jeffrey Norton.

Special Agent Jeffery Norton was called as a witness by the defense, was sworn, and testified as follows:

DIRECT EXAMINATION

[Fed. Cir. Appx13521; AR 3521]

Questions by the civilian defense counsel:

Q. All right. Special Agent Norton, I'm going to dive right in. I know you've already given your -- a little bit of background the last time you testified. But I wanted to pick up on the subject that we were talking about in the last -- in the earlier motion session of the Court. You testified earlier that in interviewing accusers and, again, I -- well, in cases such as this, in interviewing, that you felt a certain pressure not to or to, you know, put extra credence on the testimony of the accusers; is a correct?

A. Well, that's -- I'm not sure I would put it that way. It would be not to turn a -- receiving a statement from an alleged victim into an interrogation or starting to question the reliability of a victim's statement.

Q. But you would admit that as an investigator that is part of what you are supposed to do when you investigate cases?

A. I can argue that, yes.

Q. Would you say that?

A. Yes, I would say that.

Q. So if we're going to talk about your investigation, is it fair to say -- or are you telling me that you are -- you feel pressure not to actually do your job and investigate this case?

A. No, I wouldn't say that. I'm just saying that -- I mean, things have changed over time to where we're not supposed to question right away exactly -- the reliability of a victim's statement.

Q. Let me back up because I'm trying to -- now, you mentioned before that accusers -- that accuser -- and, again,

[Fed. Cir. Appx13522; AR 3522]

ma'am, I'm just going to have to -- the accuser in a sexual assault case or initially that an accuser will have a victim advocate?

A. Normally.

Q. Normally? Okay. By "normally," is that all the time? Most of the time?

A. Most of the time.

Q. Okay. How about in this case? Can you recall if Staff Sergeant R[****] [sic] had a victim advocate present when you interviewed her for the first time?

A. Yes.

Q. Lance Corporal H[*****], did she have a

victim advocate present when you interviewed her for the first time?

A. I believe so.

Q. And I wanted to ask, do you recall if Staff Sergeant A[****] had a victim advocate present when you interviewed her?

A. I don't believe that I interviewed Staff Sergeant A[****]. I'd have to check my notes.

Q. Okay. Let me ask you this way: In the timeframe of July 2013, when you interviewed -- when you did the interviews for this case, did every accuser that you interviewed have a victim advocate present?

A. I believe so, yes.

Q. And if I were to tell you that you did actually interview Staff Sergeant A[****] on June 27, 2013, would you say that she did have a victim advocate present when you interviewed her?

[Fed. Cir. Appx13523; AR 3523]

A. Yes.

Q. In the course of conducting your interviews, did they show up to the NCIS office with victim advocates?

A. Yes.

Q. Did you coordinate with victim

advocates –

TC: Objection; relevance, Your Honor.

MJ: I'm going to sustain that. You just need to move on to something relevant to UCI.

Questions by the civilian defense counsel continued:

Q. You testified earlier, Special Agent Norton, that -- I don't want to put words in your mouth, but you could see why the defense wanted to have certain text messages authenticated.

TC: Objection; relevance.

MJ: Overruled. You may answer that.

Questions by the civilian defense counsel continued:

Q. I would -- it was more or less because of -- the communication seemed casual after the incidents occurred. I don't -- I mean, I'm not a specialist in psychology or I didn't see anything going either way in the messages. I could just understand why this would be considered exculpatory, rather than us going after it as -- per se, which is why I was kind of surprised that you're trying to suppress the texts when I thought as -- though we were encouraged to get them.

Q. Well, I want to direct your attention to -- do you recall reviewing text messages from Mr. James Rieth to and from Gunnery Sergeant West?

A. Yes.

[Fed. Cir. Appx13524; AR 3524]

TC: Objection; relevance.

MJ: What's the relevance?

CDC: Ma'am, you're looking at the direct texts. Mr. Rieth testifies or gives a statement to NCIS that he -- that Warrant Officer R[****] told him that she had been assaulted at the Marine Corps Ball. We -- on reviewing the text messages six months later, we have texts from Mr. Rieth to Gunnery Sergeant West inviting him to go to the hospital, announcing the birth of their baby. And I just wanted to ask Special Agent Norton if he saw that and what was his reaction to it. Did he -- what was his follow-up and if he did not do any follow-up, did anybody tell him not to do any follow-up on that.

MJ: Ask him about -- ask him that last question.

CDC: I will, yes, ma'am.

Questions by the civilian defense counsel continued:

Q. Did you -- did anybody tell you not to follow-up on -- do you understand where I was going with that, Special Agent Norton? The question of whether or not -- did you see the text messages from --

A. I saw the text messages and I recall in the e-mail you had asked me to re-interview James Rieth pertaining to why he would have a relationship -- I'm paraphrasing it -- with a victim assailant, after he had already known about it. And I had -- after that, it was in a combination of questions and conversations I had with Captain Mason, I had -- showed him the e-mail or he was carbon copied on it. And we discussed it and Captain -- and I said, "Do I need to reinterview James Reith?"

[Fed. Cir. Appx13525; AR 3525]

And Captain Mason, "You don't have to do that."

Q. Okay. I want to move over to this investigation of 22 January 2014, a result of the interview of Gunnery Sergeant Cesar Villegas; are you familiar with that?

A. Yes.

Q. Why were you interviewing Gunnery Sergeant Villegas?

A. It had been brought up as a -- I'd have to go back to my notes, but it had been pointed out during one of my case reviews that that would be a person that I should talk to pertaining to his knowledge of what may have happened. I believe it was between Gunnery Sergeant West and Lance Corporal H[*****]. I'd have to read my investigative –

Q. I tell you what --

TC: The government is going to object to relevance, Your Honor.

MJ: What is the –

CDC: This is a result of interview for Gunnery Sergeant Cesar Villegas, ma'am. I just wanted to have the witness review it. Gunnery Sergeant Villegas is an individual who's interviewed for -- specifically for what appears to be obstructing justice in that, they were investigating him for allegedly telling Lance Corporal H[*****] not to say anything about the investigation.

MJ: Where would -- I'm sorry. Where are you going with this? What's the point that you hope to establish?

CDC: The point that I hope to help establish, ma'am, is it and, again, there's a timeframe here that we are looking at. The defense interviewed several witnesses in this January 22

[Fed. Cir. Appx13526; AR 3526]

timeframe. The witnesses all had to do with -- in this timeframe were with the Lance Corporal H[*****] allegations and those witnesses wrote statements and we have two witnesses that were specifically mentioned by Lance Corporal H[*****], a Corporal Coby and a Corporal Geddes, both of whom submitted statements that were dated around 22, 23, 24 January based on interviews that we conducted a couple days prior. We also had a statement of a Staff Sergeant Garza which was done --

MJ: So is your point -- I'm going to ask this and -- please step out of the room?

[The witness did as directed.]

MJ: Special Agent Norton has left the room. I'm just trying to understand where you are going with this. Is it your point that they did not -- they were subject to unlawful command pressure not to pursue certain leads?

CDC: That is our --

MJ: Okay. Then you have to ask that question, Mr. Brown. We are not going to go through all the different problems with this case and why they haven't followed up on all the leads that you might have gotten. That's all great material for you to work with when Special Agent Norton is on the stand at court-martial on probably about the 18th on November. I expect that the members going to hear all about it, and I will too. That's not what we are here for. What we are here for is an unlawful command influence. Did somebody in any way direct him or pressure him not to pursue a normal investigation into this matter? That's all that the court cares about on the UCI motion.

[Fed. Cir. Appx13527; AR 3527]

Not about the strengths or weaknesses of the government's case and whether they may have pursued every lead offered by every text message. Just whether there's some kind of an unlawful command influence on the investigation and I'm going to ask you to – and maybe that their

investigation is inadequate. It may be that it's not the investigation you would have conducted, but that's not within the purview of the UCI motion. Okay. So it's all perfectly grist for the mill of this court-martial in the middle of November, it's just not within the scope of a UCI motion. So what you need to establish with Special Agent Norton or Moss is whether they were subject to any pressures from the command or up the chain of command from the special or general court-martial convening authority to in some way misrepresent evidence and not pursue leads. That would be UCI.

CDC: Yes, ma'am.

MJ: Can we call the witness back in?

[The civilian defense counsel did as directed.]

MJ: I apologize, Special Agent Norton. You may proceed.

Questions by the civilian defense counsel continued:

Q. Special Agent Norton, were you directed to pursue an obstructing justice investigation against Gunnery Sergeant Villegas?

A. No.

Q. Why did you question him on 22 January and –

TC: Objection; relevance.

MJ: Overruled. You can answer that.

Questions by the civilian defense counsel continued:

[Fed. Cir. Appx13528; AR 3528]

A. He was identified as a witness -- a possible witness pertaining to my sexual assault investigation.

Q. Okay. And what did you find out about -- was he a witness to the incident that occurred between -- allegedly occurred between Gunnery Sergeant West and Lance Corporal H[*****]?

A. Not a direct witness, no.

Q. Okay. How was he a witness?

A. He was potentially a witness in terms of what had been said during the counseling between him and H[*****], and I think Master Gunnery Sergeant Thomas was involved in that as well. So just the question about what was being said -- was being alleged during this conversation.

Q. Okay. I want to back up because it sounds to me like you said, "what was being alleged." The conversation between Gunnery Sergeant Villegas and Lance Corporal H[*****], what was --

A. It was that Lance Corporal H[*****] had stated that Villegas -- I don't want to pronounce it wrong -- Villegas and West has pressured her into not divulging the incident outside of the office.

Q. And would you characterize that as obstructing justice?

A. I could see that.

Q. And you were directed by MARFORRES SJA to conduct that investigation?

A. No. What -- which investigation?

Q. The investigation into Gunnery Sergeant Villegas?

A. No. They don't dictate what we investigate.

Q. So you did it on your own?

[Fed. Cir. Appx13529; AR 3529]

A. No. We initiate investigations based on our own discretion. But I didn't -- at no point in time was I investigating obstruction of justice.

Q. But you were investigating Gunny Villegas for telling Lance Corporal H[*****] not to say anything, for Gunnery Sergeant West telling Lance Corporal H[*****] not to say anything about the alleged incident is that --

A. Well, that was to support whether or not the alleged incident happened.

Q. But my question --

A. I could never see anybody being -- it was not my intent to investigate Gunnery Sergeant Villegas for obstruction of justice. If it was, I would have read him his rights for obstruction of justice.

Q. All right. Let me back up and ask it another way.

MJ: I don't know, Mr. Brown. I don't -- whether or not there was an investigation on Gunnery Sergeant Villegas and whether that resulted in charges or not is not within the scope of this UCI motion.

Questions by the civilian defense counsel continued:

Q. Was anybody else investigated or questioned as to -- anybody -- individuals allegedly telling Lance Corporal H[*****] not to report?

TC: Objection; relevance.

MJ: I'm sustaining that objection.

Questions by the civilian defense counsel continued:

[Fed. Cir. Appx13530; AR 3530]

Q. Special Agent Norton, did you feel any pressure in -- to the investigation in any certain direction?

A. No.

CDC: No further questions.

TC: The government doesn't have any questions, Your Honor.

MJ: Is Special -- may we excuse Special Agent Norton for the day then?

WIT: Thank you, Your Honor.

MJ: Any objection? Thank you very much, Special Agent Norton. You are excused.
[The witness departed the courtroom.]

MJ: Next witness?

CDC: The defense calls Special Agent Moss.

Special Agent Trevor Moss was called as a witness by the defense, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the civilian defense counsel:

Q. Special Agent Moss, you testified earlier that your investigation started with a report made by, then, Staff Sergeant Rachel A[****] on 26 February?
A. Yes.

Q. She made a written statement to you?

A. We typed it but, yes.

Q. And in that statement, you learned that this alleged meeting between her and Master Gunnery Sergeant Thomas occurred on 20 February –

TC: Objection; relevance.

[Fed. Cir. Appx13531; AR 3531]

MJ: What is the relevance of this line of questioning, Mr. Brown?

CDC: Again, Your Honor, we have a period of six days between the time that Master Sergeant -- or that Ms. A[****] was allegedly —happened -- and the time she reports to NCIS. And I wanted to explore -- there were two meetings between Ms. A[****] and the MARFORRES sexual assault response personnel that occurred. I wanted to explore this with Special Agent –

MJ: How is that relevant to this motion? It might be relevant to the suppression motion, but how is it relevant to this motion?

CDC: It's relevant because, again, it at least -- it starts -- if the MARFORRES SAPR [sic] personnel are involved in tampering with witnesses, for lack of better term, it at least gets us to a point where we're now asking the question: Are -- does the convening authority have anything to do with it?

MJ: How does that -- Special Agent Moss, do you know anything about that?

WIT: No, ma'am. I'm not familiar with the

detailed interactions of R[*****] A[****] with SARCs or SAPRs [sic].

MJ: You may ask a limited number of questions to let see -- I need to see where you're going with this, but I'm confused right now.

CDC: I understand, ma'am. Ma'am, if I could just --

Questions by the civilian defense counsel continued:

Q. I have in the statement -- you -- the statement refers to Ms. A[****] meeting with individuals from the SAPR office on 21

[Fed. Cir. Appx13532; AR 3532]

February; are you aware of that?

A. No. That general timeframe is probably true if she stated that, yes.

Q. All right. And then she mentioned that she met with them again on 24 February 2014.

TC: Objection; relevance.

MJ: What is the relevance of this?

CDC: I'm asking the Special Agent, ma'am, if she has any reason to be meeting with the SAPR personnel, not once but twice, before she meets with NCIS.

MJ: How would this agent know? How would he know that?

I'm going to sustain the objection.

Questions by the civilian defense counsel continued:

Q. How did the meeting between you and Staff Sergeant A[****] go? Did she just call you, or did you arrange it?

A. I didn't arrange anything. I was in my office and it was like how we normally receive some cases, where someone initiates by walking in and reporting something.

Q. You had occasion to -- in the course of your investigation, you took a -- you had a copy of Ms. A[****]'s cell phone; is that correct?

A. We attempted to. It's -- we did not have a good workable copy.

Q. Okay. So you also mentioned for -- that she -- did you have consent to search authorization for Ms. A[****]?

TC: Objection; relevance.

CDC: I'm laying a foundation.

[Fed. Cir. Appx13533; AR 3533]

MJ: Overruled.

Questions by the civilian defense counsel continued:

A. She provided a permissive authorization for her phone.

Q. And so you felt it important enough to -- that something on that phone was going to be helpful to the course of your investigation, correct?

A. What I was looking for, with respect to her phone, was. She made an allegation that there was some deleted or missing text messages. So what I did was I said, "Well, let's look through your phone right now."

So the permissive authorization search and seizure was initially with the phone that she had right there. We looked through her phone. We could not find the messages that she identified. So then, I took it to a facility over in Gulfport, Mississippi, where we would be able to see if we could recover some of the deleted messages because she said she may have deleted it. And there was a potential that we could have recovered the deleted message and all of that was to see -- just to corroborate what she alleged that the text messages she was presented had some -- were missing several messages that she knew occurred between her and Gunnery Sergeant West.

Q. And the result of your search was -- that search of that cell phone was what?

A. When we went through her phone in my office, we did not find those missing messages. When we explored it over in Gulfport, unfortunately, it was

in an unreadable format.

Q. What?

A. When I reviewed Gunnery Sergeant West's phone, I looked

[Fed. Cir. Appx13534; AR 3534]

through his thumb mail folder. I did see some messages that did not appear to be in the stack of text messages that were presented to staff -- to R[*****] A[****].

Q. Did you make any other attempts to download Ms. A[****]'s cell phone?

A. Negative, because she was transitioning from the Marine Corps.

Q. Who did the download of the -- Ms. A[****]'s cell phone?

TC: Objection; relevance.

MJ: What's the relevance of this for the unlawful command influence motion?

CDC: Again, Your Honor, at this point, I want to make sure that -- we have an allegation that a cell phone was downloaded that could potentially help the defense.

MJ: This has nothing to do with unlawful command influence, Mr. Brown. What does that have to do -- you're saying that he's hiding it from

you?

CDC: Potentially, ma'am, that's -- again --

MJ: And, again, I want to say even if you are making that curious allegation, how is that unlawful command influence, within the meaning of --

CDC: If it's any -- again, if -- I'm limited to what I can do, ma'am. Obviously, I've got to lay the foundation.

MJ: For what?

CDC: A lot of times, when we talk about command influence and in a matter of the defense asking the question, you know -- if we ask the question directly: Did you or did you not do this?

[Fed. Cir. Appx13535; AR 3535]

We are going to get the, No, answer.

MJ: Well, let's see.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Special Agent Moss, did anybody from the accused's command or from the general court-martial convening authority -- did anybody ever direct you to -- in a particular direction on this investigation? Did they ever tell you to not pursue logical leads?

A. No, ma'am.

Q. Did they ever -- did any -- do you have a forensic extraction of Staff Sergeant A[****]'s phone?

A. Yes, ma'am, we do, but it was unreadable.

Q. Okay. Have you provided that to the trial counsel, or is that of no value?

A. It's just -- it would not -- the issue that we had was that the device that we downloaded to, it would have basically reformatted if we tried to extract the data, which meant it would have wiped everything off of there. So at the time, we didn't realize we had a bad download. There was a bad download, but we did go through her phone right there. The main purpose of looking at her phone was just to see if we could identify those messages. So we went through all of her current messages. We went through her sent messages. We went through her deleted messages because -- I just wanted to see if what she's saying, you know, if I could corroborate any of what she was saying.

Q. Did anybody ever, from the command, interfere with your

[Fed. Cir. Appx13536; AR 3536]

investigation in any way?

A. No, ma'am.

Q. Did you feel that you were, in any way,

being pressured to come to certain conclusions?

A. Not at all, ma'am.

Q. Or to follow certain leads?

A. No, ma'am.

MJ: Anything else, Mr. Brown?

CDC: Just -- I have a few statistical questions maybe.

DIRECT EXAMINATION

Questions by the civilian defense counsel:

Q. How many cell phone downloads are you aware of your office having conducted?

TC: Objection; relevance.

MJ: Overruled.

Questions by the civilian defense counsel continued:

A. I have no idea. It's -- I've only been in that office for maybe a year and a couple of months. That office has been there clearly much longer than that and even just the reviewing the cell phones is a pretty common process. And you figure, if we do at least a hundred cases a year, probably go through that many phones. But I have no idea.

Q. Okay. Well, and again, I've got to lay

some sort of foundation. I'm going to stick with that. So would you say a fair number is, you know, since the time you've been there about a hundred cell phones?

A. I don't know, but we have three agents. I don't know

[Fed. Cir. Appx13537; AR 3537]

what all they do, what media exploitation in their cases is.

Q. Of all of those cell phones downloaded, how many are unreadable?

A. That -- there are a handful of them. I mean, that just happens from time to time.

Q. Could you put a percentage on that?

A. A relatively small percentage. I can't give you an exact number, but I would suspect a relatively small percentage. But a lot of it doesn't usually go to that level of exploitation. A lot of it is usually just looking at the phone, you know, as it sits right there in our hands. So that's usually the reason why you don't have that level of -- that much of a failure rate. The reason why I wanted to exploit hers earlier further is because I really wanted to make an effort to see what was there and if it was deleted.

Q. Would you say that -- less than 20 percent of failures?

A. It's small. I can't quantify that.

CDC: That's fine. I'll stop there. Nothing further, ma'am.

MJ: Any questions, government?

TC: The government doesn't, ma'am.

MJ: Special Agent Moss, I want to thank you for your attendance at this motions hearings, and you are excused.

WIT: Thank you, ma'am.

[The witness withdrew from the courtroom.]

TC: Ma'am, the government recommends that we probably recess until after the –

[Fed. Cir. Appx13538; AR 3538]

MJ: Well, the last witness to be called is Gunny -- I'm sorry -- Master Gunnery Sergeant Thomas; is that correct?

CDC: Yes, ma'am.

MJ: And what's the proffer of his testimony?

CDC: The proffer of his testimony is --

TC: And he will be called telephonically, ma'am.

CDC: And, again, it's the issue of Master Gunnery Sergeant Thomas made an IG complaint

regarding an incident where he reported that somebody from SAPR office was initiating an NCIS investigation against him. He made that complaint and apparently that is the subject of the motion to compel that I want to get what the results of that complaint were and --

MJ: How is that related to unlawful command influence in this case?

CDC: Again, ma'am --

MJ: Is it just a disparate treatment? Is that what you –

CDC: I just --

MJ: I don't know any case law that talks about disparate treatment being evidence of unlawful command influence. There's other motions-- there's selective prosecution motions but disparate treatment does not inform the Court's determination on --

CDC: And --

MJ: -- unlawful command influence.

CDC: And again, ma'am, this is part of my argument —and maybe trying to characterize this as the right issue with the things that we're trying to bring up. The question I have,

[Fed. Cir. Appx13539; AR 3539]

again, is -- my appreciation of a UCI motion is – it is

hard to get your hands around it -- it's such a broad standard when you talk about anybody's attempt to influence the outcome of the court-martial. So --

MJ: I don't think there is -- you have presented the Court with no evidence that anybody is trying to influence the outcome of this court-martial. And I don't understand what the proffer on Master Gunnery Sergeant Thomas is going to add to this body of evidence on the motion. He's going to say that he complained against somebody and that person wasn't investigated, is that what you're telling me he is going to say on the telephone?

CDC: Well, that's one of the things, ma'am. He's also going to talk about a meeting that he had with regards -- and again, the commander of Headquarters Battalion, an individual was taken -- actually, it was Master Sergeant Janneau was removed from the section.

Our argument is that that was not based on any allegation, and the sexual assault was simply -- it was part of one of the individual accusers, one that came out the section for personal reasons, meeting with Master Gunnery Sergeant Thomas and the commander was to the effect that Master Gunnery Sergeant Thomas said that he did not feel that Master Sergeant Janneau should be removed from the section. Master Gunnery --

MJ: Okay. I have seen no relevance he has with regard to an unlawful command influence motion in the case of *United Stated v Gunnery Sergeant Luke T. West*. I am not convinced that there is any relevance at all. So what the Court is willing to do is, you can get an affidavit or a statement from

Sergeant Thomas, if you want it to be attached to this. But I, based on that proffer, I don't see --

CDC: Actually, I think it -- you know, I agree, ma'am. To keep from wasting any more time at this point, I -- you know, I would prefer that we be offered an opportunity to -- that the court would take this under advisement and we go out and obviously fix deficiencies -- for a lack of a better term --

MJ: Okay.

CDC: -- in other words -- and then we can go from there.

MJ: Well, I'm going to go ahead and put us in recess now because we are going to go into training at noon. So we are in recess.

[The Article 39(a) session recessed at 1145, 26 September 2014.] [The Article 39(a) session was called to order at 1323, 26 September 2014.]

MJ: The Article 39(a) session will come to order. All parties present when we recessed are again present.

We held an 802 during the mid-day recess, at which we discussed the need to schedule another 39(a) and we resolved that by -- we scheduled one for the 24th of October at 1100, to take up any motions to compel production of witnesses and argument on

the suppression motion. And we also discussed the way ahead for this afternoon, that we still have to hear argument on the UCI motion and then argument on the UMC motion unless the parties wanted to submit on their written briefs.

So then we -- just before we came on the record, in the courtroom, in the presence of his client, Mr. Brown brought up a

[Fed. Cir. Appx13541; AR 3541]

potential 514 issue that we will take up on the record.

So, first, let's go in order. Let's go ahead and finish up the UCI motion that we were litigating prior to the lunch recess. If the defense has no further evidence on the motion -- does the defense want to be heard on the UCI motion?

CDC: Ma'am, at this time, the defense is going to defer its argument -- I know that the Court was -- indicated that the Court was going to defer ruling until after we've had a chance to voir dire the members. So the defense is satisfied with that.
I'm not going to add any argument at this time.

MJ: Well, let me clarify -- well, okay.

CDC: Yes, ma'am.

MJ: Let me just say, at this point, I find that the defense has failed to meet the threshold for raising this issue, which is -- although it's low, more than mere allegation or speculation under *Biagase,*

50 MJ 143, in that, I don't see any facts that if proved constitute unlawful command influence. And I considered that both under the standards of actual UCI and apparent UCI. I find that, at this time, based on both the documentary evidence that the Court has received and the testimony that the Court has heard, that the defense has failed to meet its initial burden.

With regard to the impact on the members, what I mentioned to the defense counsel and the trial counsel, during the 802, is defense counsel is certainly entitled, after meeting these members and hearing their responses to individual voir dire is, again, entitled to raise the issue of UCI with regard to a taint on the members and ask me to reconsider that finding. It seems

[Fed. Cir. Appx13542; AR 3542]

premature right now to rule with regard to members since we have not had an opportunity to voir dire or listen to their responses on voir dire. So for the time being, the Court finds that defense has failed to meet their initial *Biagase* burden, and the defense motion to dismiss for unlawful command influence is denied.

[APPENDIX I: Excerpts of Trial Testimony of November 18, 2014 in the case of *United States v. West*]

[Fed. Cir. Appx13937; AR 3937]

Gunnery Sergeant Cesar Villegas, U.S. Marine Corps, was called as a witness by the government, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the assistant trial counsel:

Q. Good afternoon, Gunnery Sergeant.

A. Good afternoon, sir.

Q. You made the trip from Okinawa, correct?

A. That is correct, sir.

Q. Okay. Can you please state your full name and spell your last.

A. Fully name is Cesar Villegas; last name is V-I-L-L-E-G-A-S.

Q. And Caesar is C-E-S-A-R?

A. That is correct, sir.

Q. And you're a gunnery sergeant on active duty in the United States Marine Corps?

A. Yes I am, sir.

* * *

[Fed. Cir. Appx13943; AR 3943]

Q. I'm going to turn your attention to a basketball game -- a professional basketball game in March of 2013. Do you recall attending one with your section -- with members of your section?

[Fed. Cir. Appx13944; AR 3944]

A. Yes, sir.

Q. Specifically do you remember the basketball game -- that game in which you attended with Staff Sergeant A[****]?

A. Yes, sir.

Q. And Master Sergeant Janneau?

A. Yes, sir.

Q. And other members of your section, correct?

A. That is correct, sir.

Q. Where was Staff Sergeant A[****] sitting in that aisle, in relation to you?

A. Staff Sergeant A[****] was sitting directly to my right, sir.

Q. How close were you to the court?

A. We were in the nosebleed section, sir, so not very close.

Q. Okay. So she is immediately to your right, correct?

A. Yes, sir.

Q. Who is to your left?

A. To my left is Gunnery Sergeant West.

Q. And who was on the other side of Staff Sergeant A[****]?

A. It was Master Sergeant Janneau.

Q. At some point, you heard the accused make a statement regarding a work wife, correct?

A. Yes, sir.

Q. And what was that statement?

A. The statement was that Staff Sergeant A[****] was Gunny

[Fed. Cir. Appx13945; AR 3945]

West's work wife. And along those lines, he also threw out that it was his birthday, and he was displeased with the fact that she didn't acknowledge or at least tell him happy birthday. And then, he

went on another tangent and stated that, you know, he usually gets BJs on his birthday and he didn't get one that day.

Q. Okay. Did you notice a change in Staff Sergeant A[****]'s disposition after he made the comment?

A. Yes. You could definitely tell she was offended.

Q. Do you think that that was an appropriate comment?

A. I don't think it was appropriate, sir.

Q. Did Master Sergeant Janneau find out about this comment?

A. Yes, he did, sir.

Q. And were you aware of whether or not he counseled the accused on this?

A I believe he did, sir.

ATC: Gunnery Sergeant Villegas, thank you for your testimony. At this time, I do not have any additional questions.

MJ: Cross-examination of this witness?

ATC: I'm sorry, ma'am. I apologize. I have a final question.

Questions by the assistant trial counsel

continued:

Q. Over the course of your daily interaction with, then, Staff Sergeant R[****] and Staff Sergeant A[****] and Sergeant P[******], were you able to form an opinion as to their character for truthfulness?

[Fed. Cir. Appx13946; AR 3946]

A. Yes, sir, I can form an opinion on that. I never had any issues with integrity with them, so I wouldn't question their integrity when it comes to that, sir.

ATC: Ma'am, that was the last question. Thank you, Gunnery Sergeant.

APPENDIX J: Relevant Correspondence Regarding Actions of OJAG USN]

[Fed. Cir. Appx13110; AR 3110]

UNITED STATES MARINE CORPS
Office of the Staff Judge Advocate
Marine Forces Reserve
2000 Opelousas Avenue
New Orleans, LA 70114-1500

1900
SJA/ant
23 Jan 15

MEMORANDUM

From: Commander, Marine Forces Reserve
To: Defense Counsel

Subj: REQUEST FOR VERBATIM TRANSCRIPT, ALTERNATIVE REQUEST FOR AUDIO OF COUR PROCEEDING ICO U.S. v. LANCE CORPORAL LUKE T. WEST, USMC

Ref: (a) Letter of Mr. Claiborne W. Brown, dated 21 January 2015
(b) R.C.M. 1103, MCM (2012 ed.)
(c) R.C.M. 1103, MCM (2012 ed.)
(d) JAGINST 5800.7F
(e) SECNAVINST 5211.5 (series)

1. Your request set forth in reference (a) for a verbatim transcript in the subject General Court-Martial is denied. In accordance with reference (b), a verbatim transcript is not required, and, therefore, a summarized report of the proceedings will be prepared. Pursuant to reference (c), a copy of the

authenticated, summarized record of trial will be served on the accused.

2. Similarly, your alternative request for the audio recording of the court proceedings is denied in accordance with references (d) and (e), detailing the responsibility of the government to properly safeguard personally protected and identifiable information.

3. The point of contact for this matter is Lieutenant Colonel Amy N. Thomas, U.S. Marine Corps, Deputy Staff Judge Advocate, Marine Forces Reserve, who may be contacted at (xxx) xxx-xxxx or at xxxxxxxxxxx.mil.

/s/
E. R. KLEIS
By Direction

[Fed. Cir. Appx13216; AR 3216]

DEPARTMENT OF THE NAVY
Office of the Judge Advocate General
1254 Charles Morris Street SE, Suite B01
Washington, DC 20374-5124

5814
Ser 02/101
1 Dec 16

Mr. Claiborne W. Brown
222 North Vermont Street, Suite I
Covington, Louisiana 70433

Dear Mr. Brown

SUBJECT: RE APPELLATE REVIEW UNDER UCMJ ARTICLE 69(a) ICO US v. WEST, xxx-xx-8855

Thank you for your letter dated November 18, 2016. Your supplemental submission was received on August 9, 2016.

While the Office of the Judge Advocate General of the Navy works hard to ensure that each post-trial petition is reviewed as expeditiously as possible, each case must be afforded the requisite due diligence. The above referenced case is complex, involving a number of legal issues among the eleven assignments of error you have submitted. Best efforts to work with the existing summarized record of trial have led to the conclusion that a verbatim transcript is necessary for a thorough evaluation of the legal sufficiency of this case.

I have requested that the convening authority provide a verbatim transcript of Mr. West's court

martial and his Article 69 review will resume immediately upon receipt.

Sincerely,

/s/
D.J. LECCE
Colonel, U.S. Marine Corps
Assistant Judge Advocate General
of the Navy (Military Justice

Copy to: VADM J.W. Crawford III, JAGC, USN

[Fed. Cir. Appx13448; AR 3448]

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Telephone: (985) 845-2824
Facsimile: (985) 246-3199
cwbrown@cwbrownlaw.com

31 March 2017

Judge Advocate General, United States Navy
c/o AUSA Sunni J. Lebeouf
Office of the United States Attorney
Eastern District of Louisiana
650 Poydras St., Ste. 1600
New Orleans, LA 70130

Re: Appellate Review under UCMJ Article 69 ICO U.S. v. Luke T. West xxx-xx-8855

Dear Sir:

It has been brought to the attention of the undersigned through responsive pleadings in the matter of *West v. Crawford*, USDC EDLa, Docket No. 2:17-cv-1294, Section I(1), that your Office is providing Mr. West with 10 days within which to review a copy of the verbatim transcript and audio of his general court martial proceedings, obtained by him on 29 March 2017, and to submit any objections as to authenticity of same within that timeframe, after which the verbatim transcript will be inserted into the record of trial for the proceedings for continued U.C.M.J. Article 69 review (pending a

ruling from the Court in the aforementioned Federal matter). Your Office's intended commencement of this 10 day period is unclear, but could potentially be as early as 23 March 2017 (as the time the verbatim transcript and audio were purportedly made available for pick-up at Marine Forces Reserves in New Orleans). This action is purportedly being taken pursuant to Rules for Courts Martial (RCM) Rule 1104(d).

With utmost respect, Mr. West objects to this purported requirement imposed by your Office. Undersigned specifically asserts that your Office has not properly made a finding under R.C.M. 1104(d) that the authenticated record of trial is "incomplete" or "inaccurate". Additionally, undersigned counsel has not received any notice, in a manner consistent with the Due Process Clause of the U.S. Constitution, of the proposed corrections thereto, nor can 10 days be considered adequate to "permit [Mr. West, through undersigned] to examine and respond" to proposed corrections to a record that your Office has yet to acknowledge is "incomplete", "inaccurate" or otherwise "defective." As such, Mr. West hereby reserves all rights to conduct a thorough review of said transcript and to potentially contest the authenticity thereof in this or any other appropriate proceeding.

This is also to advise that undersigned takes particular exception to the contents of Paragraph 5 of the proposed "Memorandum of Agreement" tendered to undersigned by your

[Fed. Cir. Appx13449; AR 3449]

Office on 23 March 2017, and attached hereto for your reference. Paragraph 5 of this document

contains, at best, a vague and highly inappropriate suggestion of potential disciplinary action against undersigned, a U.C.M.J. Article 27(b) certified attorney admittedly subject to the jurisdiction of your Office, for duly representing Mr. West in this and other related proceedings. At worst, Paragraph 5 of the draft MOA contains a calculated threat designed to have a malicious chilling effect on that representation. Undersigned does appreciate the tendency to attempt to equate, in terms of tone, Paragraph 5 of the draft MOA with undersigned's correspondence of 18 November 2016 and 24 January 2017. That notwithstanding, in addition to incomparability as to content, there is inarguably a considerable disparity between undersigned's position as a potential complaintant *vis-à-vis*, the November and January correspondences; and yours as potential complaintant, judge, jury, and executioner, *vis-à-vis*, Paragraph 5 of the draft MOA. In any event, undersigned stands by all previous submissions to your Office notwithstanding the insinuations contained in Paragraph 5 of the draft MOA. Further, absent being provided with any specific reasonable grounds to the contrary by your Office, undersigned advises that he intends to use the verbatim transcript and audio thereof, obtained un-redacted from your duly designated representative, in any manner which undersigned deems is in the best interest of furthering the representation of Mr. West in this or any other proceedings.

Without waiving the aforementioned objections, to the extent that a response would be considered to be warranted to the conditions set by your Office, undersigned re-avers and re-asserts all assignments of error as originally asserted in the 18

July 2016 and 9 August 2016 submissions. Specifically, undersigned at this time re-asserts the specific assignments of error not properly reflected in the summarized transcript and hereby objects to any portion of the verbatim transcript to the extent that said transcript may (if at all) materially conflict with the assertions made by undersigned counsel as to the particulars of those assignments of error.

In addition to the assertions regarding the transcript of the proceedings, undersigned counsel also specifically re-avers and re-asserts, as objections to the accuracy of the record of trial, the omissions of particular critical documents as previously noted in the 18 July 2016 and 9 August 2016 submissions. Particularly, undersigned hereby re-avers the absence of the following from the previously authenticated record of trial:

a) Defense Page 58 Matters filed on 7 Nov 2014;

b) Defense Motion to Dismiss UCI filed 6 Feb 2014 (West 1);

c) Defense Motion to Dismiss UCI filed 27 Mar 2014 (West 1);

d) Defense Motion to Dismiss UCI filed 12 Sep 2014;

e) Defense Motion to Dismiss: Contempt/Suppress filed 12 Sept 2014;

f) Defense Supplemental Memo Motion to Suppress filed 1 Oct 2014;

g) Govt Response to Motion to Dismiss UMC filed 19 Sep 2014;

h) Govt Response to Motion to Dismiss UCI filed 19 Sep 2014;

i) Defense Reply on Motion to Dismiss UCI filed 24 Sep 2014;

j) Complete copy of SSgt Rieth's 4 Nov 2013 Article 32 Testimony.

Said items were previously included in the aforementioned submissions, though undersigned would be willing to re-submit them to your Office upon specific request for same.

Respectfully,

/s/
CLAIBORNE W. BROWN

CWB/cb
cc: Mr. Luke T. West (via electronic mail);

[Fed. Cir. Appx13451; AR 3451]

DEPARTMENT OF THE NAVY
Office of the Judge Advocate General
1254 Charles Morris Street SE, Suite B01
Washington, DC 20374-5124

5814
Ser 02/1244
April 6, 2017

Mr. Claiborne W. Brown
222 North Vermont Street, Suite I
Covington, Louisiana 70433

SUBJECT: RE APPELLATE REVIEW UNDER UCMJ ARTICLE 69(a) ICO US v. WEST, xxx-xx-8855

Dear Mr. Brown:

I am responding to your letter dated March 31, 2017 on behalf of the Judge Advocate General of the Navy in relation to the Navy's review of your client's, Mr. Luke T. West, court-martial conviction pursuant to Uniform Code of Military Justice (UCMJ) Article 69(a).

My office has provided you with ten business days to review the verbatim transcript before it is authenticated by the Military Judge and inserted into the record of trial. You received the verbatim transcript on March 29, 2017; therefore, you have until April 13, 2017 to review the transcript. If you need more time to review the verbatim transcript, you may request more time in writing via the Assistant United States Attorney's office, My office is authorized to approve a reasonable extension of time.

In prior correspondence, you stated that your client sought immediate resolution concerning the Article 69(a) review. I reiterated that my office will not take action on Mr. West's Article 69(a) review until the district court has ruled on your application for mandamus.

Second, you requested that my office make a determination that the record of trial containing a summarized transcript of Mr. West's proceedings be found "incomplete" or "inaccurate" pursuant to Rule for Courts-Martial (RCM 1104(d). The summarized transcript of Mr. West's trial, in and of itself, complies with the requirements of RCM 1103. Commensurate with my discretion in these matters, I deemed that, in this case, the summarized record of trial was incomplete only in the sense that it did not provide the level of detail necessary to address your client's eleven assignments of error. In the interest of providing your client a complete review of each assignment of error, I ordered the convening authority to produce the verbatim transcript you requested in your Article 69(a) petition for insertion into the record of trial. I did this despite the fact that a verbatim transcript is not required by UCMJ Article 69(a), and the Judge Advocate

[Fed. Cir. Appx13452; AR 3452]

General, in his discretion, could have issued an Article 69(a) decision based upon the summarized transcript alone.

Finally, paragraph 5 of the proposed memorandum of agreement was meant to serve as notice that, as a covered attorney under the Judge

Advocate General Instruction (JAGINST) 5803.1E[1], and specifically enclosure (1) of that instruction, you are to "obey the law and military regulations". The verbatim transcript and audio recording provided to you by Marine Forces Reserve contain information protected by the Privacy Act (5 U.S.C. § 552a). Those records contain the names of alleged victims in conjunction with their testimony, as well as other identifying information about investigators and others associated with this case that are required to be protected from public disclosure under the Privacy Act and case law interpreting the Privacy Act. We provided the un-redacted and unauthenticated verbatim transcript to you in conjunction with our customary appellate review process. The audio recordings have been made available to you since your original FOIA request in January 2015 in accordance with RCM 1103(i)(1)(B)[2]. Because you stated that you were unable to come to the Staff Judge Advocate's office of Marine Forces Reserve to review these audio files, my office made these files available to you. In so doing, we entrusted information to you that is protected by the Privacy Act. However, in accordance with JAGINST 5803.1E, as a covered attorney, you are to abide by the Privacy Act

Further, Rule 3.6 of JAGINST 5803.1E states that a "covered attorney shall not make an extrajudicial statement about any person or case

---

[1] *Partington v. Houck*, establishes the JAG's authority over civilian attorneys practicing before the JAG Corps.

[2] The discussion to RCM 1103(i)(1)(B) states "[t]he defense counsel should be granted reasonable access to reporters notes and tapes to facilitate the examination of the record." Please note the rule does not say that defense counsel must be provided with a copy.

pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney knows or reasonably should know that it will have a substantial likelihood of prejudicing an adjudicative proceeding or official review process thereof." The rule goes on to state that the "protection and release of information in matters pertaining to the Department of the Navy is governed by such statutes as the Freedom of Information Act and the Privacy Act . . ." Again, the draft memorandum of agreement was meant to serve as notice to you to abide by the Privacy Act. When you refused to sign this agreement, my office released the information to you anyway, with the Assistant United States Attorney providing notice that you must abide by the Privacy Act to safeguard protected information from public release and, as a result, avoid any potential to improperly impact this review process.

[Fed. Cir. Appx13453; AR 3453]

A Privacy Act warning is given to all appellate defense counsel practicing under JAGINST 5803.1E warning them against misusing the materials contained within the record of trial they are reviewing. Paragraph five of the memorandum of agreement serves as notice to you to abide by JAGINST 5803.1E. This does not limit zealous advocacy on your part. It simply means you must abide by the same rules applicable to all covered counsel, which includes protecting information covered by the Privacy Act.

Finally, the assignments of error you have re-asserted are acknowledged and will be reviewed

following the resolution of your application for mandamus.

Sincerely,

/s/
D.J. LECCE
Colonel, U.S. Marine Corps
Assistant Judge Advocate General
of the Navy (Military Justice)

Copy to:
Assistant United States Attorney
for the Eastern District of Louisiana
Sunni LeBeouf

[Fed. Cir. Appx14383; AR 4383]

IN THE OFFICE OF THE
JUDGE ADVOCATE GENERAL OF THE NAVY

UNITED STATES	)	NMCCA NO.
	)	201500097
v.	)	
	)	Examination
LUKE T. WEST	)	pursuant to Articles
Gunnery Sergeant(E-7)	)	69(a) and 73, UCMJ,
U.S. Marine Corps	)	of the general court-
	)	martial convened by
	)	Commanding
	)	General, HQ
	)	Battalion, Marine
	)	Forces Reserve
	)	
	)	Sentence adjudged:
	)	21 Nov 2014

The record of trial in the foregoing case has been examined in accordance with Articles 59(a), 69(a), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a), 869(a). No part of the findings or sentence is unsupported in law, and reassessment of the sentence is not appropriate. Accordingly, the findings and approved sentence are affirmed.

The petition for new trial in the foregoing case has been reviewed in accordance with Article 73, Uniform Code of Military Justice, 10 U.S.C. § 873, and Rule for Courts-Martial 1210. After careful review, it has been determined that there is no newly discovered evidence that, when considered in light of

all other pertinent evidence, would probably produce a more favorable result for the Petitioner. Additionally, there is no other evidence of any fraud on the court that had a substantial contributing effect on a finding of guilty or the sentence adjudged. Accordingly, the petition for a new trial is denied.

/s/
D.J. LECCE
By direction of the
Judge Advocate General

[APPENDIX K: Court of Federal Claims Protective Order]

[Fed. Cir. Appx417]

In the United States Court of Federal Claims

LUKE T. WEST,	)	
Plaintiff.	)	NO. 17-2052C
v.	)	Filed April 24, 2018
THE UNITED STATES,	)	
Defendant.	)	

PROTECTIVE ORDER

The Court has determined that certain information to be filed in connection with this Military Pay Act matter may be covered by the Privacy Act, 5 U.S.C. § 552a. Upon consideration of defendant's motion for an order authorizing defendant to disclose certain information covered by the Privacy Act, 5 U.S.C. § 552a, and pursuant to Rule 26(c) of the Rules of the United States Court of Federal Claims and 5 U.S.C. § 552a(b)(11), it is hereby **ORDERED** that, subject to the terms below, defendant, the United States of America (the "Government"), is authorized to release to plaintiff's counsel—without obtaining prior written consent of

the individual to whom the information pertains—records, documents, or information that is properly discoverable in this litigation but the release of which the Privacy Act would otherwise prohibit.

All disclosures of the information described above shall be subject to the following terms.

1. "Protected Information," as used herein, means any information contained in any document produced, filed, or served by a party to this litigation (including, but not limited to, a pleading, motion, brief, notice or discovery request or response, deposition transcript, court transcript, declaration, or declaration):
   a. required to be kept confidential pursuant to the Privacy Act, 5 U.S.C. § 552a; and

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   b. designated protected by the Government, pursuant to paragraphs 5 or 8 of this Protective Order, based upon the reasonable belief that the public release of such information would be contrary to the public interest.
2. This Protective Order pertains only to documents disclosed by the Government in this litigation to the extent plaintiff is not already in possession of the documents through another source. This Protective Order does not pertain to plaintiff in regard to the use of his own Protected Information, nor does it pertain to United States officials in the exercise of their lawful duties with respect to any documents obtained outside of this litigation.
3. An "Authorized Person" under this Protective Order includes only:

a. personnel of the Court, the Department of Justice, the United States Marine Corps, United States Navy, and any Executive Branch personnel involved with or affected by this litigation;
b. plaintiff's counsel of record, attorneys working with counsel of record, and administrative personnel supporting plaintiff's counsel in this litigation;
c. plaintiff;
d. court reporters who agree to be bound by this Protective Order; and
e. any person agreed to by the parties in writing or allowed by the Court. All individuals identified in subparagraphs (b) through (e) above to whom Protected Information is disclosed shall be informed of, and shall agree to abide by, the terms of this Protective Order; shall not otherwise disclose the documents or information subject to this Protective Order to the public or to any person or entity; and shall acknowledge their agreement to comply with the provisions of this Protective Order by signing a copy of the attached acknowledgment form. Counsel will retain copies of the acknowledgment forms until such time as this litigation, including all appeals, is concluded.

4. Authorized Persons shall use Protected Information solely for purposes of this litigation; may provide Protected Information only to other Authorized Persons;

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and shall not give, show, make available, discuss, or otherwise communicate Protected Information in any form except as provided herein.

5. Protected Information must be identified as follows:
   a. if provided in electronic form, the subject line of the electronic transmission shall read "CONTAINS PROTECTED INFORMATION"; or
   b. if provided in paper form, the document must be sealed in a parcel containing the legend "PROTECTED INFORMATION ENCLOSED" conspicuously marked on the outside.

   The first page of each document containing Protected Information, including courtesy copies for use by the Court, must contain a banner stating "Protected Information to Be Disclosed Only in Accordance With the U.S. Court of Federal Claims Protective Order."
6. Pursuant to this Protective Order, a document containing Protected Information may be filed electronically under the Court's electronic case filing system using the appropriate activity listed in the "SEALED" documents menu. If filed in paper form, a document containing Protected Information must be sealed in the manner prescribed in paragraph 5(b) and must include as an attachment to the front of the parcel a copy of the certificate of service identifying the document being filed.
7. If a party determines that a previously produced or filed document contains Protected Information, the party may give notice in writing to the Court and the other parties that the document is to be treated as protected, and thereafter the

designated document must be treated in accordance with this Protective Order.

8. If a plaintiff objects to the Government's designation of particular information as protected, counsel for the objecting party shall promptly notify the Government, in writing, of the objection and the basis for the objection. The parties shall confer on the objection within seven (7) calendar days of the notice to the Government of the objection. If the parties cannot resolve the objection within twenty-one (21) calendar days of the notice to the Government of the objection, either party may seek resolution of the issue by the Court. Unless and until the Court rules otherwise, the parties agree that the terms of this Protective Order apply fully to the information subject to the objection.

[Fed. Cir. Appx420]

9. Redacting Protected Documents for the Public Record:
   a. After filing a document containing Protected Information in accordance with paragraph 5, or after later designating a document pursuant to paragraph 7, a party may serve on the other party a proposed redacted version that is marked "Proposed Redacted Version" in the upper righthand corner of the first page with the claimed Protected Information deleted.
   b. If a party seeks to include additional redactions, it must advise the filing party of its proposed redactions within two (2) business days after receipt of the proposed redacted

version, or such other time as agreed upon by the parties. The filing party must then provide the other parties with a second redacted version of the document clearly marked "Agreed-Upon Redacted Version" in the upper right-hand corner of the page with the additional information deleted.

c. At the expiration of the time period noted in (b) above, or after the parties have reached an agreement regarding additional redactions, the filing party may file with the Court the final redacted version of the document clearly marked "Redacted Version" in the upper right-hand corner of the first page. This document will be available to the public.

10. The Government may at any time waive the protection of this Protective Order with respect to any and all information by so advising the Court and counsel for all parties in writing, identifying with specificity the information to which this Protective Order shall no longer apply.
11. Nothing contained in this Protective Order shall preclude a party from seeking relief from this Protective Order through the filing of an appropriate motion with the Court that sets forth the basis for the relief sought.
12. Each person covered by this Protective Order shall take all necessary precautions to prevent disclosure of Protected Information, including but not limited to physically securing, safeguarding, and restricting access to Protected Information. The confidentiality of information learned pursuant to this Protective Order shall be maintained in perpetuity. Within 45 days of the conclusion of this litigation,

including all appeals, Protected Information, including all copies of any document, shall be destroyed or returned to the Government; and Authorized Persons that executed the Acknowledgment pursuant to paragraph 3, shall certify in writing to the Government that all Protected Information has been destroyed or returned and all copies or extracts containing such information have been destroyed. Each party may retain a file copy of any document that has been filed with this Court or with a court of appeals in connection with this litigation, but the document must be maintained subject to the terms of this Protective Order.

13. Counsel for the parties shall promptly report any breach of the provisions of this Protective Order to counsel for the opposing party. Upon discovery of any breach, counsel shall immediately take appropriate action to cure the violation and retrieve any Protected Information that may have been disclosed to persons not covered by this Protective Order. The parties shall reasonably cooperate in determining the reasons for any such breach.

IT IS SO ORDERED.
s/ Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
Judge

[APPENDIX L: Judgment and Opinions: *West v. Rieth, et al.*, USDC EDLa No. 15-2512]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LUKE T. WEST	**CIVIL ACTION**
VERSUS	**NO. 15-2512**
CARRIE L. RIETH, ET AL.	**SECTION I**

JUDGMENT

Considering the Court's orders of December 22, 2015,[1] June 24, 2016,[2] and July 11, 2016,[3] granting motions to dismiss as to all of plaintiff's claims against defendants, Carrie L. Rieth, Erin E. Parrott, Rachel J. Allen, Kendra L. Johnson, Margaret "Peggy" Cuevas, Lindsay Bartucco, Shanda Stucker, and the United States of America,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants and against plaintiff, Luke T. West, as set forth below, each party to bear its own costs.

IT IS FURTHER ORDERED that plaintiff's state-law claims against defendants, Carrie L. Rieth, Erin E. Parrott, Rachel J. Allen, and Kendra L. Johnson are **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that plaintiff's

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[1] R. Doc. No. 57.
[2] R. Doc. No. 102.
[3] R. Doc. No. 104.

claims pursuant to the Federal Tort Claims Act against the United States are **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

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IT IS FURTHER ORDERED that plaintiff's federal-law claims against defendants, Carrie L. Rieth, Erin E. Parrott, Margaret "Peggy" Cuevas, Lindsay Bartucco, and Shanda Stucker are **DISMISSED WITH PREJUDICE**. New Orleans, Louisiana, July 12, 2016.

/s/
LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

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LUKE T. WEST
v.
CARRIE L. RIETH, ET AL.

CIVIL ACTION NO. 15-2512 SECTION I

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

December 22, 2015

ORDER AND REASONS

The Court has before it a motion[1] filed by the United States of America to dismiss defendants, Carrie L. Rieth ("Rieth"), Erin E. Parrott ("Parrott"), Rachel J. Allen ("Allen"), and Kendra L. Johnson ("Johnson") (collectively, the "Federal Defendants") and to substitute the United States of America as a defendant in their place. Plaintiff opposes the motion.[2] The Court has received substantial supplemental briefing. For the following reasons, the motion is granted.

BACKGROUND

Plaintiff, Luke T. West ("West"), was at all times relevant to the pending motion a service member in the United States Marine Corps. West alleges that the Federal Defendants, who with one exception were also U.S. Marine Corps service members at all relevant times, conspired to lodge false complaints and accusations of sexual harassment and sexual assault against him. According to the complaint,

such false allegations were personally motivated by a desire to remove West and another individual from their supervisory positions and to obtain favorable transfers.[3] Investigations ensued, and West was court-martialed with respect to the allegations lodged by Rieth, Parrott, and

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Allen. The allegation that West raped defendant Johnson was not part of the court-martial because an investigator found that such allegation was not credible.[4]

At the court-martial in November 2014, defendants Rieth, Parrott, and Allen testified under oath against West, which testimony West alleges was false. Defendant, Allen, was no longer an employee of the U.S. Marine Corps at the time of the court-martial; the undisputed record establishes that her service ended on April 26, 2014.[5]

West was found not guilty of the majority of charges arising out of the alleged sexual assault and harassment directed towards Parrott, Harper, and Rieth.[6] He was found guilty of a subset of charges based on (1) certain sexually suggestive comments made to Allen[7] and (2) obstructing justice by conspiring with another Marine to provide Allen with copies of their text messages in an attempt to influence her testimony.[8] West alleges that as he was being escorted to serve a sentence of thirty days in confinement as a result of his convictions, "defendants Rieth, Parrott, and Allen,

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spit upon" him.[9]

West filed this lawsuit against the Federal Defendants on July 9, 2015, invoking the Court's diversity jurisdiction.[10] The United States responded by filing the present motion to dismiss the Federal Defendants and to substitute itself as defendant on the basis of an attached certification by the U.S. Attorney for the Eastern District of Louisiana that the Federal Defendants "were at all relevant times acting within the scope of their federal employment with the United States Marine Corps at the time of the conduct alleged in the complaint."[11]

LAW & ANALYSIS

A. Applicable Law

1. The Westfall Act and Government Employee Immunity

Pursuant to 28 U.S.C. § 2679, "commonly known as the Westfall Act," "federal employees [have] absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007). "When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to

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certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" *Id.* at 229-30

(quoting 28 U.S.C. § 2679(d)(1), (2)). Pursuant to regulation, the United States Attorney for the district where a lawsuit is filed may make the scope-of-employment certification. 28 C.F.R. § 15.4(a). "Upon . . . certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee." *Osborn*, 549 U.S. at 230. "The litigation is thereafter governed by the Federal Tort Claims Act (FTCA)." *Id*. (citation omitted).

The U.S. Attorney's "scope-of-employment certification is subject to judicial review." *Id*.; *accord Williams v. United States*, 71 F.3d 502, 505 (5th Cir. 1995). Although the scope-of-employment certification is not "*prima facie* evidence," the burden of proof is on the "plaintiff to show that the defendant's conduct was not within the scope of his or her employment." *Williams*, 71 F.3d at 506. The Court must determine "that the employee[s], *in fact*, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of their employment." *Osborn*, 547 U.S. at 231 (emphasis in original).[12]

2. Louisiana Law Regarding Course and Scope of Employment

Judicial review of the scope-of-employment certification "requires the application of the law of the state in which the employee's conduct occurred." *Williams*, 71 F.3d at 505. All parties agree

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that Louisiana law governs the course-and-scope issue in this case.[13]

"In Louisiana, 'generally speaking, an employee's conduct is within the course and scope of his employment if the conduct is of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer.'" *White v. United States*, 419 F. App'x 439, 442 (5th Cir. 2011) (quoting *Orgeron v. McDonald*, 639 So. 2d 224, 226-27 (La. 1994)) (alteration omitted). "In other words, the issue is whether 'the tortious conduct of the employee was so closely connected in time, place, and causation to his employment-duties as to be regarded a risk of harm fairly attributable to the employer's business.'" *Id.* (quoting *Baumeister v. Plunkett*, 673 So. 2d 994, 997 (La. 1996)) (alteration omitted).

"Louisiana courts tend to focus on four factors: (1) whether the tortious act was primarily employment rooted; (2) whether the act was reasonably incidental to the performance of the employee's duties; (3) whether the act occurred on the employer's premises; and (4) whether it occurred during the hours of employment." *Id.* (citing *Manale v. City of New Orleans, Dep't of Police*, 673 F.2d 122, 126 (5th Cir. 1982)). "All four of these factors need not be met in a particular case." *Id.* (citing *Baumeister*, 673 So. 2d at 997). "That the 'predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment.'" *Id.* (quoting *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467, 477 (La. 1990)). "Indeed, 'if the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act is otherwise within the service.'" *Id.* (quoting

Ermert, 559 So. 2d at 477)) (alteration omitted). "The particular facts of each case must be analyzed to determine whether the employee's tortious conduct was within the course and scope of his employment."

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Baumeister, 673 So. 2d at 997.

The Fifth Circuit addressed Westfall certification, defamation, and Louisiana law in *White v. United States*, 419 F. App'x 439. The Court notes that such decisions are fact-intensive and *White* is not directly applicable to the facts here. However, the court in *White* suggested that an allegedly defamatory statement by a government employee might not be within the course and scope of employment if such statement was made solely on the basis of a "personal vendetta" and it was not motivated "at least to an appreciable extent" by serving the government employer. *See id*. at 443.

B. Analysis

The issue is whether West has satisfied his burden of proof relative to the U.S. Attorney's scope-of-employment determination and whether he has sufficiently demonstrated that any of the Federal Defendants' "conduct was not within the scope of [their] employment." *White*, 419 F. App'x at 442. Many factors relevant to this factual analysis are not seriously disputed, such as the employment relationships between West and the Federal Defendants, the fact that the allegations were made, the fact that West was court-martialed on the basis of many of those allegations, and the outcome of the

court-martial. The Court finds it efficient to group the extensive briefing as to these issues into three disputed areas: (1) the fundamental factual disagreement between West and the government as to whether the Federal Defendants falsely incriminated West regarding the alleged sexual assault and sexual harassment; (2) the undisputed fact that Allen's employment with the Marines ended before she testified against West at the court-martial; and (3) the allegation that three defendants spit on West after his court-martial.

1) The Certification and the Alleged Falsity of the Allegations

According to the government, the Federal Defendants, as employees of the Marine Corps,

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"*were required* to take the actions necessary to report and address any issue of sexual harassment and/or sexual assault with the appropriate United States Marine Corps officials."[14] The government also argues that the U.S. Attorney's certification "was appropriate because a determination had been made by the appropriate federal officials that there was enough credible evidence that the named Federal Defendants were the victims of workplace sexual harassment and/or sexual assault to refer charges to the General Court Martial."[15] The implicit premise of the government's argument in support of the scope-of-employment certification is that the Federal Defendants had a legitimate basis for reporting that West sexually assaulted and/or sexually harassed

them and then testifying to those allegations at the subsequent court-martial.

The government is plainly correct that reporting sexual harassment and/or sexual assault by another Marine is within the reporting Marine's course and scope of employment. Both parties have submitted Department of Defense documentation regarding the programs established to facilitate the reporting of such allegations, which documentation establishes that the military's "goal is a culture free of sexual assault, through an environment of prevention, education and training, response capability . . . , victim support, reporting procedures, and appropriate accountability."[16] West concedes that "sexual assault on a service member is disruptive and destructive to the military and violates its core values in a fundamental way."[17]

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The Court agrees that reporting sexual assault and/or sexual harassment would plainly be "primarily employment rooted" and "reasonably incidental to the performance of the employee's duties." *See White*, 419 F. App'x at 442. Likewise, use of a system expressly created by the Marine Corps to receive and handle such complaints is sufficiently "on the employer's premises" and "during the hours of employment" to satisfy those factors, as would be testimony by a Marine at a court-martial instigated by such reports.

However, West alleges that the underlying allegations against him were fabricated, and that making *false* reports of sexual assault and testifying *falsely* as to those allegations cannot be

characterized as within the scope of the employment of a U.S. Marine Corps service member.[18] West forcefully argues that completely false allegations made by one Marine against another solely on the basis of a personal vendetta and for personal gain would not be "reasonably incidental to the performance of the employee's duties," nor could such statements have "the purpose of serving the master's business . . . to any appreciable extent." *Id*.[19]

If such argument is to have legs, the U.S. Attorney's scope-of-employment certification depends on an underlying factual issue about which the parties disagree: whether the Federal Defendants falsely incriminated West. As a result, to challenge the certification and to show that the Federal Defendants acted outside the course and scope of their employment, West has the burden

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to establish that, as a factual matter, the allegations against him were *false*.

The Court concludes that West has not submitted sufficient evidence to meet this burden. First, it is notable that West has not submitted an affidavit or sworn statement denying the allegations against him. The assertions that the allegations were false are contained in his complaint, amended complaint, and briefing, none of which are sworn or verified. However, the Court must determine "that the employee[s], *in fact*, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of their employment." *Osborn*, 547 U.S. at 231 (emphasis in original). In what is essentially a "he-

said/she-said" situation, West has not provided the Court with a sworn version of what he said.

Second, the fact that West was found not guilty of many of the charges at the court-martial is not conclusive evidence that the allegations were false. The applicable burden of proof at a court-martial is proof of guilt "beyond reasonable doubt." 10 U.S.C. § 851(c). It is well settled that acquittal on charges that must be proved beyond a reasonable doubt does "not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *E.g.*, *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361-62 (1984). Such acquittal "does not negate the possibility that a preponderance of the evidence could show that" the defendant committed the charged acts. *Id.*

Third, the evidence West actually submitted in opposition to the government's motion is thin. He relies primarily on purported weaknesses or "material inconsistenc[ies]" in the statements and testimony of the Federal Defendants.[20] Moreover, portions of West's arguments do not dispute what occurred, but rather dispute whether it constituted sexual harassment. For example, West admits that

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he made "off-color comment[s]" to Allen on two occasions, which concession demonstrates that at least some of the allegations against him had a basis in fact, notwithstanding West's present contention that Allen "was not overly concerned" by his comments at the time.[21] West also refers to investigative reports in which an individual concluded that Johnson's allegation of sexual assault

was "not believable,"[22] and that such individual was "slightly less convinced" by the testimony before recommending that a court-martial be convened.[23]

The Court concludes that West's evidence consists of factual nitpicking, his personal "spin" on facts which equally tend to suggest that some of the allegations were well-founded, and secondhand credibility determinations. His submission falls well short of carrying his burden to establish as a factual matter that the allegations lodged against him by the Federal Defendants were false and, therefore, could not have had "the purpose of serving the master's business . . . to *any* appreciable extent." *White*, 419 F. App'x at 442 (quoting *Ermert*, 559 So. 2d at 477) (emphasis added). Accordingly, the Court concludes that West has not carried his burden to show that the disputed statements and testimony by the Federal Defendants were made outside the course and scope of their employment, with one possible caveat as to a portion of Allen's alleged conduct, which the Court will discuss below.

2) Certification As to Allen For Conduct After Her Employment Ended

As explained above, West has not established as a factual matter that Allen or any of the other Federal Defendants acted outside the course and scope of employment in connection with allegations that West committed sexual harassment and/or sexual assault. However, the undisputed

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record, as clarified and supplemented by the parties, establishes that Allen's employment with the U.S. Marine Corps ended on April 26, 2014, after she made her allegations against West but before she testified against West at his court-martial in November 2014. Accordingly, West contends that Allen cannot have been acting within the course and scope of employment when she testified against him at the court-martial because she was no longer a government employee.

The government represents, and West does not dispute, that Allen was subpoenaed to testify at the court-martial. Nothing in the record suggests that Allen's testimony at the court-martial was inconsistent with the allegations she lodged while she was employed. The court-martial was the culmination of the investigation prompted by the allegations lodged by Allen and the other Federal Defendants. Accordingly, Allen's conduct towards West constitutes a singular course of action, punctuated by the fact that her employment happened to end before her testimony at the court-martial. Other than that fact, Allen is situated identically to the other Federal Defendants.

Consequently, the issue is whether, pursuant to Louisiana law, the fortuitous occurrence that Allen's employment ended before the investigation and court-martial process reached its conclusion should affect whether Allen should be considered to have been acting within the course and scope of her employment by the U.S. Marine Corps with respect to the entirety of her alleged tortious conduct. Neither party has cited Louisiana authority directly addressing whether an employee's allegedly tortious

post-employment conduct can nonetheless "relate back" to the period of employment.

In *Cowart v. Lakewood Quarters Ltd. Partnership*, cited by the government, the issue was the employer's vicarious liability for a subordinate's attack on her supervisor immediately after an "attempted termination" of the subordinate. *See* 961 So. 2d 1212, 1215. The court found that the

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tortfeasor remained an employee "for the duration of this transaction" and, based on the facts of that case, it also found vicarious liability because "there was no appreciable passage of time between the remarks . . . regarding her termination and [her] unprovoked attack on her supervisor." *Id.* *Cowart* suggests that tortious action may be within the course and scope of employment "for the duration of [an allegedly tortious] transaction" even beyond the technical end of the employment relationship. However, the duration of the "transaction" in *Cowart* was much shorter than the months that passed between Allen's end of employment and her testimony at the court-martial.[24]

In *Parmer v. Suse*, cited by West, the court held that a defendant was not vicariously liable for the actions of a former officer who had been terminated months before he allegedly assaulted the plaintiff. *See* 657 So. 2d 666, 669 (La. App. 1 Cir. 1995). *Parmer* tends to suggest that a post-employment tort is not within the course and scope of that former employment. However, the tort in *Parmer* was an isolated physical assault which occurred completely after the end of the employment relationship. *See id.*

at 667-68. Here, the alleged tortious conduct by Allen began while she was employed by the Marine Corps and continued through the end of her employment to her testimony at the court-martial.

In the absence of a Louisiana case directly on point, the Court looks to the principles applied by Louisiana courts when deciding questions of course and scope of employment. As the Louisiana Supreme Court has explained,

> Determination of the course and scope of employment is largely based on policy. The risks which are generated by an employee's activities while serving his employer's interests are properly allocated to the employer as a cost of engaging in the enterprise. However, when the party (the alleged employer) upon whom vicarious

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> liability is sought to be imposed had only a marginal relationship with the act which generated the risk and did not benefit by it, the purpose of the policy falls, and the responsibility for preventing the risk is solely upon the tortfeasor who created the risk while performing the act.

Reed v. House of Decor, Inc., 468 So. 2d 1159, 1168 (La. 1985). As noted above, Louisiana courts also consider the *LeBrane* factors: "(1) whether the tortious act was primarily employment rooted; (2) whether the act was reasonably incidental to the performance of the employee's duties; (3) whether the

act occurred on the employer's premises; and (4) whether it occurred during the hours of employment." *White*, 419 F. App'x at 442.

As noted above, the *LeBrane* factors are satisfied as to Allen's allegations against West made while she was employed by the Marine Corps. Nothing in the record suggests that her allegations subsequently changed or that her testimony at the court-martial was inconsistent with her prior allegations. Furthermore, Allen would not have testified at the court-martial unless she had previously made those allegations in the course and scope of her employment, and her testimony at the court-martial was compelled by subpoena rather than voluntary. Accordingly, the Court concludes that pursuant to Louisiana law, Allen's post-employment conduct was also within the course and scope of her former employment as part of the entire allegedly tortious "transaction." *Cf. Cowart*, 961 So. 2d at 1215. Considering the alleged tortious "transaction" as a whole to be within the course and scope of Allen's employment, even though Allen's employment technically ended in the middle of the transaction, is consistent with Louisiana's policy of allocating risk for the purposes of determining course and scope of employment. The Court concludes that the U.S. Attorney's course-and-scope certification should be upheld in its entirety with respect to defendant, Allen, including Allen's conduct occurring after April 26, 2014.

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3) The Spitting Allegations

Finally, the Court finds that West has failed to carry his burden with respect to his allegation that Parrott, Rieth, and Allen spit on him following the court-martial.[25] At a telephone status conference with the parties, the government did not take the position that spitting on West, if it occurred, would have been within the course and scope of the Federal Defendants' employment. But West presents no competent evidence which could permit the Court to find that this incident actually occurred. Rather, the allegation is contained solely in his unsworn complaint. Accordingly, he has not demonstrated as a factual matter that such conduct occurred at all. *See Osborn*, 549 U.S. at 231 (explaining that the certification is effective "unless and until the District Court determines that the employee[s], *in fact*, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of their employment") (emphasis in original).

4) Conclusion

The Court does not find that an evidentiary hearing is warranted. *See Simon v. Bell*, 2011 WL 1233048, at *7 (S.D. Tex. Mar. 31, 2011) (noting that "there is no requirement that a court conduct an evidentiary hearing or permit discovery prior to ruling on the scope of employment issue"). Although West has requested such a hearing,[26] he has not indicated what evidence or testimony he would elicit at such a hearing or articulated how such a hearing would benefit the Court in reaching its decision.

Finally, in a surreply, West contends that Rieth and Parrott should not be dismissed because his

amended complaint should be construed as asserting *Bivens* claims against those defendants,

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which claims would not be subject to dismissal pursuant to the government's motion.[27] Alternatively, West requests leave to file a second amended complaint to assert federal law claims against Parrott and Rieth.[28]

West has previously characterized his claims against Rieth and Parrott as arising only under state law.[29] Rieth and Parrott are immune to such state-law claims for the reasons explained above. Under these circumstances, the Court finds it appropriate to dismiss Rieth and Parrott as defendants at this time and grant West leave to file a second amended complaint articulating any claims against Rieth or Parrott that he contends are viable in light of this order and reasons. Such amended complaint may be filed on or before **Monday**, **January 4**, **2015.**

CONCLUSION

IT IS ORDERED that the government's motion is **GRANTED.**

IT IS FURTHER ORDERED that defendants, Carrie L. Rieth, Erin E. Parrott, Kendra L. Johnson, and Rachel J. Allen, are **DISMISSED** for lack of subject matter jurisdiction. The United States of America is **SUBSTITUTED** as defendant in their place.

[E.D. La. No. 15-2512, R. Doc. No. 57, p.16]

IT IS FURTHER ORDERED that West may file a second amended complaint on or before **Monday**, **January 4**, **2016.**

New Orleans, Louisiana, December 22, 2015.

/s/
LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

Footnotes:

1. R. Doc. No. 6.

2. R. Doc. No. 10.

3. R. Doc. No. 1, at 5-6.

4. R. Doc. No. 10-19, at 11-12 ("Sgt. [Johnson's] accounting of the alleged rape and predicate burglary was incomplete, unsupported by any corroboration, and inconsistent. . . . Still, on balance since Sgt. [Johnson's] testimony was not believable regarding her allegations of rape and burglary I cannot recommend going forward with *any* specifications based on this witness's testimony.").

5. R. Doc. No. 10-3, at 21 ("I am Staff [sic] Rachel J. Allen. I left the Marine Corps on 26 April 2014."); R. Doc. No. 42-2, at 1 (stating that "Rachel Allen's period of Marine Corps service was 20100701-20140426").

6. *See* R. Doc. No. 10-3, at 50-51; R. Doc. No. 10-20, at 19-23.

7. Specifically, West was found guilty of (1) Charge III, Specification 4, which alleged maltreatment of Allen, a person subject to his orders based on "repeated sexually suggestive comments" in violation of Uniform Code of Military Justice article 93, 10 U.S.C. § 893; and (2) Charge V, Specification 2, which alleged "conduct prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces" in violation of Uniform Code of Military Justice article 134, 10 U.S.C. § 934. *See* R. Doc. No. 10-20, at 21, 23; R. Doc. No. 10-3, at 50-51.

8. Specifically, West was found guilty of (1) Charge I, which alleged conspiracy to commit obstruction of justice in violation

of Uniform Code of Military Justice article 81, 10 U.S.C. § 881; and (2) Charge V, Specification 3, which alleged "conduct prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces" in violation of Uniform Code of Military Justice article 134, 10 U.S.C. § 934. *See* R. Doc. No. 10-20, at 19, 23; R. Doc. No. 10-3, at 50-51.

[9.] R. Doc. No. 1, at 15.

[10.] R. Doc. No. 1, at 1. Although the complaint does not articulate any specific legal theories, in briefing plaintiff characterizes his claims against the Federal Defendants as arising "under Louisiana state law theories of intentional tort (malicious prosecution, slander, and assault and battery)." R. Doc. No. 10, at 2.

[11.] R. Doc. No. 6-3. After the government filed its motion, plaintiff filed a first amended complaint. R. Doc. No. 17. The first amended complaint specifically referred to and supplemented the original complaint by inserting new claims against new defendants, while leaving intact plaintiff's original allegations as to the Federal Defendants. Accordingly, the Court finds it appropriate to read the original and first amended complaint together with respect to the government's motion to dismiss, because the amended complaint "specifically refers to" the original complaint and cannot be read on its own without incorporation of the original complaint by reference. *See King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) ("An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading.").

[12.] The Fifth Circuit did not specify the quantum of proof required to constitute such a showing. In *Osborn*, the Supreme Court explained that the scope-of-employment certification is effective and the government "must remain the federal defendant in the action unless and until the District Court determines that the employee, *in fact*, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of his employment." 549 U.S. at 231. This requirement that the Court determine what in fact happened suggests a finding of fact by a preponderance of the evidence, and neither party has suggested that a greater or lesser burden of proof should apply.

[13.] R. Doc. No. 10, at 10; R. Doc. No. 23, at 8.

[14.] R. Doc. No. 23, at 2 (emphasis added); *see also* R. Doc. No. 23, at 9 ("It can clearly be reasoned that the Federal Defendants had an obligation to report acts of sexual harassment and/or sexual assault, and their actions in doing so were employment rooted, and incidental to the performance of the Federal Defendants' duties as members of the United States Marine Corps.").

[15.] R. Doc. No. 23, at 5.

[16.] *See* R. Doc. No. 10-2, at 3; R. Doc. No. 23-2, at 1 ("[S]exual harassment is prohibited. . . . Sexual harassment devalues the individual and threatens unit cohesion. It has no place in the Marine Corps.").

[17.] R. Doc. No. 10, at 22.

[18.] R. Doc. No. 10, at 20-21.

[19.] The Court declines to attribute any weight to an arguably contrary holding in *Stewart v. United States*, No. 13-3610, 2014 WL 1032017, at *2-3 (D. Md. Mar. 6, 2014), which case did not apply Louisiana law. Rather, the Court notes that the Fifth Circuit's decision in *White* implicitly recognized the possibility that a plaintiff can defeat a course-and-scope certification by proving that a tortious statement was made solely as a result of a "personal vendetta" and that it was not motivated to any "appreciable extent" by the purpose of serving the government employer. *See* 419 F. App'x at 443.

[20.] R. Doc. No. 10, at 7-14.

[21.] R. Doc. No. 10, at 10.

[22.] R. Doc. No. 10-19, at 11. Such allegation was not part of West's court-martial.

[23.] R. Doc. No. 10-20, at 13.

[24.] Of course, Allen had no control over the date on which she was ordered to appear pursuant to a subpoena.

[25.] R. Doc. No. 1, at 15. West does not allege that Johnson spit on him.

[26.] West does not request discovery relative to these issues. R. Doc. No. 27, at 3.

[27.] R. Doc. No. 52, at 1-2.

[28.] R. Doc. No. 52, at 2.

[29.] R. Doc. No. 10, at 2 ("On July 9, 2015, plaintiff filed this lawsuit against the defendants, in their individual capacities, under Louisiana state law theories of intentional tort . . . .").

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LUKE T. WEST
v.
CARRIE L. RIETH, ET AL.

CIVIL ACTION NO. 15-2512 SECTION I

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

June 24, 2016

ORDER AND REASONS

The Court has before it a motion[1] filed by the United States of America to dismiss plaintiff's *Bivens* claims against defendants, Carrie L. Rieth ("Rieth"), Erin E. Parrott ("Parrott"), Margaret Cuevas ("Cuevas"),[2] Lindsay Bartucco ("Bartucco"), and Shanda Stucker ("Stucker"). Plaintiff opposes the motion[3] and the Court has received reply briefs.[4] For the following reasons, the motion is granted.

BACKGROUND

Plaintiff, Luke T. West ("West"), was at all times relevant to the pending motion a service member in the United States Marine Corps.[5] West alleges that Rieth and Parrott, who were also U.S.

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Marine Corps service members at all relevant times, conspired with others to lodge false complaints and accusations of sexual harassment and sexual assault

against him. According to the complaint, such false allegations were personally motivated by a desire to remove plaintiff and another individual from their positions and to obtain favorable transfers.[6] The allegations included that "plaintiff had sexually assaulted [Rieth] at the Marine Corps Ball in November of 2011 by massaging her thigh at the Finance Section leadership table for approximately 2 minutes," and that plaintiff "sexually assaulted [Parrott] by grabbing her and attempting to kiss her in two specific instances, first in the hallway of a hotel and then in a hotel bathroom at the MFR Marine Corps Ball in November of 2011."[7] He alleges that these false allegations were "designed [to] take advantage of the charged political climate surrounding sexual assault allegations in the military for purely personal gain."[8]

According to the complaint, Cuevas was the "Sexual Assault Response Coordinator for Marine Forces Reserves," and Bartucco and Stucker were "civilian victim advocates for Marine Forces Reserves."[9] They are alleged to have been civilian employees working in one of the Marine Force Reserves Sexual Assault Prevention and Response [SAPR] offices, which offices are "civilian in nature, operate independently of their parent military commands, and do not answer to, and are not under the control of, those parent military commands."[10] Plaintiff alleges that Cuevas, Bartucco,

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and Stucker facilitated the filing of Rieth's and Parrott's allegations, either knowing that such

allegations were false or with reckless disregard for the truth of such allegations.[11]

Investigations of Rieth's and Parrott's allegations ensued. Plaintiff alleges that Cuevas, Bartucco, and Stucker "exerted significant improper influence over Naval Criminal Investigative Services (NCIS), the civilian law enforcement agency of the United States Navy," by "prevent[ing] NCIS from investigating evidence and information exculpatory to plaintiff" and "caus[ing] NCIS to attempt to improperly intimidate plaintiff and plaintiff's witnesses, with threats of obstructing justice investigations."[12]

Ultimately, West was court-martialed in November 2014 with respect to the allegations lodged by Rieth, Parrott, and Rachel Allen ("Allen"), a previously dismissed defendant. At the general court-martial in November 2014, Rieth and Parrott, among others, testified under oath against plaintiff, which testimony plaintiff alleges was false. Plaintiff was found not guilty of the charges arising out of the alleged sexual assault and harassment directed towards Rieth and Parrott.[13] He was convicted of other charges of obstruction of justice, maltreatment of a subordinate, and use of indecent language based on his conduct towards Allen.[14] Plaintiff "was sentenced to serve 30 days in confinement and a reduction in rank from Gunnery Sergeant (E-7) to the rank of Lance Corporal (E-3)."[15] He also alleges that but for the false allegations, he "would have been eligible to accept a commission in the United States Marine Corps as a warrant officer and would have continued to

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serve in the United States Marine Corps in that capacity."[16] Plaintiff alleges that as he was being escorted to serve his sentence, "defendants Rieth, Parrott, and Allen, spit upon" him.[17]

West filed this lawsuit against Rieth, Parrott, and two other accusers on July 9, 2015, invoking the Court's diversity jurisdiction and asserting state-law causes of action.[18] The Court subsequently granted a motion filed by the United States of America pursuant to the Westfall Act to substitute itself as defendant with respect to plaintiff's state-law tort claims.[19] Plaintiff has since amended his complaint twice to assert *Bivens* claims against Rieth, Parrott, Cuevas, Bartucco, and Stucker, alleging that their conduct violated his substantive due process rights under the Fifth Amendment to the U.S. Constitution.[20] Other than the claims as to which the United States was substituted, plaintiff's constitutional claims which are the subject of the present motion to dismiss are the only remaining claims in the above-captioned matter.

LAW & ANALYSIS

A. Applicable Law

A district court may dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted if the plaintiff has not set forth a factual allegation in support of his claim that would entitle him to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). As the U.S.

Court of Appeals for the Fifth Circuit explained in *Gonzalez v. Kay*:

> "Factual allegations must be enough to raise a right to relief above the speculative

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> level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Supreme Court recently expounded upon the *Twombly* standard, explaining that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* It follows that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

577 F.3d 600, 603 (5th Cir. 2009).

This Court will not look beyond the factual allegations in the pleadings to determine whether relief should be granted. *See Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999); *Baker v. Putnal*, 75

F.3d 190, 196 (5th Cir. 1996). In assessing the complaint, a court must accept all well-pleaded facts as true and liberally construe all factual allegations in the light most favorable to the plaintiff. *Spivey*, 197 F.3d at 774; *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). "Dismissal is appropriate when the complaint 'on its face show[s] a bar to relief.'" *Cutrer v. McMillan*, 308 F. App'x 819, 820 (5th Cir. 2009) (quoting *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986)).

B. Analysis

Plaintiff alleges that movants violated his Fifth Amendment substantive due process rights. Both plaintiff and defendants analyze these claims through the framework of the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which "established that, in certain circumstances, the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *De La Paz v. Coy*, 786 F.3d 367, 372 (5th Cir. 2015)

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(internal quotation marks omitted). "A *Bivens* action is analogous to a § 1983 action; the only difference is that § 1983 claims apply to constitutional violations by state actors and *Bivens* claims apply to actions by federal officials." *Espinal v. Bemis*, 464 F. App'x 250, 251 (5th Cir. 2012) (citing *Izen v. Catalina*, 398 F.3d 363, 367 n.3 (5th Cir. 2005)). The Fifth Circuit "does

not distinguish between *Bivens* claims and § 1983 claims." *Id.*

To state a *Bivens* claim, a plaintiff first must allege a constitutional violation. *Abate v. S. Pac. Transp. Co.*, 993 F.2d 107, 110 (5th Cir. 1993) ("To recover damages under *Bivens*, the injured party must show the existence of a valid constitutional violation."). Then, the Court must decide whether the Fifth Circuit "has already extended *Bivens*" to include plaintiff's claims or, if not, whether "the Supreme Court's reasoning in the *Bivens* line of cases, taken as a whole," warrants extension of the *Bivens* remedy to this context. *See De La Paz*, 786 F.3d at 373.

Defendants contend that (1) plaintiff has not stated a claim for a substantive due process violation, (2) special factors counsel against extending the *Bivens* remedy to this context, and (3) in the alternative, defendants are entitled to qualified immunity.[21] For the following reasons, it is clear that even if plaintiff has stated a claim for a constitutional violation, the *Bivens* remedy has not been and should not be extended to this factual and legal context. Accordingly, the Court will focus primarily on defendants' second argument which is dispositive.

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1.) Whether *Bivens* Should Be Extended to This Context

"[S]ubsequent holdings of the Supreme Court . . . have narrowed and reframed *Bivens* in the course of rejecting nearly all other claims for an implied

damage remedy against federal officers or agents." *De La Paz*, 786 F.3d at 372. Accordingly, the Supreme Court has "disavowed that a *Bivens* suit is an automatic entitlement; in fact, it is disfavored." *Id.* (internal quotation marks omitted). "Moreover, because *Bivens* suits implicate grave separation of powers concerns, a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 372-73 (internal quotation marks omitted).

When deciding whether to extend the *Bivens* remedy, "[i]nstead of an amendment-by-amendment ratification of *Bivens* actions, courts must examine each new context—that is, each new potentially recurring scenario that has similar legal and factual components." *Id.* at 372 (internal quotation marks omitted). Accordingly, the initial question is whether the Supreme Court or the Fifth Circuit "has already extended *Bivens*" to include plaintiffs' claims. *See id.* 373. Plaintiff does not cite such a case or contend that a *Bivens* remedy already exists for his claims against these defendants.[22] Accordingly, the Court must now "apply the Supreme Court's reasoning in the *Bivens* line of cases, taken as a whole, and decide whether to extend *Bivens*." *Id.*

Deciding whether to extend *Bivens* requires a two-prong analysis. First, the Court "may not step in to create a *Bivens* cause of action if any alternative, existing process for protecting the

interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 375. Second,

"[e]ven if no such alternative process exists . . . a court must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.*

Defendants base their argument on the second prong and articulate several "special factors counselling hesitation." The Court agrees with defendants that the military context in which this matter arose conclusively counsels against extending the *Bivens* remedy into this context.

The Supreme Court has held that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *United States v. Stanley*, 483 U.S. 669, 683 (1987). Accordingly, "the unique disciplinary structure of the Military Establishment and Congress' activity in the field . . . require abstention in the inferring of *Bivens* actions" to the same extent that the *Feres* doctrine prohibits claims against the government pursuant to the Federal Tort Claims Act.[23] *Id.* at 683-84 (internal quotation marks and citation omitted). It is therefore settled that "no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to service." *Id.* at 684 (internal quotation marks and citations omitted); *accord Walch v. Adjutant General's Dep't of Tex.*, 533 F.3d 289, 296 (5th Cir. 2008) ("[T]he United States Supreme Court has determined that because of *Feres*, the *Bivens* remedy is unavailable to someone whose claims arise incident to military service."). As another court recently noted, the Supreme Court has never extended *Bivens* "in the

military context." *Cioca v. Rumsfeld*, 720 F.3d 505, 510 (5th Cir. 2013).

Pursuant to *Stanley*, the Court must assess a proposed *Bivens* claim in the military context by applying the *Feres* test, which requires a "three-factor analysis for whether a service member's injury was incident to military service: (1) duty status, (2) site of injury, and (3) activity being performed." *Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 637 (5th Cir. 2008). Assessed through these three factors, plaintiff's allegations self-evidently are "incident to military service."

Plaintiff alleges that at all relevant times, he (as well as Rieth, Parrott, Cuevas, Bartucco, and Stucker) were employed by the Marines, and plaintiff does not allege that he or any other party was on extended leave. Accordingly, all interested parties are at the very least in the middle of the "continuum between performing the tasks of an assigned mission to being on extended leave from duty." *Regan*, 524 F.3d at 637. To the extent that there is a "place" where plaintiff's alleged constitutional injury occurred, that "place" was within the framework of his military employment and the military disciplinary process, including the formal reporting, investigation, and prosecution of the allegations against him. *See id.* at 640. Likewise, the "activity being performed at the time of the injury" was the activity surrounding the formal court-martial, which undoubtedly "served some military function." *See id.* at 640. The facts plaintiff alleges are squarely incident to military service and military discipline,

unlike the recreational rental boat accident in *Regan*. *See*, *e.g.*, *id.* at 637-42.

Plaintiff's contention that his claims did not arise "incident to military service" is not convincing. He asserts that "the allegations of sexual assault and sexual harassment took place outside of the office;"[24] however, the sexual assaults allegedly took place at a Marine Corps Ball and the subsequent accusations and court-martial were patently within the military disciplinary

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framework. Although he asserts that "any of these false allegations could have been made in a wholly civilian environment," plaintiff ignores that *these* allegations in *this* case were made by Marines against another Marine and resulted in a military prosecution. His assertion that "the administration and management of the processing of sexual assault claims are not particular to the military" is too simplistic to be credited.

Furthermore, the case to which plaintiff analogizes, *Lutz v. Secretary of Air Force*, 944 F.2d 1477 (9th Cir. 1991), is distinguishable. In *Lutz*, the Ninth Circuit held that defendants who allegedly "broke into [plaintiff's] office, took personal papers and disseminated them to other military personnel with the intent to injure [plaintiff's] reputation and career" were not acting "incident to military service." *See id.* at 1478-79. Notwithstanding some broad language in the Ninth Circuit's opinion, that court addressed "only the narrow question of whether injuries sustained by Lutz as a result of the sergeants entering her office after hours, opening her

personal mail, and disseminating it to others in an attempt to cause harm to her reputation, are injuries which arise out of or are in the course of activity incident to service." *See id.* at 1485. On the facts of that case, the *Lutz* court found that "[i]ntentional tortious and unconstitutional acts directed by one servicemember against another which further no conceivable military purpose and are not perpetrated during the course of a military activity surely are past the reach of *Feres*" and *Stanley*. *Id.* at 1487.

Lutz is distinguishable because the alleged unconstitutional action in this case is much more closely intertwined with the parties' military service and the military disciplinary framework. According to plaintiff, defendants lodged or facilitated the lodging of accusations against him, which accusations were investigated and proceeded to a general court-martial. Taking plaintiff's allegations to be true, defendants' alleged manipulation or abuse of the military disciplinary framework is more

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connected to "the course of a military activity" than the after-hours burglary at issue in *Lutz*. Furthermore, plaintiff's allegations in this case inherently involve collateral review of the basis for the underlying investigation and court-martial, which factor was also missing in *Lutz*. *See id.* at 1485 & n.8 (noting that claims "challenging disciplinary decisions" "have been found to fall squarely within the prohibited zone protected by *Feres*"). Accordingly, the constitutional violations alleged by plaintiff necessarily implicate "the unique disciplinary structure of the Military Establishment and

Congress' activity in the field," which counsels against extending the *Bivens* remedy.

In sum, *Bivens* remedies are disfavored, *De La Paz*, 786 F.3d at 372, and the military disciplinary context of this matter particularly counsels against extending *Bivens*. *Stanley*, 483 U.S. at 683. Plaintiff's claims, as stated in his complaint, arise out of allegations by fellow Marines that he sexually assaulted and sexually harassed them, which allegations were allegedly facilitated by civilian marine employees, and resulted in plaintiff's court-martial. His claims, taken as true, are sufficiently "incident to military service" such that the military context of this matter is a "special factor" which counsels against extending the *Bivens* remedy to this factual and legal context. To conclude otherwise would be to open the floodgates to a post-court-martial *Bivens* claims. Plaintiff has therefore failed to state a viable *Bivens* claim; defendants' motion should be granted and plaintiff's claims against them should be dismissed.[25]

C. Effect of Granting Defendants' Motion to Dismiss

The Court previously granted an earlier motion to dismiss and substituted the United States

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of America as defendant with respect to plaintiff's state-law claims as to Rieth, Parrott, Allen, and Johnson.[26] Granting this motion disposes of plaintiff's *Bivens* claims against Rieth, Parrott, Cuevas, Bartucco, and Stucker. Accordingly, the only

remaining claims in this matter are plaintiff's state-law tort claims against the United States as a substituted party.

"Federal courts have jurisdiction to hear suits against the government only with a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver." *Young v. United States*, 727 F.3d 444, 447 (5th Cir. 2013) (internal quotation marks omitted). The Federal Tort Claims Act is a limited waiver of sovereign immunity, but such waiver does not extend to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h); *see also White v. United States*, 419 F. App'x 439, 441-42 (5th Cir. 2011) (affirming substitution of the United States as defendant with respect to defamation claim and subsequent dismissal of that defamation claim on sovereign immunity grounds). Accordingly, the Court's subject matter jurisdiction over the only remaining claims is questioned.

In previous briefing, the government has indicated its intent to assert sovereign immunity,[27] but no motion to dismiss on that basis has been filed. The Court will direct filing of such a motion so as to be assured of its continuing subject matter jurisdiction.

CONCLUSION

[E.D. La. No. 15-2512, R. Doc. No. 102, p.13]

IT IS ORDERED that the motion is **GRANTED** and that plaintiff's claims against defendants, Carrie L. Rieth, Erin E. Parrott, Rachel J. Allen, Kendra L. Johnson, Margaret "Peggy" Cuevas, Lindsay Bartucco, and Shanda Stucker, are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that counsel for the United States of America may file a motion to dismiss on or before **Thursday**, **July 7**, **2016.** Plaintiff may file a response on or before **Thursday**, **July 14**, **2016.**

New Orleans, Louisiana, June 24, 2016.

/s/

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

Footnotes:

[1.] R. Doc. No. 85.

[2.] The first and second amended complaints name Peggy Cuevas as a defendant. R. Doc. No. 17, at 2; R. Doc. No. 59, at 5. In the motion to dismiss, counsel for defendants represent that service was accepted on behalf of Margaret "Peggy" Cuevas. R. Doc. No. 85-1, at 1 n.1. In his opposition, plaintiff refers to movant as Margaret Cuevas, R. Doc. No. 93, at 1, and accordingly there appears to be no dispute that Margaret Cuevas has been correctly identified and is properly before this Court.

[3.] R. Doc. No. 93.

[4.] R. Doc. Nos. 96, 99.

[5.] In addition to his original complaint, plaintiff has filed first and second amended complaints that specifically referred to and supplemented the original complaint with additional factual allegations and claims while leaving intact plaintiff's original allegations. R. Doc. No. 17, at 1; R. Doc. No. 59, at 1. The Court finds it appropriate to read the original, first amended, and second amended complaints together, because both amended complaints "specifically refer to" the original complaint and cannot be read on their own without incorporation of the original complaint by reference. *See King v.*

Dogan, 31 F.3d 344, 346 (5th Cir. 1994) ("An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading.").

6. R. Doc. No. 1, at 5-6.

7. R. Doc. No. 1, at 7-8.

8. R. Doc. No. 1, at 16.

9. R. Doc. No. 17, at 2.

10. R. Doc. No. 17, at 3. Defendants vigorously dispute plaintiff's characterization of the role of the SAPR program within the military chain of command. R. Doc. No. 101, at 2-3. Whether that dispute is one of fact or law, it is immaterial to resolution of this Rule 12(b)(6) motion to dismiss.

11. R. Doc. No. 17, at 4-5.

12. R. Doc. No. 17, at 3.

13. R. Doc. No. 1, at 14.

14. R. Doc. No. 1, at 15.

15. R. Doc. No. 1, at 15.

16. R. Doc. No. 1, at 16.

17. R. Doc. No. 1, at 15.

18. R. Doc. No. 1, at 1.

19. *See* R. Doc. No. 57; R. Doc. No. 80 (denying motion for reconsideration).

20. R. Doc. No. 17, at 7; R. Doc. No. 59, at 2.

21. R. Doc. No. 85-1, at 2-3. In their reply brief, defendants also raise for the first time entitlement to absolute immunity with respect to claims based on testimony at the court-martial. R. Doc. No. 96, at 9-10. Generally, a "reply memorandum is not adequate to raise entirely new arguments for dismissal." *See*, *e.g.*, *Ostrowiecki v. Aggressor Fleet, Ltd.*, 07-6598, 2008 WL 3285900, at *3 (E.D. La. Aug. 7, 2008) (Africk, J.) (internal quotation marks and citation omitted). However, the question is moot because the Court need not reach that issue to resolve defendant's motion and, at any rate, plaintiff has sought and received leave to respond to the argument.

22. Plaintiff asserts that "it is axiomatic that the protection of the integrity of the criminal justice process is inarguably within the judiciary and is, perhaps, the most appropriate area for the courts to litigate a potential Due Process Clause violation under *Bivens*." R. Doc. No. 93, at 16. Suffice it to say, plaintiff cites no case that remotely suggests that this Court's

inherent authority to police its own proceedings should be extended to creating a *Bivens* remedy for matters arising out of military court-martial proceedings. To the contrary, as will be explained below, the military discipline context of this case counsels *against* extending a *Bivens* remedy.

[23.] The *Feres* doctrine states that "'the Government is not liable under the FTCA for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.'" *Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 633 (5th Cir. 2008) (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

[24.] R. Doc. No. 93, at 21.

[25.] As a result, the Court need not address whether plaintiff has stated a claim for a constitutional violation of his Fifth Amendment substantive due process rights as to Rieth, Parrott, Cuevas, Bartucco, or Stucker, or whether those defendants are entitled to qualified immunity.

[26.] R. Doc. No. 57. Although plaintiff reiterated his demand for relief as to Allen and Johnson in his second amended complaint, R. Doc. No. 59, at 4, he asserted no additional claims as to those defendants in that pleading. Accordingly, Allen and Johnson remain dismissed as defendants.

[27.] R. Doc. No. 23, at 2, 7.

[APPENDIX M: Constitutional and Statutory Provisions]

1. United States Constitution:

Amendment I (1791)
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V (1791)
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI (1791)
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defence.

2. 5 U.S.C. § 552a:

§552a. Records maintained on individuals

(a) Definitions.—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;
(8) the term "matching program"—
(A) means any computerized comparison of—
(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of—
(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or
(II) recouping payments or delinquent debts under such Federal benefit programs, or
(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,
(B) but does not include—
(i) matches performed to produce aggregate statistical data without any personal identifiers;
(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;
(iii) matches performed, by an agency (or component thereof) which performs as its

principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches—

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency; if the purpose

of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;
(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;
(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986;
(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));
(ix) matches performed by the Secretary of Health and Human Services or the Inspector General of the Department of Health and Human Services with respect to potential fraud, waste, and abuse, including matches of a system of records with non-Federal records; or
(x) matches performed pursuant to section 3(d)(4) of the Achieving a Better Life Experience Act of 2014; [1]

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;
(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;
(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and
(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).
(b) Conditions of Disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
(2) required under section 552 of this title;
(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;
(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;
(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;
(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;
(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;
(11) pursuant to the order of a court of competent jurisdiction; or
(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.
(c) Accounting of Certain Disclosures.—Each agency, with respect to each system of records under its control, shall—
(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—
(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and
(B) the name and address of the person or agency to whom the disclosure is made;
(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;
(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and
(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.
(d) Access to Records.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual

requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency Requirements.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse

determinations about an individual's rights, benefits, and privileges under Federal programs;
(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—
(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;
(B) the principal purpose or purposes for which the information is intended to be used;
(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and
(D) the effects on him, if any, of not providing all or any part of the requested information;
(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include—
(A) the name and location of the system;
(B) the categories of individuals on whom records are maintained in the system;
(C) the categories of records maintained in the system;
(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;
(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;
(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;
(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and
(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;
(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;
(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;
(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;
(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance

of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;
(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;
(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and
(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.
(f) Agency Rules.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—
(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;
(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;
(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and
(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.
The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.
(g)(1) Civil Remedies.—Whenever any agency
(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;
(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or
(D) 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.
(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.
(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.
(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of

the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.
(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.
(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
(B) the costs of the action together with reasonable attorney fees as determined by the court.
(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery

by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of Legal Guardians.—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal Penalties.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General Exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections

553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision. At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific Exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from

subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—
(1) subject to the provisions of section 552(b)(1) of this title;
(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;
(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;
(4) required by statute to be maintained and used solely as statistical records;
(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or,

prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;
(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or
(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence. At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.
(l)(1) Archival Records.—Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.
(2) Each agency record pertaining to an identifiable individual which was transferred to the National

Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m)(1) Government Contractors.—When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.
(n) Mailing Lists.—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.
(o) Matching Agreements.—(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying—
(A) the purpose and legal authority for conducting the program;
(B) the justification for the program and the anticipated results, including a specific estimate of any savings;
(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;
(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to—

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and
(ii) applicants for and holders of positions as Federal personnel, that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;
(E) procedures for verifying information produced in such matching program as required by subsection (p);
(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;
(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;
(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;
(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;
(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and
(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems

necessary in order to monitor or verify compliance with the agreement.
(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall—
(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and
(ii) be available upon request to the public.
(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).
(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.
(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if—
(i) such program will be conducted without any change; and
(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.
(p) Verification and Opportunity to Contest Findings.—(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment

under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until—
(A)(i) the agency has independently verified the information; or
(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that—
(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and
(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;
(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and
(C)(i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or
(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.
(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of—
(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and
(C) the period or periods when the individual actually had such asset or income.
(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.
(q) Sanctions.—(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.
(2) No source agency may renew a matching agreement unless—
(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and
(B) the source agency has no reason to believe that the certification is inaccurate.
(r) Report on New Systems and Matching Programs.—Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of

Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.
(s) Biennial Report.—The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report—
(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;
(2) describing the exercise of individual rights of access and amendment under this section during such years;
(3) identifying changes in or additions to systems of records;
(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.
(t)(1) Effect of Other Laws.—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.
(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.
(u) Data Integrity Boards.—(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.
(3) Each Data Integrity Board—
(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;
(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;
(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;
(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including—
(i) matching programs in which the agency has participated as a source agency or recipient agency;
(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;
(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;
(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and
(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;
(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;
(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;
(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and
(H) may review and report on any agency matching activities that are not matching programs.
(4)(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.[2]
(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.
(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval

of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that—

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.
(v) Office of Management and Budget Responsibilities.—The Director of the Office of Management and Budget shall—
(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and
(2) provide continuing assistance to and oversight of the implementation of this section by agencies.
(w) Applicability to Bureau of Consumer Financial Protection.—Except as provided in the Consumer Financial Protection Act of 2010, this section shall apply with respect to the Bureau of Consumer Financial Protection.

3. 10 U.S.C. § 869:

§869. Art. 69. Review in the office of the Judge Advocate General
(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.

(b) The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.

(c) If the Judge Advocate General sets aside the findings or sentence, he may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.

(d) A Court of Criminal Appeals may review, under section 866 of this title (article 66)—

(1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (B) is sent to the Court of Criminal Appeals by order of the Judge Advocate General; and

(2) any action taken by the Judge Advocate General under this section in such case.

(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under this section, the Court may take action only with respect to matters of law.

Effective Date of 2016 Amendment
Amendment by Pub. L. 114–328 effective on Jan. 1, 2019, as designated by the President, with implementing regulations and provisions relating to applicability to various situations, see section 5542 of Pub. L. 114–328 and Ex. Ord. No. 13825, set out as notes under section 801 of this title.

4. 10 U.S.C. § 876:

§ 876. Art. 76. Finality of proceedings, findings, and sentences
The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President.

5. 28 U.S.C. § 1491:

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in

tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 [1] of that Act.

(b)(1) Both the Unites [2] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal

agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.