DAN WOODS (SBN: 78638)
PATRICK HUNNIUS (SBN: 174633)
WHITE & CASE LLP
633 W. Fifth Street, Suite 1900
Los Angeles, CA 90071-2007
Telephone: (213) 620-7700
Facsimile: (213) 452-2329
Email: dwoods@whitecase.com
Email: phunnius@whitecase.com

Attorneys for Plaintiff
LOG CABIN REPUBLICANS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,
Defendants.

Case No. CV04-8425 VAP (Ex)

LOG CABIN REPUBLICANS'

(1) *EX PARTE* APPLICATION FOR ORDER COMPELLING DEFENDANTS TO COMPLY WITH LOG CABIN REPUBLICANS' NOTICE OF DEPOSITION OF USA AND ROBERT M. GATES PURSUANT TO FRCP 30(b)(6);

(2) MEMORANDUM OF POINTS AND AUTHORITIES; AND

(3) DECLARATION OF PATRICK HUNNIUS

Date: N/A
Time: N/A
Courtroom: N/A

Discovery Cutoff: Mar. 15, 2010
Pretrial Conference: June 7, 2010
Trial: June 14, 2010

DISCOVERY MATTER

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FEDERAL REGULATIONS

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Pursuant to Local Rule 7-19, plaintiff Log Cabin Republicans ("Plaintiff") hereby applies *ex parte* for an order compelling Defendants United States of America and Robert M. Gates, Secretary of Defense ("Defendants") to comply with Plaintiff's Notice of Deposition of USA and Robert M. Gates pursuant to Federal Rule of Civil Procedure 30(b)(6) (the "Notice"). Plaintiff submits that cause exists to grant the relief requested herein because Defendants have failed to produce a witness in response to the Notice, and with the discovery deadline fast approaching, little time is left to complete the Federal Rule of Civil Procedure 30(b)(6) deposition. As such, Plaintiff seeks immediate relief from this Court and, accordingly, seeks this relief *ex parte*.

Pursuant to Local Rule 7-19, Log Cabin Republicans has provided notice of this *ex parte* application to opposing counsel, as set forth in the accompanying Declaration of Patrick Hunnius, and asked opposing counsel whether they would oppose the application. As of the time of this filing, counsel for Plaintiff had not received a response.

This application is based on this *ex parte* application, the accompanying memorandum of points and authorities, the accompanying Declaration of Patrick Hunnius, all pleadings, records, and files in this action, and such evidence and argument that may be presented at any hearing on this application.

Dated: March 5, 2010

PATRICK HUNNIUS
WHITE & CASE LLP

By: */s/ Patrick Hunnius*
Patrick Hunnius
Attorneys for Plaintiff
LOG CABIN REPUBLICANS

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This case challenges the constitutionality of the so-called "Don't Ask, Don't Tell, Don't Pursue" policy (the "Policy"), codified as federal law in Title 10, Section 654 of the United States Code, entitled "Policy Concerning Homosexuality in the Armed Forces," as well any Department of Defense regulations promulgated pursuant to Title 10, Section 654 of the United States Code.

On December 21, 2009, Plaintiff served on Defendants a 30(b)(6) Notice of Deposition ("Notice") to be taken on January 25, 2010 at the offices of Plaintiff's counsel in Washington, D.C. Declaration of Patrick Hunnius, ¶ 2. A copy of the Notice is attached hereto as Exhibit "A." The Notice described a variety of topics relevant to the general application of Don't Ask, Don't Tell (the "Policy"), the application of the Policy to different groups within the United States Armed Forces, and the effects of the application of the Policy. Id.

Notwithstanding the clear relevance of these and the other testimony topics and without first seeking a protective order or any other relief from their obligations to produce a witness Defendants did not produce a deponent on the date of the deposition.[1] Thereafter, on January 29, 2010, Defendants sent Plaintiff a letter objecting to Plaintiff's Notice, *in its entirety.* A copy of the letter from Defendants is attached hereto as Exhibit "B." Defendants proposed no alternative date for the deposition and made it clear they refused to designate a witness to testify on *any* subjects listed in the Notice.

[1] Several days before the scheduled deposition, Plaintiff asked Defendants to confirm they would be producing a witness. Defendants responded that they had not received Plaintiff's Notice. Plaintiff immediately sent a copy of the previously served Notice by email.

The parties met and conferred telephonically on February 9, 2010, but were unable to reach a satisfactory conclusion. Hunnius Decl., at ¶ 4. On February 11, 2010, Plaintiff sent Defendants a letter suggesting a briefing schedule that would ensure that the parties' dispute regarding the Notice could be heard by the Court before the discovery cutoff. Id. at ¶ 5. A copy of the letter is attached hereto as Exhibit "C." Plaintiff asked that Defendants respond to the proposed briefing schedule by February 17 in order – assuming Defendants agreed – to allow the parties to notify the Court of the briefing schedule. Id. Defendants never responded, thereby preventing Plaintiff from being able to proceed by a joint stipulation on the matter as contemplated by Local Rule 37-2.1. Id.[2]

Defendants' obstructionism in objecting wholesale to the discovery and refusing to cooperate by agreeing to a briefing schedule have resulted in there being insufficient time to have this motion heard on regular notice before the discovery cutoff of March 15, 2010. Defendants have failed to respond to the Notice, and it is integral to Plaintiff's case that Plaintiff depose Defendants. For the reasons set forth below, Plaintiff therefore requests that this Court order Defendants to produce a deponent or deponents responsive to Plaintiff's Notice.

[2] Plaintiff provided notice of this Application via email on March 4, 2010. Hunnius Decl., ¶9. On March 5, 2010, Defendants informed Plaintiff by letter that it opposes the Application and claimed – for the first time and without any evidence – that Defendants' had "agreed" to the briefing schedule proposed by Plaintiff. Id., Ex. D. Plaintiff asked Defendants to explain when and where they had communicated their "agreement" to the proposed briefing schedule. Id., Ex. E. Defendants' response confirms that they never did. *See* id., Ex. F.

II.

GOOD CAUSE EXISTS FOR THE COURT TO COMPEL DEFENDANTS TO COMPLY WITH PLAINTIFF'S NOTICE

1. Defendants' Objections Are Untimely and Do Not Excuse Their Failure to Appear

Defendants are obliged, pursuant to Federal Rule of Civil Procedure 30(b)(6) to designate and produce a witness to testify regarding the topics delineated in the Notice. It is undisputed (and self-evident) that: (1) the Notice was properly issued and served; and (2) Defendants did not seek a protective order regarding the Notice and were not otherwise relieved from their obligation to produce a witness.

A party properly noticed under Rule 30(b)(6) may not fail to appear for its deposition. Fed. R. Civ. P. 37(d); Henry v. Gill Industries, Inc., 983 F.2d 943, 947 (9th Cir. 1993); Hilao v. Estate of Marcos, 103 F.3d 762, 764-765 (9th Cir. 1996). Unless a protective order has been applied for, the fact that the notice of deposition is objectionable does not excuse the failure to appear. New England Carpenters Health Benefits Fund v. First Databank, Inc., 242 F.R.D. 164, 166 (D. Ma. 2007). Plaintiff's Notice was served on December 21, 2009; the Notice scheduled Defendants' deposition for January 25, 2010, giving Defendants more than 30 days to produce a deponent. However, Defendants failed to produce a deponent; indeed, they did not respond to Plaintiff until January 29, 2010 – four days after the scheduled deposition.

While a party may object to the deposition, "the examination still proceeds; the testimony is taken subject to any objection." Fed. R. Civ. P. 30(c)(2). If Defendants wish to object to Plaintiff's questioning, they may do so at the deposition after they have produced a responsive deponent or deponents.

2. Defendants' Professed Lack of Knowledge on the Relevant Topics Does Not Excuse Their Failure to Appear

Throughout their objections, Defendants claim that they have no knowledge of several topics identified by Plaintiff, and assert that their lack of knowledge excuses

their failure to designate a witness. For example, paragraph 6 of the Notice seeks "[r]eports, studies, or analyses conducted by or on behalf of Defendants relating to the experience of the armed forces of nations other than the United States with military service by individuals with a homosexual orientation or by individuals who engage in homosexual conduct [. . .]." Defendants demur by saying they have conducted no such report. Defendants' objection is non-responsive; moreover, it is irrelevant.

If Defendants plan on relying solely on the congressionally-alleged evidence underlying the Policy to support the constitutionality of the Policy, then testimony relating to that evidence – if there is any – is relevant and discoverable in a Rule 30(b)(6) deposition. Even if the deponent can identify no evidence in support of the Congressional findings cited by the statute, then Defendants' lack of evidence or knowledge is also relevant as to whether the Policy is arbitrary and capricious, or motivated solely by animus. See 5 U.S.C. § 706(2)(A); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 790 (1978); Romer v. Evans, 517 U.S. 620, 632 (1996). Defendants must therefore produce a deponent, even one who will testify to Defendants' lack of knowledge or evidence on the relevant topics.

3. Testimony Regarding the Application of the Policy to Women is Relevant to the Purported Rational Basis of the Policy

Defendants must provide testimony regarding the application of the Policy to women and other service members not permitted to hold a combat Military Occupation Specialty ("MOS") because that testimony is relevant to the purported rational basis of the Policy: to sustain unit cohesion in combat. See DEP'T OF THE ARMY, ARMY REGULATION 611-1, at 1-1 (1997), available at http://www.army.mil/USAPA/epubs/pdf/r611_1.pdf [hereinafter ARMY REGULATION 611-1].

The primary purpose of the armed forces, as identified by the Policy, is to prepare for and to prevail in combat should the need arise. 10 U.S.C. § 654. The

Policy presupposes that success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion. Id. To the extent that Defendants allege that gay and lesbian individuals who volunteer to defend their country are an impediment to their comrades' discipline in combat, Plaintiff seeks discovery regarding service members subject to the Policy who do not and/or are not permitted to engage in combat.

The testimony would be relevant as to whether a rational nexus exists between the government's interest in *combat* unit cohesion and the exclusion of gays and lesbians from *non-combat* positions. Testimony showing that the Policy led to a proportionally higher number of discharges from combat units than it did from non-combat units might demonstrate the existence of that nexus. Conversely, testimony showing the opposite may tend to disprove the existence of that nexus. In either case, the testimony is directly relevant to the rational basis at issue; Defendants, therefore, must produce a witness to provide that testimony.

4. Defendants' Burden of Proof at Trial Does Not Excuse Their Failure to Appear

Defendants also rely on Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997), to justify their refusal to produce a witness. Their reliance is mistaken for three reasons. First, as this Court pointed out, "Philips discusses equal protection concerns, not substantive due process," as is relevant here. Order re Mot. To Dismiss at 17, June 9, 2009, Dkt. No. 83. Second, Philips speaks to the government's burden of proof in the rational review of a statute; it does not refer to the government's responsibilities to provide witnesses during the discovery process. Philips, 106 F.3d at 1425. Finally, the holding in Philips was arguably limited by Lawrence v. Texas, 539 U.S. 558 (2003), and is inapposite as authority now under any circumstance.

Defendants' argument conflates the burden of proof at trial with the different question of what is an appropriate subject for discovery before trial. Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's

claim or defense. Fed. R. Civ. P. 26(b)(1). Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Id. Here, Plaintiff seeks testimony relating to the evidence – if there is any – in support of the Policy, and relating to the application of the Policy. Defendants' obligation to provide this witness is not affected by their burden of proof at trial. Therefore, Defendants must produce a deponent to provide the testimony sought by Plaintiff.

5. The Testimony Sought Relates to Information Known or Reasonably Available to the Government

Defendants object to Plaintiff's Notice on the grounds that the paragraphs 6, 7, 11, 15, and 16 – reports, studies and polls relating to the Policy, as well as the names of the individuals responsible for administering the policy – are not known or reasonably available to the government. As is detailed below, this is patently untrue; Defendants have demonstrated that they have information on many of these topics within their control through their responses to Plaintiff's first set of requests for production of documents, which include studies of foreign militaries and internal studies of U.S. military personnel policies. See, e.g., Dec. of Patrick Hunnius. Defendants cannot credibly claim that this knowledge is not reasonably available to them.

a. Defendants' Hyper-semantic Objections Ignore the Topics Identified in the Notice

Defendants specifically object first to Paragraph 6, which identifies:

> Reports, studies or analyses conducted by or on behalf of Defendants relating to the experience of the armed forces of nations other than the United States with military service by individuals with a homosexual orientation or by individuals who engage in homosexual conduct, including the consideration or evaluation of such service by those foreign states or their armed forces.

Defendants respond by claiming that "[t]he Department of Defense has not conducted its own independent study of the experience of other nations regarding gay

and lesbian service members and their military service." Even assuming the veracity of Defendants' claims, their objection is orthogonal to the topic identified. However, Plaintiff seeks "[r]eports, studies or analyses conducted by **or on behalf of Defendants**." To say that Defendants have not conducted their own independent study ignores the issue of whether studies were made by 3rd parties **on behalf of** the DOD. Such reports, prepared **for** the Department of Defense, clearly exist.

Indeed, the 1993 RAND Report, which includes a study of foreign militaries' homosexual personnel policies, written by the RAND Corporation on behalf of the DOD and already produced by Defendants in their responses to Plaintiff's first set of requests for production of documents proves conclusively that Defendants have the requisite knowledge sought by Plaintiff. Moreover, Defendants have admitted publicly that they have information from foreign governments regarding the open service by gay and lesbian individuals. U.S. Congress. Senate Armed Services Committee. "Testimony Regarding DOD 'Don't Ask, Don't Tell' Policy, As Delivered by Secretary of Defense, Robert M. Gates and Adm. Mike Mullen, chairman of the Joint Chiefs of Staff." (Date 2/2/10). Text from Joint Chiefs of Staff Official Web Site. Available at http://www.jcs.mil/speech.aspx?id =1322; Accessed 3/3/10. Defendants' claim that they have no information to disclose is patently untrue.

Defendants next object to Paragraph 7, which identifies "[r]eports, research, or analysis concerning United States Armed Forces personnel and homosexual conduct or homosexual orientation commissioned, requested, or **received by** Defendants." Defendants' objection is based on the assertion that the "Department of Defense has not conducted or commissioned such a 'report, research, or analysis.'" Their assertion is false; such studies were included in, *inter alia*, the RAND Report, received by Defendants in 1993 and produced by Defendants in their responses to Plaintiff's first set of requests for production of documents. Moreover, Defendants have publicly admitted their awareness of studies and polls regarding the Policy. Plaintiff clearly has the right to depose at least one witness with knowledge of the

reports in DOD's possession.

Defendants' objection regarding Paragraph 15 is similarly misguided. Defendants claim that they cannot produce a witness regarding "polls conducted by or on behalf of the Defendants measuring public opinion regarding service by gay and lesbian individuals" because they conducted no such study. However, communications referenced by Defendants themselves, produced by Defendants in this case, show that such polls are conducted by the United States Armed Forces.[3] Defendants' claim that they conducted no relevant polls is completely untrue.

b. At Least Two Federal Employees are Nominally Familiar with All Topics Described in Log Cabin Republican's Notice of Deposition

Defendants' failure to identify a deponent is especially troublesome given that Log Cabin Republicans can themselves identify at least two staff employees of the United States Senate – Jonathan D. Clark and Gerald Leeling – who are described by their employers as "Majority Professional Staff Members for Military Personnel Issues – Homosexual Conduct Policy." U.S. Congress. U.S. Senate Armed Services Committee Staff Listing, http://armed-services.senate.gov /SASC% 20STAFF %20AORs%20-%20SEPTEMBER%202009.pdf, Accessed 3/3/10. To say that the Defendants are without sufficient knowledge to provide even one witness regarding

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[3] Examples include the following email:
Date: Tuesday, October 13, 2009, 12:42 PM | From: [redacted] | To: [redacted]
Subject: RE: Don't Ask
For the academies, how about:
Suppose the "Don't ask, don't tell" policy was overturned and homosexuals were allowed to serve openly in the military. To what extent would this change in policy affect your military career plans once you have completed your initial commitment. Mark one.
Very large extent
Large extent
Moderate extent
Small extent
Not at all [Dec. of P. Hunnius, Ex. A]

the DOD's homosexual conduct policy is, at best, disingenuous.

c. Defendants Cannot Escape Responsibility for Producing a Witness by Vacillating on the Identity of that Witness

Defendants also object to Paragraph 11, calling for the designation of a witness to testify about "[t]he recruiting and hiring policies of private contractor corporations employed since 2002 by the United States in Iraq or Afghanistan, specifically relating to any non-discrimination policies or guidelines as to those policies." Defendants claim that the Notice is "vague," asserting that "[i]t is unclear whether the Notice calls for the designation of a Government Officer or agent to testify." Again, Defendants' objection sidesteps the actual testimony called for in the Notice. Plaintiff does not state a preference between government officers or agents because the distinction is irrelevant. Plaintiff is entitled to depose the person most knowledgeable regarding the Notice – whomever the government determines, whether officer or agent. Again, Defendants' evasions do not excuse them from their responsibility to comply with the Federal Rules of Civil Procedure. They must produce a deponent – whether officer or agent – to testify on the topic noticed.

d. Defendants Are the United States, and Are Required to Comply With Discovery Regardless of Which Federal Department or Agency Controls the Relevant Information

Defendants further claim that they do not need to produce a witness responsive to Paragraph 16, calling for a witness to testify about the "fiscal impact of the policy, including any studies, reports, research, or analysis regarding the expenses associated with the policy, and the costs of recruiting additional personnel to replace service members discharged pursuant to the Policy." Their reasoning follows: "As you know, the Government Accountability Office provided estimated costs in 2005, but that Office is an arm of Congress, not an Executive Branch agency." To the extent that Defendants are claiming that they are only responsible for producing information held by the Department of Defense, or that Plaintiff seeks information exclusively

from the Department of Defense, Defendants are mistaken. Plaintiff asserts its right to propound discovery requests on any agency or department of the United States, a named defendant.

Agency and department structure does not exempt information from discovery requests propounded upon the United States; where the federal government is a party to the suit, information controlled by any agency is considered within the possession of the United States. See Harvey Aluminum, Inc., v. National Labor Relations Board, 335 F.2d 749, (9th Cir. 1964) ("In a criminal prosecution the Department of Justice would scarcely be heard to say that it was not required to produce statements otherwise within the rule simply because the documents rested in the hands of another federal agency, . . . and though the Board may not be able to compel them to produce documents in their possession, the President or, if need be, the courts, may do so."). Thus, Defendants cannot claim that they are not obligated to produce information or witnesses in the control of the Government Accountability Office. The Government Accountability Office is a department of the United States, and Defendants must produce a deponent from that department if that person has knowledge of the topic noticed.

6. Testimony Regarding Enlistment Waivers is Clearly Relevant

Defendants claim that they do not have to produce a witness to provide testimony regarding enlistment waivers because that testimony is irrelevant. Defendants are mistaken. Military waivers are relevant to the purported rational basis of the policy: discipline.

Defendants assert that success in combat requires military units that are characterized by high morale, good order and discipline. Plaintiff seeks testimony on the change in U.S. Army personnel policy promulgated since the invasions of Iraq and Afghanistan that permit felons to join the U.S. Army. See DEP'T OF THE ARMY, ARMY REGULATION 601-210, at 4-27 (2007), available at http://www.army.mil/usapa/epubs/pdf/r601_210.pdf [hereinafter ARMY REGULATION

601-210]. The recruitment of felons and the waiver of their offenses – previously unwaivable – relate directly to the issue of whether "discipline" is a pretext to exclude law-abiding gay and lesbian service members from joining the United States Armed Forces. Because the topic is relevant to Defendants' purported rational basis, Defendants must produce a witness to provide testimony on that topic.

7. Defendants Must Provide a Witness Because a Deposition is an Appropriate Method to Obtain the Evidence Sought by Plaintiff

Defendants object to Paragraph 17, which seeks to identity the person(s) responsible for administering the policy. Defendants' reason is that "such matters can be more readily addressed through alternative, less burdensome forms of discovery," including interrogatories. Plaintiff disagrees; Defendants objection is improper for two reasons.

First, this is not a valid objection. If the Federal Rules of Civil Procedure intended an alternative to deposition for convenience, it would have provided for one. See, e.g., Fed. R. Civ. P. 33(d) (permitting parties to submit business records in lieu of answers to interrogatories where the burden of gleaning the answer from the documents is substantially the same for either party).

Second, this objection lacks credibility. It took longer for Defendants' counsel to formulate and send a response to Plaintiff's Notice than it would have for a 30(b)(6) deponent to respond.

For all the reasons described above, Plaintiff asks the Court to order Defendants to produce as many deponents as necessary to respond to Plaintiff's Notice of Deposition.

III.

NOTICE TO OPPOSING COUNSEL

Pursuant to Local Rule 7-19, the names, address and telephone number of counsel for opposing parties, the United States of America and Secretary of Defense Robert Gates, are as follows:

PAUL G. FREEBORNE
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20001
Telephone: (202) 353-0543
Facsimile: (202) 616-8202
E-mail: paul.freeborne@usdoj.gov

Counsel for Plaintiff has provided notice of this *ex parte* application to opposing counsel, as explained in paragraph 4 of the accompanying Declaration of Patrick Hunnius. Defendants oppose the application.

IV.

CONCLUSION

For the reasons set forth above, Plaintiff requests that this Court order Defendants to produce a deponent or deponents responsive to Plaintiff's Notice.

Respectfully submitted,

Dated: March 5, 2010

PATRICK HUNNIUS
WHITE & CASE LLP

By: */s/ Patrick Hunnius*
Patrick Hunnius
Attorneys for Plaintiff
LOG CABIN REPUBLICANS

DECLARATION OF PATRICK HUNNIUS

I, Patrick Hunnius, say that:

1. I am an attorney licensed to practice law before this Court. I am a partner in the law firm of White & Case LLP, counsel for plaintiff Log Cabin Republicans ("Plaintiff") in this action. I have personal knowledge of the following facts, and if called as a witness I could and would competently testify thereto.

2. On December 21, 2009, Plaintiff served on the United States of America and Robert M. Gates, Secretary of Defense ("Defendants") a 30(b)(6) Notice of Deposition ("Notice") to be taken on January 25, 2010 at the offices of Plaintiff's counsel in Washington, D.C.. The Notice described a variety of topics relevant to the general application of Don't Ask, Don't Tell (the "Policy"), the application of the Policy to different groups within the United States Armed Forces, and the effects of the application of the Policy. A copy of the Notice is attached hereto as Exhibit "A."

3. Defendants failed to produce a witness on the date of the deposition. Four days later, Defendants sent Plaintiff a letter objecting to Plaintiff's Notice. A copy of the letter is attached hereto as Exhibit "B." Defendant's letter did not offer a later date at which to hold the deposition.

4. The parties met-and-conferred telephonically on February 9, 2010, but were unable to reach a satisfactory conclusion.

5. On February 11, 2010, I sent Defendants a letter suggesting the composition of a joint stipulation to be filed with the Court on March 1 or March 2. A copy of the letter is attached hereto as Exhibit "C."

6. In the letter from February 11, I asked that Defendants respond to the proposed briefing schedule by February 17 in order – assuming Defendants agreed – to allow the parties to notify the Court of the briefing schedule. Id.

7. By February 17, I had not yet received a response from Defendants.

8. I am now unable to file a joint stipulation on the matter as required by Local Rule 37-2.1, because the earliest hearing date permitted by Local Rule 37-3 would be April 2, beyond the discovery cutoff date.

9. On March 4, 2010, I notified Defendants by email of my intention to file an Ex Parte Application for Order Compelling Defendants to Comply with Log Cabin Republicans' Notice of Deposition of United States of America and Secretary of Defense Robert M. Gates Pursuant to Federal Rule of Civil Procedure 30(b)(6).

10. By letter dated March 5, 2010, Defendants stated that they oppose this application. A copy of the letter is attached hereto as Exhibit "D."

11. Attached as Exhibit "E" is an email I sent to Ryan Parker, counsel for the government, on March 5, 2010.

I declare under penalty of perjury under the laws of the United States of America that foregoing is true and correct.

Executed on March 5, 2010, at Los Angeles, CA.

/s/ Patrick Hunnius