

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

United States of America, *ex rel.*

LYLE BEAUCHAMP and WARREN SHEPHERD,

Plaintiffs,

v.

ACADEMI TRAINING CENTER, INC. (F/K/A
U.S. TRAINING CENTER, LLC),

Defendant.

Civil Action No. 1:11-cv-371
(TSE/MSN)

**PLAINTIFFS-RELATORS' MEMORANDUM IN SUPPORT OF MOTION TO
COMPEL PRODUCTION OF DOCUMENTS AND INFORMATION**

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Plaintiffs-Relators Lyle Beauchamp and Warren Shepherd (“Relators”) bring this motion to compel Defendant Academi Training Center, Inc. (“Academi”) to produce documents critical to Relators’ ability to litigate their case properly, to provide adequate responses to Interrogatories, and to complete its document production without further delay.¹ Academi has refused to produce documents that go to the heart of Relators’ ability to litigate this case without any reasonable basis or support in the law. For example, Academi has refused to produce documents created after August 7, 2011, the date the operative Worldwide Personal Protective Service contract (“WPPS II Contract”) allegedly expired, even if the documents relate to Academi’s weapons qualifications testing procedures on the M-240 and M-249 in Afghanistan that took place before August 7, 2011, when the contract was in force. In other words, if the United States Department of State (the “DOS”) wrote to Academi on August 8, 2011, one day after the contract allegedly expired, and claimed that it had evidence that Academi personnel had been fabricating weapons scores on the M-240 and M-249 for the past few years, Academi would presumably not produce the document. Academi apparently agrees that documents that relate to its weapons qualification procedures in Afghanistan during the WPPS II Contract are relevant, regardless of when they were created, since it has subpoenaed the DOS for all documents that relate to the period when the WPPS II Contract was operative, regardless of when they were created.² Further, while Academi has objected to producing any documents Relators requested that were created after August 7, 2011, it has stated that it will produce a few

¹ Attached as Exhibit A is a list of document requests and interrogatories on which Relators seek to compel production and responses. Some of the requests have been amended somewhat from Relators’ First Set of Requests for Production of Documents to reflect compromises that Relators have made during the meet and confer process.

² In its subpoena to the DOS, Academi requested “Documents authored, produced . . . or *relating to* . . . the period April 1, 2007 – August 7, 2011.” See Academi’s *Touhy* letter and selected exhibits, attached as Exhibit B at 14 (emphasis added).

documents of its own choosing that were created after that date. The Federal Rules of Civil Procedure do not permit such cherry-picking.

In addition to documents created after August 7, 2011 that relate to relevant matters that occurred before the WPPS II Contract expired, Relators are also entitled to documents that were created after August 7, 2011 that concern changes that may have been made to Academi's weapons testing procedures in Afghanistan for the M-240 and M-249. Any changes that were made to Academi's testing procedures after this litigation was filed or after the DOS conducted its investigation are relevant to Academi's claims that any weapons scoring irregularities were either not material to the DOS or were waived by the DOS. As affirmative defenses to Relators' claims that Academi fabricated weapons qualification scores on the M-240 and M-249, Academi claims that the DOS waived requirements for its weapons qualification testing.³ *See* Academi's Answer, Dkt. No. 146, at p. 24. Academi also claims that in or about 2012 or 2013, the DOS investigated its weapons qualification practices in Afghanistan and determined to take no action against the company, suggesting that any weapons scoring irregularity was not material to the DOS. Yet, Academi has refused to produce any documents related to any changes it may have made in its weapons qualifications and scoring procedures after the DOS investigation, which would allow Relators to challenge its claim that its scoring procedures were not material to the DOS. Indeed, although Academi has refused to produce any documents related to its scoring procedures after August 7, 2011, Relators possess a few scorecards from 2012 and 2013 that

³ Although Academi has repeatedly informed Relators that the DOS waived relevant aspects of its weapons qualification testing requirements, the only waiver Relators have seen as of yet provided that testing in Afghanistan could be postponed, if necessary, for operational security. Relators have seen no waiver suggesting that Academi personnel did not have to be properly qualified on the M-240 and M-249, and certainly no waiver or any other document suggesting that the DOS did not care if scores for the M-240 and M-249 were fabricated or if Academi personnel in Afghanistan were not scored at all on the M-240 and M-249.

suggest that Academi, possibly at the direction of the DOS, tightened its procedures to make it more difficult for its firearm instructors to fabricate weapons scores. Discovery about changes Academi made to its scoring practices are thus relevant and critical for Relators to challenge Academi's suggestion that the DOS waived the irregularities in its weapons testing procedures. Particularly since Academi is relying on the investigation conducted by the DOS, Relators are entitled to discovery into changes Academi made regarding how it tests and scores its personnel in Afghanistan on the M-240 and M-249. However, Relators have agreed during meet and confers to limit the time period for documents related to changes Academi made to its testing and scoring procedures to one year after the DOS concluded its investigation.

Similarly, Academi has refused to produce documents related to Academi's termination of two firearm instructors in Afghanistan in 2012 who were fired and subsequently barred from working for any contractor who does business with the DOS, apparently at the behest of the DOS. *See Academi's Responses to Relators' First Requests for Production*, attached as Exhibit C, at pp. 12-14. Several days after they witnessed another firearm instructor in Afghanistan fabricating scores on the M-249, Robert Winston and Allan Wheeler reported what they witnessed to more senior Academi personnel. Academi allegedly fired Messrs. Winston and Wheeler at the request of the DOS for failing to report quickly enough that the firearm instructor had fabricated scores. Discovery on the termination of the firearm instructors, including Academi's communications with the DOS about their termination and decision to bar them from future work, is thus extremely relevant to Academi's claim that irregularities in its weapons scoring procedures were not material to the DOS.

Academi has also refused to produce any documents related to the M-240 or M-249 being used on missions in Afghanistan during period of time that the WPPS II Contract was in force,

discovery that might determine whether unqualified Academi personnel had been issued the weapons or negligently discharged them on missions. *See* Ex. C at pp. 10, 14. Although Academi has refused to produce any documents on the subject, Relators believe that personnel who had not been properly tested on the M-240 and M-249 during the WPPS II Contract were routinely issued the weapons to use on missions. Discovery on the use of the M-240 and M-249 on missions in Afghanistan is relevant both to the issues of materiality and damages.

Academi has also refused to provide responsive information to several interrogatories. For example, in response to an interrogatory that requested that Academi describe the process by which Academi administered weapons qualifications testing on the M-240 and M-249, Academi simply referred to the WPPS II Contract and claimed that the DOS waived certain contractual requirements. *See* Academi's Responses to Relators First Requests for Interrogatories, attached as Exhibit D, at pp. 6-7. Federal Rules of Civil Procedure 33(d) only allows a producing party to produce business records in lieu of answers when the records contain all of the information requested by the interrogatory and the producing party specifies precisely where the information is contained. The WPPS II Contract does not describe the process that Academi undertook to administer weapons qualification testing on the machine guns.

During the past few weeks, Relators have engaged in two telephonic meet and confers, and have sent three letters to Academi in attempt to clarify and narrow the issues of disagreement and avoid judicial intervention. Although compromises were made, Academi has continued to refuse to produce responsive, non-privileged information on critically relevant subjects and has refused to provide the metadata previously ordered by this Court. Further, Academi has continued to delay the time in which it will complete its overdue document production. Indeed, yesterday Academi informed Relators that it will not produce all documents in response to

Relators' First Request for Production of Documents served on May 26, 2016 that are related to the DOS investigation until at least August 11, 2016, even though it has noticed employees of the Department of State for depositions on August 8, 9, and 10, 2016. Accordingly, particularly in light of the expedited schedule in this Court, Relators are forced to move to compel the production of documents and information and seek an order requiring Academi to complete its document production without further delay.

BACKGROUND

Relators allege that Academi violated the False Claims Act by routinely failing to test its personnel in Afghanistan with the M-240 and M-249 machine guns, fabricating scores on scorecards for its personnel, and knowingly submitting false records and improper demands for payment to the DOS. *See* Relators' Second Amended Complaint, Dkt. No. 39, at ¶¶5-6. The State Department has a Worldwide Personal Protective Services ("WPPS") program whereby it retains private contractors like Academi to provide protective service personnel ("PRs") to protect United States officials and embassies abroad, as well as certain foreign government officials. *Id.* at ¶2. Pursuant to the WPPS program, the State Department entered into a contract with Academi, then operating under the name Blackwater, to protect United States officials and the United States Embassy in Kabul, Afghanistan. *Id.* The State Department issued various Task Orders under the WPPS II Contract, and it issued Task Order 4 to Academi. *Id.* at ¶ 60. According to Academi, the WPPS II Contract and Task Order 4 expired on August 7, 2011. However, on information and belief, Academi or one of its affiliates immediately entered into a subsequent contract with the DOS pursuant to a subsequent Task Order to continue providing the same services in Afghanistan.

The WPPS II Contract Required that Academi Qualify Each PRS Quarterly on the M-240 and M-249 Belt-Fed Machine Guns.

The State Department required in the WPPS II Contract, as a “**Necessary Condition,**” that Academi qualify each PRS every three months for proficiency with five specified firearms—M4 assault rifle, Glock pistol, shotgun, M-240 belt-fed machine gun, and M-249 “SAW” belt-fed machine gun. *See* Dkt. No. 39 at ¶¶ 42-44 (emphasis in WPPS II Contract). The Contract specified detailed instructions regarding how Academi must qualify its personnel. For example, it required that Academi use different targets for the two belt-fed machine guns. *See id.* at ¶ 71. The Contract required Academi to score each PRS’s performance with each weapon by counting the number of hits the PRS achieved within a specified area of the designated target. *See id.* at ¶ 72. The Contract also provided the number of hits each PRS was required to achieve. *See id.* If conducted as required by the WPPS II Contract, the M-240 and M-249 qualifications are more difficult for a PRS to pass than the weapon qualifications for the other guns tested, especially since many PRSs had little or no experience firing an M-240 or M-249 before they were in Afghanistan. *See id.* at ¶¶ 77-78. The WPPS II Contract expressly forbade any PRS who had not qualified quarterly with all required weapons from providing protective services. *See id.* at ¶ 57, 131. Further, the DOS allowed a PRS who failed a weapon qualification only two additional chances to qualify with the weapon before Academi was required to disqualify him permanently from serving as a PRS and return him to the United States at its expense. *See id.* at ¶ 82. Academi was also subject to penalties of \$1,800 a day for each position, if any protection detail position that the State Department required was not fully staffed with qualified personnel. *See id.* at ¶¶ 58-59. Thus, Academi faced strong incentives to avoid disqualifying its PRSs.

Relators allege that, beginning no later than April 2007, Academi failed systematically to subject its PRSs in Afghanistan to the required tests for the M-240 and M-249 machine guns.

See id. at ¶¶ 67-92. Instead of following the procedures mandated under the WPPS II Contract to test PRSs with the machine guns, PRSs often shot at targets that had already been shot up, and the instructors did not even attempt to count holes in the targets after each shooter. *See id.* In some instances, the PRSs did not even shoot a M-240 or M-249 during weapons qualification testing. *See id.* at ¶ 87. The firearm instructors fabricated passing scores on scorecards for each PRS on the M-240 and M-249 to avoid personnel being disqualified. *See id.* at ¶ 88. Academi billed the State Department for the personnel despite knowing that they were not qualified under the WPPS II Contract. *See id.* at ¶¶ 90-92.

Academi Claims that the DOS Waived Certain Requirements Related to Weapons Testing on the M-240 and M-249.

Academi claims that it received waivers from the DOS allowing it to circumvent the requirements of the WPPS II Contract with respect to qualifications testing on the M-240 and M-249. Although Academi has not yet produced any waivers from the DOS indicating that Academi was no longer required to score its PRSs on the M-240 and M-249 by counting holes in a target, Academi's Initial Disclosure states that it intends to rely on "[w]aivers that ACADEMI received from the Department of State concerning firearms qualifications under the WPPS II contract and Task Order 4." *See Academi's Rule 26(a)(1) Initial Disclosures at 5, attached as Exhibit E.* In its Answer to Relators' Second Amended Complaint, Academi claims the DOS "waived any contractual requirements that were inconsistent with ACADEMI's firearm qualification practices," "acquiesced to all ACADEMI firearm qualification practices that were inconsistent with the WPPS or TO-4" and "ratified ACADEMI's firearm qualification practices as a modification to the WPPI contractual terms." Academi's Answer, Dkt. No. 146, at p. 24. The only waiver that Relators have seen in connection with this case thus far was attached as an exhibit to a *Touhy* Letter that Academi sent to the DOS in this lawsuit. That waiver provided

that the weapons qualifications requirements *could be postponed or waived during those periods for security, operational or logistical reasons.*” See Ex. B at 2. (emphasis in original).

Academi Claims that the DOS Investigated its Weapons Qualification Procedures and Took No Action Against the Company.

Academi claims that the DOS investigated its weapons qualification procedures in Afghanistan and determined to take no action against the Company. Relators do not yet know the scope of the investigation, whether the DOS investigated whether Academi’s firearm instructors regularly fabricated scorecards on the M-240 and M-249, or what the DOS concluded. However, Academi is apparently claiming that any irregularity in its scoring procedures was not material to the DOS. Accordingly, Relators have sought discovery on any changes to Academi’s weapons testing procedures that came during or after the time of the DOS investigation, which might refute Academi’s claim that any irregularities were not material to the DOS. Academi has refused to produce any documents that might indicate whether the DOS sought changes to its weapons scoring process after it completed its investigation. See Academi’s Responses to Relators’ First Set of Requests for Production, attached as Exhibit D.

The DOS investigation followed on the heels of accusations made by former Academi firearm instructors Robert Winston and Allan Wheeler. In March 2012, Messrs. Winston and Wheeler reported to more senior Academi personnel that, days earlier, an Academi firearm instructor in Afghanistan had directed them to certify fabricated scores on the M-249. Academi terminated both of them, apparently at the behest of the DOS, allegedly for not reporting the fraudulent scoring quickly enough. In addition, Academi, also apparently at the behest of the DOS, had Messrs. Winston and Wheeler placed on a so-called Do Not Use (“DNU”) list to bar them from working for another contractor that provides security services to the DOS. Accordingly, Winston’s and Wheeler’s termination and placement on a DNU list are directly

relevant to Academi's claim that scoring irregularities were not material to the DOS.

Nevertheless, Academi has refused to produce documents or communications with the DOS concerning their termination or placement on a DNU list.

After the Complaint in this Lawsuit was Unsealed, Academi Made Changes to its Weapons Qualification Procedures.

In July 2011, Relators' First Amended Complaint in this action was unsealed. *See* Dkt. No. 4. On information and belief, in late 2011, or early 2012, Academi began testing its PRSs on the M-240 and M-249 for the first time in years. Relators also believe that in 2012, possibly at the behest of the DOS, Academi changed the scorecards that its firearm instructors used to record scores during the quarterly weapons testing so that, for the first time, the shooters were required to certify that the recorded scores were accurate. *Compare* Warren Shepherd's scorecard from January 2011, attached as Exhibit F, *with* his score card from May 2012, attached as Exhibit G. In 2013, Academi again changed its scorecards so that the shooters were required to certify that they had reviewed their scores before signing the certification. *See* Warren Shepherd's scorecard from February 2013, attached as Exhibit H. The changes Academi made by actually testing and scoring its PRSs with the M-240 and M-249 and by using scorecards that made it more difficult to fabricate scores suggest that proper weapons testing and scoring were material to the DOS.

Procedural History

Relators served their First Set of Documents Requests and First Set of Interrogatories on May 26, 2016. *See* Exs. I & J. Academi served its objections to Relators' Document Requests and Interrogatories on June 13, 2016.⁴ *See* Exs. K & L. That same day, Relators emailed

⁴ Academi included 30 general objections in its Objections to Relators' First Set of Interrogatories and 25 general objections in its Objections to Relators' First Set of Requests for Production. After Relators directed Academi to the Rule 16(b) Scheduling Orders issued by this

(continued...)

Academi because it was unclear from Academi's objections whether Academi was producing any non-privileged, responsive information to Relators, since they had failed to provide the information in their objections as required by Rule 34(b)(2)(B). Academi refused to provide an answer, and instead asserted that it should have been allowed to serve objections and responses simultaneously, even though the Local Rules require objections be served 15 days before responses. Relators again asked for amended objections so that they would know what documents, if any, Academi was producing, but again Academi refused.

Indeed, since Academi first responded to Relators' discovery requests, it has objected to virtually every request and has refused to provide direct answers to Relators' questions trying to understand what documents Academi was withholding or when it would complete its document production. Among other objections, Academi has complained that it did not understand what Relators meant when it asked a question about counting holes in a target during its weapons qualification testing. It claimed that the term "firearm instructor," and the phrase "while on a mission in Afghanistan," are unclear, vague, and ambiguous. *See* Ex. K at pp. 20, 22.

Academi also failed to comply with Rule 34(b)(2)(B), which requires a party to produce documents on the requested date or provide a reasonable date on which it will complete its production. Instead, Academi informed Relators that it would be producing documents on a rolling basis but failed to provide a date on which it would complete its production as required. After Relators asked Academi numerous times for the date it would complete its production, Academi said it would use its best efforts to complete its production by July 15, 2016. On July

(continued...)

Court (Dkt. Nos. 107 & 150) forbidding general objections Academi agreed to waive those objections, except for attorney client privilege and work product.

14, 2016, Academi informed Relators that it would use its best efforts to complete its production by August 11, 2016, claiming it needs additional time because it will produce at least certain documents relating to the DOS investigation, even though they are dated after August 7, 2011. Of course, Relators asked for all documents related to the DOS investigation in its initial Document Request served on May 26, 2016. Academi's document production was due on June 27, 2016. Academi's continued delay is of great concern and is seriously impeding Relators' ability to litigate their case. Academi has subpoenaed employees of the DOS for depositions on August 8, 9, and 10, 2016. Academi now claims that it will not even produce documents related to the DOS investigation of its weapon testing procedures until at least August 11, 2016.

Academi should be compelled to provide non-privileged responsive documents, to provide adequate responses to Relators' Interrogatories that comply with the Federal Rules of Civil Procedure, and to complete its overdue document production without further delay.

Academi Should Be Compelled to Produce Documents and Answer Interrogatories Relevant to Relators' Claims.

Attached as Exhibit A is a complete list of document requests and interrogatories on which Relators' seek to compel production and responses. Academi has refused to produce documents created after August 7, 2011, except for a small and select group of documents of its own choosing. In particular, Academi has told Relators that it will produce certain documents related to the DOS investigation that took place later than 2011, personnel files that may contain documents dated after August 2011, and a three-page document related to the termination of Messrs. Winston and Wheeler in 2012. Academi has refused to produce documents created after August 7, 2011 even if they relate to its weapons qualification testing and scoring procedures on the M-240 and M-249 in Afghanistan that occurred before August 7, 2011. Academi has no

basis to refuse to produce such obviously relevant documents and should therefore be compelled to produce documents responsive to RFP Nos. 3, 4, 6, 10, 11, 14, 15, 21 and 22.

Relators have also requested documents dated after August 7, 2011 that concern changes Academi may have made to its weapons qualification procedures in Afghanistan, possibly at the request of the DOS or as a result of this lawsuit, to challenge Academi's claims that any irregularities in its weapons testing procedures were not material to the DOS or were waived by the DOS. For example, Relators requested scorecards on the M-240 or M-249 after August 7, 2011 because they may indicate stricter controls were put in place to make it more difficult for firearm instructors to fabricate scores. Relators have agreed to limit the date any such documents were created to one year after the DOS investigation concluded. Similarly, Relators have requested that Academi produce the WPPS contract and Task Order for Afghanistan executed immediately after the WPPS II Contract allegedly expired in August 2011 to see whether the DOS waived or changed its requirements for testing PRSs on the M-240 or M-249. Academi should be compelled to produce documents responsive to RFP Nos. 1, 2, 17, 19, 20, 26, 28 and 33.

Academi has refused to produce documents relating to the termination of Messrs. Winston and Wheeler in 2012, and their placement on a so-called DNU list, because it claims they are "outside the relevant time frame." Ex. K. at pp. 31, 34. Despite this objection, Academi did selectively produce a single three-page memorandum written in 2012 regarding the termination, but it has refused to produce any other documents or communications with the DOS requested by Relators regarding Messrs. Winston's and Wheeler's termination. Evidence that the DOS instructed Academi to fire Messrs. Winston and Wheeler for failing to report quickly enough that another instructor was fabricating scores on the M-240 and M-249 and had them

barred from working for another contractor is obviously relevant to Academi's suggestion that its scoring procedures or irregularities were not material to the DOS. Academi should be compelled to produce documents responsive to RFP Nos. 25, 29 and 32.

Academi has also refused to produce communications with the federal government related to this lawsuit, claiming they are not material based on the same improper temporal limitation. *See* Ex. C at p. 14. Communications with the government, including the Department of State, about *this lawsuit* are clearly relevant to *this lawsuit*. Academi should be compelled to produce documents responsive to RFP No. 29.

Academi has also refused to produce any documents concerning the possession of an M-240 or M-249 by PRSs while on a mission in Afghanistan during the time the WPPS II Contract was in force, claiming such documents are not relevant. *See* Ex. K at p. 22. Similarly, Academi has refused to produce any documents concerning any incident where any person or property was harmed or damaged by a bullet fired from an M-240 or M-249 in Afghanistan during the same time period. *Id.* at pp. 32-34. Evidence that PRSs who had not been tested or scored on an M-240 or M-249 were issued the machine guns on missions or negligently discharged the weapons during missions is relevant to show the materiality of the weapons qualification procedures and to the amount of damages and penalties that may be assessed in this case. Academi should be compelled to produce documents responsive to RFP Nos. 18, 30 and 31.

ARGUMENT

Academi's refusal to produce relevant documents is irreconcilable with Relators' well-established right under Federal Rule of Civil Procedure 26 to conduct broad discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. The Fourth Circuit has held repeatedly that the "[d]iscovery under the Federal

Rules of Civil Procedure is broad in scope and freely permitted.” *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003); *see also Billips v. NC Benco Steel, Inc.*, 5:10-cv-095, 2011 WL 4005933, at *1 (W.D.N.C. Sept. 8, 2011) (discovery rules deserve “broad and liberal construction”) (citing *Herbert v. Lando*, 441 U.S. 153, 177 (1979)).

As the party objecting to discovery, Academi has the burden to establish that the discovery should not be permitted. *Singletary v. Sterling Transp. Co.*, 289 F.R.D. 237, 241 (E.D. Va. 2012). Academi has not met its burden.

I. Academi Should Not be Permitted to Set a Date Limit that Excludes from Production Relevant Documents Central to Relators’ Claims and Cherry-Pick Documents After that Date to Produce.

Academi tries to have it both ways, selectively producing self-serving documents created after its artificial date limit of August 7, 2011, while refusing to produce other relevant documents created after that date. As numerous courts have held, the relevant time period with respect to document requests may include a period before and after the offending conduct alleged in the complaint. *See Mills v. E. Gulf Coal Preparation Co., LLC*, 259 F.R.D. 118, 134 (S.D. W.Va. 2009) (in USERRA wrongful-termination action, plaintiff entitled to information regarding defendants’ employment practices “for a reasonable period of time before and after his employment”); *Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc.*, No. 12 CIV. 1579 HB JCF, 2012 WL 5927379, at *2 (S.D.N.Y. Nov. 21, 2012) (“Documents that post-date the transactions may nevertheless relate back to the state of affairs as it existed at the crucial time.”); *In re Morgan Stanley Mortgage Pass-Through Certificates Litig.*, No. 09-CV-02137 LTS SN, 2013 WL 4838796, at *3 (S.D.N.Y. Sept. 11, 2013), on reconsideration in part, No. 09-CV-02137 LTS SN, 2013 WL 5745938 (S.D.N.Y. Oct. 23, 2013) (holding, “[l]ike other courts, . . .

that the post-closing period can prove to be fertile ground for relevant discovery.”); *Fort Worth Employees’ Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 108 (S.D.N.Y. 2013).

Academi has asserted that it will not even produce post-August 2011 relevant documents that relate back to the time period in which the WPPS Contract II was in force. It has refused to produce, for example, communications with the Department of State dated after August 7, 2011 that concern Academi’s procedures for scoring on the M-240 or M-249 before August 7, 2011. Academi’s argument has no case law support and offends Rule 26 of the Federal Rules of Civil Procedure, which provides that a party may obtain discovery if it is relevant to any party’s claim or defense and proportional to the needs of the case, regardless of whether the information sought is admissible in evidence. Indeed, Academi concedes the relevance of documents created *after* August 7, 2011 that relate to qualification and testing occurring *before* August 7, 2011, as it has subpoenaed the Department of State for those documents. *See* Ex. B at 14, 17-18.

While Academi has refused to produce documents created after August 7, 2011, it has relied on a DOS investigation that took place after 2011. Further, while Academi refused to produce all documents related to its termination of Messrs. Winston and Wheeler, Academi produced a three-page memorandum about their termination written in 2012. The Federal Rules do not permit such cherry-picking. *See, e.g., High Point SARL v. Sprint Nextel Corp.*, No. CIV.A. 09-2269-CM, 2011 WL 3241432, at *3 (D. Kan. July 29, 2011) (“The Court agrees with Sprint that High Point may not ‘pick and choose’ which aspects of the requested discovery it will produce, if such discovery is in fact relevant and non-privileged as required by Federal Rule of Civil Procedure 26(b)(1).”); *Howard v. Sweetheart Cup Co.*, 2001 WL 721765, at *2 (N.D. Ill. Jun. 27, 2001) (admonishing party for “pick[ing] and choos[ing] the documents [it] thought were relevant”); *Athridge v. Aetna Cas. & Surety Co.*, 184 F.R.D. 181, 190 (D.D.C. 1998)

(obfuscatory responses to requests for production impermissibly leaves the requesting party “wondering what documents are being produced... [or] withheld” and allows the responding party “to be the sole arbiter of that decision”).

Relators have sought documents that relate to Academi’s weapons qualification procedures on the M-240 and M-249 in Afghanistan that were conducted during the WPPS II Contract (before August 7, 2011), regardless of when they were written. Relators have also sought documents related to changes that Academi may have made to its testing and scoring procedures in Afghanistan on the M-240 and M-249 for up to one year after the DOS concluded its investigation. Lastly, Relators have sought documents concerning the termination of Messrs. Winston and Wheeler in 2012 and communications related to this lawsuit, which was unsealed in July 2012. The time periods of Relators’ Requests are thus directed to relevant documents and are proportional to the needs of the case.

II. Academi Should be Compelled to Produce Documents Related to the Use of the M-240 and M-249 on Missions in Afghanistan that took Place before August 7, 2011.

Academi has flatly refused to produce any documents related to its use of M-240 and M-249 on missions in Afghanistan, claiming such documents are irrelevant. The use of the M-240 or M-249 on missions in Afghanistan by unqualified personnel goes to the heart of the materiality of the DOS’s requirement that Academi conduct weapons qualification testing and is also relevant to the issue of damages and penalties.

Section 3729(a) of Title 31 provides that any person who violates the False Claims Act is liable to the United States Government for a civil penalty for each false claim of between \$5,500 and \$11,000 plus treble damages which the Government sustains because of the act giving rise to liability. The federal trial court has considerable discretion to determine whether to award a penalty at the lower or higher amount for each claim. *See Morse Diesel Intern., Inc. v. United*

States, 79 Fed. Cl. 116 (Fed. Cl. 2007). Thus, documents that evidence that individuals who were not properly qualified to shoot the M-240 and M-249 were issued the guns on missions in Afghanistan, or caused injury or damage to individuals or property in Afghanistan, would be relevant to the Court's determination of damages and penalties.

III. Academi Should be Compelled to Describe the Process for Weapons Qualification Testing.

This Court should compel Academi to answer Interrogatories 5 and 6 and describe the process by which it performed weapons qualifications testing and reported scores to the Department of State. Instead of answering the interrogatories as required under Rule 33(b)(1), Academi responded that it performed qualification testing "in accordance with the WPPS II Contract" and "as permitted and accepted by the U.S. Department of State ('DOS') given the logistical, operational, and security risks present at the time in Kabul. . . ." *See* Ex. D at pp. 6-7. Academi claims that it has relied on Rule 33(d), which permits a producing party to rely on a business record to answer interrogatories.

Academi's reliance on Rule 33(d) is misplaced. First, the WPPS II Contract does not answer *how* Academi administered weapons qualifications or *how* it reported scores to the Department of State. Further, a party relying on a Rule 33(d) business record production to answer interrogatories must affirm, among other things, that the information sought by the interrogatory in fact is available in the specified records, and specify which records contain the information sought by the interrogatory. *See* 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2178 (2d ed. 1994). Courts have routinely held that citing to documents, without precision, is an insufficient response to an interrogatory. "Document dumps or vague references to documents do not suffice." *U.S. S.E.C. v. Elfindepan, S.A.*, 206 F.R.D. 574, 576 (M.D.N.C. 2002). When a party asks for an answer to a specific

question, a producing party cannot simply refer to business documents. *See United States v. Dist. Council of N.Y. City & Vicinity of United Bhd. of Carpenters & Joiners of Am*, No. 90 Civ. 5722(CSH), 1992 WL 188379, at *5 (S.D.N.Y. July 30, 1992).

Further, Academi's claim that it performed weapons qualification testing as accepted by the DOS does not comply with Rule 33(d)'s requirement that the documents be "adequately and precisely specified." *Elfindapan*, 206 F.R.D. at 576. Indeed, Academi has not cited a single document to support its statement that Academi's quarterly weapons qualification testing was "permitted and accepted" by the DOS. By merely referring to the WPPS II Contract or summarily concluding that the Department of State waived requirements for weapons qualification, Academi has not met its discovery obligations and it should be compelled to answer Interrogatory Nos. 5 and 6.

IV. Academi Should be Compelled to Produce File Path Metadata as Previously Ordered by the Court.

Academi refused to produce file path metadata for documents that were previously collected and produced to the government in connection with the DOS investigation into allegations relating to Academi's firearms qualifications in Afghanistan. *See* Dkt. No. 142 at 2. At a June 8, 2016 Discovery Conference before this Court, the Court rejected Academi's proposal to withhold file path metadata on the documents that had been collected for the DOS investigation. Instead, the Court ordered Academi to produce file path metadata for all documents indicating how each document was stored in the ordinary course of business.

Despite the Court's clear instructions, Academi has failed to produce file path metadata that reflects how documents it had collected for the DOS investigation were kept in the ordinary course of business. For example, dozens of excel spreadsheets relating to weapons qualifications were produced with the file path "**for_production_20130729**Documents_from_Kabul\2009 [or

2010] Kabul Site Weapons Quals; over one hundred range information forms were produced with the file path “\for_production_20130729\Documents_from_Kabul\2009 [or 2010] Range Information Sheets”; hundreds more range information forms were produced with the file path “\Kabul Firearms Document Request\2009[or 2010] Range Information Sheets”; and over two hundred documents were produced with the file path “\Production CD 20130920\QUAL-ROSTER.” (emphasis added). These file paths obviously do not identify the location of each file as it was kept in the ordinary course of Academi’s business, they do not comply with Rule 34, and they are in violation of the Court’s Order.⁵

⁵ Relators are not certain whether the information the Court ordered be produced exists, or whether it was deleted during the DOS investigation. When Relators asked Academi about its failure to produce the subset of documents as kept in the ordinary course of business as ordered by this Court, Academi responded: “While our firm was not involved in the collection or production of the OIG Documents, our understanding is that the filepath metadata provided for these OIG Documents is the same metadata that was produced to the Government and thus, accurately reflects how these documents were maintained in the ordinary course *for that production.*” See Email from T. Lee to J. Goetz et al. (June 30, 2016 3:20 p.m.) (emphasis added), attached as Exhibit M. If Academi did not maintain its documents as it had been kept in the ordinary course of its business, at least two serious issues are implicated. First, the documents were collected for the DOS investigation after this lawsuit was unsealed in July 2011, and thus, were subject to an unambiguous duty to preserve evidence. Second, Academi and its predecessor companies were subject to document hold notices dating as far back as 2007.

CONCLUSION

For the reasons stated above, Relators respectfully request this Court to compel Academi to produce documents and information responsive to Requests for Production and Interrogatories as set forth in Exhibit A.

/s/ Susan M. Sajadi

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2016, I will serve the foregoing to counsel for Defendant Academi Training Center, Inc. via CM/ECF.

/s/ Susan M. Sajadi _____

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