

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

NICHOLAS HARRISON and
OUTSERVE-SLDN, INC.

Plaintiffs,

v.

JAMES N. MATTIS, in his official capacity as
Secretary of Defense; MARK ESPER, in his
official capacity as the Secretary of the Army;
and the UNITED STATES DEPARTMENT
OF DEFENSE

Defendants.

Case No. 1:18-cv-641 (LMB/IDD)

**PLAINTIFFS' MOTION FOR ENTRY OF AGREED-UPON PROTECTIVE ORDER
AND AGREED-UPON ELECTRONICALLY-STORED INFORMATION ORDER**

Plaintiffs Nicholas Harrison and OutServe-SLDN, Inc. ("Plaintiffs"), by counsel, hereby move for entry of an agreed protective order and electronically stored information ("ESI") order, as set forth in the parties' Proposed Discovery Plan. ECF No. 67, ¶¶ 4.d and 6.

There is good cause for entry of these proposed orders in this action because disclosure and discovery activity in this action will involve the production of confidential and/or private information for which special protection from public disclosure and from use for any other purpose than litigating this action will be warranted. The parties have agreed to the Proposed Protective Order attached as Exhibit A. In addition, the parties have agreed to a stipulated order regarding ESI to facilitate discovery in this action, attached as Exhibit B.

WHEREFORE, Plaintiffs respectfully request that the Court enter the Proposed Protective Order attached as Exhibit A and the Proposed Electronically Stored Information Order attached as Exhibit B.

Dated November 2, 2018

By /s/Andrew Sommer

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November 2018, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: November 2 , 2018

Respectfully submitted,

/s/ Andrew R. Sommer
Andrew R. Sommer

Exhibit A

2. **Designation of Protected Material:** A party or non-party may, in good faith, designate as CONFIDENTIAL and therefore subject to the protections and requirements of this Order, any Discovery Material that the designating party reasonably believes contains confidential information, including personal, proprietary, or sensitive information not generally disclosed to the public, including HIV status. Discovery Material designated CONFIDENTIAL (“Protected Material”) shall be used by the receiving parties solely for the prosecution or defense of this action as shall not be disclosed to any person or entity unless specifically authorized by the terms of this Order or by further order of the Court. Consistent with the requirements of this paragraph, a party may designate Discovery Materials as CONFIDENTIAL, within fifteen (15) business days of receipt of the Discovery Materials produced or given by the other parties or by a non-party but not designated CONFIDENTIAL by that other party or non-party.

3. **Limitations on Use:** Protected Material and its contents, as well as copies, summaries, notes, memoranda, and computer databases thereto, shall be used solely for the purpose of litigating this action, shall be and remain confidential, and shall not be disclosed in any fashion, nor be used for any purpose other than litigating this action, except that, unless explicitly stated here, this Order does not in any way supersede or supplant Defendants’ statutory obligations to disclose or protect information, including obligations under the Freedom of Information Act, the Privacy Act, and the Health Insurance Portability and Accountability Act.

4. **Limited Disclosure of Protected Material:** Protected Material may be disclosed, subject to the specific procedures and provisions contained in this Order, to the following persons and/or entities only:

- a. This Court and the officers, employees, and any stenographic reporters of such courts;

- b. Counsel representing the parties (including their supervisory officials) and their support personnel whose functions require access to Protected Material (collectively “Attorney Professionals”);
- c. Outside vendors who perform scanning, photocopying, computer classification, translation, or similar clerical functions, retained by the parties or their counsel in this action, but only for the purposes of performing such services and only so long as necessary to perform those services;
- d. Independent experts consulted or retained by counsel for assistance in the preparation or prosecution of claims or defenses in the action, to the extent reasonably necessary for such experts to prepare a written opinion or to prepare to testify or to assist counsel;
- e. A witness who has been noticed or subpoenaed for deposition or a court appearance to the extent reasonably necessary for the preparation or giving of his or her testimony about Protected Material;
- f. Any other person who is so designated by order of this Court or by written agreement of the producing party for purposes of this litigation.

No Protected Material may be disclosed to persons identified in subparagraphs (d), (e), or (f) until they have reviewed this Order and have executed a written agreement in the form attached hereto as Exhibit A, which executed agreements shall be maintained by counsel of record for the party making the disclosure to such persons (provided that Counsel who makes such disclosure shall retain the written agreement but shall not be required to produce it to opposing counsel until the deposition of the person or without order of the Court).

5. **Effect of Designation:** the designation of Protected Material pursuant to the Order shall not be construed as a waiver of any objection or a concession by any party that such Protected Material is relevant or material to any issue. Nor shall a failure to object to the designation of any such Protected Material be construed as a concession by the receiving parties that such Protected Material is, in fact, confidential or otherwise entitled to protection under the terms of this Order. All parties maintain their respective rights to object to production of any requested documents or portions of requested documents on the grounds that they are otherwise not discoverable, including, but not limited to, objections based on any applicable privilege, undue burden, overbreadth, relevance, and proportionality to the needs of the case. Any party may seek an order from the Court determining that specified Protected Material is not entitled to be treated as CONFIDENTIAL.

6. **Mechanics of Designation:** No designation of CONFIDENTIAL shall be effective as to a particular page of Protected Material unless there is placed on or affixed to each page of such Protected Material a marking of "CONFIDENTIAL." In the case of electronic documents produced in native format, such designation may be made on the physical media (e.g., disk, flash drive) containing such electronic documents and on a slipsheet accompanying the native file if the file is served electronically. Testimony may be designated CONFIDENTIAL within ten (10) business days after receipt of a transcript of said testimony by furnishing to counsel for the other parties a detailed statement of the specific portions of any such information by page and line number or exhibit number, by designating lines and pages as CONFIDENTIAL by highlighting or digital marking, or by a statement on the record at the time of the testimony is given. Pending the expiration of said ten (10) business days, all parties shall presumptively treat the entire deposition transcript as CONFIDENTIAL. In addition to the requirements of this Order, the court reporter

before whom a deposition or other testimony relating to Protected Material is taken shall, at the request of any party, designate a portion of the deposition or any exhibits containing Protected Material as CONFIDENTIAL.

7. **No Waiver; Late Designation:** The failure of a party to designate information or documents as CONFIDENTIAL in accordance with this Order, and the failure to object to such a designation, is not a waiver of the right to do so and shall not preclude a party at a later time from subsequently designating or objecting to the designation of such information or documents as CONFIDENTIAL. The parties understand and acknowledge that a party's failure to designate information or documents as CONFIDENTIAL relieves the other parties of any obligation of confidentiality until such a designation is made. Promptly after written notice to the receiving parties of any such subsequent designation by the producing party, which notice shall specifically identify the documents or information to be designated, the parties shall confer and agree upon a method to mark as CONFIDENTIAL any such subsequently designated documents. All documents containing any such subsequently designated information will be thereafter treated in accordance with this Order.

8. **Objections to Designations:** A party may, at any time, make a good faith challenge to the propriety of a Confidential Information designation. In the event a party objects in writing to the designation of any material under this Order, the objecting party shall consult with the designating party to attempt to resolve their difference. If the parties are unable to reach an accord as to the proper designation of the material, after giving notice to the designating party, either party may apply to the Court for a ruling regarding the designation. If such a motion is made, the designating party has the burden of establishing that the designation is proper. If a timely motion is made, any documents or other materials that have been designated CONFIDENTIAL that are

subject to the motion shall be treated as confidential until such a time as the Court rules that such materials should not be treated as Confidential.

9. **Control of Protected Material:** All Protected Material shall be maintained under the direct control of counsel of record, who shall be responsible for preventing any disclosure thereof, except as permitted by the terms of this Order. Attorney Professionals may review and make working copies, abstracts, and digests shall be deemed Protected Material under the terms of this Order provided that access to Protected Material, in whatever form stored or reproduced, shall be limited to those persons entitled to receive such information pursuant to the terms of this Order and shall be appropriately marked in accordance with the terms of this Order.

10. **Redaction of Personal Identifiers:** In the event that the parties are required to produce personal identifying information (including, but not limited to, name, social security number, military identification number, date of birth, and home address) for individuals living with HIV who have not previously provided the parties written permission to disclose their HIV status, the parties shall redact all such personal identifying information. But the parties shall produce redacted documents in a manner that makes clear which documents pertain to a particular individual living with HIV whose identifying information has been redacted.

11. **Return or Destruction; Conclusion of Action:** Unless otherwise instructed by the Court, and subject to any applicable document retention requirements, at the conclusion of this action, including any appeals, all Protected Material, in whatever form stored or reproduced, shall be returned to counsel of record for the party who produced said Protected Material, or the receiving parties shall certify that all such information has been destroyed, except that the attorneys for the parties shall be entitled to retain all litigation documents, including exhibits and their own memoranda, containing Protected Material. Such litigation documents and memoranda shall be

used only for the purpose of preserving files, and shall not, without the written permission of the designating party or any order of this Court, be disclosed to anyone other than those to whom such information was actually disclosed, in accordance with this Order.

12. **Filing Under Seal:** Any party seeking to file documents containing Protected Material shall file a motion to file under seal pursuant to Local Civil Rule 5.

13. **Subpoena of Protected Material:** If a person in possession of Protected Material who is not the producing party with respect to that Protected Material receives a subpoena or other request that would require production or other disclosure of Protected Material, that person shall immediately give written notice to counsel for the producing party, identifying the Protected Material sought and the dates and time that production or other disclosure is required. In no event should production or disclosure be made without written approval by counsel for the producing party or by further order of the Court or another court of competent jurisdiction.

14. **Inadvertent Disclosure:** Should any Protected Material be disclosed, through inadvertence or otherwise, to any person and/or entity not entitled to access or review same, then such person and/or entity:

- a. Shall be informed promptly of all provisions of this Order by the responsible party;
 - b. Shall immediately be identified to all counsel of record by the responsible party;
- and
- c. Shall be requested, in writing by the responsible party, to return the material to the responsible party:

Inadvertent disclosure by the disclosing party of any Protected Material, regardless of whether said Protected Material was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of the protectability of the Protected Material in accordance with the

terms of this Order, either as to the specific Protected Material disclosed, or as to any other information relating thereto or relating to the same or related subject matter.

15. **Privacy Act:** Pursuant to 5 U.S.C. § 552a(b)(11), Defendants are authorized to release to Plaintiffs the names and other identifying information about Plaintiffs where that information is within the custody and control of Defendants and is responsive to a discovery request.

16. **Modification:** This Order is without prejudice to the right of any party to apply at any time for additional protection, or to amend, modify, or rescind the restrictions of this Order. The party must provide written notice to counsel of record specifying the portion(s) of this Order it seeks to amend, modify, or rescind and any additional provisions it may seek to add to the Order. The written notice must be served five (5) business days in advance of filing any such motion. The parties expressly reserve the right to seek modification, amendment, or rescission of this Order by mutual agreement in writing.

17. **Enforcement:** All persons to whom Protected Material is disclosed shall be subject to the jurisdiction of this Court, for the purpose of enforcing this Order. This Order shall continue in full force and effect, and shall be binding upon the parties and all persons to whom Protected Material has been disclosed, both during and after pendency of this case.

IT IS SO ORDERED.

Date: _____

EXHIBIT A

ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type name], of
_____ [print or type full address], declare
under penalty of perjury that I have read in its entirety and understand this Protective Order that
was issued by the United States District Court for the Eastern District of Virginia on _____ in the
case of *Harrison et al. v. Mattis et. at.*, No. 1:18-CV-00641-LMB-IDD. I agree to comply with
and to be bound by all the terms of this Protective Order and I understand and acknowledge that
failure to so comply could expose me to sanctions and punishment in the nature of contempt. I
solemnly promise that I will not disclose in any manner any information or item that is subject to
this Protective Order to any person or entity except in strict compliance with the provisions of this
Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Eastern District of Virginia for the purpose of enforcing the terms of this Protective Order, even if
such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____

Exhibit B

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

NICHOLAS HARRISON, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	No. 1:18-CV-00641-LMB-IDD
JAMES N. MATTIS, <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	

[PROPOSED] ELECTRONICALLY STORED INFORMATION ORDER

IT IS HEREBY ORDERED THAT:

Electronically Stored Information. Where reasonably available, the parties will produce discoverable electronically stored information (“ESI”) in single-page TIFF format (single page, Group 4 TIFF at 300 X 300 dpi resolution and 8½ X 11 inch page size, except for documents requiring different resolution or page size) or in PDF format. The parties may produce Microsoft Excel or Comma Separated Value (.csv) spreadsheet files in their native format. Because the parties agree that any produced document must be searchable to be usable, full extracted text will be provided for every document produced (whether TIFF or PDF) in the format of a single *.txt file for each file (e.g., not one *.txt per *.tif image). Where ESI contains text that has been redacted under assertion of privilege or other protection from disclosure, the redacted *.tif image or PDF will be OCR’d and file-level OCR text will be produced in lieu of extracted text. Searchable text will be produced as file-level multi-page UTF-8 text files with the text file named to match the beginning production number of the file. All productions shall be accompanied by two load/unitization files with the following characteristics:

- (i) **Image Load File.**
 - Every document referenced in the production load file shall have all corresponding images, text, and data logically grouped together in a directory structure with a common key to properly load the data.
 - Each document shall be produced in only one image load file throughout the productions, unless that document is noted as being a replacement document in the Replacement field of the data load file.
 - The name of the image load file shall mirror the name of the delivery volume, and should have an .lfp, .opt or .dii* extension (e.g., ABC001.lfp). The volume names shall be consecutive (i.e., ABC001, ABC002, et. seq.) **If .dii file is produced, the accompanying metadata load file shall be separate from the .dii file and not contained within the .dii file.*
 - The load file shall contain one row per TIFF image.

- Every image in the delivery volume shall be contained in the image load file.
- The image key shall be named the same as the Bates number of the page. Load files shall not span across media (e.g., CDs, DVDs, Hard Drives, etc.). A separate volume shall be created for each piece of media delivered.
- Emails will be produced with the CC and BCC line displayed in the image.

(ii) **Metadata Load File.** The following metadata fields associated with each electronic document will be produced.

- Custodian
- BegBates
- EndBates
- BegAttach
- EndAttach
- AttachCount
- AttachName
- ParentID
- ATTACHIDS
- From (for email)
- Author
- To (for email)
- Cc (for email)
- Bcc (for email)
- Subject (for email)
- Title
- DateTimeSent (for email)
- DateTimeRcvd (for email)
- DateCreated
- Native Link (if applicable)
- Text Link (full path of the .txt file for each document produced)
- Confidentiality Designation (for natively produced documents only, if required)
- FileExtension
- File size
- File type
- MD5 HASH

IT IS SO ORDERED.

Date: _____