

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

NICHOLAS HARRISON and
OUTSERVE-SLDN, INC.,
Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as acting Secretary of Defense; MARK
ESPER, in his official capacity as the Secretary
of the Army; and the UNITED STATES
DEPARTMENT OF DEFENSE,
Defendants.

NO. 1:18-CV-00641-LMB-IDD

RICHARD ROE,

VICTOR VOE, and

OUTSERVE-SLDN, INC.,
Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as acting Secretary of Defense;
HEATHER A. WILSON, in her official capacity
as Secretary of the Air Force; and the UNITED
STATES DEPARTMENT OF DEFENSE,
Defendants.

NO. 1:18-cv-01565-LMB-IDD

**MEMORANDUM IN SUPPORT OF THE PARTIES' JOINT MOTION
TO MODIFY THE SCHEDULING ORDER IN THE *HARRISON* CASE AND FOR
ENTRY OF BRIEFING SCHEDULE AND SCHEDULING ORDER IN THE *ROE* CASE**

On December 21, 2018, Judge Brinkema suggested that the Parties consider whether *Harrison et al. v. Shanahan et al.*, No. 1:18-cv-00641,¹ could be consolidated with the newly filed *Roe et al. v. Shanahan et al.*, No. 1:18-cv-01565, which also challenges the military's HIV policies. Dec. 21 Tr. 5:19-23. The Parties met and conferred on the issue on December 26, 2018 and have agreed that pretrial discovery for the two cases should be consolidated. As such, the Parties respectfully request that the Corrected Order (Dkt. 64) and Rule 16(B) Scheduling Order (Dkt. 90) in *Harrison* be modified consistent with the Parties agreed-upon consolidated discovery schedule and that the agreed-upon consolidated discovery schedule be entered in *Roe*. Under the consolidated discovery plan proposed by the Parties, fact discovery, including depositions relevant to both *Harrison* and *Roe*, will be ongoing before and during the pendency of Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss in *Roe*. Because of the overlapping matters in the two cases, this schedule will permit consolidation of pretrial discovery without undue delay of discovery in *Harrison*.

As the Court suggested, there is good cause to consolidate the discovery in these cases both to conserve judicial resources and also to conserve the resources of the Department of Defense and military branches responding to the discovery requests. *See* Dec. 21 Tr. 6:6-9.

Accordingly, the Parties respectfully request that the following consolidated discovery schedule be entered in both cases:

Proposed Consolidated Discovery Schedule:

1. Initial Disclosures (*Roe*). The parties will exchange disclosures in *Roe v. Shanahan* required by Fed. R. Civ. P. 26(a)(1)(A) by January 11, 2019.

¹ Patrick M. Shanahan became the Acting Secretary of Defense on January 1, 2019, and is automatically substituted as a party in these cases pursuant to Federal Rule of Civil Procedure 25(d).

2. Joinder of Parties. The parties do not currently anticipate the joinder of additional parties.
3. Amendment of Pleadings. The parties do not currently anticipate the filing of amended pleadings in either case.
4. Motion for Preliminary Injunction and Motion to Dismiss (Roe)
 - a. Simultaneously with the fact discovery schedule in both cases, as described below, the Parties anticipate that in the *Roe* case, Plaintiffs will move for a preliminary injunction and Defendants will move to dismiss Plaintiffs' case.
 - b. The Parties propose that Plaintiffs will file their Motion for Preliminary Injunction on January 11, 2019.
 - c. Defendants will file a Consolidated Opposition to Preliminary Injunction and Motion to Dismiss on January 25, 2019.
 - d. Plaintiffs will file a Consolidated Reply and Opposition to the Motion to Dismiss on February 1, 2019.
 - e. Defendants will file a Reply to the Motion to Dismiss on February 8, 2019.
 - f. A Consolidated Hearing on the Preliminary Injunction and Motion to Dismiss will be scheduled for February 15, 2019.
5. Discovery.
 - a. If the *Roe* case is not dismissed, any discovery to be undertaken will be coordinated and commenced in time to be completed by the close of discovery in both cases on May 22, 2019.
 - b. Discovery will proceed in stages, with fact discovery in both cases concluding on March 15, 2019, and expert discovery in both cases concluding on May 22, 2019.
 - c. Interrogatories:
 - If discovery proceeds, the *Roe* Plaintiffs, Richard Roe, Victor Voe, and OutServe-SLDN, Inc., may serve a maximum of twenty (20) interrogatories, including parts and subparts, on the *Roe* Defendants, Patrick M. Shanahan, in his official capacity as acting Secretary of Defense; Heather A. Wilson, in her official capacity as Secretary of the Air Force, and the United States Department Of Defense, without leave of court. The responses shall be due thirty (30) calendar days after service in accordance with the Federal

Rules of Civil Procedure and objections will be served in accordance with the Local Rules of this Court.

- By agreement, the *Harrison* Plaintiffs, Nicholas Harrison and Outserve-SLDN, Inc., have exhausted the number of interrogatories that they may serve on Defendants Patrick M. Shanahan, in his official capacity as acting Secretary of Defense, and the United States Department Of Defense, and have served twenty-five (25) of thirty (30) interrogatories that they may serve on Defendant Mark Esper, in his official capacity as the Secretary of the Army. Nothing about this agreement impacts discovery that may be taken in the *Roe* case by any Plaintiff in that case.
- d. Depositions: Each party may take a maximum of five (5) non-party, non-expert depositions, without leave of court. Each deposition shall be limited to a maximum of one (1) day of seven (7) hours of actual testimony, unless extended by agreement of the parties or Order of the Court. The parties agree that they will make reasonable efforts to agree on dates for any depositions convenient to the deponent, counsel, and the parties.
- The depositions of particular deponents from parties to both cases, Plaintiff OutServe-SLDN, Inc. and Defendants Patrick M. Shanahan, in his official capacity as acting Secretary of Defense, and the United States Department of Defense, shall be noticed in both cases.
 - Depositions of particular deponents of the *Harrison* parties who are not parties in both cases, Plaintiff Nicholas Harrison and Defendant Mark Esper, in his official capacity as the Secretary of the Army, shall be noticed only in *Harrison*.
 - Depositions of particular deponents of the *Roe* parties who are not parties in both cases, Plaintiffs Richard Roe and Victor Voe, and Defendant Heather A. Wilson, in her official capacity as Secretary of the Air Force, shall be noticed only in *Roe*.
- e. Protective Order: The parties will confer in good faith to agree on the terms of a draft protective order in *Roe* to propose to the Court by January 18, 2019.
- f. Document Subpoenas: The parties agree that if any documents are received from third parties pursuant to subpoena or request pursuant to the Freedom of Information Act that is relevant to this case, the receiving party shall alert the remaining parties to the receipt of such documents within five (5) days of receipt and shall make the received documents available for inspection and copying.

6. Expert Witnesses

- a. Plaintiff shall disclose any experts who may be called to testify at trial and provide reports called for in Fed. R. Civ. P. 26(a)(2)(B) on or before March 22, 2018.
- b. The Defendants shall disclose any experts who may be called to testify at trial and provide reports called for in Fed. R. Civ. P. 26(a)(2)(B) on or before April 22, 2019.
- c. Plaintiff shall disclose any rebuttal to the Defendants' disclosures on or before May 6, 2019.
- d. The retention and production of electronic media in the possession of testifying experts retained by the parties shall be governed by the Federal Rules of Civil Procedure.

7. Electronically Stored Information. The parties agree that the Court shall enter an electronically stored information ("ESI") order in *Roe* identical to the ESI order entered in *Harrison*, Dkt. 70.

8. Issues Regarding Privilege.

- a. Inadvertent disclosure: The production of privileged or protected documents (including electronic documents) without the intent to waive that privilege or protection does not constitute a waiver, so long as the disclosing party identifies the inadvertently disclosed documents within a reasonable time. If such documents are identified, they will be returned promptly to the disclosing party. The parties agree to the entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.
- b. Privilege Logs: Unless otherwise agreed, the parties shall serve a privilege log pursuant to Fed. R. Civ. P. 26(b)(5) no later than one week following the production of documents. Subject to any specific objections, the privilege log generally shall identify: (a) the date of the privileged information; (b) the author(s) of the privileged information; (c) the recipient(s) of the privileged information; (d) the subject matter of the privileged information; and (e) the basis of the claim of privilege. This includes all claims of privilege, including deliberative process privilege, presidential privilege, and executive privilege.
- c. Privileged communications between counsel, or between parties and their counsel: The parties agree that they shall not seek discovery of documents that are privileged because they are communications solely between counsel for either party, or that are privileged because they are sent between and among a party and that party's counsel. If any discovery request is susceptible of a construction that calls for the production of such documents, those documents need not be produced or identified on any privilege log.

- d. Classified information: The Government takes the position that with respect to discovery of electronic documents, certain technical matters regarding the functioning and capabilities of Department of Defense (“DoD”) and Army or Air Force systems are privileged, law enforcement sensitive, and, in some circumstances, such information may be classified national security information. Pursuant to Federal Rule of Civil Procedure 26(b)(1), and subject to privilege and classification objections, DoD, the Army, and the Air Force, by and through undersigned counsel and other representatives, will utilize best efforts to disclose all non-classified, non-privileged material that is relevant to any party’s claims or defenses and proportional to the needs of this case. The parties otherwise reserve their rights to seek any and all discovery and to raise appropriate objections and privileges to which they are entitled under the law and the Federal Rules of Civil Procedure and the Local Rules of the Eastern District of Virginia.
8. Preservation and Retention of Documents. Counsel for the parties have instructed their clients to retain and preserve documents, information, and things (including ESI) that may be relevant to the subject matter of this lawsuit.
9. Service of Pleadings, Motions, Other Papers, and Discovery Requests and Responses. All pleadings, motions, and other papers that are filed are to be served electronically as provided for by the Federal Rules and the Local Rules. In addition, the parties agree that they will serve by email all discovery requests and written responses and any other papers that are not filed, unless doing so is not technically feasible, in which case those documents will be served via first-class mail or overnight delivery.
10. Settlement. If the parties believe that any settlement discussions may be aided by a settlement conference with the presiding Magistrate Judge, they will arrange to schedule such a conference at time convenient for the Court.
11. Trial Before Magistrate. The parties do not consent to the trial of this matter by a United States Magistrate Judge.

A Proposed Order providing for these modifications to is attached hereto as Exhibit A.

WHEREFORE, the Parties respectfully request that the Court enter the Proposed Order attached as Exhibit A.

Dated: January 4, 2019

Respectfully submitted,

/s/ Andrew R. Sommer

Andrew R. Sommer
Virginia State Bar No. 70304
ASommer@winston.com
Cyrus T. Frelinghuysen (pro hac vice)
CFrelinghuysen@winston.com
John W.H. Harding
Virginia State Bar No. 87602
JWHarding@winston.com
WINSTON & STRAWN LLP
1700 K St., NW
Washington, DC 20006
T: (202) 282-5000

Scott A. Schoettes (pro hac vice)
SSchoettes@lambdalegal.org
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
105 W. Adams, Suite 2600
Chicago, IL 60603
T: (312) 663-4413

Anthony Pinggera (pro hac vice)
APinggera@lambdalegal.org
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
4221 Wilshire Blvd, Suite 280
Los Angeles, CA 90010
T: (213) 382-7600

Peter E. Perkowski (pro hac vice)
PeterP@outserve.org
OUTSERVE-SLDN, INC.
P.O. Box 65301
Washington, DC 20035-5301
T: (800) 538-7418

G. ZACHARY TERWILLIGER
United States Attorney

/s/

R. TRENT MCCOTTER
Assistant United States Attorney
2100 Jamieson Avenue
Branch Alexandria, Virginia 22314
Tel: (703) 299-3845
Fax: (703) 299-3983
trent.mccotter@usdoj.gov

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Br.

KERI L. BERMAN
ROBERT M. NORWAY
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0889
Facsimile: (202) 616-8460
robert.m.norway@usdoj.gov

Counsel for the Government

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January 2019, 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: January 4, 2019

Respectfully submitted,

/s/ Andrew R. Sommer
Andrew R. Sommer

Exhibit A

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

NICHOLAS HARRISON and
OUTSERVE-SLDN, INC.

Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as acting Secretary of Defense; MARK
ESPER, in his official capacity as the Secretary
of the Army; and the UNITED STATES
DEPARTMENT OF DEFENSE,

Defendants.

NO. 1:18-CV-00641-LMB-IDD

RICHARD ROE,

VICTOR VOE, and

OUTSERVE-SLDN, INC.,
Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as acting Secretary of Defense;
HEATHER A. WILSON, in her official capacity
as Secretary of the Air Force; and the UNITED
STATES DEPARTMENT OF DEFENSE,

Defendants.

NO. 1:18-cv-01565-LMB-IDD

[PROPOSED] ORDER

Upon consideration of the parties' Joint Motion to Modify the Scheduling Order in the *Harrison* Case and for Entry of Briefing Schedule and Scheduling Order in the *Roe* Case and accompanying memorandum in support, it is hereby

ORDERED that the joint motion is GRANTED; and it is further

ORDERED that the parties Proposed Consolidated Discovery Schedule is approved and shall control discovery to the extent of its application unless further modified by the Court.

Date: _____

Leonie M. Brinkema
United States District Judge