

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

NICHOLAS HARRISON, ET AL.,

PLAINTIFFS,

v.

MARK T. ESPER, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-CV-00641

RICHARD ROE, ET AL.,

PLAINTIFFS,

v.

MARK T. ESPER, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-cv-01565

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED
MOTION TO MODIFY THE COURT'S SCHEDULING ORDER FOR
THE LIMITED PURPOSE OF TAKING DEPOSITIONS OUT OF TIME**

Plaintiffs respectfully request that this Court permit several fact depositions to be taken out of time. According to the scheduling orders in *Harrison, et al. v. Esper, et al.*, see ECF No. 103, 106, and in *Roe, et al. v. Esper, et al.*, see ECF No. 30, 32, fact discovery closed on March 15, 2019. Since that time, Defendants were ordered to produce numerous documents that they had previously withheld on the basis of privilege. Based on these newly discovered documents, Plaintiffs submit that there is good cause to take these depositions beyond the initial deadline of March 15, 2019.¹

¹ The Parties have agreed to limit these depositions in time and scope.

I. BACKGROUND

Plaintiffs diligently took discovery. In response to Plaintiffs' requests for production, Defendants withheld many documents under the deliberative process privilege. Plaintiffs in *Harrison* filed a motion to compel the production of the withheld documents on January 25, 2019, *see Harrison*, ECF No. 107, and a somewhat lengthy motion process culminated with the Court overruling most of the government's objections to the Magistrate Judge's order granting Plaintiffs' motion to compel on May 22, 2019. *See Harrison*, ECF No. 175–76. The documents ordered to be produced in *Harrison* were produced on June 3, 2019.

Discovery in *Roe* followed a similar course. A motion to compel filed on March 22, 2019, *see Roe* ECF No. 95, was held in abeyance pending the outcome of the government's objections in *Harrison*. *Roe*, ECF No. 101. Plaintiffs' motion in *Roe* was granted on June 18, 2019. *Roe*, ECF No. 158. Most of the documents ordered to be produced in *Roe* were produced on July 1, 2019, though the parties are still engaged in discussions over eight documents.

After reviewing the documents produced by Defendants on June 3, 2019, Plaintiffs requested additional deposition time from Dr. Donald Shell, and asked for the depositions of Col. Karen Downes, and a 30(b)(6) witness to discuss the origins and statements of a document whose author is unknown. The Defendants have offered Dr. Shell for deposition on July 17th. Defendants have offered Col. Downes for deposition on July 24th and have indicated she will also be a Rule 30(b)(6) designee.²

² The parties have also discussed the deposition of Col. Patrick Danaher. Col. Danaher is no longer with the Air Force. The parties have disagreed about whether he should be deposed. Plaintiffs are filing a separate opposed motion as to that deposition.

Additionally, after the close of fact discovery, Defendants disclosed Col. Frazier as an individual having knowledge of certain facts relevant to this case. Once Defendants listed Col. Frazier as a will-call witness on their trial witness list, Plaintiffs promptly asked for his deposition. Defendants have offered him for deposition on July 26th.

II. ARGUMENT

Good cause exists to allow these depositions beyond the initial deadline for fact discovery. The documents on which Plaintiffs intend to depose these witness were not available to them prior to that deadline, due to the lengthy discovery dispute. Because these documents were not available to Plaintiffs during fact discovery, they were deprived of taking testimony that has a direct bearing on the issues to be tried in this case. Moreover, had the Defendants disclosed Col. Frazier before the close of fact discovery, Plaintiffs would have deposed him.

Good cause therefore exists to permit Col. Downes, Col. Frazier, and Dr. Shell.

Dated: July 3, 2019

/s/ Scott Schoettes

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CERTIFICATE OF SERVICE

I certify that, on the 3rd day of July, 2019, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: July 3, 2019

Respectfully submitted,

/s/ John W. H. Harding

John W.H. Harding

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PROPOSED ORDER

After considering the Plaintiffs' Unopposed Motion to Modify the Court's Scheduling Order for the Limited Purpose of Taking Depositions Out of Time, the Court GRANTS the Motion, and amends the Order, to permit the depositions of Dr. Donald Shell, Colonel Karen Downes, and Colonel Scott T. Frazier to be taken out of time.

Entered this _____ day of July, 2019.

Alexandria, Virginia
