

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

RICHARD ROE, ET AL.,

PLAINTIFFS,

v.

MARK T. ESPER, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-cv-01565

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

Plaintiffs respectfully request that this Court enter an order permitting the deposition of Col. Patrick Danaher, MD to be taken out of time. As set forth below, there is good cause to permit this deposition to occur out of time because Col. Danaher appears to be the author or recipient of documents that drive at the central issues in this case. Those documents were produced on June 3<sup>rd</sup> and July 1<sup>st</sup>—well after the fact discovery cut-off—because they were previously being withheld based on privilege claims.

**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. Those objections were resolved on May 22, 2019, leading Plaintiffs' motion to compel to be granted on June 18, 2019. *Roe*, ECF No. 158. Most of the documents ordered to be produced have been produced on July 1, 2019, though the parties are still engaged in discussions over eight documents.

Several of the documents produced by Defendants on June 3, 2019, and additional documents produced on July 1, 2019, were authored by or mentioned Col. Danaher. Those emails include several that relate to Col. Danaher's treatment of persons living with HIV and their fitness to be returned to duty after diagnosis rather than being referred to the Disability Evaluation System and discharged from the Air Force.

## **II. ARGUMENT**

Good cause exists to allow this deposition beyond the initial deadline for fact discovery of March 15, 2019. The documents on which Plaintiffs intend to depose Dr. Danaher were not available to them prior to that deadline because Defendants were withholding them on privilege grounds. Had these documents been produced in a timely fashion, Plaintiffs would have sought Col. Danaher's deposition in the time allotted for discovery. Further, the documents written by or sent to Dr. Danaher that were produced on June 3, 2019 were included on Plaintiffs' first supplemental exhibit list, *see Roe*, ECF No. 159. Several of the documents produced on July 1, 2019 that were written by or sent to Dr. Danaher will likely be included in a second supplemental exhibit list.

Plaintiffs counsel spoke with Col. Danaher, who is no longer a member of the Air Force and is unrepresented in this matter. *See* Ex. A at ¶¶ 5, 8 (Declaration of John Harding). Dr.

Danaher indicated that he would be willing to be deposed, pending approval from the Department of Veterans' Affairs of his involvement in this case. *Id.* at ¶ 8. Dr. Danaher would be available for a deposition after July 20, 2019. *Id.* at ¶ 9. Additionally, counsel for Defendants have informed Plaintiffs that Col. Danaher does not take a position on this motion. *Id.* at ¶ 10.

Good cause therefore exists to permit the deposition of Col. Danaher out of time. Plaintiffs therefore submit that their motion should be granted and the deposition should be permitted to proceed.

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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**DECLARATION OF JOHN HARDING IN SUPPORT OF  
PLAINTIFFS' MOTION TO MODIFY THE COURT'S SCHEDULING  
ORDER FOR THE LIMITED PURPOSE OF TAKING A DEPOSITION OUT OF TIME**

1. My name is John Harding. I am an associate at Winston & Strawn, LLP, and an attorney for Plaintiffs Nicholas Harrison and OutServe-SLDN, Inc. in *Harrison, et al. v. Esper, et al.*, No. 18-cv-641, and for Plaintiffs Richard Roe, Victor Voe, and OutServe-SLDN, Inc. in *Roe, et al. v. Esper, et al.*, No. 18-cv-1565.

2. I am over 18 years of age, am competent to testify about the information contained in this declaration if needed, and offer this declaration based on my own personal knowledge.

3. On June 28, 2019, Plaintiffs met and conferred with Defendants regarding Plaintiffs' request to depose Dr. Patrick Danaher, in connection with the court-ordered production of documents made by Defendants on June 3, 2019. Several of the documents produced by Defendants mention or were written by Dr. Danaher.

4. During this meet and confer, Defendants informed Plaintiffs that several of the documents to be produced by Defendants on July 1, 2019, pursuant to the Court's order in *Roe*, see ECF No. 158, also mention or were written by Dr. Danaher.

5. Defendants further informed Plaintiffs that Dr. Danaher is no longer a member of the U.S. Air Force. Although they had been attempting to contact Dr. Danaher, they had been unable to do so as of June 28, 2019. Accordingly, they do not represent Dr. Danaher, and cannot speak for him on this matter.

5. When asked whether they would, if able to contact Dr. Danaher, consent to a motion to take the deposition of Dr. Danaher out of time, Defendants stated that they would oppose such a motion.

6. I was able to locate the contact information for Dr. Danaher, and did contact him on July 1, 2019. I confirmed with Dr. Danaher that he was not currently represented by any counsel, including counsel for Defendants.

7. I explained to Dr. Danaher that Plaintiffs had filed a lawsuit against the Department of Defense, U.S. Air Force, and the U.S. Army related to their policies concerning individuals living with HIV, and that his name had appeared on several documents recently produced by Defendants.

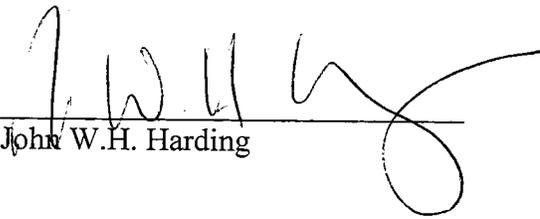
8. When asked whether he would be willing to sit for a deposition regarding his reasoning and thought process at the time that he created the documents, and his involvement in the creation of these policies, Dr. Danaher indicated that he would be willing to do so, pending a consultation with in house counsel for his current employer—the Department of Veterans' Affairs—and their approval of his involvement in this case.

9. Dr. Danaher stated that, if approved by the Department of Veterans' Affairs and this Court, he would be available to be deposed on or after July 20, 2019.

10. Attached as Exhibit A is a true and correct copy of an email I received from Rob Norway, Defendants' counsel, on July 3, 2019, which indicates that Defendants' counsel contacted Dr. Danaher and Dr. Danaher took no position regarding the re-opening of discovery and taking his deposition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3rd day of July, 2019.

  
John W.H. Harding

# Exhibit A

**From:** [Norway, Robert M. \(CIV\)](#)  
**To:** [sommerer@gtlaw.com](mailto:sommerer@gtlaw.com)  
**Cc:** [Bauer, Julie A.](#); [sschoettes@lambdalegal.org](mailto:sschoettes@lambdalegal.org); [peter@modernmilitary.org](mailto:peter@modernmilitary.org); [Cooley, Laura](#); [Harding, John](#); [McCotter, Trent \(USAVAE\)](#); [Cutri-Kohart, Rebecca \(CIV\)](#); [Abbuhl, Joshua \(CIV\)](#); [Berman, Keri L. \(CIV\)](#)  
**Subject:** Harrison v. Esper; Roe v. Esper  
**Date:** Wednesday, July 03, 2019 2:49:57 PM

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Drew,

We had the opportunity to speak with Dr. Danaher today. He indicated that he takes no position regarding the re-opening of discovery in these lawsuits or the taking of his deposition.

Best,

Robert M. Norway  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
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**PROPOSED ORDER**

After considering the Plaintiffs' Motion to Modify the Court's Scheduling Order for the Limited Purpose of Taking a Deposition Out of Time, the Court GRANTS the Motion, and amends the Order to permit the deposition of Dr. Patrick Danaher to be taken out of time.

Entered this \_\_\_\_\_ day of July, 2019.

Alexandria, Virginia

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