

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

RICHARD ROE; VICTOR VOE; and)
 OUTSERVE-SLDN, INC.,)
)
 Plaintiffs,)
)
 v.)
)
 RICHARD V. SPENCER, in his official)
 capacity as Acting Secretary of Defense;)
 MATTHEW P. DONOVAN, in his official)
 capacity as Secretary of the Air Force; and)
 the UNITED STATES DEPARTMENT OF)
 DEFENSE,)
)
 Defendants.)

No. 1:18-cv-1565-LMB-IDD

**MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO
FILE UNDER SEAL DEFENDANTS’ SUPPLEMENTAL RESPONSE BRIEF IN
SUPPORT OF THEIR RENEWED MOTION TO DISMISS PLAINTIFF
OUTSERVE-SLDN AND ATTACHED EXHIBITS**

Pursuant to Local Civil Rule 5, Defendants move the Court to seal Defendants’ Supplemental Response Brief in Support of their Renewed Motion to Dismiss Plaintiff OutServe-SLDN and attached exhibits. In support of its motion, Defendants state as follows that the Supplemental Response Brief and the exhibits upon which it relies have all been marked as “Confidential” pursuant the Protective Order in this matter, ECF No. 45. Defendants further request fourteen days to consult with the Plaintiffs to determine the appropriate redactions before filing the redacted briefing and exhibits in the public record. *See Pittston Co. v. United States*, 368 F.3d 385, 405 (4th Cir. 2004).

The Supplemental Response Brief and the exhibits contain information and testimony that could be used to identify HIV-positive service members and confidential business

information of Plaintiff OutServe-SLDN that is otherwise not known to the public, such including donor records, financial statements, and Board of Director records. Under established Fourth Circuit precedent, there are three requirements for sealing court filings: (1) public notice of the request to seal with an opportunity to object; (2) consideration of less drastic alternatives; and (3) a statement of specific findings supporting a decision to seal and rejecting alternatives to seal. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000).

Defendants have complied with the first *Ashcraft* factor because Defendants have also filed a Notice of Under Seal Filing, this public memorandum, and a Proposed Order to seal the materials pursuant to Local Rule 5. Should Plaintiffs, or any interested member of the public object to the instant motion, he or she may raise his or her objections with the Court.

Second, this is the least drastic alternative available in compliance with the second *Ashcraft* factor. Though Defendants request that the Supplemental Response Brief and attached exhibits be sealed, it is possible to provide redacted versions to ensure compliance with the second *Ashcraft* factor. Accordingly, Defendants would like time to confer with Plaintiffs regarding appropriate redactions of information that could disclose the identities of HIV-positive service members or disclose OutServe's confidential business information. Defendants intend to file a public, redacted version by August 2, 2019 to make public any information that does not fall into these categories.

Third, with respect to the identities of HIV-positive service members, the decision to seal is supported by existing Fourth Circuit precedent, the Court's January 18, 2019 Order, ECF No. 42, the Court's January 28, 2019 Order, ECF No. 59, the Court's February 8, 2019 Order, ECF No. 69, the Court's March 1, 2019 Order, ECF. No. 84, and the Court's April 8, 2019 Order, ECF No. 110.

The Court has already considered the “discrimination facing those living openly with HIV,” found “good cause” to order the protection of these identities. ECF No. 42 (citing *In re Knight Pub. Co.*, 743 F.2d 231,235 (4th Cir. 1984)). Therefore, Defendants request that this information be sealed consistent with the Court’s reasoning in its January 18, 2019 Order, ECF No. 42.

With respect to OutServe’s confidential business information, the public’s interest in the information can be outweighed in situations in which court records can reveal “sources of business information that might harm a litigant’s competitive standing.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1978). The Supplemental Response Brief and attached exhibits contain information regarding OutServe’s budget, donation history, spending profile, and internal deliberations of its Board of Directors, which, if revealed to the public, could harm Plaintiff OutServe. *See e.g., Mortg. Grp., LLC v. Stonegate Mortg. Corp.*, No. 5:14-CV-00310-F, 2016 WL 4939308, at *1 (E.D.N.C. Sept. 14, 2016) (sealing “information detailing, inter alia, their business techniques, the identification of their customers, and their finances” because “[t]his is the type of confidential business information properly subject to protection.”); *Adjabeng v. GlaxoSmithKline, LLC*, No. 1:12-CV-568, 2014 WL 459851, at *3 (M.D.N.C. Feb. 5, 2014) (“In the absence of an improper purpose and where there are no countervailing interests, sealing confidential business information is appropriate”); *E. W., LLC v. Rahman*, No. 1:11CV1380 JCC/TCB, 2012 WL 3841401, at *3 (E.D. Va. Sept. 4, 2012) (granting motion to seal “confidential business information” including “sensitive financial data, [and] gross profit data.”). The Court has previously ordered information of this type sealed in its July 17, 2019 Order, ECF No. 205.

Accordingly, Defendants respectfully request that the Court enter an order sealing the Supplemental Response Brief and attached exhibits, and order a redacted version of the Supplemental Response Brief and the exhibits be filed by August 2, 2019.

DATE: July 19, 2019

Respectfully submitted,

G. ZACHARY TERWILLIGER
United States Attorney

/s/

R. TRENT MCCOTTER
Assistant United States Attorney
2100 Jamieson Avenue
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 Branch

JOSHUA C. ABBUHL
KERI L. BERMAN
REBECCA CUTRI-KOHART
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 Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I filed the foregoing using the Court's CM/ECF system, which will send a notification of electronic filing (NEF) to the following counsel of record:

ANDREW R. SOMMER
Va. Bar Number 70304
Greenberg Traurig, LLP
1750 Tysons Boulevard, Suite 1000
McLean, Virginia 22102
sommera@gtlaw.com

_____/s/_____
R. TRENT MCCOTTER
Assistant United States Attorney
Office of the United States
Attorney
Justin W. Williams U.S.
Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3845
Fax: (703) 299-3983
Email:trent.mccotter@usdoj.gov

Counsel for Defendants