

**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-641-LMB-IDD
)	
LLOYD J. AUSTIN III, <i>et al.</i> ,)	
)	
Defendants.)	

MOTION FOR AN ENLARGEMENT OF TIME

On June 12, 2023, Plaintiff Nicholas Harrison filed a pro se motion to clarify and enforce the judgment in this case. *See* ECF No. 372. The Court scheduled a hearing for July 14, 2023. *See* ECF No. 386. The motion was docketed on June 16, 2023, so under Local Rule 7(F)(1), Defendants’ response is due on June 30, 2023. Defendants respectfully move to extend that response deadline up to and including July 21, 2023, and to continue the hearing pending further action by the Court.

There is good cause for the requested extension. During a June 23, 2023 hearing in another case attended both by Plaintiff Harrison and by undersigned counsel, the Court referenced Plaintiff Harrison’s motion and urged the parties to discuss ways to resolve any dispute without further judicial intervention. As undersigned counsel subsequently represented to Mr. Harrison, Defendants are prepared to confer in good-faith, and have already begun internally discussing potential areas of agreement. *See* Emails between Nick Harrison & Kevin Wynosky (June 23-28, 2023) (attached as Exhibit 1). But an extension of time is needed for these internal conversations to bear fruit and for the parties to engage in a meaningful conferral process. Additional time is also warranted given the press of other business handled by undersigned counsel—including a summary judgment opposition/cross-motion due the same day in *Wilkins v. Austin*, No. 1:22-1272 (E.D. Va.)—as well

as the upcoming July 4 holiday, which increases the time required for Defendants to confer with relevant stakeholders.

Prior to filing this motion, undersigned counsel conferred with Plaintiff Harrison, who represented that he opposes the requested relief.

DATE: June 29, 2023

Respectfully submitted,

JESSICA D. ABER
United States Attorney

BRYAN M. BOYNTON
Principal Deputy
Assistant Attorney General
Civil Division

/s/

DENNIS C. BARGHAAN, JR.
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (“NEF”) to all counsel of record, and I have caused a true and correct copy of the foregoing to be sent to the following “non-filing user” via first-class and electronic mail:

Nick Harrison
Harrison-Stein, PC
601 Pennsylvania Avenue, N.W.
South Building, Suite 900
Washington, D.C. 20004-3647
Email: nick@harrison-stein.com

_____/s/
DENNIS C. BARGHAAN, JR.
Deputy Chief, Civil Division
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3891
Fax: (703) 299-3983
dennis.barghaan@usdoj.gov

Counsel for Defendants

EXHIBIT

1

Wynosky, Kevin J. (CIV)

From: Nick Harrison <nick@harrison-stein.com>
Sent: Wednesday, June 28, 2023 3:40 PM
To: Wynosky, Kevin J. (CIV)
Cc: Abbuhl, Joshua (CIV); Berman, Keri L. (CIV); Barghaan, Dennis (USAVAE)
Subject: [EXTERNAL] Re: Harrison v. Austin (Case No. 1:18cv641) - Potential Discussion on Settlement Proposal

Mr. Wynosky:

Thank you for your understanding and for communicating your intentions to continue progressing on this matter. I appreciate your commitment to facilitating a meaningful discussion, and your efforts to collect more information from the Army are a step in the right direction.

However, after considering your recent proposal, I find myself returning to my original standpoint regarding the extension. As previously mentioned, I am aware that such a request is likely to be granted by the Court, regardless of my position. But the chronology of this case and the seeming stagnation in progress has led to my current perspective.

Your client has indeed taken a significant amount of time. Earlier this year, I made the difficult decision to terminate my lead counsel due to the lack of forward momentum in the case. In addition, I filed this motion against the advice of several attorneys, who suggested waiting until the adjudication of the other motion. Thus, I am resolute in my desire to see this case progress without further delays.

With regards to the briefing of this issue, it appears to hinge on the Court's interpretation of the term "that" in the order – an interpretation that only the Court can provide. Furthermore, the case law concerning Special Selection Boards seems to simply reflect the statutory language closely.

Moreover, considering that your client has also shown a degree of difficulty in affording relief to the discharged academy cadets, it is crucial to note that they, too, are closely observing these proceedings. An attorney from that team expressed his intention to attend the upcoming hearing. I would prefer not to add to his burden with scheduling changes.

While I am open to revisiting this discussion after the July 4th holiday and indeed look forward to engaging in meaningful talks regarding this issue, I must emphasize my need for closure. At this stage, I am not willing to consent to any further delays.

If you choose to proceed with a motion for an extension, I feel obliged to voice my opposition. I trust you understand my position and appreciate your ongoing efforts.

Very Respectfully,

NICK HARRISON, JD, MBA, PMP
Managing Partner (DC Bar #1024439)

Harrison-Stein, PC
601 Pennsylvania Avenue NW
South Building, Suite 900
Washington, DC 20004-3647
Office: (202) 434-8292
Cell: (202) 297-5057

From: Wynosky, Kevin J. (CIV) <Kevin.J.Wynosky@usdoj.gov>
Sent: Wednesday, June 28, 2023 10:42 AM
To: Nick Harrison <nick@harrison-stein.com>
Cc: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>
Subject: RE: Harrison v. Austin (Case No. 1:18cv641) - Potential Discussion on Settlement Proposal

Thanks very much for your response, Mr. Harrison. I appreciate your perspective as to the timing, and am certainly committed to moving this along on my end, too. In fact, I can represent that we have already begun discussing your motion with the Army and getting more information from them. But I still think we need a brief pause in the litigation schedule in order to make any meaningful headway.

At the last hearing, I understood Judge Brinkema to suggest--in the context of ruling *against* the *Roe* plaintiffs--that it would be better for both of us to work out a mutually agreeable resolution without further intervention. I'm committed to try to do so in good-faith, though for reasons that are obvious, I think it will be more productive if we can have that discussion before taking a formal position in the litigation (which absent an extension will have to happen Friday). My goals for our first talk are two-fold: first, to get on the same page factually, and second, to explore potential areas for agreement. On the former, in addition to sharing our perspective, I'd like to hear you out and to take back any additional information you provide. And on the latter, I think there are a few possibilities worth exploring. But I hope you understand that it is premature to commit to any particular person's attendance or participation in this initial discussion.

As a compromise designed to keep this moving, how about we plan to discuss next week after the holiday, and to extend our response deadline to July 21? That would allow the Court to reset the hearing before the end of the month, if one is still necessary.

Please let me know if that is an agreeable approach.

Kevin Wynosky
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
(202) 451-7746

From: Nick Harrison <nick@harrison-stein.com>
Sent: Tuesday, June 27, 2023 12:20 PM
To: Wynosky, Kevin J. (CIV) <Kevin.J.Wynosky@usdoj.gov>
Cc: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>
Subject: [EXTERNAL] Re: Harrison v. Austin (Case No. 1:18cv641) - Potential Discussion on Settlement Proposal

Mr. Wynosky:

I appreciate your prompt communication and the rationale you've laid out for your request for a continuance. Your current workload, including the upcoming summary judgment deadline in *Wilkins v. Austin* and the upcoming July 4th holiday, are certainly understandable.

However, I would like to express some of my own concerns and propose an alternative plan. As you might be aware, I have been involved in this case for almost a decade. While I anticipate the hearing to be just the initial step in the lengthy process of securing full relief, I must admit that the prolonged duration has been taxing.

While I recognize the court's prerogative to grant a continuance as a matter of course, I'm inclined to avoid any further delay. I believe we can carry out our discussions concurrently, enabling us to progress more efficiently.

Nevertheless, I'm open to consenting to a continuance under certain conditions. If you could arrange for the Army Secretary, the Army G-1, or a suitable authority overseeing these policies to either:

1. Join our discussions, or
2. Be present at the next hearing,

I'd be amenable to the extension.

As you know, Judge Brinkema made significant efforts to hold the last hearing in person, notwithstanding the option to issue a ruling based on the case documents. It was a missed opportunity that no one from the Government who oversees these policies was present to hear her concerns directly.

In closing, I look forward to your response concerning my proposal, and irrespective of the outcome, I am committed to engaging in further discussions on this matter.

Very Respectfully,

NICK HARRISON, JD, MBA, PMP

Managing Partner (DC Bar #1024439)
Harrison-Stein, PC
601 Pennsylvania Avenue NW
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Washington, DC 20004-3647
Office: (202) 434-8292
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From: Wynosky, Kevin J. (CIV) <Kevin.J.Wynosky@usdoj.gov>

Sent: Tuesday, June 27, 2023 9:44 AM

To: Nick Harrison <nick@harrison-stein.com>

Cc: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>

Subject: RE: Harrison v. Austin (Case No. 1:18cv641) - Potential Discussion on Settlement Proposal

Hi Mr. Harrison,

Thanks very much for confirming. We certainly share your interest in exploring potential ways to resolve your motion without further judicial intervention. Unfortunately, however, I don't think a call this week is doable: to ensure we have an informed and meaningful discussion, I need some more time to discuss your motion with my client—and I also want to give you the opportunity to submit any other materials you'd like DoD to consider that aren't already in your motion.

Would you be amenable to modifying the briefing schedule to build in some more time for us to share information and for me to interface with my clients? As you may know, the DOJ team's bandwidth is largely consumed by a Friday summary judgment deadline in the Wilkins v. Austin case, and then the following week spans July 4th—which will make getting ahold of the relevant folks on our end difficult (and perhaps you have plans, too). Bottom line, for a host of reasons, I don't think we'd be able to get to a resolution by July 14 in all events. So would you consent to a motion continuing the hearing and extending the Government's response deadline to July 30? If so, perhaps we can also schedule a time to talk during the week of July 10?

Let us know if this works from your perspective—we appreciate your consideration.

Kevin Wynosky
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
(202) 451-7746

From: Nick Harrison <nick@harrison-stein.com>
Sent: Tuesday, June 27, 2023 7:14 AM
To: Wynosky, Kevin J. (CIV) <Kevin.J.Wynosky@usdoj.gov>
Cc: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>
Subject: [EXTERNAL] Re: Harrison v. Austin (Case No. 1:18cv641) - Potential Discussion on Settlement Proposal

Ye, sir. That's correct. I believe each of the attorneys previously serving on my case have, by now, filed motions for leave to withdraw.

Very Respectfully,

NICK HARRISON, JD, MBA, PMP

Managing Partner (DC Bar #1024439)
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Washington, DC 20004-3647
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Cell: (202) 297-5057

From: Wynosky, Kevin J. (CIV) <Kevin.J.Wynosky@usdoj.gov>
Sent: Monday, June 26, 2023 4:11 PM
To: Nick Harrison <nick@harrison-stein.com>
Cc: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>
Subject: RE: Harrison v. Austin (Case No. 1:18cv641) - Potential Discussion on Settlement Proposal

Dear Mr. Harrison,

Thanks for reaching out—Keri and Josh forwarded your email to me. Before responding more substantively, do you mind confirming that you are not currently represented by an attorney and are instead proceeding pro se?

Thanks very much; hope you had a nice weekend.

Kevin Wynosky
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
(202) 451-7746

From: Nick Harrison <nick@harrison-stein.com>

Sent: Friday, June 23, 2023 4:44 PM

To: Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>

Subject: [EXTERNAL] Harrison v. Austin (Case No. 1:18cv641) - Potential Discussion on Settlement Proposal

Counsel:

I hope this email finds you in good health. I am reaching out to you regarding the case of *Harrison v. Austin*, specifically in light of our recent hearing and the second pending motion. (Please see attachments.)

In yesterday's proceedings, Judge Brinkema voiced a suggestion for us to contemplate the possibility of a settlement as an alternative to another appearance in court, currently scheduled for 10:00 a.m. on July 14, 2023. We give due consideration to the Judge's recommendation and believe it might be worth exploring this pathway further.

With this in mind, I would like to propose a call between our parties sometime next week to explore the potential of reaching a mutually agreeable settlement. This will not only expedite the resolution of the case but also avoid any further court appearances that may require more time and resources from all parties involved.

If you are open to this proposal, please suggest a few times and dates that might work best for your schedule, and we can schedule a call accordingly.

I appreciate your time and consideration in this matter, and I look forward to your response.

Very Respectfully,

NICK HARRISON, JD, MBA, PMP

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