

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

JOHN A. PATTERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 5:17-CV-00467
	)	
DEFENSE POW/MIA ACCOUNTING	)	
AGENCY, et al.,	)	
	)	
Defendants.	)	

**JOINT PROPOSED SCHEDULING ORDER**

Pursuant to Rules 16(b) of the Federal Rules of Civil Procedure, and the Court's November 20, 2017 Order, ECF No. 14, the parties submit this joint proposed scheduling order. The parties have conferred and jointly propose the following schedule for briefing Defendants' motion to dismiss:

- Defendants' motion to dismiss the First Amended Complaint shall be due on or before March 2, 2018;
- Plaintiffs' opposition to the motion to dismiss shall be due on or before March 23, 2018;
- Defendants' reply brief shall be due on or before April 4, 2018.

The parties also agree that it is appropriate for the Court to defer entry of a Rule 16 scheduling order until after ruling on the motion to dismiss. The parties disagree about whether discovery should proceed while the motion to dismiss is pending, and their respective positions are set forth below:

Plaintiffs are agreeable to Defendants' request to defer the entry of a Rule 16 scheduling order, but will commence with other discovery procedures authorized by the Federal Rules of Civil

Procedure. Even if no discovery deadline is scheduled at this time, Plaintiffs intend to move forward with their case. The general rule is that discovery may proceed while motions to dismiss are pending. Additionally, discovery outside of the administrative record is proper. There is no merit to Defendants' claim that discovery should be limited in this case. Further, Plaintiffs contend that while the Court's ruling on Plaintiffs' motion to dismiss could potentially alter discovery in this case, the Court may defer resolving a motion to dismiss until trial. Thus, until there is a ruling on the motion to dismiss, discovery is proper at this time. Finally, regarding prior statements discussing discovery, the parties agreed that they would further discuss discovery after the Court ruled on Defendants' motion to dismiss. *See* Joint Rule 26(f) Report at 3 ("The parties will further discuss discovery, if necessary, after the Court rules on the motion to dismiss.").

Defendants request that the Court continue to defer entry of a Rule 16 scheduling order until after disposition of Defendants' renewed motion to dismiss (as the parties had jointly requested in connection with the last motion to dismiss, *see* Joint Rule 26(f) Report at 4, ECF No. 11) because the Court's ruling may alter the available claims and the approach the parties wish to take to discovery and other matters. Defendants also expect to seek a protective order against any specific discovery Plaintiffs seek to conduct in the interim. Plaintiffs' First Amended Complaint is no more meritorious than the complaint recently dismissed, and even if the claims are not dismissed, most of the issues raised should be decided on an administrative record rather than on the basis of discovery. *See* Joint Rule 26(f) Report at 3 ("Because this case turns on issues of law, the parties anticipate that little, if any discovery will be necessary."). Accordingly, Defendants should not be burdened with responding to discovery at this stage of the case.

Accordingly, the parties jointly request entry of the proposed briefing schedule for Defendants' motion to dismiss and do not request a full pretrial scheduling order at this time.

Dated: January 17, 2018

/s/ John T. Smithee, Jr.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of January, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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