IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-GLR Hon. A. David Copperthite

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO SET A DATE CERTAIN FOR COMPLIANCE WITH DISCOVERY ORDER

INTRODUCTION

Plaintiffs' Motion to Set a Date Certain for Compliance with Discovery Order, Dkt. 222, seeks to circumvent proceedings pending before the District Court concerning the Magistrate Judge's Memorandum Opinion and Order (the "Order"), which directed the disclosure of thousands of deliberative documents from the Department of Defense ("DoD") and the Armed Services ("Services") concerning multiple military policies. Plaintiffs acknowledge that Defendants filed both a Motion to Stay Compliance with the Order and Objections to that Order, both of which are fully briefed and pending before the District Court. Even though the District Court's ruling on the Motion to Stay or the Objections may obviate the need for Defendants to produce thousands of deliberative documents, Plaintiffs insist that this Court set a date certain for Defendants to produce the documents subject to Defendants' Motion to Stay and Objections. The Court should decline to do so.

BACKGROUND

In June 2018, Plaintiffs filed a motion to compel three broad categories of documents withheld under the deliberative process privilege. Dkt. 177. On August 14, 2018, this Court granted Plaintiffs' motion and directed Defendants to disclose the following three categories of deliberative documents:

> (1) Deliberative materials regarding the President's July 2017 tweets and August 2017 Memorandum; (2) Deliberative materials regarding the activities of the DoD's so-called panel of experts and its working groups (the 'Panel') tasked with developing a plan to study and implement the President's decision; and (3) Deliberative materials regarding the DoD's implementation Plan and the President's acceptance of the Plan in his March 23 Memorandum, including any participation or interference in that process by anti-transgender activities [*sic*] and lobbyists.

Mem. Op. 3, Dkt. 204. The Order did not set a deadline for compliance.

Three days later, Defendants filed a Motion to Stay Compliance with the Order with the District Court, arguing that DoD and the Services should not have to produce thousands of deliberative documents until the District Court resolved Defendants' then-forthcoming Objections to that Order because Defendants satisfied the factors necessary for a stay. Defs.' Mot. 4, 8–16, Dkt. 208. Specifically, Defendants argued that the balance of harms weighs overwhelmingly in Defendants' favor because DoD and the Services would suffer immediate, irreparable harm absent a stay, as a result of the disclosure's chilling effect on discussions regarding sensitive personnel and security matters. *Id.* at 8–10; *see also* Defs.' Reply 2–6, Dkt. 215. On the other side of the balance, there is plainly no meaningful harm to Plaintiffs simply by staying compliance pending review of the Order because Plaintiffs have a preliminary injunction in place, the discovery deadlines have been suspended, there is no trial date set, and Plaintiffs have moved for summary judgment arguing that there is no genuine dispute as to any material fact. Defs.' Mot. 9–10, Dkt. 208; *see also* Defs.' Reply 2–6, Dkt. 215; Order, Dkt. 213. Defendants also argued that Defendants are likely to succeed on the merits of their then-forthcoming Objections to the Order because, among other things, (1) it was improper to enter the discovery order while threshold jurisdictional matters were pending before the District Court, (2) the Order overlooked the binding Supreme Court precedent in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and (3) the Order did not apply the Fourth Circuit's balancing test before ordering the disclosure of all of Defendants' deliberative documents. Defs.' Mot. 10–16, Dkt. 208; Defs.' Reply 6–19, Dkt. 215. Defendants further argued that a stay is in the public interest because the chilling effect from disclosure

on individuals within DoD and the military could affect their willingness to provide candid views on future policy matters to the Secretary of Defense and military leaders, which could lead to a negative impact on national security. Defs.' Mot. 16, Dkt. 208; Defs.' Reply 19, Dkt. 215. The Motion to Stay was fully briefed on September 14, 2018, and remains pending before the District Court. *See* Defs.' Reply, Dkt. 215.

In addition to demonstrating that the four factors weigh in favor of a stay, Defendants argued that a stay of the Order would be consistent with, and avoid the protracted discovery litigation ongoing in, the related case *Karnoski v. Trump*. Defs.' Mot. 16–17, Dkt. 208. As Defendants explained,

> In *Karnoski*, . . . the plaintiffs filed a similar motion to compel documents withheld under the deliberative process privilege. The *Karnoski* Court . . . granted Plaintiffs' motion to compel, and ordered the President and the Department of Defense to, among other things, disclose "documents that have been withheld solely under the deliberative process privilege." Order at 11, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 27, 2018), Dkt. 299. Defendants filed a petition for a writ of mandamus in the Ninth Circuit and moved to stay compliance with the *Karnoski* Court's Order pending appellate review. *See* Defs.' Mot., *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 31, 2018), Dkt. 300.

Defs.' Mot. 16–17, Dkt. 208. The Court of Appeals for the Ninth Circuit granted an emergency motion to stay the production of the same kind of discovery at issue here pending its consideration of Defendants' petition for a writ of mandamus. Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36.[1] The stay precludes the disclosure of documents protected by the deliberative process privilege in that case. *See id.* The Ninth Circuit then heard oral argument on the Defendants' petition for writ of mandamus on October 10, 2018.

While the emergency motion concerning the *Karnoski* Order was pending in the Ninth Circuit, Defendants in this case timely filed Objections to the Court's Order pursuant to Rule 72(a) of the

[1] Shortly before the Ninth Circuit ruled on the stay motion, the Government filed an application for a stay with the Supreme Court, Application for a Stay, *Trump v. U.S. Dist. Ct. for the W. Dist. of Wash.*, No. 18A276 (Sept. 14, 2018), which the Government withdrew when the Ninth Circuit granted the stay motion, Letter, *Trump v. U.S. Dist. Ct. for the W. Dist. of Wash.*, No. 18A276 (Sept. 17, 2018).

Federal Rules of Civil Procedure. *See* Defs.' Objs., Dkt. 209. In those Objections, Defendants reiterated and expanded upon their merits arguments first raised in their Motion to Stay. *See id.* at 8–28. In addition, Defendants filed a notice of the Ninth Circuit's stay in *Karnoski*, arguing that because the Order directs "Defendants to disclose many of those same deliberative documents, a stay of the Magistrate Judge's Memorandum Opinion and Order pending further review would be consistent with the current posture of proceedings in the Ninth Circuit." Defs.'s Notice, Dkt. 217; *see also* Defs.' Reply, Dkt. 220. The Objections were fully briefed on September 28, 2018, and remain pending before the District Court. *See* Defs.' Reply, Dkt. 221.

After Defendants filed the Motion to Stay and Objections to the Order, the parties filed a Joint Motion to Suspend Certain Deadlines, requesting that the District Court suspend the discovery deadline "in the interest of judicial economy" because the parties' cross-motions for summary judgment, Defendants' Motion to Stay Compliance with the Order, and Defendants' Objections to the Order are all pending before the District Court. Jt. Mot. 1–2, Dkt. 210. The Court granted the parties' motion, and the discovery deadline is suspended. Order, Dkt. 213.

On September 21, 2018—just one week after briefing on Defendants' Motion to Stay concluded and during the pendency of briefing on Defendants' Objections—Plaintiffs demanded the production of Defendants' deliberative documents and further requested that Defendants inform Plaintiffs as to the steps Defendants have taken to comply with the Order. *See* Pls.' Letter, Dkt. 222-3. On October 1, 2018, Defendants reminded Plaintiffs that Defendants' Motion to Stay (and, by that point, Defendants' Objections), had been fully briefed and were pending before the District Court. *See* Defs.' Letter, Dkt. 222-4. Defendants also informed Plaintiffs that "the Department of Defense ('DoD') and the Services have already devoted significant time and resources toward producing the documents that are subject to the Memorandum Opinion and Order if the motion to stay is denied, subject to the Government considering appellate options" and that additional time and resources

would be required to comply with the Order. *Id.*

Among other things, before any privileged documents can be produced, a careful document-by-document re-review is required to redact other deliberative and pre-decisional information that is not relevant to this case. *See id.*; *see also* Declaration of Robert Easton ("Easton Decl.") ¶ 12 (Nov. 5, 2018). Many deliberative and pre-decisional documents that contain responsive information also contain information that is not material to this case, but until these documents are re-reviewed, DoD cannot know exactly how many such documents there are. Defs.' Letter, Dkt. 222-4; *see also* Easton Decl. ¶ 12. For example, the information collected in this and the related cases dates back nearly three years and therefore includes deliberative information not relevant to this litigation that is closely comingled with relevant and responsive, privileged information. Defs.' Letter, Dkt. 222-4; *see also* Easton Decl. ¶ 12. In addition, some of the non-responsive information contained in responsive documents is considered Controlled Unclassified Information ("CUI"), which would also have to be redacted before production. Defs.' Letter, Dkt. 222-4; *see also* Easton Decl. ¶ 13. Finally, some deliberative documents contain non-responsive classified national security information, and review, segregation, and redaction of that non-responsive, classified material would need to be performed according to the proper procedures before production. Defs.' Letter, Dkt. 222-4; *see also* Easton Decl. ¶ 14.

After receipt of Defendants' letter, Plaintiffs' counsel stated that they had additional questions, so counsel for the parties spoke on the phone on October 12, 2018. During that call, Plaintiffs' counsel asked numerous questions concerning the steps Defendants were taking to prepare to comply with the Court's Order, and Plaintiffs' counsel stated that she would send the questions in an email. On October 16, 2018, when the undersigned counsel for Defendants was out of the office, Plaintiffs' counsel emailed the list of questions to Defense counsel. *See* Email, Dkt. 222-5. Before Defense counsel was able to respond to the email, Plaintiffs, without providing any notice to Defendants, filed

the instant motion, in which they request that the Court order Defendants to "begin[] productions of the compelled documents and information within seven calendar days."[2] Pls.' Mot. 4, Dkt. 222.

Had Plaintiffs' counsel permitted Defendants an opportunity to respond to their questions before filing their motion, Defense counsel would have informed Plaintiffs' counsel that after the *Karnoski* district court issued its discovery order in July 2018, DoD counsel began undertaking a re-review of the thousands of documents at issue in that case. *See* Easton Decl. ¶ 16. The Order in this case directs disclosure of a large subset of the documents at issue in the *Karnoski* Order. *See id.* Therefore, when the Court issued the Order in August, DoD continued the re-review it was already doing to prepare for compliance with the *Karnoski* Order, which, at that point, had not yet been stayed by the Ninth Circuit. *See id.* DoD counsel have re-reviewed thousands of deliberative documents, which encompasses more than half of DoD's documents that require re-review to comply with the Order. *See id.* But, owing to the number of deliberative documents at issue and other work that needs to be done in this and other cases, counsel for DoD and the Services still have thousands of deliberative documents to re-review. *See id.* As noted, documents containing comingled, non-responsive information, such as CUI, would need to be redacted prior to production. *Id.* Finally, the re-review and redaction of non-responsive information from documents marked "classified" will take additional time because DoD must follow certain internal procedures. *See id.* In short, the Department of Defense and the Services will continue to work diligently to ensure that production, if ultimately

[2] Plaintiffs also requested that the Court set "an expedited briefing schedule for [their] motion" and that the Court "direct Defendants to respond to [their] motion within seven calendar days." Pls.' Mot. 2, Dkt. 222. Defendants objected to this request because "Plaintiffs failed to comply with Local Rule 104.7 by not meeting and conferring with Defendants before filing their motion," "Plaintiffs plainly suffer no harm by briefing this matter on the schedule set forth in the Local Rules," and "counsel for Defendants require more than seven days to adequately respond to Plaintiffs' unannounced and unexpected motion." Defs.' Resp. 1–3, Dkt. 223. Because the Court did not rule on Plaintiffs' request for expedited briefing, Defendants file their response within the time period set forth in the Local Rules.

required, can occur in a timely manner following final resolution of Defendants' Motion to Stay and Objections. *See id.*

ARGUMENT

As a preliminary matter, Plaintiffs' motion should be denied because they failed to comply with Local Rule 104.7 by not meeting and conferring with Defendants before filing their motion. Although the parties had been discussing issues with the production of documents via correspondence and telephone, *see, e.g.*, Dkt. 222-3–222-5, Plaintiffs' counsel did not inform Defendants' counsel of the instant motion or seek to obtain Defendants' position on such a motion, nor did Plaintiffs discuss moving for expedited briefing on the motion. For that reason alone, their motion should be denied.

Even if the Court overlooks this procedural violation, the Court should nevertheless deny Plaintiffs' motion. Setting a date certain for production of deliberative documents, as Plaintiffs demand, would undermine the District Court's review of Defendants' pending Motion to Stay and Objections. Under Rule 72(a) of the Federal Rules of Civil Procedure, "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). Thus, "[b]y its explicit language, the Rule allows a party 14 days to file objections to a Magistrate's order, and if it does so, the district court *must* consider the objections." *S.E.C. v. McNaul*, 277 F.R.D. 439, 442 (D. Kan. 2011); *see also In re Brown*, 409 F. App'x 591, 593 (3d Cir. 2011) (noting that because the objections were pending before the district court, "the District Court is obligated to rule" on them). There is no dispute that Defendants filed timely Objections to the Order and that they are pending before the District Court. *See* Defs.' Objs., Dkt. 209. Therefore, the District Court must consider those Objections, Fed. R. Civ. P. 72(a), and this Court should permit the District Court the opportunity to do so. *Cf. L.C. 1 v. Delaware*, No. 07-675-GMS-LPS, 2009 WL 3806335, at *1 (D. Del. Nov. 13, 2009) (refusing to allow plaintiffs to file an "amended complaint to circumvent the court's review of the plaintiffs' objections to the [Magistrate

Judge's Report and Recommendation]").

Recognizing that under Local Rule 301(5)(a), the effect of a magistrate judge's order is not automatically stayed upon the filing of Objections by one of the parties, within three days of the Court's Order, Defendants filed a Motion to Stay Compliance with the Order. *See* Defs.' Mot., Dkt. 208. At the time Plaintiffs filed their motion, Defendants' Motion to Stay had been fully briefed and pending before the District Court for a little over one month. In recognition of the time it will take to ultimately resolve Defendants' pending Motion to Stay and Objections, the District Court granted the parties' joint motion to suspend discovery deadlines until ultimate resolution—including resolution of any appeal—of those pending matters. Order, Dkt. 213; *see also* Jt. Mot., Dkt. 210. But rather than allow the District Court to consider the merits of Defendants' Motion to Stay, which, if resolved in Defendants' favor, could obviate the need for the production of thousands of deliberative documents, Plaintiffs now request that the Court intervene in those proceedings and direct Defendants to begin production of the deliberative documents within seven days. Pls.' Mot. 4, Dkt. 222. This Court should decline to do so.

Here, the interest of judicial economy is best served by denying Plaintiffs' motion, letting the proceedings proceed before the District Court, and avoiding the potential for litigation before the Fourth Circuit. As noted, when the district court in the related *Karnoski* litigation entered a similar order directing disclosure of thousands of deliberative documents within ten days, Order at 11, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 27, 2018), Dkt. 299, Defendants filed a motion to stay with the district court, Defs.' Mot., *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 31, 2018), Dkt. 300. Because the district court did not rule and a specific compliance date was approaching, Defendants filed an emergency motion to stay compliance with the district court's order in the Ninth Circuit pending the resolution of their petition for a writ of mandamus related to that Order. Pet. for Writ of Mandamus and Emerg. Mot., *In re Donald J. Trump*, No. 18-72159 (9th Cir.

Aug. 1, 2018), Dkt. 1. The Ninth Circuit granted "a temporary stay of the district court's July 27, 2018 discovery order pending the district court's decision on petitioners' July 31, 2018 motion to stay the July 27, 2018 order." Order at 2, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Aug. 2, 2018), Dkt. 4. After the district court denied Defendants' motion to stay, Order, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. Aug. 20, 2018), Dkt. 311, Defendants filed another emergency motion to stay in the Ninth Circuit, Emerg. Mot. 6, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Aug. 23, 2018), Dkt. 20. Again, as noted, the Ninth Circuit granted Defendants' emergency "motion for a stay pending consideration of the petition for a writ of mandamus," which precludes the disclosure of documents protected by the deliberative process privilege, remains in effect. Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36.

Plaintiffs cite *Maness v. Meyers*, 419 U.S. 449, 458 (1975), for the proposition that orders "must be complied with promptly." Pls.' Mot. 5, Dkt. 222. Since the issuance of the Order in August, Defendants have been taking steps to comply. Although Defendants respectfully request that the Court not set a deadline for disclosure of documents before the District Court has the opportunity to rule on Defendants' pending Motion to Stay and Objections, Defendants have been preparing to produce the documents. As set forth more fully in the attached declaration from Robert Easton, the Director of DoD's Office of Litigation Counsel, counsel for DoD have devoted significant time and resources to re-reviewing the thousands of deliberative documents to ensure non-responsive, sensitive information is redacted prior to production. *See* Easton Decl. ¶¶ 12–16. As Mr. Easton states, in the past several months, "DoD counsel have re-reviewed thousands of deliberative documents, which, to the best of [his] knowledge, encompasses more than half of DoD's documents that require re-review to comply with the Order." *Id.* ¶ 16. Because thousands of documents are at issue in this case, DoD's re-review will take several more months to complete. *See id.* DoD counsel will continue to work diligently to ensure that production, if ultimately required, can occur in a timely manner. *See id.* But,

in the meantime, this Court should not set a specific date for production, not only because substantial work remains to be done if compliance is ultimately ordered, but because such a deadline would require the production of privileged material that Defendants continue to reserve the right to protect by law. *See, e.g.*, Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36 (granting a stay to preclude disclosure of deliberative documents pending consideration of the petition for writ of mandamus); *In re United States*, 678 F. App'x 981, 988–91 (Fed. Cir. 2017) (granting in part the Government's petition for writ of mandamus to preclude the disclosure of certain deliberative documents); *In re United States*, 321 F. App'x 953, 958–61 (Fed. Cir. 2009) (same); *In re Perez*, 749 F.3d 849, 854 (9th Cir. 2014) (granting the Government's petition for a writ of mandamus to preclude the disclosure of information protected by the informant privilege).

Plaintiffs rely on cases that are factually distinguishable. None of the cases on which Plaintiffs rely present a situation where, as here, a magistrate judge has issued an order that does not set a deadline for compliance, and a party files both a motion to stay and objections with the district court. In *McLean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204, 1210 (4th Cir. 1985), the party did not even file a motion to stay, and in *United States Home Corporation v. Settlers Crossing, LLC*, 2012 WL 3536691, at *14 (D. Md. Aug. 14, 2012), the party filed a motion for reconsideration rather than a motion to stay. Other cases on which Plaintiffs rely involve appeals of magistrate judge's orders where a party failed to take any steps to comply by a date certain set in the order. *See Alston v. Becton, Dickinson & Co.*, No. 1:12CV452, 2014 WL 338804, at *2 (M.D.N.C. Jan. 30, 2014); *Holly v. UPS Supply Chain Sols., Inc.*, No. 3:13-CV-980-DJH-CHL, 2015 WL 2446110, at *3 (W.D. Ky. May 20, 2015); *Jeld-Wen, Inc. v. Nebula Glass Int'l, Inc.*, No. 05-60860CIV-TORRES, 2007 WL 1625721, at *1 (S.D. Fla. May 26, 2007); *Am. Rock Salt Co., LLC v. Norfolk S. Corp.*, 371 F. Supp. 2d 358, 360 (W.D.N.Y. 2005). None of this authority addresses the circumstances presented here, where there is no deadline for compliance, Defendants are taking steps to ensure timely compliance if ultimately

necessary, and multiple matters are currently pending before the District Court awaiting resolution.

In addition, Plaintiffs' request that the Court order production to begin within seven days is unreasonable. *See* Pls.' Mot. 4, Dkt. 222. That deadline would shorten by half the time Defendants would have under Rule 72(a) to file Objections to any such order, *see* Fed. R. Civ. P. 72(a), and it would not give the District Court sufficient time to consider Objections to such an order or a motion to stay compliance with that order. Nor is there any litigation justification for Defendants to commence production within a week. For one thing, the District Court has suspended discovery deadlines in this case, Order, Dkt. 213, and no trial date has been set. Moreover, Plaintiffs have moved for summary judgment arguing that there is no dispute as to any material fact. *See* Dkt. 163. And there is no risk of prejudice to Plaintiffs given that the preliminary injunction in place since November 2017, Prelim. Inj., Dkt. 84, protects their interests during the pendency of the litigation. *See* Order, *Doe v. Trump*, No. 17-cv- 1597 (D.D.C. June 19, 2018), Dkt. 145 (stating that holding a discovery dispute in abeyance would "not prejudice Plaintiffs, because the Court's preliminary injunction remains in place"). Lastly, because many of the same deliberative documents are at issue in *Karnoski*, disclosure of the deliberative documents could render the majority of the Government's petition for a writ of mandamus in the Ninth Circuit effectively moot. *See* Defs.' Mot. 16–17, Dkt. 208 (arguing that a stay would be consistent with, and would avoid the discovery litigation ongoing in *Karnoski*).

Finally, Plaintiffs argue that production of the documents would not moot Defendants' Motion to Stay because if Defendants ultimately prevail, Defendants could claw back the documents and the Court could exclude them from being used as evidence. Pls.' Mot. 6 n.2, Dkt. 222. Because Plaintiffs raise this argument in a footnote, the Court should decline to consider it. *See Sanders v. Callender*, No. CV DKC 17-1721, 2018 WL 337756, at *7 n.5 (D. Md. Jan. 9, 2018) (noting that because "ruling on an issue minimally addressed is unfair to [opposing party] and would risk an improvident or ill-advised opinion on the legal issues raised," "district courts [have] declined to consider arguments

only raised in a footnote" (citations omitted)). In any event, Plaintiffs' argument is plainly meritless. As should be obvious, once Defendants produce the deliberative documents, the harm to the deliberative process that Defendants seek to protect will have occurred, *see* Easton Decl. ¶¶ 17–21, and, moreover, Defendants' Motion to Stay will be rendered moot, *see Am. Rock Salt Co., LLC*, 371 F. Supp. 2d at 361 (denying as moot a motion to stay compliance with the magistrate judge's order because the deadline for compliance as set forth in that order had passed).

Thus, regardless of Defendants' ability to claw back the documents and preclude their use in dispositive briefing or at trial, production of the documents would negate the very interests that Defendants have sought to protect by properly raising objections with the District Court and seeking a stay of the Court's order. Indeed, Plaintiffs' suggestion illustrates their fundamental misunderstanding of the importance of the deliberative process privilege to Government deliberations. The ability to claw back documents neither eliminates the chilling effect created by disclosure of deliberative materials, nor justifies disregarding the Government's interest in maintaining the documents' confidentiality. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163–64 (9th Cir. 2009) (granting defendants' mandamus petition and overruling a district court's order compelling the defendants to produce documents whose disclosure threatened to "inhibit[] internal campaign communications that are essential to effective association and expression," while emphasizing that "[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms"). "The compelled disclosure of deliberative documents and communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and opinions on various topics, both related to DoD transgender policy and other non-transgender policies, could be open to scrutiny, regardless of any judicial protective order or order permitting Defendants to claw back the deliberative documents." Easton Decl. ¶ 17. Owing to these unique concerns underpinning

the deliberative process privilege, Plaintiffs' reliance on *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 n.2 (2011), which concerns the attorney-client privilege, is misplaced. *See* Defs.' Reply 5, Dkt. 215 (explaining why Plaintiffs' reliance on cases concerning the attorney-client privilege, and specifically, *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), which the *Jicarilla Apache Nation* Court cites, 564 U.S. at 169 n.2, is misplaced where the deliberative process privilege is at issue).

Indeed, Plaintiffs concede that the concerns raised by Defendants as to production "are the precise purpose of a stay motion." Pls.' Mot. 6 n.2, Dkt. 222. Defendants agree, and have raised these very concerns in their pending Motion to Stay. This Court should wait for the District Court to consider these concerns, as well as Defendants' Objections to the Court's discovery Order, before setting a date certain for Defendants to produce the deliberative documents subject to the Order.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion to set a date certain for compliance with its Order pending a decision by the District Court on Defendants' Motion to Stay and Objections.

Date: November 5, 2018

Respectfully submitted,

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