THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al*., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States; *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER ORDER OF OCTOBER 19, 2017

NOTED ON MOTION CALENDAR: NOVEMBER 14, 2017

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RULES

I. INTRODUCTION

Reconsideration of this Court's order compelling disclosure of identifying information of class members, including their names and corresponding registration numbers, is not warranted. Defendants have not met the standard outlined in Local Rule 7(h) because they do not point to any new facts, intervening case law, or manifest errors. Rather, Defendants simply disagree with the Court's conclusions, which is not a proper basis for reconsideration. Contrary to Defendants' assertions, this Court accorded due consideration to the McCament Declaration and applied the correct legal standard on the law enforcement privilege, which requires specifying with particularity the protected information and why it falls within the scope of the privilege and calls for balancing the interests of disclosure against the interests of withholding. The Court's balancing was not erroneous because Plaintiffs established that they need a list of the members of the two certified nationwide classes to litigate their claims, identify witnesses, and properly represent the class members. Finally, the Court properly considered the Stipulated Protective Order when balancing the parties' respective interests. Courts routinely consider existing safeguards, such as a protective order, when weighing the risks of disclosure.

II. BACKGROUND

On June 21, 2017, the Court granted Plaintiffs' motion to certify two classes: a Naturalization Class and an Adjustment Class. Dkt. # 69. Defendants moved to reconsider the class certification order, which the Court denied. Dkt. # 85. On August 1, 2017, Plaintiffs served Defendants with discovery requests asking for, among other things, documents sufficient to identify the class members, including a list of class members, and documents relating to why Named Plaintiffs' applications were subject to CARRP. Declaration of David A. Perez in Support of Plaintiffs' Motion to Compel (Dkt. # 92) ("Perez Decl."), Ex. A at 32, 34-39, 48-51.[1]

[1] Exhibit A to the Perez Declaration is Defendants' responses and objections to Plaintiffs' discovery requests, which also includes the requests themselves. Defendants served these responses on September 5, 2017.

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Defendants objected to these discovery requests, invoking broad and largely unspecified privilege concerns. *Id.* Defendants have since clarified that the privilege they were invoking is the law enforcement privilege. After exchanging letters and conducting a meet and confer, the parties were at an impasse on this issue and several others. Accordingly, Plaintiffs filed a motion to compel (Dkt. # 91), which Defendants opposed (Dkt. # 94). After full briefing, the Court granted in part, and denied in part, Plaintiffs' motion to compel. Dkt. # 98.

With respect to discovery of "information to allow Plaintiffs to identify potential class members and why Named Plaintiffs were subjected to CARRP," the Court granted Plaintiffs' motion to compel. Dkt. # 98 at 2-4. The Court's order specifically addressed two arguments Defendants advanced for resisting this discovery: that compiling the list would be too burdensome and that the list was subject to the law enforcement privilege. The Court rejected the burden arguments, pointing out that "the Government concedes it already compiles potential class members into searchable databases," and "can produce it without incurring such a high expense." *Id.* at 3. As for the law enforcement privilege, the Court applied the relevant legal standard and concluded that Defendants' factual assertions were too vague and speculative. *Id.* at 3-4. The Court also reasoned that even if the Defendants' contentions were sufficient, application of the privilege is not automatic, and after balancing the parties' respective interests, the Court found "that the balance weigh[s] in favor of disclosure." *Id.* at 4.

Defendants have moved to reconsider only this portion of the Court's order, and only as it relates to their assertion of the law enforcement privilege over identification of class members.[2]

III. ARGUMENT

A. Legal Standard for Reconsideration Motions

Local Rule 7(h) emphasizes that "[m]otions for reconsideration are disfavored." The Court "will ordinarily deny such motions" unless the moving party demonstrates "manifest

[2] Defendants did not move to reconsider any other portion of the Court's order, including the other aspect of Part III.A concerning the reasons why Named Plaintiffs were subjected to CARRP.

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error" in the Court's prior ruling or "new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." LCR 7(h). When a motion for reconsideration "merely rehashes the same arguments made and rejected by the Court," it "may be denied for this reason alone." *Ledcor Indus. (USA) Inc. v. Va. Sur. Co., Inc.*, No. 09-CV-01807 RSM, 2012 WL 223904, at *1 (W.D. Wash. Jan. 25, 2012); *see also Anderson v. Domino's Pizza, Inc*., 11-CV-902 RBL, 2012 WL 2891804, at *1 (W.D. Wash. July 16, 2012) (noting reconsideration is an "extraordinary remedy" that "should not be granted . . . unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law") (quotations omitted).

B. Reconsideration is Not Warranted.

Defendants fail to meet the standard for reconsideration under Local Rule 7(h). Rather than identifying manifest errors, new facts, or intervening changes in law, the motion restates the same arguments Defendants already briefed. Similarly, Defendants previously moved to reconsider the Court's order on class certification. In denying that motion, the Court made an observation that applies equally here: "Defendants couch their motion in terms of the Court's manifest errors but in reality the motion argues that the Court should revisit its conclusions. Parties cannot use motions for reconsideration to simply obtain a second bite at the apple, and this is what Defendants appear to be doing with this motion." Dkt. 85 at 2.

1. The Court properly considered the McCament Declaration.

Defendants erroneously assert that the Court "dismissed the sworn statement of the head of USCIS," Mr. McCament. Dkt. # 99 at 2.[3] At the outset, this argument is notable for what it does not include: any *new* facts. *See Henderson v. Metro. Prop. & Cas. Ins. Co.*, C09-1723 RAJ, 2010 WL 3937482, at *2 (W.D. Wash. Oct. 5, 2010) (denying reconsideration where litigant failed to "point[] to new facts that justify the court reconsidering its order"). Instead, Defendants

[3] Defendants submitted two separate declarations from Mr. McCament in support of their opposition brief. The one that addresses the law enforcement privilege is Dkt. # 94-5.

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simply assert that the Court failed to analyze or properly consider the evidence already presented. That is not sufficient to justify reconsideration.

Moreover, Plaintiffs' briefing and the Court's order each show that the McCament Declaration was properly considered. Plaintiffs' reply brief highlighted several problems with the McCament Declaration. First, the two certified classes are limited to individuals whose applications have been languishing for at least six months; practically speaking, those individuals are *already* on notice that their applications have been subject to additional scrutiny. Dkt. # 95 at 3-4. Second, courts previously have rejected similar concerns about disclosing the names of individuals subject to the No Fly List. *See Latif v. Holder*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014). Third, Defendants *routinely* disclose this information in other litigation. Dkt. # 95 at 4. Each of these arguments casts doubt on the McCament Declaration.

For its part, the Court's order makes clear that the Court expressly considered Defendants' assertions "that releasing the identities of potential class members could lead individuals to potentially alter their behavior, conceal evidence of wrongdoing, or attempt to influence others in a way that could affect national security interests." Dkt. # 98 at 3 (citing the McCament Declaration). After considering it, however, the Court concluded that these assertions were too speculative and hypothetical "to claim privilege over basic spreadsheets identifying who is subject to CARRP." *Id*. at 4. In other words, the Court disagreed with Defendants' factual and legal arguments. Where a court has considered the factual evidence presented, a litigant's disagreement with that factual analysis is not a basis for reconsideration. *See Minhnga Nguyen v. Boeing Co.*, C15-793RAJ, 2017 WL 2834273, at *2 (W.D. Wash. June 30, 2017), *motion for relief from judgment denied sub nom. Nguyen v. Boeing Co.*, C15-793 RAJ, 2017 WL 4167875 (W.D. Wash. Sept. 19, 2017) (finding plaintiff did not meet her Rule 7(h)(1) burden for reconsideration because she did not present facts or legal authority that were not previously available and instead reiterated previously pled facts). The Court similarly found that the McCament Declaration's "vague, brief explanation" (Dkt. # 98 at 3) failed to meet

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Defendants' high legal burden of "specify[ing] with particularity the information for which the protection is sought, and explain why the information falls within the scope of the privilege." *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 687 (S.D. Cal. 1996). Nothing in Defendants' motion for reconsideration supports reversing that legal conclusion.

The Court also was correct to conclude that Defendants did not present "competent evidence" to support invocation of the privilege. *See* Dkt. # 99 at 3; Dkt. # 98 at 3-4. Defendants appear to be arguing that so long as they submit a declaration containing their view for why the information should not be disclosed, the privilege automatically adheres. But that is not the law. As the Court pointed out, even if the McCament Declaration was "sufficient, the privilege is not automatic; the Court must balance the need for Plaintiffs to obtain this information against the Government's reasons for withholding." Dkt. # 98 at 4; *see also In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) ("[T]he law enforcement investigatory privilege is qualified. The public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information."). Notably, "a district court has considerable leeway" in striking that balance. *Id*. Here, after Plaintiffs and Defendants each laid out their needs in their respective briefs, the Court came down in favor of disclosure. Defendants' disagreement with that conclusion does not demonstrate manifest error.

Because this argument does not demonstrate that the Court committed any legal errors, or provide any new facts, it is not a basis for reconsideration.

2. Plaintiffs demonstrated a need for this discovery, and the Court properly balanced the parties' interests.

Defendants similarly are mistaken in their assertions that the Court did not require Plaintiffs to demonstrate a "necessity" for this discovery, and failed to balance the parties' needs. Neither assertion provides a basis for reconsideration.

First, Plaintiffs did show a need for this information. *See* Dkt. # 91 at 4-6; Dkt. # 95 at 1-2. Specifically, Plaintiffs explained that each class member is a potential witness or source of

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information regarding, *inter alia*, unwarranted denials and other impacts of CARRP and successor extreme vetting programs. Such testimony will be critical to establishing Plaintiffs' assertions that CARRP is unlawful and extra-statutory by highlighting those individuals who are plainly eligible for the benefits for which they are applying, and yet still have not been approved. Likewise, such information bears directly upon Plaintiffs' claims under procedural due process (*e.g.*, that class members had a right to notice and a meaningful explanation for their classification) and equal protection (*e.g.*, demonstrating discrimination and disparate treatment on the basis of religion). Moreover, class counsel now represent such class members and are entitled to know who they are. *See Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985) ("Class counsel represents all class members as soon as a class is certified."). Indeed, class counsel must be able to respond to inquiries from potential class members seeking assistance.

As outlined above, the Court explicitly "balance[d] the need for Plaintiffs to obtain this information against the Government's reasons for withholding." Dkt. # 98 at 4. After doing so, the Court considered the parties' protective order (which will protect particularly sensitive information) and concluded "the balance weigh[s] in favor of disclosure." *Id.* Given the importance of this information to Plaintiffs' case, and the considerable leeway afforded to district courts in striking this balance, that conclusion was not erroneous. *See Hemstreet v. Duncan*, CV-07-732-ST, 2007 WL 4287602, at *2 (D. Or. Dec. 4, 2007) (privilege is overcome "[w]hen the records are 'both relevant and essential' to the presentation of the case on the merits") (citation omitted). Defendants may disagree with the Court's conclusion, but the assertion that "the Court failed to balance [the parties'] litigation needs," Dkt. # 99 at 6, is just wrong.

Second, the cases Defendants cite for its "necessity" argument have nothing to do with the law enforcement privilege. For instance, they cite *United States v. Valenzuela-Bernal*, 458 U.S. 858, 870 (1982), for the notion "that evidence must be 'essential,' or meet an equally high threshold, to justify piercing the privilege." Dkt. # 99 at 4. But *Valenzuela-Bernal* is not about

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the law enforcement privilege. The case concerned a criminal defendant's right to confront a witness under the Sixth Amendment, and when denying access to a witness becomes so material to a defense that it violates the right to a fair trial. 458 F.3d at 870.

Defendants' citation to *Roviaro v. United States*, 353 U.S. 53 (1957) and other cases that deal with disclosing the identities of *informants* are similarly inapposite because an informant's privilege is categorically different from the law enforcement privilege. *See In re Perez*, 749 F.3d 849, 855-56 (9th Cir. 2014) (explaining that the informant's "privilege protects 'the identity of persons who furnish information of violations of law to officers charged with enforcement of that law' from 'those who would have cause to resent the communication'") (citing *Roviaro*, 353 U.S. at 59-60). Disclosure of a list of class members is not the same as disclosure of an informant in a criminal case. It was not error for the Court to apply the correct legal standard, rather than the one governing a different privilege. Nevertheless, to the extent the informant's privilege provides guidance here, the key is that it, too, is qualified: "the privilege will give way [w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id*. (quotation omitted).

And finally, Defendants misapply the discovery rules by trying to shift the burden onto the party seeking discovery. Though there is a balancing of needs, the party resisting discovery at all times bears the burden of proving the privilege applies. *See In re Anthem, Inc. Data Breach Litig.*, 236 F. Supp. 3d 150, 166 (D.D.C. 2017) ("The Government bears the burden of proving the information for which the law enforcement privilege is claimed falls within the scope of the privilege."); *Cable & Comput. Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997) ("The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections.").

In sum, Plaintiffs established why this information is essential their case, and in concluding that disclosure was appropriate, the Court properly balanced the parties' interests.

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3. The Court properly considered the Stipulated Protective Order when balancing the parties' litigation needs.

Given that Defendants regularly released information about whether an individual falls under CARRP in response to FOIA requests and in litigation without any protection, there is no need to shield the identities of class members pursuant to a protective order. But, to the extent any protection is needed, the Court appropriately noted that the protective order is sufficient to protect any confidentiality interests. None of the cases cited by Defendants undermine the appropriateness of the Court's consideration of the protective order in making this determination.

Two of the three cases Defendants cite involve litigation under the Freedom of Information Act (FOIA): *Islamic Shura Council of Southern California v. F.B.I.*, 635 F.3d 1160, 1168 (9th Cir. 2011) and *Arieff v. U.S. Department of Navy*, 712 F.2d 1462 (D.C. Cir. 1983). In both cases, the courts' reasoning was specific to the FOIA context where attorneys are retained for the express purpose of obtaining information that may be released to the public at large; in that context, it makes little sense, and would "strain" the attorney-client relationship, to permit only the attorney to view "the very data he has been retained to acquire." *Islamic Shura Council*, 635 F.3d at 1168 (discussing *Arieff*, 712 F.2d at 1470). Neither case dealt with the discovery law enforcement privilege, and neither case discussed how a protective order may be used to inform a court's balancing of interests when applying that privilege.

Similarly, *In re City of New York*, 607 F.3d 923 (2d Cir. 2010) is also inapposite. In that case, the Second Circuit concluded that an attorneys' eyes only protective order was inadequate "in the circumstances of this case," in large part because there was reason to believe that materials already disclosed on an "'attorneys' eyes only' basis . . . were used as the source of a newspaper article discussing the secret operations" at issue. *Id*. at 936. Here, there is no suggestion that anything produced in this case has been or will be "leaked" in violation of the parties' Stipulated Protective Order. And far from stating a categorical rule that protective orders are always inadequate, the Second Circuit made clear that in other cases involving the law

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enforcement privilege "the court is free to tailor the protective order to the circumstances presented." *Id*. at 949. In other words, after finding the protective order inadequate *in that case*, the Second Circuit expressly stated that in other cases a protective order may be adequate.

This case is distinguishable from *In re City of New York* for several reasons. For starters, Defendants already have shown that the government does not treat the identification of CARRP cases or the reasons why individuals are subjected to CARRP as privileged. *See, e.g.*, Declaration of Stacy Tolchin in Support of Plaintiffs' Motion to Compel (Dkt. # 93), Exs. 1 and 2; Perez Decl. Ex. E at 276:15-17; *id*., Ex. F; Declaration of Jay Gairson in Support of Motion to Compel (Dkt. # 97), Exs. A, B, and C. Defendants now assert those disclosures were mistakes. But the disclosures cast significant doubt on the Government's contention that producing a class list would so compromise national security that the list should not be disclosed. Additionally, although the Second Circuit in *In re City of New York* had "no difficulty in concluding that plaintiffs do not have a need, much less a compelling need" for the information sought, 607 F.3d at 946, here, the Court has expressly found that the information is relevant to Plaintiffs' case. Dkt. # 98 at 3. Furthermore, in contrast to *In re City of New York*, where the plaintiffs argued they were entitled to the documents "regardless of their showing of need," 607 F.3d at 946, here Plaintiffs explained at length why this information is both relevant and essential to litigating their claims, *see* Dkt. # 91 at 4-6; Dkt. # 95 at 1-4.

Plenty of courts expressly and appropriately consider protective orders when balancing parties' interests under the law enforcement privilege. For instance, in *Floyd v. City of New York*, the court explained that when "balancing the interests favoring and disfavoring disclosure" the court "must consider the effect of a protective order restricting disclosure to the plaintiff and the plaintiff's attorney….. Such an order can mitigate many if not all of the oft-alleged injuries to the police and to law enforcement." 739 F. Supp. 2d 376, 381 (S.D.N.Y. 2010) (quotation omitted). *See also In re Anthem, Inc. Data Breach Litig.*, 236 F. Supp. 3d at 167 (Despite law enforcement privilege, "disclosure of these materials simply does not carry the risks the

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Government anticipates. First and foremost, all the materials to be disclosed will be covered by the protective order in the underlying litigation."); *Ibrahim v. Dep't of Homeland Sec.*, C 06-00545 WHA, 2009 WL 5069133, at *15 (N.D. Cal. Dec. 17, 2009), *vacated and remanded on other grounds by*, 669 F.3d 983 (9th Cir. 2012) (finding "law enforcement privilege balancing test militates in favor of authorizing disclosure" given "safeguards, such as a protective order"); *MacNamara v. City of New York*, 249 F.R.D. 70, 88-89 (S.D.N.Y. 2008) (ordering disclosure, even after finding that law enforcement privilege applied, because "disclosure of the documents subject to the restrictions of the Protective Orders will sufficiently mitigate the risks, if any, that may arise from disclosure"); *Nat'l Cong. for Puerto Rican Rights ex rel. Perez v. City of New York*, 194 F.R.D. 88, 96 (S.D.N.Y. 2000) (ordering disclosure, despite both law enforcement and "official information" privileges, "in light of the carefully crafted protective order already in place").

The Court's decision to consider the parties' Stipulated Protective Order when balancing the parties' interests was not a "manifest error."

IV. CONCLUSION

The Court should deny Defendants' motion for reconsideration.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER ORDER OF OCTOBER 19, 2017 via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 14th day of November, 2017, at Seattle, Washington.

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