

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES ELMER MITCHELL and
JOHN JESSEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 16-MC-0036-JLQ

ORDER RE: FOURTH
MOTION TO COMPEL

Related Case:

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN
JESSEN,

Defendants.

No. CV-15-0286-JLQ

BEFORE THE COURT is Defendants/Petitioners' fourth Motion to Compel (No. 64) which seeks to compel the depositions of two CIA officials: Gina Haspel and John/Jane Doe. The fourth Motion to Compel (hereafter "Motion") was filed on February 14, 2017. Defendants also filed a Motion to Expedite, which the court granted. The court issued an expedited briefing schedule and stated the "Motion to Compel will be deemed submitted for decision as of February 24, 2017" unless the court set the matter for oral argument. (See Order at ECF No. 69).

The Government's Response was due February 22, 2017. If the court had not expedited the briefing, the Government's Response would have been due by February 28, 2017. (See Local Rule 7.1(b)). The Government's Response (ECF No. 71) is three pages

1 in length and does not substantively address the Motion. The Government instead argues
2 it should be allowed until March 8, 2017 to respond to the Motion. At the February 14,
3 2017 hearing on the third Motion to Compel, reference was made to the impending fourth
4 Motion and the Government stated: "We will fold our response to that motion into our
5 forthcoming assertion." (Transcript at ECF No. 72, p. 29). Counsel for the Defendants
6 did not agree the third and fourth Motions to Compel should be addressed jointly: "I
7 guess my point would be that that opposition, in my mind, ought not necessarily be tied
8 to whatever it is that the Court might obligate the Government to do at this point with
9 regard to the current Motion to Compel. They're different items, in my mind, your
10 honor." (*Id.* at p. 32). As the fourth Motion to Compel had not even been filed as of the
11 February 14, 2017 hearing, the court did not address a briefing schedule for the Motion at
12 that time.

13 The court rejected the Government's suggestion for a joint brief when it issued its
14 written Order on February 16, 2017 which set an expedited briefing schedule on the
15 fourth Motion to Compel. (ECF No. 69). The Government then failed to comply with the
16 Order by filing a non-substantive response and instead stated the Defendants do not
17 object to the Government's "proposed briefing schedule". (ECF No. 71, p. 2). The parties
18 may not merely agree to "briefing schedules" which extend the time provided in the
19 court's Local Rules. Doing so is particularly inappropriate when the parties contest
20 discovery after the deadline for completion of discovery has passed. If the Government
21 had good cause for requiring additional time, it should have filed a motion to extend time.

22 Defendants' Reply briefly addresses the merits of the Motion, and then confirms
23 they "do not object to the U.S. suggestion that consideration in a single, consolidated
24 brief addressing all of the privilege issues is appropriate." (ECF No. 73, p. 4). The court
25 has repeatedly cautioned it will not allow discovery disputes between Defendants in the
26 underlying action, 15-286, and the Government to delay resolution of the matter. The
27 belated pursuit of these two depositions evidences a lack of diligence. The depositions
28 were requested on December 1, 2016. Defendants did not file the Motion to Compel until

1 some ten weeks later, on February 14, 2017, just three days prior to the close of
2 discovery. The Defendants' Motion states the Government has "willfully delayed" and
3 counsel for the Government failed to respond to communications from defense counsel
4 for weeks at a time. (ECF No. 64, p. 1). If that was the case, Defendants should have
5 brought the matter to the court's attention in a more timely manner. When the Motion
6 was brought, the court granted Defendants' request for expedited consideration of the
7 Motion, but then Defendants and the Government agreed to delay the briefing.

8 Despite the depositions being requested approximately three months ago, the
9 Government has just "recently taken steps to expand the authorization process" to assert
10 the state secrets privilege in regard to the two depositions at issue. (ECF No. 71, p. 2).
11 Defendants have previously raised the issue of whether failing to raise the privilege in a
12 timely manner may result in waiver of the privilege. The Government and Defendants
13 agree this fourth Motion to Compel can be addressed under the briefing schedule ordered
14 on the third Motion to Compel. (See Order of February 20, 2017 setting schedule).

15 **IT IS HEREBY ORDERED:**

- 16 1. Ruling on Defendants' fourth Motion to Compel (ECF No. 64) is **RESERVED**.
17 2. The Government's request to file a consolidated response to Defendants' third
18 and fourth Motions to Compel by the March 8, 2017 deadline previously set is
19 GRANTED.
20 3. The deadlines and briefing parameters, including page limitations, set in the
21 court's Order of February 20, 2017 (ECF No. 70) shall apply.

22 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
23 furnish copies to counsel.

24 **DATED** this 28th day of February, 2017.

25 s/ Justin L. Quackenbush
26 JUSTIN L. QUACKENBUSH
27 SENIOR UNITED STATES DISTRICT JUDGE
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