BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL C. ORMSBY
United States Attorney

TERRY M. HENRY
Assistant Branch Director

ANDREW I. WARDEN (IN Bar No. 23840-49)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
andrew.warden@usdoj.gov

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES E. MITCHELL and JOHN JESSEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 16-MC-0036-JLQ

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO COMPEL AND CROSS-MOTION TO QUASH OR MODIFY DOCUMENT SUBPOENAS

Motion Hearing:
September 29, 2016 at 1:30 p.m.
Spokane, Washington (Telephonic)

Related Case: No. CV-15-0286-JLQ

INTRODUCTION

The United States of America ("Government") opposes Petitioners' (Defendants in related case No. CV-15-0286-JLQ) motion to compel production of documents and cross-moves to quash the document subpoenas Defendants issued to the Central Intelligence Agency ("CIA") and the Department of Justice ("DOJ"). Defendants' document requests are massively overbroad and compliance would impose an undue burden on the Government. Indeed, Defendants seek "all documents identifying or describing" or "relating to" approximately 30 broad categories of information in the possession of the entire CIA and DOJ without limitation over a 15-year period. This request for voluminous national security documents, which would require production of a significant volume of information about Government officials and detainees irrelevant to this case, is incompatible with the discovery schedule and case management deadlines establish by the Court. This Court previously rejected Defendants' proposed plan for indefinite discovery and instead adopted Plaintiffs' limited and accelerated case management plan. Defendants, however, have made no meaningful effort to tailor their discovery demands to the realities of the Court's current scheduling order, nor have they provided any authority to support such a sweeping request for national security information from CIA and DOJ, nonparty Government agencies who have a serious and legitimate interest in not having their national security resources compelled into the service of a private party. Rather, Defendants want the Government to bear the undue burden of completing a massive discovery production in an impossibly short period of time.

Contrary to the assertions in Defendants' motion, the Government has worked diligently to provide Defendants with non-privileged, unclassified information to litigate this case and, to date, has produced approximately 1,100 pages of documents about the operation of CIA's former detention and interrogation program. Those efforts remain ongoing and, unlike Defendants, the Government has proposed

thoughtful alternative ways to narrow the scope of Defendants' requests in a manner that will provide them with a reasonable amount of information about the primary topics relevant to this case, while taking into account the burdensome realities associated with processing and reviewing for release potentially classified national security information.

Federal Rule of Civil Procedure 45 imposes an affirmative duty on Defendants to avoid issuing a document subpoena that imposes an undue burden on the Government, and the Rule further requires the Court to enforce this duty by quashing or narrowing an improper subpoena. This duty, combined with the realities of the Court's case management schedule and Defendants' unreasonable and impracticable discovery plan, warrant quashing the subpoenas or, at a minimum, modifying them consistent with the limitations suggested by the Government below.

BACKGROUND

1. Procedural History

On April 8, 2016, Plaintiffs and Defendants submitted competing proposed discovery plans that differed dramatically in scope. Defendants proposed an indefinite discovery period in which they would seek broad and extensive discovery (much of it of potentially classified or privileged information) in the possession of the CIA and other United States government agencies. *See* ECF No. 31. In contrast, Plaintiffs represented that the information necessary to adjudicate this case is available in the public record and proposed limited fact discovery over a six-month period. *See* ECF No. 34.

Also on April 8, the Government filed a Statement of Interest requesting that the Court consider the interests of the United States when formulating a discovery plan. *See* ECF No. 33. The Statement of Interest explained that, as recognized by the Court of Appeals, where the Government is not a party to a suit, it has a strong interest in avoiding the unreasonable diversion of the Government's national security

resources to satisfy the discovery demands of private parties. *See id*. Accordingly, the Government explained it has a significant interest in ensuring that any third-party discovery proceeds in an efficient manner without imposing undue burdens on any agency carrying out a national security mission. *See id*.

On May 23, 2015, the parties and the Government filed a Joint Stipulation addressing discovery. *See* ECF No. 47. With respect to the scope of discovery, the Joint Stipulation provided, *inter alia*, that "[d]iscovery shall focus on (1) the roles of Defendants and others in designing, promoting, and implementing the methods alleged in the Complaint, as related to Plaintiffs, . . .; and (2) Plaintiffs' detention, rendition, interrogation and alleged resulting injuries." *Id.* ¶ 5. The parties and the Government also agreed to various procedural mechanisms designed to prevent the unauthorized disclosure of information deemed classified, protected, or privileged by the Government during party discovery and to streamline service of so-called *Touhy* (*United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951)) requests for information or testimony from nonparty Government agencies. *See id*. ¶¶ 6, 14-17.

On June 10, 2016, Defendants filed an unopposed motion to have the key provisions of the Joint Stipulation, as described above, incorporated into a Court order. *See* ECF No. 48. On June 15, 2016, the Court granted the parties' request to "to limit the scope of discovery," but the Court denied the request to memorialize the stipulated discovery procedures in an order because "[i]t has been the long-standing practice of this court to refrain from incorporating parties' discovery agreements . . . in a court order." *See* ECF No. 51 at 1-2. The Court also directed Plaintiffs and Defendants to propose specific case management deadlines and the expected timeframe for discovery. *See id*. at 5.

In response to the Court's Order, Plaintiffs and Defendants filed competing case management submissions on June 30, 2016, that largely mirrored the proposed discovery plans submitted to the Court in April 2016, as discussed above. Defendants

proposed sweeping and broad discovery, primarily directed at the Government, lasting an indefinite period of time. *See* ECF No. 56. Plaintiffs, on the other hand, proposed specific case management dates consistent with their view that discovery should be limited and expeditious. *See* ECF No. 57.

On July 8, 2016, the Court held a telephone status conference to establish dates for the case management order. *See* ECF No. 60, Transcript of July 8, 2016 Telephone Hearing. The Court began the conference by taking Defendants to task for what it characterized as noncompliance with the Court's June 15, 2016 Order, which required the submission of specific case management deadlines. *See id*. at 4. Because Defendants did not propose specific case management dates, the Court adopted Plaintiff's proposed case management schedule in full. *See id*. at 4-5. That same day the Court issued a written case management scheduling order establishing a seven-month discovery period, closing in February 2017, as well as other pre-trial and discovery deadlines suggested by Plaintiffs. *See* ECF No. 59.

2. Defendants' Document Subpoenas to CIA and DOJ.

On June 28 and 29, 2016, Defendants served *Touhy* requests and nonparty document subpoenas on the CIA and DOJ, respectively. *See* Gov't Exs. 1 & 2. The subpoenas were issued from this Court, with production of the documents demanded in Washington, D.C., on August 1, 2016. *See id.* The subpoenas sought a wide range of documents regarding nearly every facet of the CIA's former detention and interrogation program. The CIA subpoena sought, *inter alia*, "all documents relating to" 28 broad categories of information in the possession of the entire CIA without limitation over a 15-year period, from the time of the attacks of September 11, 2001, to the present. *See* Gov't Ex. 1. The DOJ subpoena was similarly broad and sought "all documents relating to" the same 28 categories as the CIA subpoena as well as three additional DOJ-specific categories related to legal advice about the former detention and interrogation program. *See* Gov't Ex. 2. The subpoenas include

sweeping requests for overly broad subjects, including the following, as well as many others:

- All documents relating to the structure of the program (CIA Request #4);
- All documents related to the handling or treatment of Plaintiffs by any person (CIA Request #12-13);
- All documents related to Defendants' involvement in the treatment and interrogation of certain detainees other than the Plaintiffs (CIA Request #20-22).

On July 19, 2016, pursuant to Federal Rule of Civil Procedure 45(d)(2)(B), CIA and DOJ objected to the production called for in the subpoenas for various reasons. *See* Gov't Exs. 3 & 4. The agencies' objection letters explained, *inter alia*, that the requests for documents were massively overbroad, and compliance would impose an undue burden on the agencies; that the requested documents likely include classified information and/or information protected by law from disclosure by a variety of federal statutes and regulations; that the subpoenas seek information of questionable relevance to the case; and the requested documents (or portions thereof) are likely protected by various privileges and protections, such as the state secrets privilege, the deliberative process privilege, and attorney-client privilege, among others. *See id*.

Notwithstanding these objections, the Government expressed its willingness to work with Defendants to narrow the scope of the document requests in order to facilitate production of a more focused and limited set of information as well as explore alternative discovery options in order to provide Defendants with the information they needed. *See id*.

Defendants, however, were unwilling to agree to any meaningful material limitations regarding the scope of their subpoenas or to potential alternative discovery mechanisms proposed by the Government. On July 27 and August 1, 2016, Defendants' responded to the Government's objection letters, making only minor

modifications to their subpoenas that did little to narrow their scope or burden. *See* Gov't Ex. 5 & 6. As currently phrased, the subpoenas now seek either "all documents identifying or discussing" or "relating to" the same broad categories of information. *See id*. In response, the Government explained that these cosmetic modifications did little to address the Government's overbreadth and burden concerns. *See* Gov't Ex. 7 & 8. Defendants have made no further modifications to their subpoenas.

3. The Government's Efforts To Produce Documents.

The CIA and DOJ have been working diligently to search for, review, and produce responsive documents to Defendants. Indeed, the Government has produced approximately 1,100 pages of documents to Defendants in several key categories responsive to the subpoenas:

- Defendants' nondisclosure agreements as well as classification guidance regarding the former detention and interrogation program. *See* Gov't Ex. 9.
- The contracts governing Defendants work on the CIA's former detention and interrogation program during the time of Plaintiffs' detention by the CIA. *See* Gov't Ex. 10.
- Final legal advice provided by the Department of Justice to the CIA and White House Counsel's Office regarding various aspects of the former detention and interrogation program. *See* Gov't Ex. 11.
- Interrogation reports and internal CIA operational cables about Plaintiff Rahman's capture, detention, rendition, and interrogation from the time of his capture to the time of his death. *See* Gov't Ex. 12.
- Summaries of interviews of on-site personnel who were present at the detention facility when Plaintiff Rahman died, including of Defendant Jessen, conducted in connection with the CIA's January 2003 internal investigation into the death of Rahman. *See id*.
- A CIA document explaining Defendants' role in developing the enhanced interrogation technique used in the CIA's former detention and interrogation program. *See* Gov't Ex. 19.

The Government is also moving forward with additional productions. Specifically, the Government has agreed to re-review several lengthy documents previously released in response to Freedom of Information Act requests and related litigation about the former detention and interrogation program and release additional information for use in this case, as appropriate. *See* Gov't Ex. 12. These reports include the CIA's Inspector General's report about the operation of the program from 2001 to 2003 and separate reports by the CIA Deputy Director for Operations in 2003 and Inspector General in 2005 about the death of Gul Rahman. *See id.* Further, the Government has agreed to produce several documents cited in the Senate Select Committee on Intelligence (SSCI) Executive Summary and specifically identified by Defendants for production. *See id.* The Government anticipates producing these additional documents in advance of the hearing on September 29, 2016.

A. CIA Resources Implicated By The Subpoenas.

As explained in the attached declaration of CIA information review officer Antoinette Shiner, the CIA must undertake an extremely burdensome and time-consuming review process in order to locate documents responsive to Defendants' requests and then subsequently process those documents for release consistent with the Government's obligation to prevent the unauthorized disclosure of information that could harm the national security. *See* Gov't Ex. 13 ("Shiner Decl.").

After analyzing Defendants' document requests in this case, the CIA identified its RDINet database as the Agency's record system most likely to contain potentially responsive documents. *Id*. at ¶6. RDINet is the CIA's principal and most complete repository of information about the former detention and interrogation program. *Id*. ¶¶ 6-7. It is a highly classified electronic computer database created in part to facilitate investigations into the former detention and interrogation program. *Id*. ¶ 7. RDINet contains millions of highly classified documents, including emails, memoranda, and other sensitive records containing classified and compartmented

information about intelligence sources and methods; pseudonyms and true names of CIA personnel, assets, and liaison officers; and details about liaison relationships. *Id*.

Due to the highly classified and sensitive nature of the documents contained within RDINet, the database has purposely been decentralized and compartmented to limit personnel access and to enhance its physical security. *Id*. ¶. 8. As a result, fewer than ten CIA employees and/or contractors are currently permitted to search for documents contained within the system. *Id*. Every query of RDINet for records or information must go through this small cadre of experienced subject matter experts, who help determine the best search terms to use to locate the requested information. *Id*. This small team must run every search of RDINet required by CIA or other government agencies, whether for litigation or other mission-related purposes. *Id*. Further, search requests must be prioritized depending on the exigency or need for the information, such as ongoing or time-sensitive intelligence matters. *Id*.

In this case, the assigned RDINet subject matter experts conducted several searches designed to find documents responsive to Defendants' requests. *Id*. ¶ 9. Because of the breadth of Defendants' requests, the RDINet subject matter experts conducted searches for documents containing any references to Defendants or Plaintiffs using a variety of search terms, including Plaintiffs' and Defendants' names and identifiers. *Id*. Those searches resulted in the collection of 35,000 potentially responsive documents. *Id*.

Once the electronic search process is complete, a more time-consuming review process must then take place as each document must be reviewed by the assigned RDINet subject matter expert to ensure that it is referencing the correct individual who was the target of the search. *Id*. ¶ 10. This process is to ensure that only those persons with a "need to know" the information receive it and to prevent sensitive classified information about another person or intelligence matter from being inappropriately distributed. *Id*. The process of reviewing documents to determine if

they refer to the correct individual often requires careful and time-consuming review. *Id.* For example, each Plaintiff in this case has several Arabic names and aliases, some of which are quite common (*e.g.*, Salim Abdullah), thereby multiplying the number of documents that must be reviewed due to various spelling and transliterations of common Arabic names. *Id.* This first-line review is cumbersome and burdensome, as many of these documents are lengthy and there are many duplicate documents within RDINet; thus it is not uncommon for these reviews to take several days for even very limited searches with limited results. *Id.* Given the large volume of potentially responsive documents at issue in this case, it was recently estimated that one dedicated RDINet subject matter expert can review no more than approximately 1,000 documents for responsiveness per week. *Id.* At this rate, a review of the approximately 35,000 potentially responsive documents in this case would take approximately 35 man-weeks to complete. *Id.* These burdens would be exponentially greater if the CIA had to conduct searches for persons other than the Plaintiffs and Defendants, such as other detainees or CIA personnel who participated in the former detention and interrogation program. *Id.*

Once this first-line review process is complete, the documents must then be reviewed for responsiveness to Defendants' requests. *Id.* ¶ 11. Due to the fact that RDINet contains many extremely sensitive documents, all of the potentially responsive documents are required to be initially treated with special storage and handling restrictions. *Id.* This means, among other things, that persons reviewing the documents must acquire clearances appropriate to both enter the facility in which the documents are housed and to be permitted to use computer terminals within that facility to view the highly classified RDINet documents. *Id.*

After documents responsive to Defendants' requests are identified, the CIA must then conduct a painstaking and exacting line-by-line review process, identifying whether any information can be released consistent with national security and

privilege concerns. *See* Shiner Decl. ¶ 12. This classification review is necessary because, although certain categories of information about the former detention and interrogation program have been declassified by the Executive Branch, other categories of information about the program remain classified. Determining whether certain information remains classified can turn on subtle nuances, carefully parsed distinctions, and the context of the proposed disclosure. *Id*. ¶ 13.

In making these determinations, it is often necessary to analyze additional material beyond the particular documents at issue. *Id*. ¶ 17. Although disclosure of a discrete piece of information by itself may be innocuous, its release in conjunction with other, seemingly harmless bits of information may result in the disclosure of sensitive information that could harm national security. *Id*. Therefore, the documents at issue must often be reviewed in conjunction with other prior disclosures, which in the case of the former detention and interrogation program are quite voluminous, and this process adds additional time to each document review. *Id*.

Additionally, the review process must involve the input from multiple CIA components, subject-matter experts, and senior CIA officials. *Id*. ¶¶ 18-22. These experts are uniquely knowledgeable about the kind of disclosures that could, for example, jeopardize specific intelligence sources or methods, and are therefore best qualified to determine what damage, if any, to the national security reasonably could be expected to result from an unauthorized release of the information. *Id*. ¶ 18. This collaborative review is especially important because the significance of one item of information frequently depends upon knowledge of other items of information, the value of which cannot be appropriately considered without the input of other individuals with knowledge of the entire landscape. *Id*. ¶ 18.

This review must be conducted with precision and accuracy because of the sensitivity of the categories of information about the former detention and interrogation program that remain classified. *See* ¶¶ 14-16. These categories include

the identities of foreign liaison services, who are likely to cease or restrict their current and future cooperation with the CIA should their identities be disclosed. *Id.* ¶¶ 14-15. Additionally, the CIA has a compelling interest in protecting the identities of its personnel who participated in the program due to the harm that could come to these individuals and their families should their identities become known to terrorist elements. *Id.* ¶ 16.

The CIA officers involved with the review process must also balance their work on this project with other mission-critical intelligence duties. *Id.* ¶ 19. Many of the relevant CIA components' subject matter experts are also tasked with important duties such as collecting, analyzing, and preparing intelligence for distribution to policymakers. *Id.* Taking time away from those duties to conduct lengthy classification reviews pulls intelligence officers from the central focus of their mission for days or weeks at a time. *Id.* Further, senior CIA officials whose input is necessary are actively involved in the conduct and management of intelligence collection or analytical activities. *Id.* ¶ 22. Such officials are often called upon to respond quickly to international crises and pressures, and therefore cannot, as a practical matter, instantly devote disproportionate time and effort to classification review decisions. *Id.* And the limited staff at the CIA's Litigation Information Review Office maintains a full portfolio of other litigation matters with documents to review and court-ordered deadlines to meet, spanning a full range of criminal and civil cases. *Id.* ¶¶ 23-24.

In short, the burdens of this review process are enormous and time-consuming. *See id.* ¶ 23. For a recent production of 12 CIA documents to Defendants, the CIA required three weeks to conduct the classification review process after the documents were identified as responsive to Defendants' request. *Id.* At that rate, the classification review and processing of even 1,000 documents would take

approximately 250 weeks, which does not even account for the lengthy front-end search and review process discussed above. *Id*.

In light of the significant and undue burdens associated with this type of document production, the Government engaged in discussions with Defendants regarding more efficient and less burdensome discovery mechanisms. *See* Gov't Exs 14 & 15. Specifically, the Government proposed an anonymous CIA witness pursuant to Federal Rule of Civil Procedure 30(b)(6) who could provide unclassified testimony about aspects of the CIA's former detention and interrogation program relevant to this case. *See* Gov't Ex. 14. Defendants, however, rejected this proposal based on concerns that such testimony would not be admissible at trial. *See* Gov't Ex. 16.

B. DOJ's Efforts To Produce Documents.

As noted above, the DOJ document subpoena is largely redundant and duplicative of the CIA subpoena, as it seeks "all documents" in 31 broad categories, 28 of which are also sought in the CIA subpoena (*i.e.*, all requests other than #6-8). The Government informed Defendants that there is no need for both DOJ and CIA to conduct duplicate productions for the same documents, and that these 28 requests, which call for documents or information belonging to the CIA, are more properly directed to CIA. *See* Gov't Ex. 5. Accordingly, DOJ focused its efforts on the three DOJ-specific document requests (Requests #6-8) for documents related to the legality of the former detention and interrogation program. *See id*.

With respect to Request #8, which seeks communications between the Defendants and DOJ officials about the legality of the program, the Government informed Defendants that, based on inquiries into the issue, there is no reason to believe any responsive documents exist, as officials at DOJ who were involved with providing CIA with legal advice regarding the program would have been providing that advice to CIA lawyers and officials, not to Defendants. *See id*.

As for Requests #6 and 7, DOJ focused its search on documents in the possession of DOJ's Office of Legal Counsel (OLC). *See id*. OLC exercises the Attorney General's authority under the Judiciary Act of 1789 to provide controlling legal advice to the President and all Executive Branch agencies. *See id*. Following the attacks of September 11, 2001, OLC provided legal advice to various Executive Branch agencies regarding a range of complex and novel national security legal issues. *See id*. Documents pertaining to OLC's legal advice on these issues have previously been the subject of Freedom of Information Act requests and related litigation. *See id*. Accordingly, OLC conducted a reasonable search of its production files in these cases, resulting in the collection of approximately 5,000 pages of documents. *See id*. These documents were then reviewed for responsiveness to Requests #6 and 7 and, on August 31, 2016, the Government produced a wide array of responsive documents including, among other things, final memoranda and letters that CIA and OLC exchanged regarding various legal aspects of the detention and interrogation program, congressional testimony from senior OLC officials about the program, and internal DOJ reports about OLC's legal advice. *See* Gov't Ex. 11.

4. Defendants' Motion To Compel.

Even as the Government's efforts to produce documents remained ongoing, on August 15, 2016, Defendants stated that they would file a motion to compel production of all nonprivileged documents responsive to the subpoena unless the Government proposed, and Defendants agreed with, an alternative production proposal in less than three business days. *See id*. The Government objected to Defendants unreasonable demands given the continuing production of documents, the potential for agreement, or at least a significant narrowing of areas of dispute. *See* Gov't Ex. 14. Defendants nonetheless proceeded to file their motion to compel and a corresponding motion to transfer in the United States District Court for the District of Columbia. *See Mitchell et al., v. United States*, No. 16-MC-1799 (KBJ) (D.D.C.).

That Court transferred adjudication of the motion to compel to this Court on September 2, 2016. *See id.* (ECF No. 11).

ARGUMENT

Defendants' motion to compel should be denied and the massively overbroad document subpoenas Defendants issued to CIA and DOJ should be quashed or, at a minimum, significantly modified to alleviate the undue burdens they impose on the Government. *See* Fed. R. Civ. P. 45(d)(3).

The unduly burdensome document subpoenas at issue here are completely incompatible with the discovery timeframes established by the Court's Case Management Order. Defendants had an opportunity to persuade the Court to adopt Defendants' discovery plan and schedule during the July 8, 2016 hearing, but the Court rejected Defendants' proposal for an indefinite discovery period and adopted Plaintiff's more limited and focused discovery schedule, which was predicated on narrow and limited discovery. Having lost that issue, Defendants have taken no meaningful steps to modify their original discovery plan to account for the Court's current deadlines nor come forward with any realistic proposal for completing discovery within the timeframe established by the Court. Rather than revise their approach and narrowly tailor their discovery demands to the realities of the current scheduling order, Defendants seek to compress their massively overbroad discovery into an unreasonably short period of time and demand that the Government comply in a matter of weeks with a sweeping request for roughly 30 broad categories of national security documents over a 15-year period. The Court should not permit Defendants, who find themselves in this position based on their own unsuccessful litigation decisions, to impose undue discovery burdens on CIA and DOJ, two nonparty federal agencies who have a significant interest in avoiding the diversion of national security resources to satisfy the unreasonable discovery demands of a private party.

1. The Court Must Quash Or Modify Subpoenas That Impose Undue Burdens Or Fail To Allow A Reasonable Time To Comply.

Rule 45 of the Federal Rules of Civil Procedure addresses discovery of nonparties by subpoena. *See* Fed. R. Civ. P. 45. Under Rule 45, "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" *See* Fed. R. Civ. P. 45(d)(1). Rule 45 further specifies that Courts "must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; … or (iv) subjects a person to undue burden. *See* Fed. R. Civ. P. 45(d)(3).

Additionally, Rule 45 incorporates the limitations on the scope of discovery found in Rule 26,[1] which was recently amended in December 2015 to place a greater emphasis on the proportionality of the requested discovery. Rule 26(b)(1) currently authorizes discovery "of any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *See* Fed. R. Civ. P. 26(b)(1); Advisory Committee Notes (2015 Amendment); *see also CAT3, LLC v. Black Lineage, Inc.*, No. 14CIV5511ATJCF, 2016 WL 154116, at *5 (S.D.N.Y. Jan. 12, 2016) (discussing

[1] The "scope of discovery through a subpoena is the same as that applicable to Rule 34 and other discovery rules." Rule 45 advisory committee's note (1970). Under Rule 34, which governs production of documents by parties, the proper scope of discovery is as specified in Rule 26(b). *See* Fed. R. Civ. P. 34; *see also Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (applying both Rule 26 and Rule 45 to motion to quash nonparty subpoena).

Supreme Court's Order that new rules apply to pending cases "insofar as just and practicable").

The issue of undue burden is of particular importance in this case, where the subpoenas are aimed at nonparty Government agencies for purposes of a civil suit involving private parties. The Court of Appeals has recognized "the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations." *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994); *see United States v. Columbia Broadcasting Sys.*, 666 F.2d 364, 371-72 (9th Cir. 1982); *Dart Industries Co. v. Westwood Chemical Co.*, 649 F.2d 646, 649-50 (9th Cir. 1980). Indeed, the Court's duty to protect persons subject to a document subpoena from undue burden or expense "is at its apex where non-parties are subpoenaed." *Wapato Heritage, LLC v. Evans*, No. CV-07-0314-EFS, 2009 WL 720956, at *4 (E.D. Wash. Mar. 17, 2009).

In evaluating whether a document subpoena imposes an undue burden, courts in this Circuit have examined "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described[,] and the burden imposed." *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (internal quotations omitted); *F.T.C. v. AMG Servs., Inc.*, 291 F.R.D. 544, 552 (D. Nev. 2013) (same); *In re Subpoena of DJO, LLC*, 295 F.R.D. 494, 497 (S.D. Cal. 2014) (same). Here, as explained below, the Government has carried its burden of establishing that Defendants' subpoenas impose an undue burden. *See Goodman v. United States*, 369 F.2d 166, 169 (9th Cir. 1966).

2. Defendants' Subpoenas Are Overbroad And Compliance Would Impose An Undue Burden On The Government.

Defendants' subpoenas are facially overbroad as to scope and content. Indeed, the subpoenas seek "all documents identifying or describing" or "relating to"

approximately 30 broad categories of information in the possession of the entire CIA and DOJ without limitation over a 15-year period. *See* Gov't Ex. 18 (reprinting Defendants' document requests as revised). Defendants' motion provides no authority for that type of sweeping document request as a general matter, let alone against nonparty Government agencies in the national security context, where the Government has a substantial interest in avoiding diversion of its resources in order to perform other critical national security duties. *See* Shiner Decl. ¶¶ 18-24.

First, the temporal scope of each request is overbroad. The subpoenas state that "the time period covered by these requests is September 11, 2001 to the present." *See* Gov't Ex. 1, Definitions and Instructions ¶ 18. But Plaintiffs concede in their Complaint that their detention by the CIA ended in 2002 (for Gul Rahman) and 2004 (for Ben Soud and Salim). *See* Complaint ¶¶ 9, 11, 152. Accordingly, there is no basis for the Government to search and review 15 years' worth of documents when the relevant period of activity in this case ended in 2004. *See Moon*, 232 F.R.D. at 637-38 (document requests seeking "information over a ten year or greater period" were "overbroad on their face and exceeded the fair bounds of discovery"); *Geller v. Von Hagens*, No. C11-80269 LHK HRL, 2012 WL 1413461, at *4 (N.D. Cal. Apr. 23, 2012) (granting motion to quash where the "time period covered by the subpoena is quite long—approximately five years"). Moreover, the burdens associated with such an expansive search and review of documents would be completely disproportionate to the anticipated benefit. With the exception of several well-known and readily available CIA reports that the Government has agreed to produce, it stands to reason that documentation describing Plaintiffs' conditions of confinement, treatment, or interrogations, as well as any participation by Defendants in those activities, would have been generated during or approximate to the time of Plaintiffs' detention, not before or after.

Second, the scope of the information sought by the document requests is massively overbroad. With the exception of one particularized request (CIA Request #29), which seeks approximately 70 specific documents cited in the footnotes of the SSCI's Executive Summary report, every other request in the subpoenas is a broadly worded demand for "all documents identifying or describing" or "relating to" various sweeping categories of information about the operation of the former detention and interrogation program. These requests are not described with a sufficient degree of particularity, as the broad requests will require the Government to undertake significant efforts merely to locate documents and determine their responsiveness to Defendants' requests. This is not a situation where Defendants are seeking an easily identifiable set of information, such as a particular Government report or administrative record. Rather, this is a sweeping request for a voluminous quantity of information about vague topics like the "design," "structure," or "scope" of the former detention and interrogation program that will require detailed review and subjective judgments merely to establish responsiveness. *See* Gov't Ex. 1, Request #2-4. Courts have routinely found these types of overbroad categorical requests for "all" documents overly broad and unduly burdensome. *See, e.g., Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649-50 (10th Cir. 2008); *Williams v. City of Dallas*, 178 F.R.D. 103, 110 (N.D. Tex. 1998). As one court explained the point:

> Requests which are worded too broadly or are too all inclusive of a general topic function like a giant broom, sweeping everything in their path, useful or not. They require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request. The court does not find that reasonable discovery contemplates that kind of wasteful effort.

Audiotext Commc'ns v. U.S. Telecom, Inc., No. CIV. A. 94-2395-GTV, 1995 WL 18759, at *1 (D. Kan. Jan. 17, 1995).

Third, the subjects sought in the document requests are overbroad in the extreme. Collectively, Defendants' requests seek documents about nearly every facet and detail of the former detention and interrogation program, even though the claims in this case focus only on the treatment of Plaintiffs during their detention by the CIA and Defendants' role, if any, with respect to that treatment. Indeed, it is possible that every one of the millions of pages of documents in RDINet arguably could fall into one or more of Defendants' broad document requests, literally read. *See* Gov't Ex. 18. To highlight that obvious overbreadth using several examples, every document in RDINet discussing any aspect of the former detention and interrogation program, whether an interrogation report, operational cable, or email, is likely to identify or discuss in some fashion the "structure" or "the intended or actual scope" of the program. *See id.*, Requests #2-4. The requests are also broad enough to cover any documents identifying any participant and their role in the program, whether Government official, contractor, or in some cases even detainees, as they seek all documents referencing or relating to anyone "involved in any way in the Program's design" (#3); anyone who "approved the Program's structure" (#2); anyone "for whom the Program was designed" (#5); anyone at the CIA who communicated with Defendants about the Program (#6); anyone "who knew of" Defendants' activities (#11); anyone who had contact with the Plaintiffs (#12 & 13); and anyone involved in the operation of any of the detention facilities where Plaintiffs were located (#14).

Collectively, the requests are factually overbroad and Defendants have taken no meaningful steps to tailor their document requests to the key factual points they want to establish in this case, *see* Gov't Ex. 15, or limit the requests in a way that is proportional to the needs of the case and the burdens on the Government. "District courts need not condone the use of discovery to engage in fishing expeditions." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004). The requests here are

exactly that and far exceed the scope of discovery that should be permitted against nonparty Government agencies particularly in the national security context.

The overbreadth of these requests is further magnified by the fact that many of the requests seek information not relevant to the claims at issue in this case. For example, the subpoena seeks information about the treatment and interrogation of detainees other than the Plaintiffs. *See* Gov't Ex. 6, Requests #20-22. Indeed, the request defines the term "detainee" to include any detainee in United States custody at any location since September 11, 2001. *See* Gov't Ex. 1, Definitions and Instructions ¶ 7. Further, as noted above, Defendants seek documents referencing a vast array of people who likely have no connection whatsoever to the claims at issue in this case. Consistent with this Court's July 15, 2016 Order, discovery in this case should be limited to information about Plaintiffs' treatment. *See* ECF No. 51. What actions Defendants or other Government officials did or did not take with respect to the treatment or interrogations of the other detainees is irrelevant and beyond the scope of this case. Further, the burdens associated with searching for documents about other detainees and persons is completely disproportional and far exceeds any purported benefit that such information would have on this case. *See* Fed. R. Civ. P. 26(b)(1).

In light of this overbreadth, compliance with Defendants' subpoenas would impose an undue burden on the Government. As explained in the attached declaration from the CIA, complying with Defendants' document requests would impose enormous burdens and potentially compromise critical resources the CIA devotes to protect the national security. *See* Shiner Decl. ¶ 5-25. The volume of national security documents potentially at issue in this case is immense, as the CIA's search of RDINet located 35,000 documents potentially responsive to Defendants' broad requests. *See* Shiner Decl. ¶ 9. Each of these documents must undergo multiple levels of review by various offices to prepare the documents for release consistent with the Government's duty to protect sensitive classified information from

unauthorized disclosure. *See id*. ¶¶ 10-25. The review includes critical steps to ensure that the documents reference the correct individual, thus preventing the improper disclosure of potentially sensitive classified information. *See id*. ¶¶ 10. Further, each responsive document must be carefully reviewed, often by multiple personnel, line by line, to sort out what material is unclassified and can be released to Defendants; what material is classified but can be declassified; what material is classified and must remain so to prevent harm to national security; and what material, though unclassified, should remain protected based on other privileges. *See id*. ¶ 12-25. The complexity of this task, when combined with the extraordinary volume of documents potentially at issue, would impose undue burdens on the CIA, as the review process could take hundreds of weeks to complete. *See id*. ¶¶ 10, 23, 25.

Some of these burdens might be avoided altogether or substantially reduced if Defendants chose to pursue discovery from Plaintiffs before seeking the same information from the Government. Courts are in agreement that a subpoena to a nonparty should be quashed or limited if it seeks information from a nonparty that could be obtained from a party to the action. *See, e.g., Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575 (N. D. Cal. 2007); *Precourt v. Fairbank Reconstruction Corp.*, 280 F.R.D. 462, 467 (D.S.D. 2011). Here, for example, one of the principal factual points Defendants want to establish is that they had no direct contact with two of the Plaintiffs (Salim Abdullah and Ben Soud). *See* Gov't Ex. 15. This point could be established with a simple request for admission or perhaps a trial stipulation. Indeed, Plaintiff Salim Abdullah does not even allege he had personal contact with Defendants. *See* Complaint ¶¶ 71-116. Instead, Defendants ask the Government to cull through a potentially enormous volume of interrogation reports and other documents about Plaintiffs (Requests #12-18) in an attempt to help them prove a negative: that Defendants are not mentioned in these documents.

Further, Plaintiffs have conceded many of the key facts that Defendants are trying to establish through their nonparty discovery from the Government. Plaintiffs' theory of the case is that Defendants' liability does not "turn[] on (1) whether they personally ordered or were present for Plaintiffs' capture or torture, and (2) the participation and approval of other actors." *See* ECF No. 34. Additionally, "Plaintiffs have not alleged that Defendants made decisions as to which individuals the CIA would subject to the RDI Program, nor that Defendants had final decisionmaking authority as to the RDI Program itself." *Id*. Plaintiffs also do not dispute that Defendants' actions "were approved by others." *Id*. Given Plaintiffs' position on these key factual issues, it appears the parties could reach agreement on a factual stipulation that would obviate or substantially reduce the amount of discovery that would need to be sought from the Government. Accordingly, the Court should require the parties to confer on these issues and narrow the areas of actual dispute before requiring the Government to engage in lengthy and burdensome document discovery that may ultimately add minimal or no value to the case.

Additionally, many of the document requests seek information that would be expected to be substantially duplicative of information contained in publicly released reports and documents about the CIA's former detention and interrogation program. For example, the CIA has publicly released multiple documents and reports addressing the former detention and interrogation program generally, as well as the treatment of Plaintiff Gul Rahman. *See* Documents Related to the Former Detention and Interrogation Program, available at www.cia.gov/library/readingroom/collection/documents-related-former-detention-and-interrogation-program. Plaintiffs' counsel has also collected the Government's responses to multiple national security-related FOIA requests over the last decade, including about the CIA's former detention and interrogation program, in a public database containing over 100,000 pages of documents. *See* https://www.thetorturedatabase.org. Defendants' document requests,

however, take no account of these prior releases and make no effort to reduce the undue burden on the Government by narrowly tailoring the discovery requests to independently relevant information not otherwise available in these readily-available reports. *See* Fed. R. Civ. P. 45(d)(1).

3. The Subpoenas Failed To Provide The Government With A Reasonable Time To Comply.

Rule 45 also provides that a court "must" quash or modify a subpoena that "fails to allow a reasonable time to comply." Fed. R. Civ. P. 45(d)(3)(A)(i). Defendants' subpoenas gave CIA and DOJ 34 days to produce all documents identifying or discussing" or "relating to" 30 broad categories of information over a 15-year period. This request and the motion to compel, which seeks immediate compliance with the subpoenas, failed to provide a reasonable time to respond.

As explained above, the CIA's declaration provides a compelling and detailed explanation why 34 days is an unreasonable period of time to respond to Defendants' requests. *See* Shiner Decl. ¶¶ 5-25. The declaration explains all of the critical steps the CIA must take to search for and collect potentially responsive documents, as well as the detailed review process that CIA must undertake to prepare those documents for release consistent with the Government's duty to protect sensitive classified information from unauthorized disclosure. *See id*. The declaration also explains that the search process has so far resulted in the collection of 35,000 potentially responsive documents and, given this significant volume, review of that material could take several hundred weeks. *See id*. ¶ 23.

For all of these reasons, the Court should quash or modify the subpoenas because they did not provide a reasonable amount of time to comply.

4. The Subpoenas Should Be Modified And Narrowed Significantly.

In the event the subpoenas are not quashed outright, they should be modified and narrowed significantly. *See* Fed. R. Civ. P. 45(d)(3). The Government does not

object to providing Defendants with a manageable amount of relevant documents that do not impose an undue burden or impinge on important national security interests and are proportional to scope of discovery established by the Court's scheduling order. The Government also remains open to other ways to provide Defendants with the information they seek, such as through an anonymous Rule 30(b)(6) witness from the CIA. *See* Gov't Ex. 14. But the Government objects to Defendants' unreasonable demand that the Government comply with sweepingly broad document requests envisioned by Defendants' original proposed discovery schedule (which the Court rejected), all in an impossibly short period of time. Accordingly, the subpoenas should be narrowed significantly in accordance with the following limitations.

First, consistent with the limitations described below, Defendants should be required to limit their document requests as an initial matter to the documents cited as footnotes in the SSCI Executive Summary Report. This report includes detailed discussion on the same topics as Defendants' discovery requests and further identifies specific Government documents related to those topics. Although Defendants have requested some documents in the SSCI Executive Summary Report (Request #29), Defendants should be required to exhaust discovery of specific documents cited in this report before requiring the Government to conduct additional overbroad and burdensome searches. Limiting document discovery in this way will reduce the burden on the Government by enabling targeted searches and production of specifically-identifiable documents. Further, production of these documents may eliminate or, at a minimum, reduce the scope of follow-up searches and productions.

Second, the temporal scope of Defendants' document requests should be limited to (1) the time period surrounding the date of each Plaintiff's capture and release by the CIA; and (2) March-August 2002, when the CIA developed and authorized the interrogation techniques it later utilized on detainees in the program. With the exception of comprehensive CIA reports discussed above that the Government has

agreed to produce, it stands to reason that any interrogation reports and other documents describing the conditions, treatment, or interrogations of Plaintiffs, including Defendants' participation therein, would have been generated during or approximate to the time of Plaintiffs' detention by the CIA. Additionally, documents between March and August 2002 will show any role Defendants played in the development of the interrogation techniques from the time that the first detainee entered the program (March 2002) to the time when DOJ authorized the interrogation techniques (August 2002). Collectively, these two time periods will show how the techniques were developed and then how they were applied, if at all, to Plaintiffs.

Third, the subpoenas should be narrowed to require production of documents that describe only (1) the conditions, treatment, or interrogations of Plaintiffs; (2) Defendants' involvement in the development of the enhanced interrogation techniques used in the program; and (3) Defendants' involvement, if any, in any interrogator training courses. This limitation is consistent with the scope of discovery authorized by the Court's Order June 15, 2016, and would likely provide Defendants with the core information sought in Requests #1-20 and #27-28. Specifically, documents in these narrow categories would provide Defendants with information about their involvement, if any, in Plaintiffs' interrogations; their involvement in the development of the interrogation techniques as a general matter; and their involvement in training courses during the period of Plaintiffs' detention. There should be no discovery of the conditions, treatment, or interrogations of detainees other than the Plaintiffs or of matters unrelated to the three categories above (Requests # 21, 22, 29).

Fourth, any searches for documents should be limited to the CIA's RDINet database. This database contains millions of highly classified and compartmented documents about the former detention and interrogation program. The CIA should not be unduly burdened with conducting new Agency-wide searches for documents when a searchable repository of documents already exits.

Fifth, any discovery about Plaintiff Gul Rahman should be limited to the comprehensive reports the CIA has authored about Rahman's capture, detention, and interrogation. The death of Gul Rahman has been the subject of three separate CIA internal investigations. *See* Memorandum for Deputy Director of Operations, subject "Death Investigation – Gul Rahman" (January 28, 2003); CIA Inspector General's Special Review re: Counterterrorism Detention and Interrogation Activities, Sept. 2001 – Oct. 2003 (May 7, 2004); CIA Inspector General's Report regarding the death of Gul Rahman (April 27, 2005). These comprehensive investigations eliminate the need to conduct any new searches for records about Gul Rahman. Document production related to Gul Rahman should be limited to these reports and any exhibits thereto that meet the above-described limitations. These reports would likely provide Defendants with the key information they seek in Requests #23-26.

Sixth, the DOJ subpoena should be narrowed to require only the production of final legal advice that DOJ provided about the former detention and interrogation program. As noted above, this collection of documents has already been produced to Defendants. This limitation is appropriate because there are no allegations in the Complaint that DOJ or its personnel were involved the capture, detention, or interrogation of Plaintiffs. Nor is there any allegation that DOJ or its personnel had any contact or communication with Plaintiffs or Defendants during the period of Plaintiffs' detention by the CIA. Twenty-eight of the 31 document requests to DOJ (*i.e.*, all requests other than #6-8) are duplicative of the CIA subpoena and those requests are more properly directed to CIA given its responsibility for running the program. DOJ provided legal advice related to the program to the CIA during the period of Plaintiffs' detention, and the document production in this case should be consistent with that role.

5. Formal Invocation Of Privilege Is Premature At This Time And Should Await Production of Documents In Response to A Properly Narrowed Subpoena.

In addition to the overbreadth, burden, and relevance objections discussed above, the Government's Rule 45 objection letters also objected to Defendants' subpoenas on the basis that the requested documents (or portions thereof) are likely protected by various privileges and protections, such as the state secrets privilege, the deliberative process privilege, and attorney-client privilege, among others. *See* Gov't Ex. 3 & 4. These objections were asserted in accordance with Rule 45(d)(2)(B), which requires a nonparty to assert timely objections to a document subpoena or risk waiver. *See Berrey v. Plaintiff Inv. Funding LLC*, No. CV-14-00847-PHX-BSB, 2014 WL 6908525, at *3 (D. Ariz. Dec. 9, 2014). Defendants, however, erroneously contend that the Government should be required to formally assert all of those privileges now, before objections to the scope of the subpoena are resolved by this Court and production of nonprivileged information in response to a properly narrowed subpoena is complete. *See* Defs.' Mot. to Compel at 11-13.

When a third party objects to a subpoena as overbroad or burdensome or beyond the scope of proper discovery, Rule 45 does not require a third party claiming privilege to assert that privilege formally and describe the withheld information in a log at the same time it objects to the scope of a subpoena. Otherwise, an overbreadth objection would be pointless because the third party would still face the undue burden of documenting privileges relating to numerous irrelevant documents. *See Williams v. City of Dallas*, 178 F.R.D. 103, 115 (N.D. Tex. 1998) (holding that to require third party "to undertake the task of lodging objections to a potentially vast array of protected materials that technically fell within the scope of the [overbroad] subpoenas. . . would be to deprive a subpoenaed party of its right to quashal or modification"); *Haddix v. Burris*, No. c-12-1674, 2014 WL 6983287, *4 n.2 (E.D. Cal. Dec. 9, 2014) ("Here, the mere preparation of a privilege log would be an onerous task as many of

Plaintiff's discovery requests were overbroad."). As the Federal Rules Advisory Committee has stated: "A person served a subpoena that is too broad may be faced with a burdensome task to provide full information regarding all that person's claims to privilege. . . . Such a person is entitled to protection that may be secured through an objection." Fed. R. Civ. P. 45 Advisory Committee Notes (1991 Amendment); *see* Fed. R. Civ. P. Rule 26 Advisory Committee Notes (1993 Amendment); *United States v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003). Thus, a court should assess and resolve objections to a subpoena's scope before requiring a third party to formally assert privilege and submit a privilege log. *See* Charles Alan Wright & Arthur R. Miller, 9A Fed. Prac. & Proc. Civ. § 2464 (3d ed.); *Grand River Enterprises Six Nations, Ltd. v. King*, No. 02-cv-5068(JFK), 2009 WL 63461, at *3 (S.D.N.Y. Jan. 12, 2009); *Heckler v. Koch, Inc.*, No. 1:11-cv-1108, 2013 WL 2406266, *4 (S.D. Ind. May 31, 2013). Accordingly, the Government acted properly here by objecting to the scope and associated burden of Defendants' subpoena and waiting for the scope to be clarified by this Court before addressing the application of any specific privileges to documents produced in response to a properly narrowed subpoena.

Neither of the cases cited by Defendants is contrary to this conclusion. *See* Defs.' Mot. to Compel at 12-13. In both cases Defendants cite, the potentially privileged nature of subpoenaed material was either the exclusive or the primary basis for the Government's subpoena objection. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404 (D.C. Cir. 1984); *Goodman*, 369 F.2d at 169. As such, the Government was required to formally assert and defend those privileges to prevent withholding. *Northrop Corp.*, 751 F.2d at 404; *Goodman*, 369 F.2d at 169. These cases, thus, merely stand for the unremarkable position that in order to quash a subpoena in its entirety on privilege grounds, the privilege must be properly invoked. Here, in contrast, the Government presently seeks to quash or modify the subpoenas on the basis of overbreadth, undue burden, relevance, and failure to provide a

reasonable time to comply. The Government is not at this time invoking privilege to quash the subpoenas in their entirety. Rather, as explained above, the Government is working to provide Defendants with a reasonable amount of responsive documents. To be sure, some of these documents may contain privileged information, either in whole or in part, but any disputes over application of any privileges to any specific documents or information in the documents eventually produced should be addressed at the end of production, not as a hypothetical matter now.

After the Court rules on the Government's objections and determines the proper scope of Defendants' subpoena, the Government should be allowed to prepare a privilege log after it has completely complied with the narrowed subpoena and any disputes over withheld information are identified. Rule 45 itself does not establish when a third party is required to provide a privilege log, but the First, Second, and D.C. Circuits have all adopted the position that a log must be produced within a "reasonable time," based on the specific circumstances of the case and the burden of creating such a log. *See In Re Jury Proceedings*, 802 F.3d 57, 67-68 (1st Cir. 2015) (collecting cases). The Ninth Circuit has not considered the issue, but has recognized that compiling a privilege log within a limited time frame "may be exceedingly difficult, even for counsel who are sophisticated, experienced, well-funded, and acting in good faith." *Burlington N. & Santa Fe Ry. v. Dist. Ct., Mt.*, 408 F.3d 1142, 1149 n.3 (9th Cir. 2005). Accordingly, district courts in the Ninth Circuit have upheld, in appropriate instances, privilege objections documented in logs submitted many months after the discovery requests were made and several months after the production of responsive documents. *See, e.g., Coal. for a Sustainable Delta v. Koch*, No. 1:08–cv–00397, 2009 WL 3378974, at *11–14 (E.D. Cal. Oct. 15, 2009); *Carl Zeiss Vision Int'l GmbH v. Signet Armorlite Inc.*, No. CIV 07-cv–0894, 2009 WL 4642388, at *3-4 (S.D. Cal. Dec. 1, 2009); *McKeen-Chaplin v. Provident Sav. Bank, FSB*, No. 2:12-CV-03035, 2015 WL 502697, at *11 (E.D. Cal. Feb. 5, 2015).

Here, formally asserting privilege and creating a privilege log may take an unusually long period of time because, in addition to the usual burdens of preparing a privilege log, the United States may be required to assert the state secrets privilege. *See* ECF No. 33, Gov't Statement of Interest at 10-12 (describing rigorous process for asserting state secrets privilege). Indeed, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), and its progeny, demand that any determination as to whether the United States will invoke the privilege can only be made by senior officials of the Executive Branch after their personal consideration. In addition to the judicial authority recognizing the significance of the state secrets privilege and the need for the Executive to invoke it with prudence, *see Reynolds*, 345 U.S. at 7, the Executive Branch's own internal guidance provides for a rigorous, layered, and careful process for review of any potential state secrets privilege assertion, including personal approval from the Attorney General. *See* ECF No. 33, Gov't Statement of Interest at 10-12. These procedures have been expressly endorsed by the Court of Appeals. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010) (en banc).

Accordingly, given the possibility that the Government may have to assert a variety of privileges, including the state secrets privilege, over a potentially large volume of information, the Government requires a significant amount of time to formally assert those privileges and prepare an appropriate privilege log. In this case, then, a "reasonable time" for the Government to submit its privilege log is after it has completely responded to a properly narrowed subpoena and the Government and Defendants have conferred about the production and narrowed any areas of dispute.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Defendants' motion to compel and grant the Government's cross-motion to quash or modify. A proposed order is attached.

Dated: September 16, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL C. ORMSBY
United States Attorney

TERRY M. HENRY
Assistant Branch Director

s/ Andrew I. Warden
ANDREW I. WARDEN
TIMOTHY A. JOHNSON
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
andrew.warden@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Dror Ladin:
Dladin@aclu.Org

Hina Shamsi:
Hshamsi@aclu.Org

Paul L Hoffman:
Hoffpaul@aol.Com

Steven Watt:
Swatt@aclu.Org

Attorneys for Plaintiffs

Brian Paszamant:
Paszamant@blankrome.Com

Henry Schuelke, III:
Hschuelke@blankrome.Com

James Smith:
Smith-Jt@blankrome.Com

Christopher Tompkins:
Ctompkins@bpmlaw.Com

Attorneys for Defendants

/s/ Andrew I. Warden
ANDREW I. WARDEN
Indiana Bar No. 23840-49
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
Attorney for the United States of America