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 "BRUCE" JESSEN Petitioners, v. UNITED STATES OF AMERICA, Respondent.	No. 16-MC-0036-JLQ UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S OCTOBER 4, 2016 ORDER Without Oral Argument Related Case: No. CV-15-0286-JLQ

GOVT'S OPPOSITION TO MOTION FOR RECONSIDERATION

The United States of America ("Government") opposes Petitioners' (Defendants in related case No. CV-15-0286-JLQ) motion for reconsideration of the Court's October 4, 2016 Order (ECF No. 31).

ARGUMENT

As a threshold matter, Defendants' incorrectly contend that Federal Rules of Civil Procedure 59 and 60 govern reconsideration of the Court's October 4 Order. *See* Defs.' Mot. at 2. Those rules govern reconsideration of a final judgment, which is not at issue here. *See* Fed. R. Civ. P. 59(e), 60(b). Federal Rule of Civil Procedure 54(b) governs reconsideration of non-final interlocutory orders, such as the Court's October 4 discovery order. *See* Fed. R. Civ. P. 54(b). Relying on Rule 54(b), this Court has established the following standard for reconsideration of interlocutory orders:

> The court has discretion to reconsider interlocutory orders at any time prior to final judgment. *See Sch. Dist. No. 5 v. Lundgren,* 259 F.2d 101, 105 (9th Cir. 1958). "Nonetheless, the orderly administration of lengthy and complex litigation such as this requires the finality of orders be reasonably certain," and the major grounds that justify reconsideration involve "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Pyramid Lake Paiute Tribe of Indians v. Hodel,* 882 F.2d 364, 369 n. 5 (9th Cir. 1989). . . . A motion for reconsideration should not be used "to ask the Court to rethink what it has already thought." *Motorola, Inc. v. J.B. Rodgers Mech. Contrs., Inc.,* 215 F.R.D. 581, 582 (D. Ariz.2003); *see also Taylor v. Knapp,* 871 F.2d 803, 805 (9th Cir. 1988) (holding denial of a motion for reconsideration proper where "it presented no arguments that had not already been raised in opposition to summary judgment").

Kirby v. City of E. Wenatchee, No. 12-CV-190-JLQ, 2013 WL 2396008, at *1 (E.D. Wash. May 31, 2013). In short, motions for reconsideration are "not a vehicle for a 'second bite at the apple,'" and litigants should not be permitted to "re-hash arguments the court has already thought through, or present arguments or

evidence for the first time which could reasonably have been raised earlier in the litigation." *Salazar v. Monaco Enterprises, Inc.*, No. 2:12-CV-00186-LRS, 2015 WL 8773279, at *1 (E.D. Wash. Dec. 14, 2015).

A. The Court Correctly Limited the Timeframe for Production of Documents Referencing Defendants' Role in the Design of the Former Detention and Interrogation Program.

In accordance with the Court's October 4 Order and the comments made by the Court during the September 29, 2016 telephonic hearing, the Government must search for documents that reference or describe the role Defendants played in the design and development of the former detention and interrogation program, not limited to references to the Plaintiffs or Abu Zubaydah. The Court also placed clear a date limitation on the production of documents falling within this category. Specifically, the Court limited production to documents created between September 11, 2001 and August 1, 2004. *See* Oct. 4 Order at 4-5; Transcript of Hearing (Sept. 29, 2016) at 48:19-20 ("I am ruling that the design search is limited to, from 9-11 to 8-1-04.").

This time limitation is appropriate and Defendants have not offered any convincing reason to alter this date range that would satisfy the Court's reconsideration standard, let alone warrant a significant and unduly burdensome expansion of the Government's document production obligation for an additional *twelve years* beyond 2004, from 2001 to the present.

Defendants' motion raises no new arguments that were not already considered by the Court during the September 29 hearing. The Court heard detailed argument from both sides regarding the cut-off date for documents related to Defendants' involvement in the design of the program. *See* Transcript 44:4-48:22. Indeed, the Court specifically considered whether the search for documents about the design of the program should include documents up to the present time.

See id. 45:18-48:20. In response, the Government explained that the design of the program occurred during the spring and summer of 2002, against the backdrop of the capture and interrogation of Abu Zubaydah, and argued that production should be limited to this time period. *See* Transcript at 30:24-32:18; 45:18-48:18. After considering the arguments of both sides, the Court ordered production of documents created between September 11, 2001 and August 1, 2004. *See id*. at 48:19-20. This decision struck an appropriate balance between, on the one hand, Defendants' need to obtain documents about their role in the design of the program during the key dates when the program was developed and, on the other hand, the Government's interest in avoiding an overbroad and burdensome search for documents years after the relevant actions took place. This compromise ruling is not a manifest injustice and cannot satisfy the strict standard for reconsideration.

The only basis for Defendants' request for such a dramatic expansion of the Government's discovery obligation is Defendants' assertion that there must be more documents created after 2004 that discuss Defendants' role in developing the program. *See* Defs.' Mot. at 3-5. Although the Government has produced several key documents created after 2004 that discuss Defendants' role in the creation of the program, such as the CIA's inspector general's report about the program, the production of those documents should not require the Government to undertake a burdensome, time-consuming, leave-no-stone-unturned discovery effort for more, potentially duplicative, documents created years after the program was developed. Indeed, Defendants provide no explanation why the documents the Government has produced are inaccurate or in any way contrary to Defendants' own understanding or recollection of the way the program developed, thereby requiring a search for twelve additional years of documents. The documents produced thus far, when combined with the additional searches required by the Court's Order,

which reach documents created during the time period when the program was actually developed (2002) as well as for two years thereafter (through 2004), are more than sufficient to provide Defendants with information about their role in developing the program. Accordingly, Defendants will not suffer any manifest injustice if the production of the design documents is limited in this reasonable fashion.

Defendants' position essentially boils down to the speculative belief that there is non-cumulative, material information contained in documents created years after the program was developed that is not contained in either the key reports and documents the Government has already produced, the Senate Select Committee on Intelligence's (SSCI) multi-year the study of the program, or the documents required to be produced by the Court's Order. Defendants' position is unreasonable. The Government should not be required to produce twelve more years of documents simply because Defendants want more for the sake of more. Defendants have not met the high threshold for reconsideration, and the Court should reject Defendants' request for such a significant expansion of the Government's discovery obligations as disproportional to, and far excess of, any purported benefit that such additional information would have on this case. *See* Fed. R. Civ. P. 26(b)(1).

B. The Court Correctly Limited Production of Documents Related to Abu Zubaydah to Documents That Must Also Reference Defendants.

The Government understands the Court's October 4 Order to require the production of documents about Abu Zubaydah if three criteria are satisfied: 1) the document must reference Abu Zubaydah; 2) the document must reference one or both of the Defendants; and 3) the document must have been be created between

September 11, 2001 to August 1, 2004.[1] The Government bases this understanding on both the terms of the Court's Order and the consistent statements by the Court during the September 29 discovery hearing. *See* Oct. 4 Order at 4-5; Transcript at 34:8-10 ("I'm not ordering the complete furnishing of any and all Zubaydah documents, it's only anything that relates to Zubaydah and these two defendants."); 34:23-25 ("My ruling is that any reports as they relate to these two defendants dealings with Zubaydah, between March of 2002 and August of 2004, are included in the subpoena."); 43:19-44:4 (stating it "is correct" that the "focus of the subpoena will be on defendants' relationship with Mr. Zubaydah, from March of 2002 to August of 2004"). Indeed, when asked by the Court, Defendants' counsel specifically stated that Defendants had no objection to this understanding of the Court's Order. *See id*. at 44:3-4. Defendants should not be permitted to have a 'second bite at the apple' to ask the Court "to re-think what it has already" decided. *Kirby*, 2013 WL 2396008, at *2.

In any event, there is no basis for the Court to reconsider its decision and impose an unduly burdensome expansion of the Government's discovery obligations. Defendants' motion would unreasonably require the Government to produce all "documents referencing the decision to use enhanced interrogation techniques with Abu Zubaydah generated between September 2001 and August 2004 that *do not mention Defendants*." Defs.' Mot. at 1 (emphasis added). This request is completely contrary to, and the opposite of, the Court's clear direction that "the proper scope is to focus on the actions of the two Defendants and the detention and interrogation of the three plaintiffs." Oct. 4 Order at 5.

[1] Defendants have agreed, however, that the Government "need not produce substantive intelligence reports concerning Zubaydah." Defs.' Mot. at 6 n.4.

Further, the search and production that Defendants now request would impose undue burdens on the Government. Instead of continuing to search for documents referencing Defendants and Abu Zubaydah, the Government would have to start the search process over and re-initiate searches of RDINet for documents referencing Abu Zubaydah without reference to the Defendants. As the Government explained in the status report filed on October 11, 2015, the Government has initiated searches for documents referencing Defendants, as Defendants are the common denominator in the categories of documents required for production by the Court's Order. *See* ECF No. 85 at 10-11. There is no basis for the Government to scrap its current search and production efforts, which have been ongoing since the Court issued its Order, and start over with a new search for documents referencing only Abu Zubaydah. Although the Government has not run a search for Abu Zubaydah in the RDINet database, the Government anticipates that the volume of documents within RDINet containing a reference to Abu Zubaydah or one of his aliases will be incredibly voluminous given his prominence as the first detainee in the program.[2] The Government would then have to undertake the process explained in the status report to transfer this likely massive collection of documents, one by one, to a separate classified computer network; review the documents for references to a decision to utilize enhanced interrogation techniques on Abu Zubaydah, but without reference to Defendants; and then process responsive documents for production in accordance with the Government's obligation to protect sensitive national security information from unauthorized release. Completely overhauling the Government's search and production

[2] For example, the SSCI executive summary report has over 800 references to Abu Zubaydah, including several sections about his detention and interrogation. *See, e.g.*, SSCI Executive Summary Report at 17-49.

obligations at this stage of the case would impose massively undue burdens on the Government and would likely be incompatible with the discovery schedule and case management deadlines established by the Court.

At no stage of this case have Defendants ever requested the precise documents they currently seek: neither their subpoena, their motion to compel, nor their arguments during the discovery hearing sought the specific Abu Zubaydah documents that Defendants now seek by way of a motion for reconsideration. Further, the documents cited in Defendants' motion as examples of the type of Abu Zubaydah documents that Defendants now seek were disclosed by the Government prior to the discovery hearing on September 29. *See* Defs.' Mot., Exs. 4-5 (Gov't production date stamp of Sept. 26, 2016).[3] Thus, Defendants could have brought these documents, and this category of documents generally, to the Court's attention during the hearing, but they did not. A motion for reconsideration is not the proper vehicle to raise new arguments that could have been raised earlier in the case, and the Court should not reward Defendants by granting their motion.

Defendants will not suffer manifest injustice if discovery is limited to production of documents that reference both Abu Zubaydah and one of the Defendants. The various categories of documents about Abu Zubaydah that Defendants raise in their motion, *see* Defs' Mot. at 7, will be included within the scope of the Court's Order to the extent Defendants are mentioned in those documents. Thus, documents referencing Defendants related to the decision to use interrogation techniques on Zubaydah, analyses of the effectiveness of the interrogation techniques on Zubaydah, or assessments of whether Abu Zubaydah was withholding information, are covered by the Court's Order. There is no

[3] These documents were cited in the SSCI Report and specifically requested by Defendants in their document subpoena.

manifest injustice in excluding documents about the Abu Zubaydah's capture, detention, interrogation, intelligence information, and conditions of confinement that have nothing to do with Defendants. Put simply, this is a case about Plaintiffs and Defendants, not Abu Zubaydah, and the Court properly tailored discovery "to focus on the actions of the two Defendants and the detention and interrogation of the three Plaintiffs." Oct. 4 Order at 5. To hold otherwise, and require the Government to re-design and re-initiate searches for and production of a potentially massive trove of information about Abu Zubaydah that has no reference to Defendants is completely disproportional to any purported benefit that such information would have on this case. *See* Fed. R. Civ. P. 26(b)(1).

C. Defendants' Contracts After 2004 Are Irrelevant To The Issues In This Case And Should Not Be Produced.

The Government has produced the contracts governing Defendants' work on the former detention and interrogation program during the time of Plaintiffs' detention by the CIA. *See* ECF No. 84. Plaintiffs concede in their Complaint that Plaintiff Gul Rahman's detention ended in 2002, and Plaintiffs Salim and Ben Soud's detention ended in 2004. *See* Complaint ¶¶ 9, 11, 152-53. Therefore, the Government has produced Defendants' contracts during this time period, from 2001-2004. *See* ECF No. 84.

Defendants, however, seek all contracts post-dating 2004, but their motion provides no explanation why any contracts after 2004 are relevant to the claims or defenses in the case. The contracts during the time of Plaintiffs' detention by the CIA are plainly relevant to this case, as those contracts set forth the duties and functions Defendants were authorized to undertake during Plaintiffs' detention. But the same cannot be said for any contracts governing Defendants' work on the CIA program after the Plaintiffs were no longer in CIA custody.

Defendants' motion provides no explanation why contracts after 2004 have any relevance to the actions Defendants took years before, during the time of Plaintiffs' detention. Indeed, any post-2004 contracts would not have been in existence during the time of Plaintiffs' detention. Consequently, those contracts will not define the scope of the work Defendants were authorized to undertake during Plaintiffs' detention. Any contracts after 2004 would speak only to the actions Defendants were authorized to undertake with respect to detainees other than the Plaintiffs, and those authorizations and actions are irrelevant to this case.

The Court's October 4 Order reaffirmed that discovery should "focus on the actions of the two Defendants and the detention and interrogation of the three Plaintiffs." *See* Oct. 4 Order at 5. Defendants' request for post-2004 contracts is inconsistent with that standard, as contracts created after 2004 will not say anything about the actions Defendants were authorized to engage in during Plaintiffs' detention by the CIA. Further, Defendants have not cited any legal authority, from government contracting cases or otherwise, to support their expansive discovery request for contracts issued years after the relevant actions alleged by the Plaintiffs concluded. The Government's position on this issue is also consistent with the approach in *Al-Shimari v. CACI Premier Tech., Inc.*, 119 F. Supp. 3d 434, 444–45 (E.D. Va. 2015), where the court focused on the contracts in existence during the time of the plaintiffs' detention, and said nothing about contracts governing the contractors' duties years after the plaintiffs were released from military custody.[4]

[4] On October 21, 2016, the Court of Appeals for the Fourth Circuit vacated this decision and remanded the case back to the district court for further consideration of the political question issue. *See Al-Shimari v. CACI Premier Tech., Inc.*, No. 15-1831, 2016 WL 6135246 (4th Cir. Oct. 21, 2016).

Defendants also incorrectly argue that production of the contracts will not burden the Government. *See* Defs.' Mot. at 10. Contrary to Defendants' position, the primary burden with producing the contracts is not locating them, but the complex and exacting line-by-line review process to determine whether information can be released consistent with national security and privilege concerns. *See* Declaration of Antoinette Shiner ¶¶ 12-25 (ECF No. 19; Gov't Ex. 13). The burdens associated with conducting that review for all contracts after 2004 is completely disproportional to, and far exceeds, any purported benefit that such information would have on this case. *See* Fed. R. Civ. P. 26(b)(1); *see also Gilead Scis., Inc. v. Merck & Co, Inc.*, No. 5:13-CV-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) (emphasizing the impact of 2015 amendments to Rule 26 and the increased emphasis on proportionality).

CONCLUSION

For the reasons stated above, Defendants' motion for reconsideration should be denied. A proposed order is attached.

Dated: October 26, 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
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

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 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