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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. 16-MC-0036-JLQ

PETITIONERS' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF COURT'S OCTOBER 4, 2016 ORDER RE: MOTION TO COMPEL [ECF No. 31]

Without Oral Argument
November 18, 2016
Expedited Hearing Requested

Related Case:

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

NO. CV-15-0286-JLQ

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Defendants submit this Reply in further support of their Motion for Reconsideration of the Court's October 4, 2016, *Order re: Motion to Compel.*

I. THE CURRENT TEMPORAL LIMITATION APPLICABLE TO DESIGN AND IMPLEMENTATION DOCUMENTS CAUSES MANIFEST INJUSTICE.

Defendants are not seeking a "second bite at the apple." (Opp'n 1:24-25). They are moving to prevent the imposition of avoidable "manifest injustice."[1]

One of Plaintiffs' primary theories of liability is their (mis)characterization of Defendants as the "psychologists who designed, implemented, and personally administered an experimental torture program," (ECF No. 1 ¶ 1), accusing Defendants of "supervis[ing] ***their plan's*** implementation." (*Id*. ¶ 18; emphasis added).[2] According to Plaintiffs, Defendants' supposed "central role" in the EIT

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[1] The Government claims Fed.R.Civ.P 54(b), not 59(e) and 60, govern reconsideration. (Opp'n 1:5-10.) This is wrong. Noting that the Fed.R.Civ.P. "do not contemplate reconsideration of interlocutory orders," this Court observed that irrespective of the cited Rule, the authority derives from a court's "'inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient'[.]" *Tofsrud v. Potter*, 2010 U.S. Dist. LEXIS 106132, at *4 (E.D. Wash. Oct. 5, 2010) (Quackenbush, J.). Regardless, all agree that preventing "manifest injustice" justifies reconsideration. (Opp'n 1:17-18.)

[2] In fact, this appears to be Plaintiffs Salim and Soud's only theory, as there is presently no evidence Defendants were ever with either Plaintiff. (Tr. 47:16-19).

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Program is "detailed" in various untested oral and written accounts. (*Id.* ¶¶ 20-22). Limiting Defendants' discovery to only those documents generated between 9/1/01 and 8/1/04 results in "manifest injustice" to Defendants in that it inappropriately hampers their ability to counter one of Plaintiffs' central theories.

To demonstrate the very real impediment posed by the current temporal limitation, Defendants put before the Court ***multiple*** exemplar documents created ***after*** 2004 that evaluate the "decision-making process at the genesis of the use of EITs" and Defendants' involvement. (Mot. 4:1-5:11). Unable to dispute the relevance/significance of these documents, the Government instead implies that perhaps these are the only documents of such ilk generated after 2004 because Defendants' have not identified others, (Opp'n 4:7-12), and based upon this theory, tries to mischaracterize Defendants' position as a mere belief there "must be" more such documents. (*Id.* 3:14-15). But, given what has already been revealed to date, surely the more likely conclusion is ***other*** post-2004 documents directly relevant to Defendants' role in the EIT Program's design/implementation would also exist. Why is it logical to assume the contrary? And why should Defendants receive only certain "key" samples of such documents unilaterally selected by the Government? (*Id.* 3:16-17.) Equally misdirected is the suggestion that the temporal restriction should be maintained absent Defendants first "explaining" how the current documents are "inaccurate" or "contrary" to their recollection. (*Id.* 3:22-24.) The Fed.R.Civ.P. contemplate no such burden.

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The Court need look no further than the documents Defendants have identified to see that the temporal limitation will deprive them of relevant post-2004 documents,[3] and causes manifest injustice that can, and should, be avoided.[4]

II. THE LIMITATION THAT ANY ZUBAYDAH DOCUMENTS MUST ALSO MENTION DEFENDANTS CAUSES MANIFEST INJUSTICE.

As the Motion explains, the Government, relying upon a portion of the transcript of the September 29 oral argument, has determined that even though the Order does not restrict the production of Zubaydah-related documents to only those also referencing Defendants this was the Court's intention. (Opp'n 4:22-5:23.) The Motion, using the Government's existing production as a reference point, also explains the very real danger of the Government's overly-narrow approach, (Mot. 7:14-18), and, again, supplies ***tangible proof*** that relevant documents would fall outside this additional limitation. (ECF Nos. 33-4, 33-5).

Unable to address the salient prejudice created by its overly-narrow approach, the Government pivots and claims the proposed "search and production" would "impose undue burdens" because it would have to "scrap" its current search of the RDINet and begin searching for all things Zubaydah.

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[3] For example, if on August 2, 2004, the CIA Director drafted a memo stating that while Defendants were involved in the EIT Program, they had no role in its design, the Government would not currently have to produce that document.

[4] The Government has also provided no evidence as to any "burden." (*Id.* 3:25.)

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(Opp'n 6:1-12.) This is not so. First, even setting aside that the Government should not be heard to complain of any burden resulting from its unilateral decision to deviate from the express language of the Order, the Motion does not seek all Zubaydah documents—only those concerning the decision to use EITs on Zubaydah. (Mot. 6:18-19). Nor is there a need for a "scrap[ping]" of effort. Indeed, the RDINet is apparently capable of handling multiple search terms simultaneously, as it is currently being searched for documents "referencing Defendants ***and*** Abu Zubaydah." (Opp'n 6:3; emphasis added.) Thus, even if there exists a large volume of documents containing the term "Zubaydah,"[5] the RDINet can simply combine that term with others—*e.g.*, "EIT," "facial slap," "walling"—to reduce the resultant data set. Such additional search(es) would just supplement the Government's current search; thus, no "scrapping" is necessary.

Further, the claim that Defendants "never sought" the Zubaydah documents at issue—*i.e.*, at the September 29 hearing—is simply disingenuous. (*Id.* 7:4-7). The Government concedes that it first produced the documents that became Exhibits 4 and 5 a mere ***three days*** before the September 29 hearing.[6] (*Id.* 7:8-13). Another Exhibit was produced ***just hours before the hearing***, (ECF No. 33-

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[5] The Government concedes it has "not run a search for Zubaydah," and simply "anticipates" the volume will be "incredibly voluminous." (*Id.* 6:12-16.)

[6] Notably, Defendants' *Motion to Compel*, (ECF No. 1), and *Reply*, (ECF No. 23), were both filed ***before*** these documents were even produced to Defendants.

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1)—yet was discussed. (Tr. 13:5-14:2). In any event, whether these ***particular documents*** were discussed is of no moment, as all such documents were requested in Defendants' subpoenas, and Defendants plainly had no idea how the Government would choose to interpret the Order; hence, the need for this Motion.

III. THE GOVERNMENT HAS DISREGARDED THIS COURT'S ORDER TO PRODUCE DEFENDANTS' CONTRACTS.

The Government does not even address that the Court ***previously ordered*** production of the contracts. (Mot. 10:1-4). Instead, the Government curiously identifies ***another court's*** handling of post-detention contracts to disregard ***this Court's*** Order. (Opp'n 9:17-22). Yet, even setting that aside, the Government's contention that any contract created after Plaintiffs were "no longer in CIA custody" is irrelevant is illogical. (*Id.* 8:25-26). What if a post-2004 contract discussed Defendants' prior responsibilities and/or how they have now changed? The Government's "burden" complaints are also baseless. (*Id.* 10:1-9). The Government first discussed the contracts in May 2016, (ECF No. 46 2:13-21), and in a July 7 email noted said "documents ***were reviewed***," (Rosenthal Decl. **Ex. A**; emphasis added), so they have apparently already been accumulated/reviewed.[7]

IV. CONCLUSION

For the foregoing reasons, Defendants' motion should be granted.

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[7] Until today, the Government had not produced any documents since the 9/29 hearing; it has still not produced documents from the SSCI Report's footnotes.

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DATED this 31st day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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