**BETTS, PATTERSON & MINES P.S.**
Christopher W. Tompkins (WSBA #11686)
CTompkins@bpmlaw.com
701 Pike Street, Suite 1400
Seattle, WA 98101-3927

**BLANK ROME LLP**
Henry F. Schuelke III (admitted *pro hac vice*)
HSchuelke@blankrome.com
600 New Hampshire Ave NW
Washington, DC 20037

James T. Smith (admitted *pro hac vice*)
Smith-jt@blankrome.com
Brian S. Paszamant (admitted *pro hac vice*)
Paszamant@blankrome.com
One Logan Square, 130 N. 18th Street
Philadelphia, PA 19103

Attorneys for Petitioners Mitchell and Jessen

**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 TO COMPEL**

February 14, 2017

**Related Case:**

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

NO. CV-15-0286-JLQ



Betts
Patterson
Mines
**One Convention Place**
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

## I. INTRODUCTION

Since July, the US has been heavily redacting documents without formally invoking any potentially applicable privilege. In fact, were it not for Defendants' persistence and, more importantly, this Court's Order obligating the US to provide a log identifying the claimed basis for redactions, Defendants and the Court would still not know the basis for the redactions. The US must now formally assert its privileges so that they may be assessed, or produce the withheld information.

The US's Opposition consists largely of a now-common refrain: because of purported burden, the US should not be obligated to review each of the (oftentimes heavily) redacted documents that it has produced to assess whether to actually invoke a potentially applicable privilege; instead, Defendants should further assess these redacted documents and advise the US which documents warrant further consideration. Setting aside that the US's position inverts the well-settled tenet that a party advancing a privilege to withhold information bears the burden of establishing the privilege's applicability, that position also asks Defendants to do the impossible: divine what lies under a redaction and assess whether the unknown materials are important. Moreover, notwithstanding the Opposition's suggestion that Defendants only recently provided a list of subject matters that Defendants agree may be excluded from review, the US was advised of most of these subject matters in June. Finally, with the exception of the state secrets privilege, the US fails to explain why the identified bases for its nondisclosure are applicable, and does not state that it has commenced the steps necessary to invoke the relied-upon privileges.



Betts
Patterson
Mines
701 Pike Street, Suite 1400
Seattle, Washington 98101-3927
(206) 292-9988

## II. ARGUMENT

### A. The US's Privilege Assertions are Long Overdue

Although the US continues to claim that it previously had no obligation to formally assert privileges, it now finally concedes—in response to Defendants' second motion to compel—that it must "tak[e] steps necessary to submit [] formal claims of privilege." Opp'n at 5. Despite this concession, the US seeks to further delay formal privilege assertions because it is "overwhelmed" by Defendants' motion and wants Defendants to limit its burden by (1) identifying the most material redactions and (2) affording more time.

Defendants have not moved to compel as to every redaction within the 252 documents the US has produced and the 40 documents it has withheld in full, totaling approximately 2,500 pages. Nor have Defendants suddenly agreed that large categories of information are immaterial. To the contrary, as early as June 2016, Defendants informed the US that they had no interest in certain categories of purportedly classified information, such as CIA sources and foreign government cooperators. In fact, Defendants provided the US with a detailed list of the types of information: (1) critical to their defense; and (2) claimed to be classified that Defendants did not desire. (Paszamant Decl. ¶3 and **Ex. AA**.) As a result, 155 documents and roughly 1,100 pages of the US's production remain at issue. This tally is unlikely to substantially decrease with the US's most recent re-review of its production for "agreed-upon exempt categories" given that most of these categories were previously identified as immaterial.

At this point, Defendants are simply unable to further narrow the document set. Setting aside that the US has the burden to substantiate its withholding, *El-*



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701 Pike Street, Suite 1400
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(206) 292-9988

*Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007); *see Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007), and that Defendants raised the issue of unsubstantiated redactions in their original motion to compel, the US continues to ask Defendants to do the impossible: identify the withheld information that is most important. Defendants have no idea what has been redacted, and cannot say that one redaction is more important than another, especially when many redactions go on for multiple pages (Tompkins Decl. at **Ex. G**), and other redactions encompass almost entire documents (*id.* at **Ex. B**; Paszamant Decl. at **Ex. EE**).

In an effort to narrow this dispute, Defendants have tried to identify which heavily redacted or completely withheld documents are most likely to be critical to their defense, but this effort has not helped resolve this dispute. In response to the US's request, Defendants identified 35 documents for the US to "re-review". 24 days later (and within hours of filing its opposition), the US provided Defendants with general summaries of the contents of the documents which simply confirm that almost every document is likely material to Defendants' defense. (Paszamant Decl. at ¶6 & **Ex. BB**.)

The US should not be permitted to push its burden onto Defendants. If the US wants to withhold information that the Court ruled discoverable, it has the burden to justify doing so. Over the last eight months, the US has cited no fewer than six "privileges," while invoking none. *Maria Del Socorro Quintero Perez, CY v. United States*, No. 13-1417, 2016 WL 362508, at *3 (S.D. Cal. Jan. 29, 2016) ("[A] prerequisite to asserting any federal privilege is that the government must



Betts
Patterson
Mines
701 Pike Street, Suite 1400
Seattle, Washington 98101-3927
(206) 292-9988

make a 'substantial threshold showing' by way of a declaration or affidavit from a responsible official with personal knowledge of the matters to be attested to in the affidavit."). The US has not yet explained why most of the proffered "privileges," e.g. the CIA or NSA Acts, are even potentially viable in this case.

Additionally, the US wants to further delay invoking any privilege, suggesting a briefing schedule to revisit these issues again in a few months. This is not surprising. The US has pursued a strategy of delay, apparently hoping that time would expire before it formally asserts any privileges—and hoping to prevent the Court from reviewing its privilege assertions. This strategy appeared when the US urged Defendants not to file a motion to compel, and again in opposing transfer of Defendants' motion to compel from the District of Columbia to this Court, and when the US proposed a mid-January production deadline while asking to delay producing a privilege log. (Paszamant Decl. at ¶4; ECF Nos. 10 & 36.) The US's preferred schedule is not consistent with the Court's deadlines; Defendants would not receive additional information or formal privilege assertions until after discovery, or potentially after trial.

In an effort to justify further delay, the US asserts it will face an "undue burden" in asserting privileges. The US's effort to assert burden as a justification for delay, or inaction, is not new. When the US resisted producing any documents, it cited the burden it faced in reviewing 35,000 documents. (ECF No. 19-13.) After this Court ordered production, the US realized that many documents were duplicates, and it ultimately produced only 120 documents and withheld another 40 documents. (Tompkins Decl. at ¶ 4; ECF No. 45 & 50.) The burden is similarly



Betts
Patterson
Mines
701 Pike Street, Suite 1400
Seattle, Washington 98101-3927
(206) 292-9988

overstated when only 155 documents remain at issue.

The Court should reject the US effort to avoid having to formally assert privileges. Formal privilege assertions enable the Court to review whether information withheld is actually privileged. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) ("[I]it is essential that the courts continue critically to examine instances of [the state secret] invocation."). If the US is successful in not asserting privileges, the Court has no opportunity to review the propriety of the assertion. This is concerning for many reasons, including that the US may—accidentally or otherwise—be withholding information that should be disclosed. As one example, the US recently produced a document that it re-reviewed because Defendants listed it as one of 35 heavily redacted documents likely to be critical to a defense. (Paszamant Decl. at ¶7.) The re-reviewed document revealed four paragraphs that had previously been redacted. (*Id.* at **Ex. DD**.) The newly-disclosed information does not appear to fall within the categories of information the US claims to be withholding. (*Id.*) Defendants are aware of no reason to believe this is the only such redaction.

**B. The Deposition of James Cotsana.**

The US has known since the summer of Defendants' desire to depose Mr. Cotsana because he was Defendants' direct supervisor during a critical period. The US maintains exclusive control over the assertion of the state secrets privilege. If it intends to advance this privilege with regard to Mr. Cotsana's deposition, it should be required to do so *post haste*. Mr. Cotsana's deposition should be compelled absent prompt assertion of this privilege.



Betts
Patterson
Mines
701 Pike Street, Suite 1400
Seattle, Washington 98101-3927
(206) 292-9988

DATED this 6th day of February, 2017.

BLANK ROME LLP

By *s/ Brian S. Paszamant*
James T. Smith, admitted *pro hac vice*
smith-jt@blankrome.com
Brian S. Paszamant, admitted *pro hac vice*
paszamant@blankrome.com
Blank Rome LLP
130 N 18th Street
Philadelphia, PA 19103

Henry F. Schuelke III, admitted *pro hac vice*
hschuelke@blankrome.com
Blank Rome LLP
600 New Hampshire Ave NW
Washington, DC 20037

Christopher W. Tompkins, WSBA #11686
ctompkins@bpmlaw.com
Betts, Patterson & Mines, P.S.
701 Pike St, Suite 1400
Seattle, WA 98101

Attorneys for Defendants Mitchell and Jessen

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of February, 2017, 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:

Andrew L. Warden
Andrew.Warden@usdoj.gov
United States Department of Justice
20 Massachusetts Ave NW
Washington, D.C. 20530

Emily Chiang
echiang@aclu-wa.org
ACLU of Washington Foundation
901 Fifth Ave, Suite 630
Seattle, WA 98164

Kate E. Janukowicz
kjanukowicz@gibbonslaw.com

Lawrence S. Lustberg
llustberg@gibbonslaw.com

Gibbons PC
One Gateway Center
Newark, NJ 07102
Dror Ladin, admitted *pro hac vice*
dladin@aclu.org

Hina Shamsi
hshamsi@aclu.org

Steven Watt
swatt@aclu.org

ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10007

By *s/ Ann Querns*
Ann Querns
aquerns@blankrome.com
Blank Rome LLP