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

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| JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN,<br><br>Petitioners,<br>vs.<br><br>UNITED STATES OF AMERICA,<br><br>Respondent. | NO. 16-MC-0036-JLQ<br><br>DEFENDANTS' MOTION TO COMPEL CIA DEPOSITIONS<br><br>March 16, 2017<br>Oral Argument Requested<br>Expedited Hearing Requested |
| Related Case:<br><br>SULEIMAN ABDULLAH SALIM, et al.,<br><br>Plaintiffs,<br>vs. | NO. CV-15-0286-JLQ |



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JAMES E. MITCHELL and JOHN JESSEN,

Defendants.



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## I. INTRODUCTION

Petitioners James Elmer Mitchell and John "Bruce" Jessen (collectively, "Defendants") hereby move this Court to compel non-party the United States ("Government") to produce for deposition Ms. Gina Haspel and John/Jane "Doe."

On December 1, 2016, Defendants served subpoenas via a *Touhy* request on the Government, specifically upon the Central Intelligence Agency ("CIA") directed to: (1) CIA employee, Gina Haspel (who, at the time, was identified as Gina "Doe" in recognition of her status as a covert CIA employee); and (2) John/Jane "Doe" (who likewise was identified in this way in recognition of his status as a covert CIA employee) in compliance with the parties' and this Court's agreed-upon procedures. Since then, the Government has willfully delayed responding to these subpoenas almost to the point of nullifying the request, with the apparent hope that the discovery clock will simply run out before these noticed depositions can occur. Indeed, Defendants reached out to the Government's designated discovery point-of-contact, Andrew Warden, multiple times since serving the *Touhy* request. But only yesterday, February 13, 2017, did the Government finally inform Defendants it will "not authorize" these depositions. Nor did the Government ever object to the subpoenas prior to the date for compliance—as it did with other CIA deponents—thereby resulting in a waiver with respect to these. With the deadline for the close of discovery rapidly approaching, Defendants seek to compel compliance with their *Touhy* request.

As shown, Ms. Haspel was centrally involved in the events alleged in Plaintiffs Suleiman Abdulla Salim, Mohamed Ahmed Ben Soud, and Obaid Ullah, on behalf of Gul Rahman's (collectively, "Plaintiffs") suit against Defendants for actions they purportedly took while contractors for the CIA. In fact, recent articles

identify Ms. Haspel as the person running the black site where Abu Zubaydah and Abd al-Rahmin al-Nishiri—both of whom Defendants interrogated at the direction and under the control of the CIA—were detained. It is similarly believed John/Jane "Doe"—whose true identity remains concealed—was the former Chief of Special Missions for the CIA's Counterterrorism Center (CTC), and was also the immediate successor to CIA employee Mr. Jim Cotsana.

Defendants do not seek to delay this case or pursue unnecessary motions. But as this Court's *Order Re: Case Management Procedures* provides, discovery concerning Plaintiffs' claims that Defendants designed, promoted, and implemented the methods alleged in the Complaint shall focus in part on "whether Defendants merely acted at the direction of the US, within the scope of their authority, and that such authority was legally and validly conferred[.]" (ECF No. 51 at 3.) That information, unlike information upon which Plaintiffs rely, is not in the public record and is vital to their defenses. Thus, Defendants request this Court compel the Government's compliance with their *Touhy* request.

## II. RELEVANT FACTUAL BACKGROUND

Plaintiffs have sued Defendants for actions they purportedly took while contractors for the CIA. Specifically, Plaintiffs allege Defendants designed, implemented, and participated in the CIA's former detention and interrogation program. According to Plaintiffs, they were subjected to this program when they were detained by the CIA in connection with the United States' War on Terror in the aftermath of the September 11th attacks. Plaintiffs claim Defendants' actions violated the law of nations, and thus, they can be held personally liable under the Alien Tort Statute, 28 U.S.C. § 1350, for compensatory and punitive damages.

To defend against these claims, on December 1, 2016, Defendants issued subpoenas, via a *Touhy* request to the CIA (the "*Touhy* Request"), for testimony from its employee, "Gina Doe, former Chief of Staff to Jose Rodriguez when he served as the Chief of the CIA's Clandestine Service and former Deputy to Jose Rodriguez when he served as the Director of the CIA's Counterterrorism Center." (Decl. of Brian S. Paszamant in Support of Motion to Compel [hereinafter "Paszamant Decl."] ¶ 3, Exhibit A at 44.) Defendants simultaneously sought testimony from CIA employee, "John/Jane Doe, former Chief of Special Missions for the CIA's CTC and immediate successor to Jim Cotsana in that position and who also served as the Chief of the CIA's CTC Renditions Group." (*Id*. at 47.)

Per the accompanying *Affidavit of Brian S. Paszamant In Connection With Subpoenas For Depositions Of Gina Doe and John/Jane Doe*, Defendants further explained that "[t]he depositions that are requested pursuant to the enclosed subpoenas are critical to the defense of Plaintiffs' allegations because, among other things, it will enable Defendants to demonstrate the following":

a. Defendants' role in the CIA's detention and interrogation program, framework and implementation.

b. That Defendants' actions/inactions were within the scope of legally and validly conferred authority.

c. That even assuming, *arguendo*, that Defendants' actions/inactions somehow fell outside the scope of legally and validly conferred authority, their actions/inactions were nevertheless known to and approved by individuals possessing higher authority.

d. That whatever improper actions/inactions, if any, were taken (or not taken) vis-à-vis one or more Plaintiffs is not capable of being attributable to Defendants' direct involvement.

e. That Defendants were not present for any interrogation of two of the three Plaintiffs and had only minor involvement with regard to Gul Rahman, whose executor is the third Plaintiff.

f. That Defendants' actions/inactions did not cause, directly or indirectly, Plaintiffs' alleged injuries.

(**Ex. A** at 4-5.) The *Touhy* Request set January 4 as the proposed deposition date for Gina "Doe," and January 5 for John/Jane "Doe"; it also identified counsel's Washington, D.C. office as the proposed deposition location. (*Id.* at 44, 47.)

The *Touhy* Request was served on the Government, specifically the CIA, via email on December 1, 2016, and by regular mail. (**Exhibit B**.) Two weeks later, on December 14, Mr. Warden responded to the email as follows:

> I am in receipt of your *Touhy* request and attendant subpoenas for depositions of Gina Doe and John/Jane Doe. ***In accordance with paragraph 6 of the discovery stipulation, I accept service of the Touhy request on behalf of the CIA and I have passed the request on to the appropriate officials at CIA for a decision.***[1] I am not authorized to accept service of the subpoena on behalf of the two Doe witnesses at this time and will not be authorized to do so, at a minimum, while the *Touhy* request remains under consideration with the CIA. I will advise you once the CIA has made a decision on your *Touhy* request.

(*See id.* at 3.) With no direct access to Gina "Doe" (whose true identity was concealed at the time of service) and/or John/Jane "Doe" (whose identity remains

[1] As a reminder, paragraph 6 of the *Discovery Order* states "[a] primary source for this Discovery will be the United States. Such information shall be requested from the United States through *Touhy* (*United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)) requests or such other procedure as the Parties may agree. *Touhy* requests directed to the CIA and DOJ shall be served on counsel for the United States, who will communicate the requests to the appropriate agency contacts." (Ex. A at 31; *see also* ECF. No. 47 at 3.) Thus, Defendants properly followed the procedures set forth for serving a *Touhy* request directed to the CIA.



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concealed) Defendants had to fully rely on Mr. Warden's representation that they would be "advise[d]" once the CIA "made a decision" on the *Touhy* Request.

Having heard nothing for another two weeks, defense counsel again reached out to Mr. Warden via email on January 2, 2017—i.e., two days before the first proposed deposition was to occur—to inquire about "any movement" from the CIA. (*Id.* at 2.) Defense counsel received no response.

On February 8, counsel emailed Mr. Warden yet again to say they were "following up on the [*Touhy* Request]. As you can see, it has been quite some time since service of the *Touhy* requests. Of course, we would like to avoid unnecessary motion practice if possible. Please advise." (*Id.*) Finally, on February 13, Mr. Warden said the CIA will "not authorize" the depositions. (*Id.*)

Although the Government continues to represent it is committed to providing Defendants necessary, discoverable information, it took over two months to respond to counsel's multiple requests for an update from the CIA. And despite having the *Touhy* Request since December 1, 2016, the Government has not objected to the subpoenas to Gina "Doe" (now Haspel) and/or John/Jane "Doe." Nor has it even attempted to identify and/or narrow the proposed topics for deposition (as was done with other CIA deponents, like Mr. Jim Cotsana).

Given the deadlines applicable to this action, Defendants are thus compelled to seek relief as set forth in the accompanying proposed order. Indeed, this Court recently ordered that discovery be extended (at Plaintiffs' request) until March 20, 2017, to permit the deposition of Jose A. Rodriguez, Jr.—i.e., Gina Haspel's former boss—and John A. Rizzo. (ECF No. 142.) Defendants request that a similar extension be granted here given this recent development.

## III. ARGUMENT

### A. The Subpoenas Directed To Gina Haspel And John/Jane Doe Are Not Unduly Burdensome, And The Government Has Failed To Raise Any Objections Despite Having Two-And-A-Half Months To Do So.

Federal Rule of Civil Procedure 45 permits district courts to issue subpoenas seeking documents and testimony to government agencies that are not parties to an action. *See* FED. R. CIV. P. 45; *Yousuf v. Samantar*, 451 F.3d 248, 257 (D.C. Cir. 2006). Under the Federal Housekeeping Statute, 5 U.S.C. § 301, however, any party issuing a subpoenas to a federal agency must first comply with the specific agency's regulations concerning the production of documents and testimony through so-called *Touhy* requests. *In re Boeh*, 25 F.3d 761, 766 (9th Cir. 1994) (citing *Touhy*, 340 U.S. at 468). A court has authority to compel the Government's compliance with subpoenas. 5 U.S.C. § 704; *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 780 (9th Cir. 1994). "[A] challenge to an agency's refusal to comply with a Rule 45 subpoena should proceed . . . as a Rule 45 motion to compel." *Watts* v. *S.E.C.*, 482 F.3d 501, 506 (D.C. Cir. 2007).

The Federal Rules of Civil Procedure apply to "discovery requests made against government agencies, whether or not the United States is a party to the underlying action." *Exxon*, 34 F.3d at 780. "Under the balancing test authorized by the rules, courts can ensure that the unique interests of the government are adequately considered," while also protecting a litigant's right to "every man's evidence." *Id*. at 779-80. Here, the Government should be compelled to comply with the *Touhy* Request because Defendants' need for the evidence outweighs any burden on the Government, and separately, because the Government has purposefully stalled, has not objected, and has failed to provide any response.



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As a preliminary matter, it is well-settled that a non-party's failure to object to a Rule 45 subpoena before the date for compliance results in waiver. *See Simplex Mfg. Co. v. Chien*, 2012 WL 3779629, at *2 (W.D. Wash. Aug. 31, 2012); *Chandola v. Seattle Hous. Auth.*, 2014 WL 4685351, at *7 (W.D. Wash. Sept. 19, 2014) (responsibility to make objections to Rule 45 subpoena belongs to the nonparty served with the subpoena); *Butler v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 11714833, at *2 (W.D. Wash. Aug. 3, 2015) (citing *Uzzell* v. *Teletech Holdings, Inc.*, 2007 WL 4358315, at *1 (W.D. Wash. Dec. 7, 2007)). This alone should suffice to compel the Government's compliance with the subpoenas.

Moreover, if it had wanted to quash the *Touhy* Request, the Government bears the burden of persuasion. *Westinghouse Elec. Corp. v. City of Burlington, Vt.*, 351 F.2d 762, 766 (D.C. Cir. 1965); *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir. 1966). As such, even if the Government had objected, it must do more than simply state that the *Touhy* Request is unduly burdensome and continuously delay producing a deponent, perhaps in the hope that discovery will end before production is required. *See Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404-05 (D.C. Cir. 1984); *Goodman*, 369 F.2d at 169.

And even setting that aside, the Court has already cautioned the Government not to delay this case by refusing to respond to *Touhy* requests. On April 22, 2016, the Court heard from the parties with respect to Defendants' motion to dismiss and preliminary discovery issues. (ECF No. 38.) Counsel for the Government, Mr. Warden, appeared at the hearing. (Apr. 22, 2016 Hr'g Tr., **Exhibit C**.) Throughout the hearing, the Court advised that the action would be proceeding into discovery and informed the parties and Mr. Warden it expected the Government would cooperate in discovery. The Court also made clear the parties should bring

discovery issues to its attention: "[i]f you, whether it be a party or the Department of Justice, that you represent, the United States, want to object, then present the objections and I'll rule upon it." (*Id.* at 78:7-78:11.)

On July 8, 2016, the Court held a telephonic scheduling conference. (ECF No. 58.) During the conference, the Court set a February 17, 2017, discovery deadline. (ECF No. 59 ¶ 7, **Exhibit D**.) The Court specifically asked Mr. Warden if the Government had any issues with the dates proposed, and the Government said, "[t]he dates you've set, your Honor, are acceptable to the Government." (*See* July 8, 2016 Hr'g Tr. 16:17-16:20, **Exhibit E**.) The Court then reiterated that any discovery issues should be promptly brought to its attention because it is "***not going to delay this case at the instance of the Government.***" (*Id.* at 22:17-22:18; emphasis added.) Defendants also specifically asked if the Court would potentially order the Government to respond to *Touhy* requests within a certain timeframe and the Court responded:

> Well, the case is assigned to me. I'll decide the issues . . . as they arise. And, if there's an issue, get it timely noted in a motion or other filing; and I'll give the Government a reasonable period of time. I'm not going to let the Government delay this case, and I'm not going to let defendants delay this case because they say, well, there's classified information that . . . issue[] need[s] to be resolved.

(*Id.* at 23:13-23:20.) Despite this warning, the Government has baited Defendants with months of delay regarding a "decision on [their] *Touhy* request" that has only very recently come. This has resulted in a need to compel.

Defendants cannot obtain this testimonial evidence sought from any other source because it remains within the minds of Government employees. With respect to Gina Haspel, the CIA only recently officially acknowledged her identity



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on February 2, 2017, when she was selected to serve as Deputy Director of the CIA. (**Exhibit F**.) And in a New York Times article published the same day, Ms. Haspel—who was noted as having "spent most of her career undercover"—was said to have played a "direct role in the C.I.A.'s 'extraordinary rendition program'"; "oversaw" the interrogation of terrorism suspects; and that the CIA's first overseas detention site in Thailand was "run by Ms. Haspel, who oversaw the … interrogations of [Zubaydah] and [al-Nishiri]." (**Exhibit G**.) As discussed, Plaintiffs' Complaint details Defendants' alleged involvement with Zubaydah as forming the basis for the treatment of the named Plaintiffs. (*See* ECF No. 1 ¶ 31 ("In late March 2002, the CIA and Pakistani government authorities captured [Abu Zubaydah]. The CIA rendered Abu Zubaydah to Thailand."); *see also id.* ¶¶ 32-55.)

The Government has thus far also prohibited Defendants from using certain relevant information they may possess because of the Government's position it is classified. Thus, any burden on the Government is greatly outweighed by Defendants' need for the requested testimony from those, like Ms. Haspel, who personally "oversaw" the CIA's interrogation program, and John/Jane "Doe" who served in high-level positions in the CIA's special mission/rendition program.

The prejudice to Defendants is plain. Defendants' main defenses include that they were under the plenary and direct control of the CIA, and acted within the scope of properly delegated authority. The Government's ongoing obdurate behavior leaves Defendants hamstrung. For instance, assuming Gina Haspel did, in fact, "overs[ee]" the interrogation of Zubaydah, everything Defendants did would have been directed and/or approved by or through her. The same could be true of John/Jane "Doe"—who was the immediate successor to Mr. Jim Cotsana.



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In sum, Defendants simply cannot mount a fair defense if they are precluded from obtaining such critical evidence. Accordingly, these CIA-controlled witnesses should now be compelled to testify in the instant case.

DATED this 14th day of February, 2017.

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By *s/ Brian S. Paszamant*

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## CERTIFICATE OF SERVICE

I hereby certify that on the 14th 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:

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