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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES ELMER MITCHELL and
JOHN JESSEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 16-MC-0036-JLQ

ORDER RE: PETITIONERS'
THIRD MOTION TO COMPEL

Related Case:

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN
JESSEN,

Defendants.

No. CV-15-0286-JLQ

ORDER RE: DISCOVERY STATUS

BEFORE THE COURT is Petitioners/Defendants James Mitchell and John
Jessen's Third Motion to Compel (ECF No. 54 in case # 16-mc-36). The Government has
filed a Response (ECF No. 59), and Defendants filed a Reply (ECF No. 61). The court
heard oral argument on the Motion on February 14, 2017. The court also directed
Plaintiffs in the underlying case, 15-286, attend the telephonic argument and all parties to

1 "be prepared to advise as to the status of discovery." (ECF No. 142). Dror Ladin
2 participated on the call for Plaintiffs. Brian Paszamant and James Smith argued for
3 Defendants. Andrew Warden appeared on behalf of the United States.

4 **I. Introduction and Background**

5 Petitioners James Mitchell and John Jessen in the miscellaneous action, 16-mc-
6 0036, are the Defendants in the related case, *Salim et al. v. Mitchell et al.*, 15-286-JLQ,
7 and are referred to as Defendants herein. Respondent is the United States, representing
8 the interests of the Central Intelligence Agency ("CIA") and Department of Justice
9 ("DOJ") in responding to a subpoena. Plaintiffs in the underlying action, 15-286-JLQ,
10 allege Defendants worked under contract with the CIA and "designed, implemented, and
11 personally administered an experimental torture program." (Complaint, ¶ 1). Plaintiffs,
12 who bear the burden of proof on their claims, have consistently taken the position, "the
13 facts necessary to adjudicate this matter are available in the public record." (ECF No. 34
14 in Case # 15-286-JLQ, at p. 3). Plaintiffs have previously asserted Defendants' discovery
15 proposal was "overbroad, protracted, and unduly burdensome." (*Id.* at 4).

16 The Defendants and the Government have engaged in a long running dialogue
17 concerning the Government's response to a subpoena issued to the CIA. The subpoena
18 was served in late-June 2016. The Government served written objections on July 19,
19 2016. On August 22, 2016, Defendants filed a Motion to Compel in the District Court
20 for the District of Columbia, which was transferred to this court. The court heard oral
21 argument on the Motion to Compel on September 29, 2016, and issued an Order granting
22 in part the Motion to Compel on October 4, 2016. (ECF No. 31).

23 In April 2016, when discovery was just beginning, Plaintiffs argued: "Defendants
24 should not be permitted to turn the discovery process in this case into a far-flung and
25 irrelevant inquiry that will guarantee unnecessary expense and delay." (ECF No. 34 at p.
26 7). Both the Government and Defendants have blamed each other for the delay. In a
27 prior Motion to Compel (ECF No. 38), Defendants took issue with the Government's
28 general reasons for the discovery redactions, stating: "The Government's identified bases

1 for the redactions are unfounded, or, at minimum, inadequately disclosed." (ECF No. 38,
2 p. 3). The Government opposed the Motion and stated: "Defendants' efforts are focused
3 on delay" and Defendants' "scorched earth approach" could slow the case to a standstill.
4 (ECF No. 48, p. 1). In the instant Motion, Defendants state the Government has taken six
5 months to complete a "limited document production." (ECF No. 54, p. 4). Defendants
6 accuse the Government of "unilateral and often wholesale nondisclosure" and argue the
7 Government's conduct will "greatly prejudice" Defendants. (*Id.* at p. 5, 11). It thus
8 appears to be the Defendants' position that the Government, while currently paying the
9 costs of Defendants' legal defense and potentially being responsible for indemnification
10 of any adverse judgment, is attempting to hinder and undermine the defense.

11 The court has previously cautioned counsel concerning the unusual nature of this
12 discovery dispute between the Government and Defendants, the parties who allegedly
13 entered into a contract for Defendants to provide services to the Government concerning
14 the enhanced interrogation program. (See Order of October 4, 2016 at ECF No. 31, p. 3).
15 The court advised at that time it "intends to hold firm to the scheduled dates and it would
16 be completely inappropriate for the Government and the Defendants to take actions, or
17 fail to act, in a manner that would interfere" with the schedule set by the court. (*Id.*).
18 Nearly five months later, the dispute continues. The Government is now requesting more
19 time to state whether to assert claimed privileges.

20 In the Order of November 23, 2016, (ECF No. 52), this court ordered the
21 Government to produce a privilege log. The Order states: "Preparing a privilege log
22 should not be unduly burdensome, or necessitate extension of the December 20, 2016
23 deadline." (ECF No. 52, p. 4). The Order further reminded the parties of the February 17,
24 2017 deadline for completion of discovery. The instant Motion seeks to have the
25 Government produce unredacted documents and also seeks the deposition testimony of
26 Mr. Cotsana, a former CIA official.

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1 II. Discussion

2 A. **Third Motion to Compel** - Counsel for the Government and Defendants filed
3 a Statement (ECF No. 63) pursuant to Local Rule 37.1, setting forth the issues on which
4 they had been able to agree, and those remaining in dispute. The parties stated there are
5 "approximately 175 documents (and 1,300 pages) listed on the CIA's and DOJ's privilege
6 log" remaining in dispute. (ECF No. 63, p. 5). The Government also prepared an
7 "unclassified" summary of "selected documents" that have been withheld in full or in
8 part. (ECF No. 63-1). The summary is 20-pages long, but does not discuss all 175
9 documents remaining at issue. The Defendants and Government have stated they will
10 continue to work to resolve these issues.

11 Defendants' Motion and proposed Order seek to have the Government produce all
12 documents in dispute without redactions. Defendants also object to the Government's
13 refusal to allow former CIA official, Mr. Cotsana, to testify. Defendants state they
14 "reported directly to Mr. Cotsana, and everything they did was directed or approved by or
15 through him." (ECF No. 54, p. 9). The Government's apparent position would not allow
16 Mr. Cotsana to even confirm or deny that he had any involvement with the CIA's
17 detention and enhanced interrogation program (the "Program"). Mr. Cotsana has signed a
18 Declaration (ECF No. 55-5), stating in part: "Given that the Government will not permit
19 me to answer any questions related to the former detention and interrogation program ... I
20 understand this written declaration is being submitted in lieu of my oral deposition." The
21 Cotsana Declaration provides no information on the Program.

22 The Government previously filed a Motion for Protective Order (ECF No. 73 in
23 case #15-286) seeking to limit Cotsana's deposition to written questions. The
24 Government's Motion for Protective Order was denied. (ECF No. 80). The court stated:
25 "The parties are directed to meet and confer further concerning the scheduling of the
26 depositions and the best manner for efficiently proceeding." (*Id.* at p. 8). The court
27 directed, as to Cotsana, that a list of subject areas be provided at least 10 days prior to the
28 deposition so the parties could avoid a situation where everyone gathered for a deposition

1 and the Government instructed the witness not to answer. The parties and the
2 Government agreed in a "Stipulation Re: Discovery" (ECF No. 47, ¶ 14) that the
3 Government could "attend all depositions and proceedings in this case and may make
4 objections they deem necessary to prevent the unauthorized disclosure of privileged or
5 classified information." The objection or assertion of privilege would then be addressed
6 by the court.

7 The Government's Response (ECF No. 59) appears to advance two primary
8 arguments: 1) the Government and Defendants should work further to narrow the issues
9 in dispute; and 2) the Government should be allowed additional time to determine
10 whether to assert the state secrets privilege. The Government states it "has initiated the
11 internal process to obtain the requisite authorization to assert the state secrets privilege in
12 opposition to Mr. Cotsana's deposition." (ECF No. 59, p. 6). The Government argues it
13 is not required to make a privilege assertion until after a specific motion to compel is
14 filed. However, this action, 16-36, commenced with a Motion to Compel and this is
15 Defendants' third Motion to Compel. The Government seeks until March 15, 2017, to
16 decide whether to assert the state secrets privilege.

17 **B. Waiver of Privilege**

18 The Defendants' Reply argues the Government has unduly delayed invoking the
19 state secrets privilege, and at oral argument Defendants argued invocation of the privilege
20 has been waived because no such claim has been made. There is a credible argument the
21 Government has waived the privilege. It is undisputed the Government has not employed
22 the proper procedure to invoke the state secrets privilege. "There must be a formal claim
23 of privilege, lodged by the head of the department which has control over the matter, after
24 actual consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

25 The Government has long been a participant in the Salim, 15-286 case, having
26 filed a Statement of Interest (ECF No. 33) in April 2016. The Government has also long
27 been aware the close of discovery is February 17, 2017. The Government participated in
28 the Scheduling Conference on July 8, 2016, and the Government agreed the dates set

1 were "acceptable". (ECF No. 60, Tr. at p. 16). The Government was ordered to produce a
2 privilege log by December 20, 2016. (ECF No. 52). The Government should have been
3 aware that merely writing "state secrets privilege" in a privilege log does not invoke the
4 privilege.

5 The Government's argument that it is not required to formally invoke the privilege
6 until after a motion to compel is filed raising a specific challenge is not well-taken. First,
7 this is Defendants' third Motion to Compel. Second, a similar argument has been rejected
8 by the Ninth Circuit. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077, 1080
9 (9th Cir. 2010)(en banc)("Plaintiffs contend that the government's assertion of privilege
10 was premature, urging that the *Reynolds* privilege cannot be raised before an obligation to
11 produce specific evidence subject to a claim of privilege has actually arisen. We
12 disagree."). The *Mohamed* case establishes the Government herein was not required to
13 wait to invoke the privilege, but that does not answer the question of whether the
14 Government has failed to timely assert the privilege. At oral argument, the court asked
15 Defendants if they had any case law where a court found the state secrets privilege had
16 been waived. Defendants responded they did not. The parties may present any such
17 authority they have on the issue of waiver in the upcoming briefing.

18 The court at this time **RESERVES** ruling on the third Motion to Compel,
19 including the issue of waiver. The Defendants and Government shall work further to
20 narrow the discovery dispute and the court hereby sets a final deadline of March 8, 2017,
21 for the Government to file its privilege claim(s) and file any briefing and documentation
22 in support of the privilege assertions.

23 **C. Status of Discovery**

24 The third Motion to Compel presents a dispute between Defendants and the
25 Government, but the court also directed Plaintiffs' counsel attend the call so the parties
26 could report on the status of discovery. (ECF No. 142)("all parties shall be prepared to
27 advise as to the status of discovery"). The deadline for completion of discovery is
28 February 17, 2017, with some limited exceptions granted by the court. At the February

1 14 argument, Defendants and the Government raised numerous issues which had not been
2 previously briefed or brought to the attention of the court. Defendants informed they
3 would be filing a fourth Motion to Compel, which was, in fact, filed shortly after the
4 hearing. The parties mentioned a subpoena issued to the Department of Defense.
5 Defendants suggested the current discovery schedule may not work and the trial date
6 may, in their opinion, need to be continued. Any request to continue the trial date must
7 only be made by formal motion to the court demonstrating the necessity for a
8 continuance. Defendants also made an oral motion to allow their expert, Dr. Pitman, to
9 submit his expert report on his examination of Plaintiff Soud after he completes his exam
10 of Plaintiff Salim on March 12th. Plaintiffs did not object to this request, and the request
11 is GRANTED. Dr. Pitman shall provide his reports no later than March 24, 2017.

12 **III. Conclusion**

13 The underlying case, 15-286, has been pending for 16-months and is set for trial on
14 June 26, 2017. The dispute between Defendants the Government, for whom Defendants
15 worked as independent contractors, and with whom they appear to share similar monetary
16 and other interests in the defense of this action, has been on-going now for eight months.
17 Defendants have filed two motions to dismiss, which were fully briefed, heard, and
18 denied. The parties have engaged in discovery, including traveling internationally, and
19 continue to do so with an upcoming trip to South Africa planned for depositions and
20 medical exams. Defense counsel mentioned at the hearing that seven expert depositions
21 remain to be completed.

22 The court reminds counsel of this District's Local Rule 16.2(b), which states: "The
23 Court encourages the attorneys for all parties to the action, except nominal parties, to
24 meet at least once and engage in a good faith attempt to negotiate a settlement of the
25 action." If counsel have not already done so, they are hereby directed to confer with each
26 other and their clients in good faith, to frankly discuss the case, and determine whether
27 this matter can and should be resolved. It appears the parties have expensive and time
28 consuming discovery scheduled for the next four to six weeks, and defense counsel has
recently suggested continuing the trial date. If the parties' informal discussions result in a

1 desire to pursue alternative dispute resolution (ADR), such as mediation, the court would
2 consider a motion to continue the pretrial and trial dates so the parties could avoid further
3 litigation costs while pursuing ADR.

4 **IT IS HEREBY ORDERED:**

5 1. Ruling is **RESERVED** on Defendants' Third Motion to Compel (ECF No. 54)
6 pending consideration of further briefing on the issues of privilege and state secrets
7 doctrine.

8 2. The Government shall file its additional briefing on any claims of privilege and/
9 or state secrets doctrine **no later than March 8, 2017**. If the Government chooses to
10 invoke the state secrets privilege, it shall file any declarations or other documentation in
11 support of that assertion by **March 8, 2017**. Failure to do so will result in assertion of the
12 state secrets privilege being deemed waived.

13 3. The Government has requested 40-pages for its brief, and that request is
14 GRANTED.

15 4. Defendants shall be allowed 30-pages for a response brief, and the response
16 shall be filed no later than **March 22, 2017**.

17 5. Any reply brief by the Government shall not exceed 10-pages and shall be filed
18 no later than **March 27, 2017**.

19 6. Plaintiffs, at oral argument, requested the opportunity to file a brief addressing
20 these discovery issues, and that request was GRANTED. Plaintiffs' brief shall not exceed
21 20-pages and shall be filed no later than **March 27, 2017**.

22 7. After consideration of the above-referenced briefs, the court will consider
23 setting a hearing, which may be telephonic or in-court.

24 8. Defendants' oral motion to allow their expert, Dr. Pitman, to submit his expert
25 report on his examination of Plaintiff Soud after he completes his exam of Plaintiff Salim
26 is GRANTED. Dr. Pitman shall provide his reports by no later than **March 24, 2017**.

27 9. The parties are directed to meet and confer in good faith concerning the
28 prospects of settlement as required by Local Rule 16.2(b).

1 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
2 furnish copies to counsel.

3 **DATED** this 20th day of February, 2017.

4 s/ Justin L. Ouackenbush
5 JUSTIN L. QUACKENBUSH
6 SENIOR UNITED STATES DISTRICT JUDGE

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