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

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN),

Plaintiffs,

vs.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN,

Defendants.

NO. 2:15-CV-286-JLQ

DEFENDANTS' OPPOSITION TO MOTION BY THE UNITED STATES FOR A PROTECTIVE ORDER LIMITING DEPOSITIONS OF CIA OFFICIALS TO WRITTEN QUESTIONS

Hearing Date: September 29, 2016
Hearing Time: 1:30 p.m., Telephonic

I. INTRODUCTION

In accordance with the Government's Statement of Interest, ECF No. 33, and applicable regulations implementing *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951), Defendants served the Government with deposition subpoenas for four current or former officers of the CIA: John Rizzo, Jose Rodrigues, Jonathan Fredman, and James Cotsana. Defendants provided along with the subpoenas an affidavit expressly identifying, by way of subject matter, the information that they seek to explore during the depositions. *See* ECF No. 73-1.

The Government does not contend that the subject matters sought to be explored during the depositions are in any way irrelevant to the claims and defenses at issue in this action. Rather, the Government argues that despite the typical right afforded a party to conduct an oral deposition (a right predicated, in part, upon recognition that an oral deposition affords the examiner the ability to pose follow-up inquiries based upon responses given), and notwithstanding that in this very action the Parties and the Government previously negotiated (and filed) express procedures to be used during oral depositions (procedures expressly affording the Government the ability to not only assert objections to questions posed, but to instruct the witness to refrain from answering), ECF No. 47 ("Joint Procedures"), potential security concerns justify that the Court mandate that the noticed depositions be conducted via written questions.

The Government does not establish the existence of good cause and its Motion should therefore be denied. Specifically, the Government's request is

contrary to well-established precedent articulating the strong preference favoring oral depositions and contrary to the procedures previously agreed upon by the Parties and the Government in this action. Moreover, there is no indication that the requested relief will increase efficiency or lessen delay; in fact, it will likely only lead to increased delay in that even if the Court granted the current Motion, oral depositions of these same individuals would likely be required in the future.

II. ARGUMENT

A. Depositions upon Written Questions are Atypical and Disfavored

The Government claims that Fed.R.Civ.P. 26(c)(1) "*is often invoked* by motions seeking to conduct depositions by written questions pursuant to Rule 31." Motion at 4 (emphasis added). But, this claim is directly at odds with the well-settled preference favoring oral depositions. *See, e.g.*, 7 *Moore's Federal Practice* § 31.021(1) ("In the case of adverse or hostile witnesses, these disadvantages can pose special difficulty, making oral depositions the clearly preferred discovery method."); 8A Charles Alan Wright & Arthur R, Miller, *Federal Practice & Procedure* § 2131 (3d ed. 2016) (a deposition on written questions "is more cumbersome than an oral examination and is less suitable for a complicated inquiry or for a searching interrogation of a hostile or reluctant witness"); *Shaffer Tool Works v. Joy Mfg. Co.*, 14 Fed. R. Serv. 2d 1282 (S.D. Tex. 1970) ("[T]here is abundant authority for the proposition that a party should be free to select the mode of its discovery and that *an oral deposition is the normal and preferable and indeed not the exceptional method*.") (emphasis added; citations omitted). The

reason for this preference is succinctly expressed by the United States District Court for the Southern District of New York in *Zito v. Leasecomm Corp.*: "Written questions are rarely an adequate substitute for oral depositions both because it is difficult to pose follow-up questions and because the involvement of counsel in the drafting process prevents the spontaneity of direct interrogation. Accordingly, depositions upon written questions are disfavored." 233 F.R.D. 395, 397 (2006).

There is copious precedent establishing that depositions upon written questions are inappropriate substitutes for oral depositions. *See, e.g., Adams v. Teck Cominco Alaska, Inc.*, No. A04-49 CV JWS, 2005 WL 856202 (D. Alaska Apr. 7, 2005); *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 549-50 (S.D.N.Y. 1989); *Greenberg v. Safe Lighting Inc.*, 24 F.R.D. 410, 411 (S.D.N.Y. 1959). And, the District Court in *Mill-Run* identified "several reasons why oral depositions should not be routinely replaced by written questions," such as to facilitate "the probing follow-up questions necessary in all but the simplest litigation," to permit counsel to observe a witness's demeanor and evaluate his credibility for trial, and to avoid the "opportunity for counsel to assist the witness in providing answers so carefully tailored that they are likely to generate additional discovery disputes." 124 F.R.D. at 549-50. *See also Shaffer Tool*, 14 Fed. Serv. 2d at 1282 (recognizing that preference for oral depositions over written questions applies when subpoenaed parties are government employees, and denying plaintiffs' motion for a protective order for written deposition questions of

government patent examiners and attorneys based on finding that deposition by written interrogatories is inferior to oral examination.).

The rationales identified in *Mill-Run* are equally applicable to the instant situation, *i.e.* oral depositions will permit Defendants to ask probing follow-up questions, observe the witnesses' demeanor and credibility for trial and potentially avoid additional discovery requests. In fact, the need for oral depositions in this matter is particularly compelling in that it appears that the noticed witnesses reside outside the jurisdictional reach of the Court for trial purposes. *See* Motion at 5 (identifying that Mr. Cotsana resides in New Hampshire).

B. The Joint Procedures Contemplate Oral Depositions

In pursuing its Motion, the Government disregards that the Joint Procedures – previously agreed to by the Government and filed with the Court – expressly contemplate oral depositions of those who may possess classified information, and include express procedures to protect against the inadvertent disclosure of classified information during such depositions. ECF No. 47 at ¶ 14. Indeed, these procedures specifically contemplate that Government representatives will be permitted to attend all depositions and will not only be permitted to object to questions posed during depositions, but given the right to instruct witnesses not to answer questions posed. *Id.*

The Government's Motion fails to explain why the Joint Procedures are now inadequate or require revisiting and renegotiation at this time, much less why the Court should now intervene and mandate that depositions of the very type

contemplated by the Joint Procedures should instead be conducted via written questions (particularly given the shortcomings of such method discussed above).[1] The Government also fails to explain why proceeding pursuant to written questions in the first instance will be any more efficient or less time consuming[2] in that (1) any follow up will necessarily have to be conducted at a later date; (2) should an objection be raised at oral depositions, Defendants will have an opportunity to

[1] The Government offers the Declaration of CIA Information Review Officer ("IRO") Antoinette B. Shiner in support of the Motion. *See* ECF No. 73-2. But, IRO Shiner does not explain why the protections afforded by the Joint Procedures are now inadequate. Moreover, it is unclear whether IRO Shiner is competent to attest to various of the items contained in her Declaration, *e.g.* her statements concerning how a "global clandestine intelligence service" must be able to conduct its operations (*Id.* at ¶6), how the CIA "vet[s] prospective intelligence officers (*Id.* at ¶7) or the training undertaken by CIA officers during their careers. *Id.*

[2] IRO Shiner attests that one of the reasons that the Government desires to have the depositions conducted by written questions is that proceeding in this manner will allow the Government to "*take more time* to consult the resources we have at our disposal . . . ." *See* ECF No. 73-2 (emphasis added). Notably, IRO Shiner does not indicate how long such a review is anticipated to take.

resolve the objection by revising the question or otherwise, so as to potentially avoid any further issue and potentially eliminate the need to bring the issue to the court's attention (this ability to immediately rectify the situation would not be available if the written question method is utilized); and (3) the Government expressly concedes that follow up by way of subsequent depositions in some form will likely be required. Motion at 9. Moreover, although the Government notes that it is "not foreclosing the option of follow-up oral depositions of the CIA officers at a later stage of discovery in this case", *id.*, it does not explain why it might be prepared to permit oral depositions at a later date concerning the very issues it contends now justify proceeding upon written questions.

Additionally, while the Government generally suggests that the fluidity of an oral deposition heightens the chance of inadvertent disclosure of classified information, [3] the Government has been provided with a list of subject matters

[3] Although the Motion is advanced primarily out of an alleged concern that classified information, i.e. "state secrets", not be inadvertently disclosed, the Government concedes that it has not yet invoked any privileges. *See* United States' Opposition to Defendants' Motion to Compel, Case 2:16-mc-00036-JLQ, ECF No. 16, at 27-30. Of course, Fed.R.Civ.P. 45(2)(A) does not enable a subpoenaed party to withhold information under a claim of privilege unless it "expressly makes[s] the claim."

about which Defendants wish to inquire. Presumably the Government can use this list to prepare the deponents to protect against potential inadvertent disclosures.

Further, Messrs. Rizzo and Rodriguez have both published books and/or conducted public interviews related to matters germane to this action. *See, e.g.*, Jose Rodriguez, "Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives," Simon & Schuster (2012); John Rizzo, "Company Man: Thirty Years of Controversy and Crisis in the CIA," Simon & Schuster (2014); Interview of Jose Rodriguez by Lesley Stahl on April 29, 2012, available at http://www.cbsnews.com/news/hard-measures-ex-cia-head-defends-post-9-11-tactics/ (last visited on Sept. 27, 2016). Surely, this prior conduct strongly suggests that each is capable of answering questions at oral deposition without disclosing potentially classified, information.

Finally, with respect to Mr. Cotsana, the Government argues that he should be deposed by written questions even though any information he might provide is classified. *See* ECF No. 73 at 4-5. The Government's position is at a minimum facially overbroad. Moreover, if Mr. Cotsana can testify through written questions, surely he can sit for an oral deposition near his residence.

C. The Decisions Relied upon are Inapposite

The decisions relied upon by the Government are inapposite. For instance, although the court in *Gatoil, Inc. v. Forest Hill State Bank*, 104 F.R.D. 580 (D. Md. 1985), granted a motion for deposition by written questions, the witness at issue in that matter had already begun an oral deposition, but was unable to

complete the oral deposition due to ill health. *Id*. at 581. In *Fidelity Management & Research Co. v. Actuate Corp*., 275 F.R.D. 63, 64 (D. Mass. 2011), the plaintiffs had taken the deposition of one of the defendant's witnesses pursuant to Fed.R.Civ.P. 30(b)(6) and the issue before the court was whether to compel further 30(b)(6) testimony concerning information that counsel had previously instructed the witness not to answer. *See also Olivieri v. Rodriguez*, 122 F.3d 406, 409 (7th Cir. 1997) (written interrogatory would suffice where plaintiff needed to ask only one question to defendant and failed to propound written discovery before seeking deposition of defendant); *Hyam v. Am. Exp. Lines*, 213 F.2d 221, 223 (2d Cir. 1954) (requiring witness to travel from Bombay, India to New York for deposition was seriously burdensome). None of the issues addressed in the aforementioned decisions is present in the instant situation.

III. CONCLUSION

For the foregoing reasons, the Government has failed to establish good cause warranting the relief sought by its Motion and its Motion should be denied.[4]

[4] Defendants agree to conduct the depositions on a mutually agreeable date and time and at a mutually agreeable location to ensure that oral depositions do not impose an undue burden on the deponents.

DATED this 28th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 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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