

1 Emily Chiang, WSBA No. 50517
2 echiang@aclu-wa.org
3 AMERICAN CIVIL LIBERTIES UNION
4 OF WASHINGTON FOUNDATION
5 901 Fifth Avenue, Suite 630
6 Seattle, WA 98164
7 Phone: 206-624-2184

7 Dror Ladin (admitted *pro hac vice*)
8 Steven M. Watt (admitted *pro hac vice*)
9 Hina Shamsi (admitted *pro hac vice*)
10 AMERICAN CIVIL LIBERTIES UNION FOUNDATION

10 Lawrence S. Lustberg (admitted *pro hac vice*)
11 Kate E. Janukowicz (admitted *pro hac vice*)
12 Daniel J. McGrady (admitted *pro hac vice*)
13 Avram D. Frey (admitted *pro hac vice*)
14 GIBBONS P.C.

14 Attorneys for Plaintiffs

15 UNITED STATES DISTRICT COURT
16 FOR THE EASTERN DISTRICT OF WASHINGTON

17 SULEIMAN ABDULLAH SALIM,
18 MOHAMED AHMED BEN SOUD, OBAID
19 ULLAH (AS PERSONAL
20 REPRESENTATIVE OF GUL RAHMAN),

21 Plaintiffs,

22 v.

23 JAMES ELMER MITCHELL and JOHN
24 "BRUCE" JESSEN

25 Defendants.
26

15-CV-286-JLQ

PLAINTIFFS'
MEMORANDUM IN
RESPONSE TO
DEFENDANTS' MOTION
FOR A PROTECTIVE
ORDER

November 10, 2016

WITHOUT ORAL
ARGUMENT

MEMORANDUM IN RESPONSE TO
MOTION FOR PROTECTIVE ORDER

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

1 In response to Defendants’ Motion for a Protective Order, ECF No. 81
2 (“Mot.”), Plaintiffs state as follows:
3

4 1. Defendants’ motion ignores this Court’s express direction in this case
5 that discovery agreements entered into between the parties not be embodied in
6 Orders of the Court. As the Court has made clear:
7

8 It has been the long-standing practice of this court to refrain from
9 incorporating parties’ discovery agreements . . . in a court order.
10 Rather it is the court’s ongoing practice to treat discovery
11 agreements as matters between the parties with any person or entity
12 thereto who feels the agreement has been breached or needs court
13 attention to bring an appropriate motion to the court.

14 ECF No. 51 at 1; *see also P.D. v. United States*, No. 11-cv-192, 2011 U.S. Dist.
15 LEXIS 146334 (E.D. Wash. Dec. 7, 2011) (Quackenbush, J.); *Wenger v. Wash.*
16 *Dep’t of Soc. Servs.*, No. 11-cv-222, 2011 U.S. Dist. LEXIS 108742 (E.D.
17 Wash. Sept. 23, 2011) (Quackenbush, J.). Defendants provide no explanation as
18 to why the parties’ Discovery Confidentiality Agreement is inadequate to cover
19 their commercial concerns. They cite no legal authority to support their
20 arguments that the Agreement “will not carry the same weight as this Court’s
21 order,” Mot. at 8, and that “the power and authority of a protective order will,”
22 in the unlikely event of a leak, “be more likely to prevent further dissemination.”
23 *Id.* at 7-8. Nor do they justify their steadfast disregard of this Court’s Order, the
24 same Order which Defendants previously violated by failing to provide
25
26

1 proposed dates for the completion of discovery. Plaintiffs do not consent to this
2 motion, as they told Defendants’ counsel, for one reason alone: they do not wish
3 to be party to a violation of this Court’s Order, or to act contrary to its practices.
4

5 2. The Discovery Confidentiality Agreement executed by the Parties,
6 Decl., Ex. A, is sufficient to protect the third party interests that Defendants here
7 assert. Indeed, Defendants concede that the Agreement “affords adequate
8 protection for confidential information generally”, *see* Mot. at 2. And the
9 Agreement, which was the culmination of extended negotiations between the
10 parties, protects from public disclosure any “manuscripts that are pending
11 publication” and “non-final drafts of such manuscripts and emails and other
12 documents related to such manuscripts.” *Id.* at ¶ 2.
13
14
15

16 Nonetheless, despite the adequacy of the Discovery Confidentiality
17 Agreement, and the Court’s clear direction, Defendants have insisted on a
18 Protective Order, and then waited over two weeks after the Agreement was
19 executed to file this motion, based upon which relevant discovery is being
20 withheld. As a result of Defendants’ delay, Plaintiffs still have not received
21 highly relevant discovery that Plaintiffs requested on August 8, 2016.
22
23

24 3. Defendants cite no authority whatsoever to support their argument that
25 a Protective Order is needed to protect materials undisputedly covered by the
26

1 Discovery Confidentiality Agreement. Lacking such authority, Defendants
2 contend, for the first time and though they never expressed this concern in any
3 of their communications with Plaintiffs' counsel, that a Protective Order is
4 necessary because Plaintiffs may violate the Agreement by leaking confidential
5 materials to the media. *See* Mot. at 8. This argument is insulting, reckless, and
6 completely without basis. That it has no basis is clear from the fact that the
7 documents on which Defendants rely for this argument, *see* Paszaman Decl. ¶
8 9, were expressly stamped "For Public Release" by the government, and were
9 provided to the parties with a cover email stating that "[t]here are no restrictions
10 on their distribution." *See* Decl. at Ex. B. That, of course, would not be the case
11 were documents provided pursuant to the Confidentiality Agreement. It should
12 go without saying, but Defendants' motion requires it to be said: Plaintiffs have
13 not, and would not, violate the Confidentiality Agreement.

14
15
16
17
18
19 4. To be sure, this action has garnered media attention, due to the
20 significance of the allegations that are presented in the Complaint, matters
21 which, as Defendants concede, are undoubtedly of great public interest. *See*
22 Paszaman Decl. ¶ 8. Defendants' actions have been the subject of multiple
23 congressional inquiries and have resulted in extensive press coverage, including
24 numerous interviews that Defendants themselves have given to the press. *See*,
25
26

1 e.g., Interview with James Mitchell, The Kelly Files, Fox News (Dec. 15, 2014)
2 available at <http://insider.foxnews.com/2014/12/15/exclusive-james-mitchell->
3 [man-who-interrogated-khalid-sheikh-mohammed-speaks-out-kelly](http://insider.foxnews.com/2014/12/15/exclusive-james-mitchell-man-who-interrogated-khalid-sheikh-mohammed-speaks-out-kelly); Interview
4 with James Mitchell, Vice News (Dec. 11, 2014) available at
5 <https://news.vice.com/video/the-architect>. And, of course, this very motion is
6 brought because Defendant Mitchell intends, “during the first quarter of 2017,”
7 *i.e.*, prior to this case’s trial date, to publish a book about the Defendants’ role in
8 the development and implementation of the torture program. Mot. at 2.
9 Plaintiffs do not claim that, as a result, Defendants cannot be trusted to abide by
10 the terms of the Confidentiality Agreement. There is no basis to regard
11 Plaintiffs any differently.

12 Respectfully submitted,

13
14
15
16
17
18
19 Emily Chiang, WSBA No. 50517
20 echiang@aclu-wa.org
21 AMERICAN CIVIL LIBERTIES
22 UNION OF WASHINGTON
23 FOUNDATION
24 901 Fifth Avenue, Suite 630
25 Seattle, WA 98164

26 Paul Hoffman
hoffpaul@aol.com

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, admitted *pro hac*
vice
llustberg@gibbonslaw.com
Daniel J. McGrady, admitted *pro hac*
vice
dmcgrady@gibbonslaw.com
Kate E. Janukowicz, admitted *pro hac*
vice
kjanukowicz@gibbonslaw.com
Avram D. Frey, admitted *pro hac vice*
afrey@gibbonslaw.com

1 Schonbrun Seplow Harris & Hoffman,
2 LLP
3 723 Ocean Front Walk, Suite 100
4 Venice, CA 90291

GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102

5 Dror Ladin, admitted *pro hac vice*
6 dladin@aclu.org
7 Steven M. Watt, admitted *pro hac vice*
8 swatt@aclu.org
9 Hina Shamsi, admitted *pro hac vice*
10 hshamsi@aclu.org
11 ACLU Foundation
12 125 Broad Street, 18th Floor
13 New York, NY 10007

14 DATED: October 13, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Andrew I. Warden
andrew.warden@usdoj.gov

Attorney for the United States of America

Brian S. Paszamant:
Paszamant@blankrome.com

Henry F. Schuelke, III:
Hschuelke@blankrome.com

James T. Smith:
Smith-Jt@blankrome.com

Christopher W. Tompkins:
Ctompkins@bpmlaw.com

Attorneys for Defendants

s/ Lawrence S. Lustberg
llustberg@gibbonslaw.com
GIBBONS P.C.