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16 **UNITED STATES DISTRICT COURT**  
17 **FOR THE EASTERN DISTRICT OF WASHINGTON**  
18 **AT SPOKANE**

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

23 Plaintiffs,

24 vs.

25 JAMES ELMER MITCHELL and  
26 JOHN "BRUCE" JESSEN,

27 Defendants.

NO. 2:15-CV-286-JLQ

**DEFENDANTS' STATEMENT  
RE DEADLINE FOR U.S.  
DOCUMENT PRODUCTION**

28 DEFENDANTS' STATEMENT RE  
DEADLINE FOR U.S. DOCUMENT  
PRODUCTION

[NO. 2:15-CV-286-JLQ]

139114.00602/103752976v.1

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1 In its Order re: Motion to Compel filed herein and in the related case of  
2 *Mitchell and Jessen v. United States of America*, No. 16-MC-0036-JLQ (“Order”)  
3 (ECF No. 80), the Court ordered the United States (“U.S.”) and Defendants to  
4 submit their positions on an appropriate deadline for completion of document  
5 production in compliance with the CIA subpoena (if unable to agree). The U.S. has  
6 proposed January 20, 2017. Defendants, for the reasons set out herein, request that  
7 the deadline be set for November 18, 2016, at noon, EST, so that Defendants are  
8 able to provide the documents to their consultants for processing that day.

9  
10 The Court has repeatedly advised the Parties and the U.S., including in the  
11 Order, that it will not allow delay in the prosecution of this case because of issues  
12 related to Defendants’ discovery from the U.S. Despite that repeated warning, the  
13 U.S. now proposes to take 207 days, or almost 7 months, to complete production of  
14 documents in response to a subpoena issued on June 28, 2016. The U.S. proposes  
15 that deadline without advising the Court, or Defendants, when it began attempts to  
16 identify potentially responsive documents; when it began transfer of potentially  
17 responsive documents as referenced in its Status Report filed October 11, 2016  
18 (ECF No. 85); how many people will be involved in reviewing documents for  
19 responsiveness, classified information or privileges; or any other information which  
20 would allow the Court to assess the reasonableness of the January 20 date.

21  
22 The U.S. also proposes its January 20, 2017 deadline in light of a December  
23 12, 2016 expert disclosure deadline and a February 17, 2017 discovery cut-off. The  
24 result, if the U.S. proposal is adopted, is that Defendants’ experts will be unable to

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1 review responsive documents prior to their disclosure deadline, and Defendants will  
2 have almost no time to review the documents and to conduct depositions based  
3 upon them. In addition, if the documents are heavily redacted as prior production  
4 has been, or if the U.S. orders CIA personnel not to answer questions during  
5 depositions because the information sought is classified, Defendants will have no  
6 time to challenge those redactions or to seek the Court's review of the instructions  
7 not to answer. Simply put, the U.S.'s proposed deadline would make it impossible  
8 for Defendants to develop their defense to Plaintiffs' claims. The Court should not  
9 permit Defendants to be so prejudiced.

11 ANALYSIS RE: NOVEMBER 18 PRODUCTION

12  
13 The documents to be produced by the CIA may impact three separate aspects  
14 of Defendants' defense: depositions of Plaintiffs, expert review and disclosure, and  
15 depositions of CIA personnel. In addition, Defendants would no doubt benefit from  
16 review of the CIA documents prior to their depositions in order to refresh their  
17 memory of events that occurred almost 15 years ago. Defendants do not anticipate  
18 Plaintiffs will wait until February, 2017, to depose Defendants.

19 Depositions of Plaintiffs

20  
21 Defendants seek to conduct depositions and IMEs of Plaintiffs close in time  
22 in an effort lessen the burden on these foreign citizens. Given the expert disclosure  
23 deadline, Defendants have asked Plaintiffs' counsel to arrange those depositions  
24 and IMEs in mid to late November. As a practical matter, that means that even if  
25 the Court sets the production deadline for November 18, 2016 (as Defendants  
26

1 request), depositions of Plaintiffs will proceed without the benefit of those  
2 documents, or with minimal chance for Defendants to review them.

3 Expert Review and Disclosure

4 Production by November 18, 2016, will allow three weeks for review by  
5 Defendants' experts—over the Thanksgiving holiday—before Defendants' expert  
6 disclosures are due. While this is likely insufficient time for complete review given  
7 the volume of documents the U.S. indicates may be produced, Defendants are  
8 cognizant of the Court's directives, and therefore propose November 18.

9 Depositions of CIA Personnel

10 Depositions of CIA personnel are critical to Defendants. CIA personnel have  
11 sole access to information Defendants need to prove their jurisdictional and  
12 substantive defenses, including the political question doctrine, derivative sovereign  
13 immunity, the Military Commissions Act and the Detainee Treatment Act. In  
14 addition, the CIA depositions may effectively constitute trial testimony given the  
15 residency of the contemplated CIA witnesses. Review of the CIA documents that  
16 this Court has ordered to be produced is critical to structure examination of these  
17 witnesses and to limit, or impeach, their testimony.

18 As such, Defendants will need to review the CIA documents well before any  
19 CIA depositions. And, production in January will render any detailed review  
20 impossible—especially if the bulk of the production is made at or near the deadline.  
21 (Even with the “rolling production” proposed by the U.S., there is no protection  
22  
23  
24  
25  
26

1 against production of the bulk of the documents at or near the production deadline.  
2 Since the September 29 hearing, no additional production has been made.)

3 There is an additional issue with the CIA depositions. Defendants anticipate  
4 that the DOJ will instruct witnesses not to answer multiple questions because the  
5 information sought is allegedly classified. This will require motion practice to  
6 resolve those objections and, likely, resuming the depositions to complete them.  
7

8 The proposed January 20, 2017 deadline would not permit such efforts. As a  
9 practical matter, production no later than November 18, 2016, is required to permit  
10 Defendants to review the production; challenge redactions as necessary; obtain  
11 review by experts; and conduct depositions of CIA personnel, including obtaining  
12 review by the Court of anticipated instructions not to answer based on alleged  
13 issues with classified information.  
14

15 Response to United States' Anticipated Argument

16 The U.S. will argue that it cannot complete production prior to January 20,  
17 because of the volume of documents and the difficulties in identifying and  
18 reviewing them. That problem, if it exists, is one of the U.S.'s own making—and is  
19 not a reason to deprive Defendants of their ability to prepare a defense.  
20

21 The U.S. has known for months that it would be the primary focus of  
22 discovery by Defendants. The Parties, and the U.S., so agreed in a Stipulation  
23 (ECF No. 47) filed in May. The U.S. has also known of the Court's schedule and  
24 insistence that discovery issues between the U.S. and Defendants would not delay  
25 the trial date since the Court's Scheduling Order (ECF No. 59) was entered in July.  
26

1 Despite this knowledge, the U.S. has given no indication that it made serious  
2 efforts to respond to Defendants' CIA subpoena prior to the Court's October 4  
3 Order. Indeed, the Status Report references ongoing "technological difficulties  
4 with the initial document transfers" (12:16-17), indicating that the *initial* document  
5 transfers are occurring now. Had those transfers begun in July, or even August, the  
6 U.S. would be months closer to completing production today. Similarly, the U.S.  
7 does not indicate why review cannot be completed more quickly, or why  
8 "additional information technology resources" which may "facilitate review" on a  
9 faster timeframe (12:22-23) were not explored earlier.

#### 11 Conclusion

12 Defendants understand the Court's determination that discovery issues with  
13 the U.S. not prejudice Plaintiffs' ability to keep their trial date. By the same token,  
14 however, the U.S. should not be allowed to prejudice Defendants' ability to defend  
15 themselves. Four and one-half months (June 28 to November 18) should be more  
16 than adequate time for the U.S. to respond to Defendants' subpoena to the CIA,  
17 especially in light of its knowledge of Defendants' intended discovery and the  
18 Court's position on scheduling. The U.S., and not Defendants, should bear the  
19 impact of any difficulty stemming from its approach to Defendants' subpoena and  
20 apparent failure to take steps necessary for a timely response. The Court should  
21 require the U.S. to produce responsive documents on the rolling basis it proposes,  
22 but should require that production be completed no later than November 18, 2016,  
23 at noon EST, in order to permit Defendants to develop their defense in this matter.

1 DATED this 17<sup>th</sup> day of October, 2016.  
2

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