

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

RYAN KARNOSKI, *et al.*,
Plaintiffs, and
STATE OF WASHINGTON,
Plaintiff-Intervenor,
v.
DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,
Defendants.

Case No. 2:17-cv-01297-MJP
**PLAINTIFFS’ MOTION TO SHOW
CAUSE**
NOTE ON MOTION CALENDAR:
May 25, 2018
ORAL ARGUMENT REQUESTED

INTRODUCTION

On March 14, this Court ordered Defendants to supplement their initial disclosures to provide meaningful responses as required by Federal Rule of Civil Procedure 26(a)(1). The Court specifically criticized Defendants' previous disclosures for failing to identify any witnesses beyond the Plaintiffs and the Plaintiff-Intervenor in this case. The Court initially gave Defendants five days to cure this and other defects. More than five *weeks* later, Defendants have yet to identify a single additional witness and refuse to commit to doing so in a timely manner. Accordingly, Plaintiffs respectfully request that this Court require Defendants to fully comply with the Court's March 14 Order.

BACKGROUND

After receiving inadequate initial disclosures from Defendants, the Plaintiffs moved to compel full disclosures. (Dkt. No. 190.) The Court granted that motion. (Dkt. No. 204 (the "March 14 Order").) Among other things, the Court noted Defendants' refusal to identify potential witnesses, observing that President Trump's twitter proclamations and Defendants' court filings alleged that "Generals and military experts" including "Service Chiefs and Secretaries" contributed to the adoption of the policies giving rise to this lawsuit. (*See* March 14 Order at 3, internal citations omitted (finding that "Defendants cannot reasonably claim there are *no* individuals likely to have discoverable information and *no* documents relevant to their claims and defenses regarding the current policy.") The Court posed two direct questions to the Defendants: "Which Service Chiefs and Secretaries provided counsel? What information did they review or rely upon in formulating the current policy?" and ordered Defendants to supplement their initial disclosures within five days. (*Id.*)

Five days later, Defendants provided a supplemental disclosure that identified a meager 19 documents but did not identify any witnesses beyond Plaintiffs and Plaintiff-Intervenor in this matter. (Dkt No. 206-1 (Defendants' Second Amended Initial Disclosures (the "March 19 Disclosures").)¹ On the same day, Defendants filed a motion seeking clarification or

¹ While already on file with the Court, a courtesy copy of the March 19 Disclosures is also attached to the Declaration of Vanessa Barsanti as Exhibit A.

1 reconsideration of the March 14 Order. (Dkt. No. 205.) Defendants acknowledged that the Court
2 had ordered them to identify additional witnesses but argued that this was error and asked the
3 Court to clarify that their March 19 Disclosures were adequate or to stay their obligation to
4 supplement to permit Defendants time to prepare an appeal. (*See id.*) In doing so, the Defendants
5 argued—for the first time—that they “should not be required to provide initial disclosures that
6 include information that is *potentially* subject to Executive privilege.” (*Id.* at 3, emphasis added.)

7 The Court rejected Defendants’ argument, noting that they had failed to invoke Executive
8 privilege in their initial disclosures, supplements thereto, or their opposition to the motion to
9 compel and had also failed to provide a privilege log. (Dkt. No. 210 (the “March 20 Order”) at
10 2.) Moreover, the Court noted, Defendants were not being asked to disclose the substance of any
11 communication, merely the identities of potentially crucial witnesses. The Court’s ultimate
12 conclusion was clear and unambiguous: “The Court expects Defendants to comply with [the
13 March 14 Order] no later than 5:00 PM Pacific Daylight Time on March 22, 2018.” (March 20
14 Order at 3.)

15 But the March 22 deadline came and went without the Defendants providing any further
16 disclosures. (Declaration of Vanessa Barsanti (“Barsanti Decl.”), ¶ 2.) Instead, Defendants filed a
17 response to the March 20 Order reiterating their position that their March 19 Disclosures were
18 adequate. (Dkt. No. 211.) Plaintiffs have since asked Defendants to provide amended initial
19 disclosures on multiple occasions, but Defendants have consistently ignored these requests.
20 (Barsanti Decl. ¶ 3.) During the parties’ most recent meet-and-confer on May 8, 2018, the parties
21 discussed the issue and Defendants refused to commit to any date by which Defendants would
22 comply with the Court’s orders. (Barsanti Decl. ¶¶ 3–4.)

23 ARGUMENT

24 **A. Defendants are in civil contempt because they are violating the Court’s unambiguous** 25 **orders to adequately supplement their initial disclosures.**

26 In order to establish civil contempt, the “moving party has the burden of showing by clear
27 and convincing evidence that the contemnors violated a specific and definite order of the court.
28 The burden then shifts to the contemnors to demonstrate why they were unable to

1 comply.” *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (internal quotations
2 and citations omitted). “The contempt need not be willful, and there is no good faith exception to
3 the requirement of obedience to a court order.” *In re Dual-Deck Video Cassette Recorder*
4 *Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) (internal quotations and citations omitted).

5 There is no reasonable dispute regarding the clarity of the Court’s order nor the fact of
6 Defendants’ violation. The Defendants themselves believed the Court’s March 14 Order required
7 them to identify witnesses—as evidenced by their motion for reconsideration—and any potential
8 doubt as to the adequacy of Defendants’ March 19 Disclosures was removed by the Court’s
9 March 20 Order requiring further disclosures that have yet to be made. In other words,
10 Defendants have been twice ordered to supplement their initial disclosures to identify additional
11 witnesses and, so far, Defendants have twice refused.

12 The Court itself has the inherent power to sanction parties that appear before it, and Article
13 III judges have the inherent power to hold in contempt those who disobey a Judge’s
14 order. *See Employee Painters’ Tr. v. K & M Wallcovering, LLC*, No. 2:14-CV-0525-MJP, 2014
15 WL 6673286, at *2 (W.D. Wash. Nov. 21, 2014) (citing *In re Sequoia Auto Brokers Ltd.*,
16 *Inc.*, 827 F.2d 1281, 1284 (9th Cir.1987). A Court’s ability to issue contempt orders is inherent
17 within the administration of justice. *Id.* (citing *Michaelson v. U.S. ex rel Chicago, St. P., M. &*
18 *OR Co.*, 266 U.S 42, 65–66 (1924).) If courts were without the ability to enforce their orders
19 through contempt, they would be completely dependent upon other branches of government for
20 enforcement of orders. *Id.* (citing *In re Sequoia Auto Brokers*, 827 F.2d at 1284.) Indeed,
21 Defendants’ pointed refusal to comply with this Court’s lawful orders illustrates that very
22 concern.

23 **B. Defendants must submit to this Court’s lawful orders.**

24 Plaintiffs seek only what this Court has already (twice) ruled they are entitled to: an
25 adequate initial disclosure of witnesses by the Defendants. Despite the Defendants’ long delay, if
26 they fully comply now, Plaintiffs are content to let the issue drop.

27 If Defendants continue to refuse to comply, the Court has broad power to fashion adequate
28 remedies. *See Trueblood v. Washington State Dep’t of Soc. & Health Servs.*, No. C14-1178-MJP,

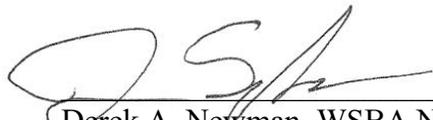
1 2016 WL 3632486, at *8 (W.D. Wash. July 7, 2016), *clarified on denial of reconsideration*, No.
2 C14-1178-MJP, 2016 WL 4384861 (W.D. Wash. Aug. 17, 2016). To that end, Plaintiffs leave it
3 to this Court's sound discretion to determine whether sanctions are necessary to compel
4 compliance with the Court's orders. *See id.* (citing *Shuffler v. Heritage Bank*, 720 F.2d 1141,
5 1147 (9th Cir. 1983); *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829
6 (1994).)

7 **CONCLUSION**

8 Defendants are in open defiance of this Court's orders. Plaintiffs respectfully request
9 Defendants be held in contempt and be forced to make an adequate disclosures of witnesses
10 consistent with the Court's March 14 and March 20 Orders.

11
12 Respectfully submitted May 10, 2018.

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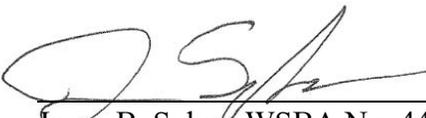
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on May 10, 2018.



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Case No. 2:17-cv-01297-MJP
**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION TO SHOW
CAUSE**
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May 25, 2017
ORAL ARGUMENT REQUESTED

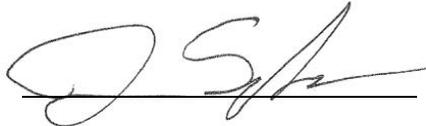
This matter, having come before the Court on Plaintiffs Motion to Show Cause, and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Show Cause is hereby GRANTED. The Court finds that Defendants are in contempt of the Court's March 14 Order (Dkt. No. 204) and March 20 Order (Dkt. No. 210). Within three days of the date of this Order, Defendants shall cure their contempt by serving amended initial disclosures that make the required disclosures identified by the Court in its previous Orders.

1 Dated this ___ day of _____, 2018.
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5 The Honorable Marsha J. Pechman
6 United States District Court Judge
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