The Honorable Marsha J. Pechman

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' OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

NOTED FOR CONSIDERATION:
June 13, 2018

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INTRODUCTION

There is nothing "extraordinary" about the discovery Plaintiffs seek from the President. (*See* Dkt. No. 268 at 1.) What is extraordinary is Defendants' attempt to transform the qualified presidential communications privilege into an absolute bar—contrary to settled law and this Court's clear directives. Indeed, the Court has already held it "not only [has] jurisdiction to issue declaratory relief against the President, but that this case presents a 'most appropriate instance' for such relief," rejecting the same separation-of-powers arguments Defendants reprise here. (Dkt. No. 233 at 29.) Plaintiffs are plainly entitled to discovery into the key facts that could support their well-pleaded claim: the President's justifications and intent behind enacting the July 2017 ban on military service by transgender individuals (the "Ban"). President Trump is the only one who knows why he issued the Ban: Defendants have never identified the "Generals and military experts" the President claims to have consulted, even after the Court ordered Defendants to do so. (*See* Dkt. No. 204 at 3 (granting motion to compel); *see also* Dkt. No. 233, at 29 ("Even Secretary Mattis was given only one day's notice before President Trump's Twitter Announcement.") (denying Defendants' motion for summary judgment of Plaintiffs' claim for declaratory relief against the President).) As the Court put it, these circumstances have led the Court "to conclude that the Ban was devised by the President, and the President alone." (*Id.*)

Defendants' attempt to categorically invoke the presidential communications privilege and completely immunize the President from civil discovery fails as a matter of law. *First*, Defendants' contention that the President is immune from civil discovery is simply not the law, and that argument has been rejected by every court to consider the question. *Second*, there is no requirement that Plaintiffs make any showing before Defendants invoke the presidential communications privilege—on a document-by-document basis, like any other privilege—and provide an adequate log. *Finally*, even if, contrary to the law (and law of the case), Defendants were right that Plaintiffs have an initial burden to establish their need for discovery before Defendants are required to invoke the privilege or provide a log, Plaintiffs easily meet that purported standard here. The Court should deny Defendants' motion for a blanket protective order and require Defendants to produce all responsive, non-privileged information, and at the

very least require Defendants to comply with the Court's prior order that, "[t]o the extent that Defendants intend to claim Executive privilege, they must 'expressly make the claim' and provide a privilege log" that complies with Federal Rule of Civil Procedure 26(b)(5). (Dkt. No. 235, at 3.)

BACKGROUND

In the weeks following the Court's entry of a preliminary injunction against the Ban on December 11, 2017 (Dkt. No. 103), Plaintiffs propounded three forms of discovery to obtain evidence in support of their constitutional claims. First, on December 29, 2017, Plaintiffs served their first set of interrogatories and requests for production on all Defendants, including President Trump. These discovery requests asked for key information and documents about the President's decision to ban transgender people from military service:

- The identity of individuals with whom President Trump discussed or corresponded with regarding policies on transgender military service or related health care from the date of his election as President to the present. (*See* Declaration of Daniel Siegfried ("Siegfried Decl.") Ex. 1, at 11 (Interrog. No. 4).)
- The date on which President Trump decided that transgender people should be banned from military service in any capacity. (*See id.* (Interrog. No. 5).)
- The process by which the President formulated his July 2017 tweets announcing the Ban and his August 2017 Presidential Memorandum and all sources of fact he consulted or considered in doing so. (*See id.* at 12 (Interrog. No. 7).)
- Documents and communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related health care. (*See* Siegfried Decl. Ex. 2, at 13 (RFP No. 7).)
- Communications between Congress and President Trump concerning military service by transgender people between President Trump's inauguration and his tweets. (*See id.* at 16–17 (RFP No. 10).)

- Documents pertaining to visits and communications between President Trump and his Evangelical Advisory Board. (*See id.* at 17–18 (RFP Nos. 11–12).)

On February 9, 2018, Defendants issued responses and objections on behalf of the President, both of which contained a lengthy "general objection" that Plaintiffs' discovery was improper under separation of powers principles and that "virtually all" of the discoverable information was shielded by executive privilege, specifically the presidential communications privilege. *See* Siegfried Decl. Exs. 1, 2. As Defendants readily admit, beyond this general objection, "[t]he President did not provide substantive responses to Plaintiffs' requests." (Dkt. No. 268 ("Mot."), at 3.)

The same was true for Plaintiffs' requests for admission served on January 26, 2018. (*See* Siegfried Decl. Ex. 3.) Plaintiffs sought unquestionably relevant information, including an admission that President Trump decided to institute the Ban on or before July 26, 2017 (RFA No. 2) and that he failed to inform General Dunford and the Joint Chiefs of Staff of the Ban before he announced it on Twitter. (RFA No. 3.) Again, Defendants stonewalled these discovery efforts by lodging a general objection and refusing to provide any substantive responses.

Defendants hoped to avoid this issue altogether by filing a cross-motion for summary judgment on all claims against the President based on their belief that the President is immune from both injunctive and declaratory relief. (Dkt. No. 194, at 22–23.) Their argument was premised on the very same one advanced here—that separation of powers principles prevent the Court from issuing orders against the President. (*Id*. at 23.) In opposition, Plaintiffs argued that the Court had jurisdiction to issue both injunctive and declaratory relief against the President, but informed the Court they did "not object to omitting the President from the injunctive relief sought, provided the Court issues declaratory relief against the President." (Dkt. No. 207, at 7.) Nevertheless, Plaintiffs maintained that the Court has the power to impose declaratory relief against the President and that the "unique circumstances of this case necessitate such a declaration." (*Id*.) The Court agreed, expressly citing the President's singular role as progenitor of the Ban as evidence that "this case presents a 'most appropriate instance'" for declaratory relief against the President. (Dkt. No. 233 at 29 (quoting *NTEU v. Nixon*, 492 F.2d 587, 616

(1974).)

Prior to the Court's summary judgment order, Defendants sought a protective order staying discovery pending resolution of their motion to dissolve the preliminary injunction. (*See* Dkt. No. 225.) As a basis for staying discovery, Defendants argued that Plaintiffs' discovery requests implicated executive privilege and "led to a significant dispute" about whether discovery directed to the President should be "foreclosed based on separation-of-powers principles and because virtually all of the specific discovery sought is subject to Executive privilege, and in particular, the presidential communications privilege." (*Id.* at 2.) The Court again rejected Defendants' position and ordered that "discovery in this case proceed." (Dkt. No. 235, at 3.) The Court further held that, "[t]o the extent that Defendants intend to claim Executive privilege, they must 'expressly make the claim' and provide a privilege log 'describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." (*Id*. (quoting Fed. R. Civ. P. 26(b)(5)(i)-(ii)).)

Following the Court's orders, Plaintiffs requested that Defendants withdraw their categorical objection to all discovery directed at the President and provide substantive responses. *See* Siegfried Decl. Ex. 4, at 3. Following a good faith meet-and-confer, Defendants continued to withhold any substantive discovery responses from the President, and the parties agreed that Defendants would move for a protective order. Defendant's most recent objections and responses on behalf of the President, served on May 29, 2018, demonstrate a continued refusal to provide any substantive response to Plaintiffs' discovery requests. *See* Siegfried Decl. Exs. 5, 6.

ARGUMENT

The Court should deny Defendants' request for a protective order precluding all discovery directed at the President. The presidential communications privilege is "qualified, not absolute, and can be overcome by an adequate showing of need." *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). Defendants' claim that the President is categorically exempt from civil discovery is simply contrary to law. Equally meritless is their contention that Plaintiffs must meet some "exacting" burden before the President is even required to formally invoke the

privilege under Rule 26. Indeed, the Court has already rejected that premise, directing the President to "'expressly make the claim' and provide a privilege log" that meets the requirements of Rule 26(b)(5) to "enable other parties to assess the claim." (Dkt. No. 235, at 3 (quoting Fed. R. Civ. P. 26(b)(5)(i)–(ii)).) Yet even if a preliminary showing were required—and it is not—Plaintiffs' targeted requests for discovery central to their constitutional claims would easily meet it. Plaintiffs' discovery requests meet all the requirements of Rule 26 of the Federal Rules of Civil Procedure, and there is no legitimate basis for Defendants to categorically refuse to respond.

A. The President Is Not Absolutely Immune from Civil Discovery.

Defendants refuse to respond to any of Plaintiffs' discovery requests directed at the President, arguing they are "extraordinary" because they are directed to the sitting President. (Mot. at 1.) Defendants assert that "[d]iscovery directed at the President . . . should not be permitted because it raises serious separation-of-powers concerns." *Id.* And the asserted immunity does not end there; it also purportedly extends to discovery from any other source concerning "presidential communications and deliberations." *Id.*

Defendants cite no support for the sweeping immunity they claim—because there is none. In fact, the law is to the contrary. *See United States v. Nixon*, 418 U.S. 683, 706 (1974) (rejecting "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances" and upholding enforcement of a subpoena against the sitting President); *Nixon v. Fitzgerald*, 457 U.S. 731, 753–54 (1982) ("separation-of-powers doctrine does not bar every exercise of jurisdiction over the President"); *Clinton v. Jones*, 520 U.S. 681, 704 (1997) ("Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty."). Courts have uniformly allowed discovery of the President where, as here, he is a party or has information in his possession that may be relevant to the issues in dispute. *See, e.g.*, *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977) (response to subpoena); *Sun Oil Co. v. United States*, 514 F.2d 1020, 1025 (Ct. Cl. 1975) (production of documents); *Dairyland Power Co-op. v. United States*, 79 Fed. Cl. 659, 668 (2007) (*in camera*

review and production).

In the face of this settled, on-point law, the only authority Defendants muster is *Mississippi v. Johnson*, 71 U.S. 475 (1866), and Justice Scalia's concurring opinion in *Franklin v. Massachusetts*, 505 U.S. 788, 823 (1992) (Scalia, J., concurring in part). (Mot. at 4.) Both addressed whether a judicial *injunction* against the President would raise separation of power issues; neither involved the President's obligations to respond to *routine discovery requests* in a civil case. Defendants' bare assertion that the "same separation-of-power concerns apply" in these two very different situations, Mot. at 1, is not only wholly unsupported, but also defies logic and common sense and is refuted by even the excerpts of those cases Defendants quote.

Mississippi v. Johnson and *Franklin* place in stark relief the fundamental differences between requiring the President to respond to routine discovery requests, on the one hand—particularly in a case where his deliberation and communications are directly relevant to the central issues in dispute—and an injunction directing the President to take or refrain from taking certain actions. Discovery, unlike an injunction, does *not* involve "judicial" interference with the exercise of Executive discretion, Mot. at 4 (*quoting Mississippi v. Johnson*, 71 U.S. at 499), or a court "ordering" the President "to perform particular executive . . . acts." (Mot. at 4 (quoting *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part).) Nor will the President's compliance with routine discovery requests "distract him from his constitutional responsibility to 'take Care that the Laws be faithfully executed'" or "produce needless head-on confrontations between district judges and the chief executive." (Mot. at 5 (quoting *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part).)[1]

The final case Defendants cite, *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), does not help them either. *Swan* does not even mention discovery against the President, let alone stand for the sweeping proposition that the President is completely immunized from civil discovery.

[1] Indeed, Justice Scalia recognized that "the President is not *absolutely* immune from judicial process," pointing to cases involving Presidents Jefferson and Nixon where the Executive was "merely required" to provide relevant information, "which is what any citizen might do." *Franklin*, 505 U.S. at 826 (Scalia, J., concurring in part).

B. There is No Exhaustion or Heightened Need Requirement Prior to Seeking Discovery.

Defendants next argue Plaintiffs must establish a "heightened, particularized need" for discovery from the President before they need even invoke the presidential communications privilege. (Mot. at 9.) Not so. "This argument—that the Government may somehow claim the privilege without actually claiming it—defies logic." *Wagafe v. Trump*, No. C17-94 RAJ, 2018 WL 1737939, at *1 (W.D. Wash. Apr. 11, 2018) ("*Wagafe I*"). And Defendants ignore that the Court has in fact already ordered Defendants to invoke any claimed privileges and produce corresponding privilege logs. (Dkt. No. 235 at 3.)

Defendants purport to glean the heightened showing of need they advocate from *United States v. Nixon*, 418 U.S. 683, 710 (1974), suggesting the plaintiffs in that case were required to satisfy "exacting standards of '(1) relevancy; (2) admissibility; [and] (3) specificity'" to overcome the privilege. (Mot. at 10.) But that test had nothing at all to do with the presidential communications privilege. The *Nixon* Court was actually describing and applying the test for quashing subpoenas under Federal Rule of Criminal Procedure 17(c). *Nixon*, 418 U.S. at 697–700. The discussion of that test came in a completely separate section of the Court's opinion, and the Court never once tied it to the presidential communications privilege.

What *Nixon* actually said about the privilege is that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute unqualified Presidential privilege of immunity from judicial process," and that "this presumptive privilege must be considered in light of our historical commitment to the rule of law." *Id.* at 705, 708 ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."). The Court recognized that is particularly true where, as here, the President's claim of privilege is not grounded in any assertion of "military or diplomatic secrets," but instead seeks "deference to a President's generalized interest in confidentiality." *Id.* at 711.

Defendants also try to ground their motion in the Supreme Court's decision in *Cheney v. District Court*, 542 U.S. 367 (2004). But, contrary to Defendants' suggestion, *Cheney* certainly

did *not* hold "that when discovery requests are submitted to the Executive, lower courts should not force the Executive to respond by invoking privilege." (Mot. at 6.) Nor does it "stand for the principle" that discovery requests against the President "should be allowed only when plaintiffs can show that they are absolutely necessary to their case." (*Id.* at 7.)

Cheney involved a claim under a statute that requires the executive branch to disclose certain information. 542 U.S. at 373. The plaintiffs brought a claim for declaratory relief alleging they were entitled to disclosures under that statute, and once litigation was underway sought discovery of that very information. The Court reasonably rejected the plaintiffs' attempted end-run around the statute, explaining that the discovery requests would "provide respondents all the disclosure to which they would be entitled in the event they prevail on the merits, and much more besides." *Id.* at 388. The Court therefore concluded that—"*in these circumstances*"—the executive branch "need not bear the onus of critiquing the unacceptable discovery requests lines by line." *Id.* (emphasis added). By its own terms, *Cheney* was a fact-bound decision, limited to the its unique "circumstances," that did not purport to establish the broad rule Defendants claim and remove any obligation for the executive branch to assert the presidential communications privilege in the first instance.

Plaintiffs' constitutional claims in fact have much more in common with the "constitutional dimensions" at play in *Nixon*, 418 U.S. at 710, which *Cheney* recognized required "the Executive Branch [to] first assert privilege to resist disclosure." *Cheney*, 542 U.S. at 384. Just like the criminal claims in *Nixon*, "the allowance of the privilege to withhold evidence that is demonstrably relevant . . . would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Nixon*, 418 U.S. at 712. Thus, even if the showing in *Cheney* were required, the close tie between the discovery Plaintiffs seek and the Court's core Article III duties, combined with the generalized nature of the countervailing government interests, favor disclosure here. *See Cheney*, 542 U.S. at 385 (distinguishing *Nixon* because there, as here, the "court's ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction hinge[d]" on the discovery being sought); *Nixon*, 418 U.S. at 711 ("No case of the Court, however, has extended this high degree of deference to a

President's generalized interest in confidentiality."); *compare* Mot. at 7 (citing "intrusion upon the confidentiality afforded to presidential decisionmaking").

The other cases Defendants cite are distinguishable too. In *Dairyland Power Co-op. v. United States*, 79 Fed. Cl. 659 (2007), the court analyzed these issues only after the Government *had already produced a privilege log*, which the court relied on to assess the relevance of the withheld documents. *See id.* at 667 (denying Government's motion for a protective order and requiring *in camera* review of documents). That analysis would have been impossible without the descriptions provided in the privilege log. *Id.* And Defendants' reliance on *Wagafe v. Trump*, No. C17-94 RAJ, 2017 WL 5990134, at *3 (W.D. Wash. Oct. 19, 2017) ("*Wagafe II*"), which required the parties "to discuss alternative . . . sources of information," ignores the crucial distinction that here Defendants take the position that the privilege also extends to "discovery from other sources that seeks information concerning presidential communications and deliberations." (Mot. at 1.) Defendants should not be permitted to close off all routes to discovery and insist that there are still "alternative custodians" from whom the information should be obtained. (*See* Mot. at 7.)

In short, Plaintiffs have no obligation to preemptively rebut an assertion of privilege. Just like in any other case—and just as the Court has already ordered (Dkt. No. 235 at 3)—if Defendants wish to invoke the privilege they must "*expressly* make the claim" and provide a document-by-document log that complies with Rule 26 and *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with descriptions "detailed enough for the district court to make a *de novo* assessment" of Defendants' claim of privilege.[2] *Columbia Snake River Irrigators Ass'n v. Lohn*, No. C07-1388MJP, 2008 WL 750574, at *4 (W.D. Wash. Mar. 19, 2008) (quoting *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997)). The minimal requirement of providing a *Vaughn* index, indicating withheld documents reflecting presidential

[2] While Defendants have already provided a purported log for the President in *Stone v. Trump*, No. 17-cv-2459 (D. Md.), it is plainly inadequate under Rule 26 and should not simply be reproduced in this case. The *Stone* log generically categorizes documents and provides virtually no information about the underlying documents or the rationale for withholding them.

communications, is unexceptionable and routinely required by courts. *See, e.g.*, *Loving v. Dep't of Def.*, 550 F.3d 32, 36 (D.C. Cir. 2008) (logged items included "documents reflect[ing] the sequential transmission of Loving's case—and recommendation on it—to the President"); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1110–11 (D.C. Cir. 2004) (*Vaughn* index included letters and reports from the Deputy Attorney General to the President); *In re Sealed Case*, 121 F.3d at 735 ("[T]he White House produced a privilege log identifying the date, author, and recipient of each document withheld as well as a general statement of the nature of each document and the basis for the privilege on which the document was withheld."); *Dep't of the Treasury v. Pension Benefit Guar. Corp.*, 222 F. Supp. 3d 38, 45 (D.D.C. 2016) (ordering privilege log where presidential communications privilege was asserted).

Finally, there is no merit to Defendants' claim that they need not invoke the privilege or produce a log until after all other discovery is completed. (Mot. at 10.) Unlike in *United States v. McGraw-Hill Cos.*, No. CV 13–0779–DOC (JCGx), 2014 WL 8662657, at *8 (C.D. Cal. Sept. 25, 2014), on which Defendants rely, this case turns on a decision by President Trump himself. Defendants have not produced any documents responsive to the critical issue of the President's justifications and rationales for the Ban, and Defendants should not be allowed to further stonewall by waiting until the close of discovery to produce a privilege log.

C. Plaintiffs Have Demonstrated Heightened Need Sufficient to Overcome the Privilege.

Even if Plaintiffs were required to meet Defendants' illusory "heightened" standard before the President is required even to invoke the privilege the Court has already ordered him to invoke (*see* Dkt. No. 235 at 3), Plaintiffs would easily meet that purportedly heightened standard here. In particular, Defendants suggest that Plaintiffs have an initial burden to establish the information they seek meets a heightened standard of "(1) relevancy; (2) admissibility; [and] (3) specificity." (Mot. at 10.) It does.

First, Plaintiffs' discovery requests seek information that is not merely relevant, but at the very core of their constitutional claims. The Court has already "conclude[d] that the Ban was devised by the President, and the President alone," and Plaintiffs seek documents,

communications, and other information pertaining to the President's justifications for it—the central issue in the case. (Dkt. No. 233, at 29; *see id* at 28 (explaining that the constitutionality of the Ban turns on whether it was "motivated by compelling state interests" or "prejudice or stereotype").) Indeed, Defendants ignore that the Court already rejected Defendants' core premise in denying their prior request for a protective order, holding "discovery related to President Trump is not 'irrelevant.'" (Dkt. No. 235, at 2.) Far from it. The evidence required to evaluate the Ban's constitutionality—including the adequacy of the purported justifications, the fit between those justifications and the discriminatory policy, and the existence of animus—will be informed primarily, if not entirely, by documents, communications, and information within the President's control. Because the President's decision-making process is itself at issue, Plaintiffs' discovery requests, which are all aimed directly at that decision-making process, seek evidence directly relevant to issues central to this litigation.

Second, there can be no legitimate dispute the requested information would be otherwise admissible. Nor do Defendants suggest any ground for inadmissibility aside from privilege.

Third, Plaintiffs' discovery requests are specifically targeted—and limited—to the specific communications and specific decisions the Court will be scrutinizing. As detailed above, several requests seek only identities and dates. (*E.g.*, Interrog. Nos. 4 and 5.) And the documents and communications Plaintiffs seek are limited to the justification for specific Presidential pronouncements—the July 2017 tweets, and the August 2017 and March 2018 Memoranda—and communications with a limited universe of parties, many of whom are non-governmental parties, regarding transgender health care in the armed forces. (Interrog. No. 7; RFPs No. 7, 10–12.) Plaintiffs' requests are narrowly tailored and seek the bare minimum necessary to pursue their "most appropriate" claim against the President. (Dkt. No. 233, at 29.)

Finally, the information Plaintiffs seek—and need to prove their claims—is not available from any other source. The presidential communications privilege is "qualified, not absolute, and can be overcome by an adequate showing of need." *In re Sealed Case*, 121 F.3d at 745. A party's need overcomes the privilege where the evidence is "directly relevant to the issues that are expected to be central to the trial" and is not available from other sources despite due diligence.

Id. at 754. Here, "no other persons have ever been identified by Defendants" as having consulted with the President in the formulation of the Ban, leading the Court "to conclude that the Ban was devised by the President, and the President alone." (Dkt. No. 233, at 29.) Not to mention, in Defendants' view, the privilege extends to "discovery from other sources that seeks information concerning presidential communications and deliberations" (Mot. at 1)—an express admission that, if Defendants are right on the law, Plaintiffs could not possibly obtain this information from a non-privileged source. Plaintiffs' inability to obtain this highly relevant information establishes adequate need to overcome any proper invocation of the presidential communications privilege.

CONCLUSION

For all of these reasons, Defendants' motion for a protective order should be denied. The Court should order Defendants to comply with Plaintiffs' discovery requests directed at the President or, at the very least, properly invoke the privilege and provide a privilege log that complies with Federal Rule of Civil Procedure 26.

Respectfully submitted June 6, 2018.

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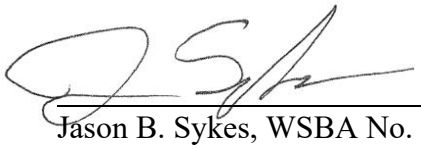
CERTIFICATE OF SERVICE

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 June 6, 2018.



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