IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, vs. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459-GLR Hon. A. David Copperthite

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO SET A DATE CERTAIN FOR COMPLIANCE WITH DISCOVERY ORDER

On August 14, 2018, the Honorable A. David Copperthite ordered Defendants to produce documents and information they had withheld since January based on inappropriate assertions of the deliberative process privilege. Defendants have ignored that order for over three months. Defendants attempt to justify their noncompliance by arguing that they have lodged objections to the Magistrate Judge's order and moved to stay the order pending resolution of their objections. That is not a basis to ignore this Court's order. The Local Rules and binding case law provide that neither the filing of objections nor a motion to stay relieves Defendants of any compliance obligations. The Court should enforce its order, and Fourth Circuit law, by granting Plaintiffs' Motion and setting a date certain for compliance with the August 14 order.

ARGUMENT

I. PLAINTIFFS SATISFIED THEIR CONFERENCE OBLIGATIONS PRIOR TO FILING THE PRESENT MOTION.

Lacking any substantive basis for refusing to comply with this Court's order, Defendants allege a "procedural violation," arguing that Plaintiffs failed to satisfy their meet-and-confer obligations. ECF 225 at 7. Defendants are wrong. Local Rule 104.7 (D. Md.) requires parties to

"confer with one another concerning a discovery dispute and make sincere attempts to resolve the differences between them." As discussed in Plaintiffs' reply in support of their related request for expedited briefing (ECF 224), over the course of numerous communications Defendants' counsel informed Plaintiffs of their view that Defendants need not produce documents or information because they have filed objections and moved to stay. *See, e.g.*, ECF 222-4 (letter from Defendants explaining that they would produce compelled documents "if the motion to stay is denied, subject to the Government considering appellate options"); ECF 222-2 ¶ 5 (discussing telephone conference). Plaintiffs informed Defendants that they disagreed. ECF 222-2 ¶ 5; ECF 222-5. Defendants cannot explain the source of any formalistic requirement that Plaintiffs were required to expressly state that they would file a motion to resolve this clear discovery dispute. In these circumstances, Plaintiffs complied with the meet-and-confer requirement.

"[S]ome intractable issue[s] require[] court involvement." *Bethesda Softworks LLC v. Interplay Entm't Corp.*, 2011 WL 1559308, at *7 (D. Md. Apr. 25, 2011); *see* ECF 222 at 3–4; ECF 224 at 1–2. Here, it is abundantly clear that further efforts to meet and confer would be futile. *See* ECF 225. There was no "procedural violation."

II. DEFENDANTS' OBJECTIONS AND MOTION TO STAY DO NOT JUSTIFY NONCOMPLIANCE WITH THE AUGUST 14, 2018 ORDER.

Defendants urge this Court to excuse their noncompliance in "the interest of judicial economy." ECF 225 at 8 (citing no authority). Any "interest of judicial economy" (if it existed here) would not displace binding precedent. Courts widely agree that the mere fact of filing objections or a motion to stay does not relieve a party's obligations to promptly comply with pending orders. *See, e.g.*, *Maness v. Meyers*, 419 U.S. 449, 458 (1975) ("If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay,

he must comply promptly with the order pending appeal."); *U.S. Home Corp. v. Settlers Crossing, LLC*, 2012 WL 3536691, at *14 (D. Md. Aug. 14, 2012) ("A court's order remains in force until it is vacated or stayed." (quoting *New Pac. Overseas Grp. (USA) Inc. v. Excal Int'l Dev. Corp.*, 2000 WL 377513, at *7 (S.D.N.Y. Apr. 12, 2000))); *Alston v. Becton, Dickinson & Co.*, 2014 WL 338804, at *2 (M.D.N.C. Jan. 30, 2014) ("[T]he mere filing of a motion to stay does not effect a stay."); *Tinsley v. Kemp*, 750 F. Supp. 1001, 1013 (W.D. Mo. 1990) ("[B]y refusing to comply with discovery merely because a motion to stay is pending, a party effectively is granting its own motion to stay—even before the court has ruled. Such a phenomenon would reduce a court's orders to useless and senseless formalities.").

Defendants' ongoing refusal to comply with the Court's order prejudices Plaintiffs' ability to press their claims and obtain a final ruling on their constitutional challenges. Notwithstanding the preliminary injunction in effect, Plaintiffs continue to suffer harm from the policy here at issue due to, *inter alia*, the stigma of being forced to serve in the military "under a false presumption of unsuitability, despite having already demonstrated that they can and do serve with distinction." ECF 139-11. By unnecessarily delaying discovery, Defendants compound this harm. The documents Defendants are withholding are also necessary to assist Plaintiffs in fully responding to Defendants' pending motion for summary judgment, as set forth in Plaintiffs' previously filed Rule 56(d) affidavit. *See* ECF 163-16; *see also Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988) ("[T]he Court ordinarily

should not stay discovery which is necessary to gather facts in order to defend against the motion.").[1]

Defendants attempt to distinguish the precedent cited by Plaintiffs on three grounds. None has merit.

First, Defendants argue that "[n]one of the cases on which Plaintiffs rely present a situation where, as here, a magistrate judge has issued an order that does not set a deadline for compliance, and a party files both a motion to stay and objections with the district court." ECF 225 at 10–11. Defendants contend that, absent such a deadline, a federal court's order to produce information is merely a suggestion. *See id.* Their conclusion defies both common sense and caselaw; in the words of the Supreme Court, "absent a stay, [Defendants] *must comply promptly* with the order pending appeal." *Maness*, 419 U.S. at 458 (emphasis added); *see also United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980) ("The public interest requires not only that Court orders be obeyed but further that *Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders*." (emphasis added) (quoting *Perry v. Golub*, 74 F.R.D. 360, 366 (N.D. Ala. 1976)).

Second, Defendants assert that they have met their compliance obligations because they have begun "preparing" to produce the documents. ECF 225 at 9–10 ("[S]ince the issuance of the Order in August, Defendants have been taking steps to comply."). However, these internal

[1] In any event, Defendants' argument that their continued noncompliance does not prejudice Plaintiffs, ECF 225 at 11, and that disclosure would have a "chilling effect," *id.* at 2, are more appropriately addressed in a motion to stay, as they were in Defendants' motion to stay, ECF 208 at 8–10, and Plaintiffs' opposition to that motion, ECF 211 at 13–16. These arguments are pending before the District Court. At issue in *this* Motion is whether Defendants should be ordered to comply with a presently binding obligation in the absence of a stay. They should.

measures do not comply with the Magistrate Judge's order to *disclose* the three categories of documents described in Plaintiffs' motion to compel. Defendants do not contest that they are ready to begin producing responsive documents, and are failing to do so only because they do not consider themselves bound by this Court's order.

Third, Defendants complain about the burden of production. This argument is a smokescreen. According to Defendants' declarant, DoD has already reviewed "more than half" of the documents that require re-review to comply with the Magistrate Judge's order. ECF 225 at 9 (citing Easton Decl. ¶ 16). Thus, by their own admission, Defendants are fully capable of beginning rolling productions in the very near future, if not immediately.[2] Moreover, Defendants' burden argument has no bearing on their obligation to produce supplemental interrogatory responses.

III. A DECISION GRANTING PLAINTIFFS' MOTION WOULD NOT "MOOT" DEFENDANTS' OBJECTIONS TO THE AUGUST RULING.

Granting Plaintiffs' Motion to Set a Date Certain would not "undermine" the District Court's review of Defendants' substantive objections. *See* ECF 225 at 7–8. Production of compelled information pending an appeal is "a common occurrence." 13B Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3533.2.2; *see, e.g.*, *Power Analytics Corp. v. Operation Tech., Inc.*, 2017 WL 2903257, at *8 (C.D. Cal. June 7, 2017) (reviewing magistrate judge's discovery order after the compelled party complied, because compliance did "not render the issues raised here moot"). The case Defendants cite for this point supports Plaintiffs' position. ECF 225 at 12 (citing *Am. Rock Salt Co., LLC v. Norfolk S. Corp.*, 371 F. Supp. 2d 358, 360 (W.D.N.Y. 2005)). The decision in *American Rock Salt* confirms that a party must fully comply "with the order

[2] As Plaintiffs' Motion makes clear, Plaintiffs are prepared to work with Defendants to establish a reasonable schedule to complete the productions ordered by the Magistrate Judge. ECF 222 at

appealed from until a court grants a stay," even if the effect is to moot a pending motion to stay. 371 F. Supp. 2d at 360. A contrary outcome would improperly grant the effect of an actual stay to "the mere filing of a motion to stay." *See Alston*, 2014 WL 338804, at *2.[3]

Defendants' alleged concerns about mootness are not only irrelevant, but also exaggerated. After a party has produced allegedly privileged documents, courts can "still provide effective relief by preventing further disclosure and by excluding the evidence from trial." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 n.2 (2011); *see* ECF 222 at 6 n.2. Defendants can thus seek to claw back any documents they produce which are later determined to be privileged, and may also oppose the introduction of any documents at trial. To the extent Defendants believe extraordinary interim relief is required while the District Court considers their objections, they must petition the court of appeals for a writ of mandamus. Defendants sought this remedy in the related *Karnoski* case,[4] and have suggested they might do the same here. *See* ECF 215 at 5. If Defendants are dissatisfied by the fact that the District Court has not stayed their existing discovery obligations, their recourse is to seek appellate review—not to ignore a duly entered order of this Court.

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[3] Defendants claim the Court should decline to consider Plaintiffs' argument regarding mootness because it was raised in a footnote. ECF 225 at 11–12. Aside from the fact that Defendants themselves regularly make arguments in footnotes, *see, e.g.*, ECF 215 at 10 n.3, there is no "unfairness" to Defendants in this case. Plaintiffs merely anticipated an argument they expected Defendants would make, and Defendants have now made that argument.

[4] In *Karnoski*, the Ninth Circuit granted Defendants' motion for a stay pending consideration of the merits of Defendants' petition. *Trump v. Karnoski*, No. 18-72159 (9th Cir. Sept. 17, 2018). The discovery order at issue there, however, ordered Defendants to produce a privilege log identifying materials withheld under the presidential communications privilege, in addition to ordering the production of materials withheld under the deliberative process privilege. *Trump v. Karnoski*, No. C17-1297-MJP, ECF 299 (W.D. Wa. July 27, 2018). By contrast, Plaintiffs in this case specifically stipulated that their motion to compel did not seek any information in the possession of the President or that Defendants contend is subject to the presidential communications privilege. ECF 185-2.

In the absence of appellate relief, Defendants are under a present obligation to comply with the Magistrate Judge's order. This Court should order them to proceed with full compliance and complete this by a date certain.

CONCLUSION

Plaintiffs respectfully request that the Court enforce its order by ordering that Defendants begin their productions of compelled documents and information within seven calendar days of grant of the enforcement order and promptly coordinate with Plaintiffs' counsel to establish a reasonable schedule for completing production.

Dated: November 19, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 19, 2018, a copy of the foregoing was served on Defendants via CM/ECF.

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