The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL FURTHER DISCOVERY RESPONSES (ECF 358)

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Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 514-3346

INTRODUCTION

Plaintiffs' Motion to Compel Defendants to provide further responses and objections to prior discovery requests (ECF No. 358)[1] should be denied. To begin, Plaintiffs ignore the Ninth Circuit's decision granting a writ of mandamus in this case by arguing that the President has not adequately invoked executive privileges. Plaintiffs have not even attempted to meet the "heightened standard" required by the Ninth Circuit to pursue such discovery. *Karnoski v. Trump*, 926 F.3d 1180, 1205 (9th Cir. 2019). Thus, the relief Plaintiffs seek as to the President's discovery objections (as well as the Department of Defense's ("DoD's") invocations of presidential communications privilege) would contradict the express decision of the Ninth Circuit and should be rejected.

The remainder of Plaintiffs' Motion should be rejected on its merits. Defendants have provided sufficiently specific objections to every one of Plaintiffs' discovery requests, either through descriptions contained in the objections themselves or through the production of privilege logs describing documents withheld and the privileges asserted. Further, Defendants have provided ample information regarding their search method and application of those privileges. As explained in the Declaration of Robert Easton, DoD and the Military Services conducted an expansive search over a wide range of custodians to identify all documents even "remotely related" to the challenged policy, and its predecessor policies going back to July 2015. Andrew Carmichael Decl. Ex. A, Robert Easton Decl. ¶ 13, ECF No. 371 (hereinafter "Ex. A"). Those documents were then collected, maintained, and produced to Plaintiffs as they appeared in the ordinary course of business within DoD files. Privilege determinations were only made after a document was determined to be responsive, and no DoD custodians or documents were excluded from review because they were likely to have or contain privileged information. Ex. A ¶ 16. The Federal Rules of Civil Procedure do not require parties to undertake a cumbersome and inefficient effort to search for, organize, and produce documents according to categories specified in an opposing party's requests for production, as would be required for Defendants to expressly state that documents are being withheld in

[1] Plaintiffs' Motion to Compel Defendants to Adequately Respond to Plaintiffs' First, Second, and Third Sets of Requests for Production of Documents and Interrogatories (ECF No. 358).

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1100 L Street, NW
Washington, DC 20005
Tel: (202) 514-3346

response to particular requests.

BACKGROUND

A. Defendants' Objections and Responses to Plaintiffs' Requests

Defendants served their objections to Plaintiffs' First and Second Sets of Requests for Production ("RFPs") more than a year ago on February 9, 2018, and May 29, 2018. ECF Nos. 359-1, 359-2 (served February 9, 2018); ECF Nos. 359-3, 359-4 (served May 29, 2018). Defendants' objections to Plaintiffs' First and Second Sets of Interrogatories were similarly served on February 9, 2018, and June 1, 2018. ECF No. 359-7 (served February 9, 2018); ECF No. 359-8 (served June 1, 2018); ECF Nos. 359-9, 359-10 (served May 29, 2018). Because Plaintiffs served a third set of discovery requests in April 2019, Defendants' objections to Plaintiffs' Third Sets of Requests for Production and Interrogatories were more recent, having been served on May 28, 2019. ECF Nos. 359-11, 359-12 (served May 28, 2019). In total, Plaintiffs have served 68 requests for production and more than 25 interrogatories on DoD and the President respectively. Plaintiffs across the four related cases challenging the military policy at issue in this case have served DoD with a total of 218 requests for production. Ex. A ¶ 13.

In response to this large group of requests for production, Defendants undertook a rigorous effort to collect, review, and produce responsive materials. DoD and the Military Services collected more than 225,200 documents for responsiveness and privilege review, applying an expansive set of search terms to a lengthy list of custodians. Ex. A ¶ 10. These terms and custodians were selected to capture any document remotely related to the formulation of DoD's various policies on transgender military service, over a period going back to June 2015. DoD searched the accounts of numerous officials in the Offices of the Secretary and Deputy Secretary of Defense, the Office of the Undersecretary for Personnel and Readiness, and the Office of General Counsel ("OGC"), for a period from June 30, 2016 to Mach 23, 2018. Ex. A ¶¶ 6, 7. The agency applied general terms like "transgend*" and "gender dysphoria," as well as more complex and specific terms and connectors search phrases. *Id.* Supplemental collections were also made by a sub-set of key custodians, who were instructed to provide copies of potentially relevant documents from organizational shared

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Washington, DC 20005
Tel: (202) 514-3346

drives and Outlook email accounts, and did so going back to June 2015. Ex. A ¶ 11. The Military Services separately identified key custodians, gathered data, and reviewed such documents. Ex. A ¶¶ 10, 11, 18.

A team of DoD OGC staff reviewed the enormous universe of DoD documents, coding them for responsiveness and privilege. As to responsiveness, the team was instructed to mark a document as responsive if the document was "remotely related to DoD's transgender policy, past or present, and further instructed to err on the side of finding responsiveness." Ex. A ¶ 13. In light of the 218 RFPs across the four cases challenging the DoD policy, DoD did not further categorize documents as responsive to particular RFPs. *Id.*

After a document was determined to be responsive, privilege determinations were made, based on a holistic consideration of the document's content, title, author, recipients, and date of creation. Ex. A ¶ 16. No documents were excluded from responsiveness review on the basis that they contained or were anticipated to contain privileged materials. *Id.* Moreover, DoD did not apply any other objections to exclude from production any documents that were reviewed. Ex. A ¶ 14.

Responsive, non-privileged documents were produced to Plaintiffs as they were maintained in the ordinary course of business, i.e. by component of DoD and the Military Services and by custodian. Ex. A ¶ 13. To date, DoD has produced over 38,000 documents in response to RFPs in this and the three related cases challenging DoD's policy. DoD has also produced privilege logs reflecting the responsive documents withheld pursuant to privileges. Ex. A ¶ 17. These logs contain metadata information for the documents, like the author of the email or the creator of the document, the recipient of any email, the date of creation or the date the email was sent, the title of the document, a privilege determination, and the basis for the privilege determination. *Id.* This information was provided for every single document that DoD has withheld as privileged in this case. *Id.*

B. Ninth Circuit Decision

On June 14, 2019, the Ninth Circuit granted Defendants' petition for a writ of mandamus and vacated this Court's order granting Plaintiffs' prior motion to compel, which ordered

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Washington, DC 20005
Tel: (202) 514-3346

Defendants to produce "documents that have been withheld solely under the deliberative process privilege" and to produce a privilege log identifying documents withheld under the presidential communications privilege. *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1163–64 (W.D. Wash. 2018), *mandamus granted, order vacated*, 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit vacated this order "so that the district court may reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Karnoski*, 926 F.3d at 1207. The Ninth Circuit cautioned that the "executive privileges—the presidential communications privilege and deliberative process privilege—although not absolute, require careful consideration by the judiciary." *Id.* The Ninth Circuit also vacated this Court's order striking Defendants' motion to dissolve the preliminary injunction entered and remanded for the Court to reconsider the motion. *Id.* at 1187.

Two aspects of the Ninth Circuit's opinion are particularly relevant here. First, the Ninth Circuit held that before the President is obligated to produce a privilege log invoking the presidential communications privilege, "Plaintiffs must make a preliminary showing of need demonstrating that the evidence sought is directly relevant to issues that are expected to be central to the trial and is not available with due diligence elsewhere." *Id.* at 1205 (citations and alterations omitted). Second, the Ninth Circuit held that "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision," *id.*; in other words, "the district court must apply appropriate military deference to its evaluation of the 2018 Policy," *id.* at 1202. Thus, the Ninth Circuit questioned whether information concerning the basis of the August 2017 Presidential Memorandum, for example, was still relevant now that DoD has adopted a new policy. *Id.* at 1206. In light of that decision and as discussed below, it is now clear that many of Plaintiffs' requests do not seek information relevant to these proceedings, further reinforcing the basis for Defendants' objections.

ARGUMENT

A. Defendants' Objections Are Stated With Sufficient Specificity.

Plaintiffs contend that Defendants have failed to "state with specificity" their objections to Plaintiffs' requests. Plaintiffs' arguments are divided between Defendants' objections with respect

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1100 L Street, NW
Washington, DC 20005
Tel: (202) 514-3346

to privileges (attorney-client, attorney work product, deliberative process, and presidential communications) ("Privilege Objections"), and all other objections ("Non-Privilege Objections"). Defendants will accordingly address the arguments in this manner as well.

1. Privilege Objections

Discovery of the President: In asserting that the President's Privilege Objections are insufficient, Plaintiffs seek to end run the Ninth Circuit's decision. The Ninth Circuit held that in order to pursue discovery that may implicate the presidential communications privilege, including requiring the President to assert the privilege, "Plaintiffs must make a preliminary showing of need demonstrating that the evidence sought is directly relevant to issues that are expected to be central to the trial and is not available with due diligence elsewhere." *Karnoski*, 926 F.3d at 1205 (citations and alterations omitted). Because Plaintiffs have not even attempted to "meet this heightened standard," requiring the President to produce a privilege log in support of his privilege objections would be squarely contrary to the Court of Appeals' decision. *Id.* (granting writ of mandamus and vacating order for Defendants to produce privilege log concerning the presidential communications privilege). The same is true of DoD's objections to Plaintiffs' interrogatories under the presidential communications privilege. *See, e.g.*, DoD Interrogatory Nos. 4–6, 8, 15, 20, 21. Plaintiffs' motion to compel as to discovery requests directed to the President and implicating the presidential communications privilege should be denied.

Discovery of DoD: DoD's Privilege Objections to Plaintiffs' discovery also are adequately stated. As to DoD's objections to the requests for production, Plaintiffs' argument that the objections are not specific ignores the rule that "a privilege log is *sufficient* to properly assert the privilege." *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1148 (9th Cir. 2005) (citation omitted). DoD has provided detailed privilege logs describing each document withheld on the basis of privilege, including a reference to the particular privilege that applies to each document. Ex. A ¶ 17. By contrast, in *Athwal v. Nijjer*, upon which Plaintiffs heavily rely, the court's decision turned on the fact that the defendant had *failed* to provide a privilege log in support of its assertion of attorney-client privilege and work product protection. Case No. C17-

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1100 L Street, NW
Washington, DC 20005
Tel: (202) 514-3346

00740RSL, 2018 WL 1156233, at *6 (W.D. Wash. Mar. 5, 2018). Because Plaintiffs' motion does not also challenge the sufficiency of DoD's privilege logs, they have raised no basis for relief from the Court.

DoD's Privilege Objections to Plaintiffs' interrogatories are likewise sufficient. To begin, in supplemental objections served concurrent with this brief, DoD has withdrawn its privilege objections as to DoD Interrogatory Nos. 1 (aside from presidential communications) and 9–12. Andrew Carmichael Decl. Ex. B, Defs.' Objections to Pls.' First Set of ROGs at 5, 35–45, ECF No. 371 (hereinafter "Ex. B"). The remaining interrogatories on their face request the production of privileged material, and Defendants have done all they need to do at this point to properly assert the applicable privileges.

For example, Defendants have sufficiently identified their privilege objections to DoD Interrogatory Nos. 4–6, 8, 15, 20, and 21, in which Plaintiffs expressly seek information about the President's actions and communications. Those requests manifestly seek information about "presidential decision making and deliberations," *Karnoski*, 926 F.3d at 1203, and the responses would be presumptively privileged. Even if DoD were obligated to be more specific in so objecting to these requests, Plaintiffs must meet the heightened burden required by the Ninth Circuit in order to pursue discovery concerning the President.

DoD has also adequately objected to DoD Interrogatory Nos. 2 and 3, in which Plaintiffs seek facts supporting the "governmental purposes or interests that [DoD] contend[s] will be advanced by" the military's policy on transgender service and service by persons diagnosed with gender dysphoria, because those requests plainly extend to information that would have been considered as part of the deliberative process that led to the policy. Defendants have provided privilege logs to Plaintiffs that include "documents considered or generated by the Panel of Experts as well as communications to or from members of the Panel regarding their work." ECF No. 359-14 at 2. These documents reflect the privileged documents that, under Fed. R. Civ. P. 33(d), would otherwise be identified by DoD in response to these interrogatories. *See* Ex. B at 7, 15 (objections

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to Interrogatory Nos. 2 and 3). Such privilege logs are sufficient to describe the privileges asserted. *Burlington*, 408 F.3d at 1148.

Finally, Defendants adequately objected to Interrogatory Nos. 7, 13, 14, and 16–19, each of which expressly call for information about agency deliberations, including the process through which agency decisions were reached and the opinions considered. *See, e.g.*, Ex. B at 26, Interrogatory No. 7 ("Explain the *process* you used to formulate . . . the Interim Guidance, and the Implementation Plan, and identify all sources of fact *or opinion* You consulted . . . .") (emphasis added);[2] *id.* at 46, Interrogatory No. 13 ("Describe in detail the circumstances leading" to DoD's decision to delay implementation of the Carter policy, "including all reasons for the decision"); ECF No. 363-1 at 3, Interrogatory No. 16 ("Identify . . . each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of Secretary James Mattis's February 22, 2018, Memorandum"); *id.* at 5, Interrogatory No. 18 ("[D]escribe in detail the information, statement, advice, opinion, or other input such person provided" to the Panel of Experts). Responses to these questions would necessarily encompass information subject to the deliberative process privilege or the attorney client privilege. Defendants need do no more to properly assert these privileges.

2. Non-Privilege Objections

Defendants' Non-Privilege Objections are also adequately stated. Plaintiffs focus their attention on a handful of Defendants' objections on the basis of relevance, burden, and proportionality. But Plaintiffs' arguments misconstrue the requirements of civil discovery.

As is required by Rule 33 and 34, Defendants have stated their objections with "specificity." In each instance that Defendants have interposed an objection on any basis other than privilege, they have explained their particular basis for that objection. For example, Defendants have explained that requests seeking "all" documents or communications are impermissible because they would require Defendants to search for and produce documents throughout the entirety of DoD—a massive, two-million-member organization—regardless of whether such documents would have any

[2] Many of the documents reflected on the privilege logs referenced above in regard to DoD Interrogatory Nos. 2 and 3 may also be responsive to DoD Interrogatory No. 7.

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1100 L Street, NW
Washington, DC 20005
Tel: (202) 514-3346

relevance to these proceedings or would be redundant of the more targeted searches DoD has undertaken. *See, e.g.*, ECF No. 359-2 at 2–3 (objections to RFP No. 1); *see also* ECF No. 359-6 at 7 (objections to RFP No. 36) ("the Department of Defense is an organization consisting of over two million employees stationed throughout the world"). Plaintiffs contend that such an explanation is inadequate, relying again on *Athwal*. But the *Athwal* court rejected the defendant's discovery objections where the defendant had "not provided any reasons." *Athwal*, 2018 WL 1156233 at *5. That is not the case here. Defendants' objections are all the more reasonable in light of the Ninth Circuit's decision that military deference applies in this case and that "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision." *Karnoski*, 926 F.3d at 1205. For example, Plaintiffs' request for "all Documents and Communications relating to the RAND Report" produced during the prior Administration to support the 2016 policy, DoD RFP No. 14, clearly seeks information far beyond the "record supporting" the current DoD policy.

Plaintiffs appear to disagree with Defendants' decision to use consistent language throughout their objections, but the repeated use of particular phrasing does not render an objection inappropriate boilerplate. Defendants have not interposed objections to discovery requests without any explanation of their relationship to that request. To the contrary, for each and every non-privilege objection asserted, Defendants have provided an explanation of the basis for the objection and its connection to that particular request. Defendants have asserted their Non-Privilege Objections only where warranted, carefully choosing the particular requests to which they have asserted each of their objections. For example, Defendants omitted any kind of burdensomeness, proportionality, or overbreadth objections in response to RFP Nos. 9–11, 13, 16–21, 24, 25, or 27–35. *See* ECF Nos. 359-2, 359-4. Defendants also raised vagueness objections only in response to RFP Nos. 7, 11, 17, 22, and 23, objecting to the use of particular undefined and unclear terms. *See* ECF No. 359-2. Defendants' objections comply with the rules.

* * *

It should also be noted that Plaintiffs do not actually challenge the specificity of the Non-Privilege Objections set forth in Defendants' responses to Plaintiffs' Second and Third Sets of

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1100 L Street, NW
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Tel: (202) 514-3346

Requests for Production and Third Set of Interrogatories. Mot. at 3, 7–8 (omitting any specific complaint about the specificity of the Non-Privilege Objections contained in these responses). Instead, Plaintiffs challenge only Defendants' objections concerning requests for "all" documents, a type of objection that is not present in Defendants' objections to these sets of requests. Plaintiffs have thus raised no basis to compel as to those objections in particular.

B. Defendants Have Adequately Demonstrated What Has Been Withheld Pursuant to Their Objections.

Plaintiffs also err in complaining that Defendants have not specifically stated in response to each of their discovery requests whether documents are being withheld based on their objections.

First, the President expressly stated he will not produce any documents in response to Plaintiffs' requests, so it is plain that documents may have been withheld pursuant to objections. The same is true for some of DoD's objections to particular requests, which specifically state that DoD stands on its objections and will not produce documents in response to the request. *See, e.g.*, ECF No. 359-4 at 11 (response to RFP No. 34).

Second, for those requests to which DoD has responded, Rule 34 does not require the kind of express statement Plaintiffs call for. As Plaintiffs acknowledge, *see* Mot. at 12, a party may adequately show that materials have been withheld pursuant to an objection if they describe "the limits that have controlled the search for responsive and relevant materials." Fed. R. Civ. P. 34, 2015 advisory committee note. This description "may include the parameters of a search for documents, such as custodians, sources, date ranges, and search terms (or search methodology)." The Sedona Conference, *Federal Rule of Civil Procedure 34(B)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 Sedona Conf. J. 447, 479 (2018).

DoD has satisfied this rule by describing the process it used to search for documents in response to Plaintiffs' requests, including in a detailed declaration attached to this motion. This kind of search description is sufficient under the rules to demonstrate whether documents have been withheld pursuant to objections. That rule makes sense—Defendants did not withhold from production any documents they reviewed on the basis of objections aside from privilege. Ex. A ¶

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Washington, DC 20005
Tel: (202) 514-3346

14. Instead, the result of DoD's Non-Privilege Objections is demonstrated through the search methodology DoD employed. For example, in accord with their objections to the burden and proportionality of requests for "all" documents of various kinds, DoD did not search every office or component across the agency for potentially responsive documents. *See* Ex. A ¶¶ 6, 7. And in accord with their objections to the production of service-member medical records, DoD did not query the databases containing this information. Ex. A ¶ 9.

Rule 34 does not require Defendants to undertake the even more burdensome discovery process that Plaintiffs' motion appears to contemplate. Specifically, in order for DoD to satisfy Plaintiffs' apparent demand to identify specific documents withheld pursuant to each RFP, it might need to redo its search and review for documents in this case, perhaps either compartmentalizing those new searches on a request by request basis, or re-reviewing all responsive documents to categorize them as responsive to particular requests. Ex. A ¶ 18. Such a cumbersome and unnecessary procedure is flatly contrary to the commonsense approach provided for in the Rules. Rule 34 specifically states that a party may either "produce documents as they are kept in the usual course of business *or* must organize and label them to correspond to the categories in the request." Fed. R. Civ. P. 34(b)(2)(E)(i) (emphasis added). In accord with the rules, Defendants have stored and produced documents in this case according to the manner in which they are stored in the ordinary course of business, by component of DoD and the Military Services and by custodian. Ex. A ¶ 10. Producing documents according to the categories specified by any plaintiff is not required and DoD would necessarily need to do so in order to specifically state that documents have been withheld as to each of Plaintiffs' requests.

Moreover, requiring Defendants to produce documents in the manner Plaintiffs demand would ignore the reasonable approach that DoD undertook to respond to the myriad document requests at issue. Document requests, as is the case here, "often overlap or are elastic, so that the producing party might be compelled to decide which best suits each item in order to consign it to the proper batch." Richard L. Marcus, 8B Federal Practice & Procedure § 2213 (3d ed.). This "undertaking would usually not serve any substantial purpose, and it could become quite

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Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 514-3346

burdensome if considerable numbers of documents were involved." *Id.* Here, Defendants have produced over 38,000 documents and withheld over 42,000 documents as privileged pursuant to 218 requests for production across four related cases challenging the military's policy on military service by transgender individuals and individuals with a history of gender dysphoria. Categorizing this volume of documents by such a large number of requests could take DoD a year to accomplish. Ex. A ¶ 20. Moreover, it would have little value to any plaintiff. For documents withheld as privileged—the only responsive documents that DoD has chosen to "withhold" upon review—Plaintiffs have received extensive privilege logs describing the documents withheld, the privileges asserted, and the metadata associated with each document produced. This metadata allows Plaintiffs "to locate when a document was sent, created, or received by any particular custodian." *Id.* Plaintiffs need no more and are not entitled to more through relief from this Court.

Requiring DoD to undertake this burdensome process is still more unreasonable in light of the fact that Plaintiffs have been aware of these purported insufficiencies for over a year. It is a basic principle that a "party may not unduly delay in moving to compel discovery" and that "[u]ntimeliness, standing alone, is sufficient ground to deny a discovery motion." *V5 Techs. v. Switch, Ltd.*, No. 217CV02349KJDNJK, 2019 WL 3814287, at *2 (D. Nev. Aug. 13, 2019) (citing cases). Courts will "often deny" motions to compel "because the moving party delayed too long." Richard L. Marcus, 8B Federal Practice & Procedure § 2285 (3d ed.). Thus, motions to compel have been rejected as untimely where the motion was made, for example, fourteen months after the discovery responses at issue were served. *Davidson v. Citizens Gas & Coke Util.*, 238 F.R.D. 234, 234–35 (S.D. Ind. 2006).

Plaintiffs' delay in raising this dispute with the Court is highly prejudicial to Defendants. Defendants served their objections to Plaintiffs' First and Second Sets of Requests for Production eighteen and fifteen months ago respectively. ECF Nos. 359-1, 359-2 (served February 9, 2018); ECF Nos. 359-3, 359-4 (served May 29, 2018). To go back now and expressly state whether documents have been withheld with respect to each of Plaintiffs' requests for production would require Defendants to re-review every one of the more than 42,000 documents withheld on the basis of privilege and categorize these documents for responsiveness to each of the 68 RFPs served in this

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Washington, DC 20005
Tel: (202) 514-3346

case. Ex. A ¶ 18. That burdensome process is unjustifiable even if it had been raised in a timely manner; it is doubly so when raised after well over a year in which Defendants have been proceeding apace with their discovery efforts.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be denied.

Dated: August 29, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

JAMES M. BURNHAM
Deputy Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Andrew E. Carmichael
ANDREW E. CARMICHAEL
JAMES R. POWERS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Telephone: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants