

1 Defendants respectfully give notice to the Court of their compliance with the Court's
2 September 29, 2020 Order regarding the remaining documents from the Court's presumptively
3 non-predecisional timeframes from the Department of Defense, Department of Homeland
4 Security, Department of the Army, Department of the Navy¹, Department of the Air Force, and
5 Coast Guard withheld solely pursuant to the deliberative process privilege. See Order of Sep.
6 29, 2020, Dkt. 617 at 2. As with the documents submitted for *in camera* review on August 28,
7 2020, see Dkt. 573, September 4, 2020, see Dkt. 597, October 9, 2020, see Dkt. 622, and October
8 30, 2020, see Dkt. 631, in an attempt to narrow the dispute before the Court, and in light of this
9 Court's instruction that Defendants' submissions should be more limited and "more
10 circumspect," 8/24/2020 Hr'g Tr. 10:22, and the short period of time the Court has afforded
11 Defendants to formally assert the deliberative process privilege over documents during this time
12 period, Defendants have focused their assertion of the deliberative process privilege over only
13 the most sensitive documents at the highest levels of the relevant agencies. Accordingly,
14 Defendants have chosen to formally assert the deliberative process privilege over 24 documents
15 in the Court's remaining presumptively non-predecisional timeframes. These documents are
16 being provided to the Court for *in camera* review accompanied by a declaration from the
17 Department of Defense formally asserting the deliberative process privilege. The remaining
18 documents in the Court's presumptively non-predecisional timeframes that were previously
19 withheld exclusively pursuant to the deliberative process privilege, and were not previously
20 submitted to the Court for *in camera* review, are being separately produced to Plaintiffs.

21 The Court's recent order required that the *in camera* submission "be accompanied by a
22 certification" by one of Defendants' counsel that attorneys of record have "personally reviewed

23 ¹ Last night, on November 12, 2020, undersigned counsel learned that a set of documents from
24 the Department of the Navy were inadvertently excluded from Defendants' re-review of
25 documents from the Court's presumptively non-predecisional timeframes. This issue arose
26 because Defendants' e-discovery platform erroneously indicated that these documents had
27 previously been produced in full to the Plaintiffs. Defendants are now working expeditiously to
28 determine if any documents in this set of documents are subject to the Court's Orders of August
24, 2020, Dkt. 569, and September 29, 2020, Dkt. 617, and if they are Defendants will produce
them as quickly as possible.

1 the documents” submitted. Order of Aug. 24, 2020, Dkt. 569; *see also* Order of Sep. 29. 2020,
2 Dkt. 617. Insofar as this Order intended to require a formal assertion of the deliberative process
3 privilege, Defendants are submitting a declaration from the Department of Defense formally
4 asserting the privilege, consistent with the principle that litigation counsel do not make formal
5 assertions of the privilege on behalf of an agency. *See* Declaration of Robert Easton, on behalf
6 of the Department of Defense, Ex. A of Carmichael Decl.; *see Landry v. FDIC*, 204 F.3d 1125,
7 1135–36 (D.C. Cir. 2000) (requiring that a formal assertion of the privilege be made by a
8 sufficiently high official at the agency). The Department of Defense declaration specifically
9 addresses each document submitted to the Court and provides information necessary for the
10 Court’s review. The formal assertion of privilege in this declaration supersedes any prior
11 privilege log. However, Defendants have still provided a privilege log to accompany this
12 declaration as required by the Court. *See* Ex. B of Carmichael Decl.; Order of Sep. 29. 2020 at
13 2-3. Documents are described in the declaration in the order they have been submitted for review.
14 As required by the Court’s order, Defendants are also submitting a separate declaration certifying
15 that attorneys of record in this case for the Department of Justice reviewed the documents
16 submitted. *See* Declaration of Andrew E. Carmichael; Order of Aug. 24, 2020; Order of Sep. 29.
17 2020.

18 In light of Defendants’ efforts to narrow the dispute at issue discussed above, and the
19 short period of time the Court afforded Defendants to formally assert the deliberative process
20 privilege over documents in the Court’s presumptively non-predecisional timeframes,
21 Defendants will not formally assert the deliberative process privilege over the remaining
22 documents in these timeframes (except where Defendants have previously submitted those
23 documents for *in camera* review, *see* Dkt. 573, Dkt, 597, Dkt. 622, Dkt. 631). Accordingly, these
24 remaining documents have been separately produced to Plaintiffs on November 6, 2020.² This

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26 ² A portion of the documents produced to the Plaintiffs contain redactions to preserve the attorney
27 client and attorney work product privileges and Defendants’ ability to formally assert the
28 presidential communications privilege. Additionally, documents wholly subject to any of these
other privileges have been withheld in full.

1 disclosure of documents is consistent with the approach Defendants have routinely applied in
2 this case and others, insofar as Defendants have attempted to focus their assertions of the
3 deliberative process privilege when limited categories of documents are at issue. *See, e.g.,*
4 7/21/2020 Hr’g Tr. 16:5–6 (explaining that in the related *Doe* case, the plaintiffs sought narrow
5 categories of documents, and the Government “waive[d] the privilege” over certain deliberative
6 documents “in order to narrow the scope of the dispute”). Rather than consider sweeping
7 categories of deliberative documents wholesale, Defendants have repeatedly urged that the
8 parties should negotiate and litigate over individual documents (or narrow categories) for which
9 Plaintiffs have identified a particular need related to their claims. Those documents should be
10 the focus of any privilege disputes.

11 Although Defendants have made further disclosures this week as discussed above, they
12 nonetheless maintain their continued objection that Plaintiffs have not established the relevance
13 of the documents at issue—let alone that those documents would further their claims—which
14 should be a basic requirement before Defendants are required to formally invoke the deliberative
15 process privilege or otherwise disclose privileged documents.

16 Dated: November 13, 2020

Respectfully submitted,
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