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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, *et al.*, Plaintiffs, v. JAMES E. MITCHELL and JOHN JESSEN, Defendants.	No. 2:15-CV-286-JLQ MOTION BY THE UNITED STATES FOR A PROTECTIVE ORDER LIMITING DEPOSITIONS OF CIA OFFICIALS TO WRITTEN QUESTIONS Hearing Date: September 29, 2016 Hearing Time: 1:30 p.m., Telephonic

GOVERNMENT'S MOTION FOR PROTECTIVE ORDER

INTRODUCTION

The United States of America ("Government") respectfully requests that this Court issue a protective order pursuant to Federal Rule of Civil Procedure 26(c) requiring that the upcoming depositions of four current and former officers of the Central Intelligence Agency ("CIA") be conducted by written questions rather than orally. The Court should grant the motion in order to accommodate the Government's compelling interest in preventing the unauthorized and inadvertent disclosure of classified national security information.

As an initial step in the discovery process in this unique case, the depositions of the CIA officers should be conducted by written questions consistent with Federal Rule of Civil Procedure 31. Oral depositions of the CIA officers, which would require spontaneous narrative answers from certain persons who have not been associated with the Agency or the former detention and interrogation program for many years, will increase the likelihood that classified information will be inadvertently disclosed. Further, even with the assistance of an appropriately knowledgeable CIA information review officer ("IRO") present at the depositions to guide the deponents in the appropriate classification of the deponents' answers, the broad scope of the topics Defendants intend to raise during the depositions increases the likelihood that the CIA IRO will be unable to provide an instantaneous decision on classification, given that such decisions can turn on subtle contextual nuances and often require consultations with other CIA resources to determine whether information can be released at an unclassified level. This combination of factors risks inadvertent disclosure of classified information and could lead to a situation in which the depositions cannot proceed smoothly or in a fruitful manner.

The written questions format would avoid these problems by allowing Defendants to submit their questions to the deponents in advance and then enable the

Government to review the deponents' proposed answers for classification and privilege before disclosure. This process would provide a safeguard against the inadvertent disclosure of classified information and still allow Defendants to pose a full range of deposition questions to the CIA officers. The Government is not foreclosing the option of follow-up oral depositions at a later stage of discovery, but proceeding with depositions by written questions as a first step is a reasonable compromise that is warranted by the unique circumstances of this case and the potential harms to national security that could result from unauthorized disclosure of classified information.

For these reasons, as explained further below, the Court should grant the Government's motion for a protective order and require that the depositions of the four CIA officers be taken by written questions in the first instance.

BACKGROUND

On September 6, 2016, Defendants served counsel for the United States with *Touhy* (*United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951)) requests and nonparty subpoenas seeking oral deposition testimony from four current and former officers with the Central Intelligence Agency. *See* Gov't Ex. 1. Specifically, Defendants seek to depose:

- John Rizzo: Mr. Rizzo is a former acting General Counsel of the CIA. *See* Gov't Ex. 2, Declaration of Antoinette Shiner ("Shiner Decl.") ¶ 2, n.1.
- Jose Rodriguez: Mr. Rodriguez is a former director of the CIA's National Clandestine Service. *See id.*
- Jonathan Fredman: Mr. Fredman is a current senior attorney in the CIA Office of General Counsel. *See id.*
- James Cotsana: Mr. Cotsana is a retired intelligence officer. *See id.*

Defendants seek to depose these CIA officers on a range of broad topics related to the CIA's former detention and interrogation program, including Defendants' role in the program, the legality of Defendants' actions, and Defendants' involvement, if any, in the detention and interrogation of the Plaintiffs. *See* Gov't Ex. 1, Affidavit of Brian S. Paszamant ¶ 11.

Notwithstanding the territorial limitations on this Court's subpoena power, *see* Fed. R. Civ. P. 45(c)(1), the deposition subpoenas require the CIA officers to appear in Washington, D.C. *See* Gov't Ex. 1. The subpoenas further direct Mr. Cotsana to appear on September 28, Mr. Rodriguez on September 29, Mr. Rizzo on October 6, and Mr. Fredman on October 7.[1] *See id.*

ARGUMENT

The depositions of the CIA officers should be conducted by written questions consistent with Federal Rule of Civil Procedure 31, and in a manner permitting the CIA to conduct a classification and privilege review of the deponents' anticipated answers, in order to accommodate the Government's compelling interest in preventing the unauthorized disclosure of classified national security information.

Federal Rule of Civil Procedure 26(c) provides that a Court may, "for good cause," issue an order to protect a party subject to discovery "from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). As relevant here, Rule 26 specifically authorizes the Court to issue a protective order

[1] Undersigned counsel for the Government conferred with Petitioners' counsel regarding the relief sought in this motion and Petitioners' counsel indicated they oppose. *See* Gov't Ex. 3. The Government and Defendants are in agreement that any oral depositions of the witnesses will be scheduled for a date and location convenient for all parties and counsel after this motion is resolved. *See id.*

"prescribing a discovery method other than the one selected by the party seeking discovery." Fed. R. Civ. P. 26(c)(1)(C); *see Sullivan v. Dollar Tree Stores, Inc.*, No. CV-07-5020-EFS, 2008 WL 706698, at *1 (E.D. Wash. Mar. 14, 2008). Indeed, [t]his provision of Rule 26(c) is often invoked by motions seeking to conduct depositions by written questions pursuant to Rule 31." 9 James Wm. Moore, et al., Moore Federal Practice § 26.105[4] (2015).

Where, as in this case, nonparty subpoenas are issued to CIA officers seeking information they acquired in connection with their employment duties, the Court must properly accommodate "the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations." *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994); *see also United States v. Columbia Broadcasting Sys.*, 666 F.2d 364, 371-72 (9th Cir. 1982) (noting that nonparties are powerless to control the scope of discovery, and should not be forced to subsidize an unreasonable share of the costs of litigation); *Dart Industries Co. v. Westwood Chemical Co.*, 649 F.2d 646, 649-50 (9th Cir. 1980) (stating that broader restrictions on discovery are appropriate to protect nonparties).

Here, good cause exists for the Court to order that that the CIA officers be deposed on written questions pursuant to Federal Rules of Civil Procedure 31. As explained in the attached declaration of CIA information review officer Antoinette Shiner, the process required to safeguard classified information during oral depositions will impose undue burdens on the CIA and the written deposition format would significantly reduce the risk of inadvertent disclosure of classified information. *See* Shiner Decl. ¶¶ 2-13.

As an initial matter, a deposition by written questions is particularly appropriate for James Cotsana given his unique status. Mr. Cotsana is a retired intelligence officer

who has not been acknowledged as having any role in the former detention and interrogation program. *See id*. ¶ 2, n.1. To confirm or deny that fact would itself disclose classified information. *See, e.g.*, *Minier v. CIA*, 88 F.3d 796, 800-02 (9th Cir. 1996). Given the broad scope of the topics noticed in Defendants' *Touhy* request, the Government would object to, and instruct the witness not to answer, any deposition questions that would tend to confirm or deny whether Mr. Cotsana had any involvement in the program. *See* Discovery Stipulation ¶¶ 14-15 (ECF No. 47). Thus, an oral deposition of Mr. Cotsana would likely be fruitless and an inefficient use of party resources.

To avoid that scenario and the unnecessary expenditure of time and money for all counsel in this case to conduct a deposition in New Hampshire, where Mr. Cotsana currently resides, Mr. Cotsana's deposition should be conducted by written questions in a fashion that permits the CIA to conduct a classification and privilege review of the his anticipated answers prior to disclosure. The Government recognizes that Defendants should be able to make an appropriate record of the specific questions they want Mr. Cotsana to answer, and to which the Government objects, should Defendants later decide to move to compel answers to those questions, as contemplated in the parties' discovery stipulation. *See id.* But that record can be made appropriately and effectively on written questions. *See* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

Under these circumstances, there is no need for the parties and the Government to incur travel expenses and fees in connection with an oral deposition in New Hampshire where it is likely that few, if any, substantive questions will be answered. Indeed, courts have concluded that a deposition by written questions is an appropriate

discovery method in similar situations where extensive privilege objections are likely to occur during an oral deposition. *See Gatoil, Inc. v. Forest Hill State Bank*, 104 F.R.D. 580, 582 (D. Md. 1985) (granting motion for deposition by written questions due to "travel expenses and fees" associated with conducting oral deposition where the witness intended to assert his 5th Amendment privilege against self-incrimination); *Fid. Mgmt. & Research Co. v. Actuate Corp.*, 275 F.R.D. 63, 64 (D. Mass. 2011) (concluding that oral deposition makes "little sense" given likely privilege objections and deposition by written questions would be "more convenient, less burdensome and less expensive"); *Am. Standard Inc. v. Bendix Corp.*, 80 F.R.D. 706, 708 (W.D. Mo. 1978) (concluding that deposition by written questions would be sufficient "[t]o reveal any problems of privilege or other immunity to discovery that would arise if the deposition . . . were taken on oral questions").

The depositions of Messrs. Rizzo, Rodriguez, and Fredman stand on different ground because their association with the former detention and interrogation program has previously been declassified by the CIA. Therefore, the Government acknowledges that they could provide relevant, non-privileged, and unclassified information about the program. Providing that information in an oral deposition format, however, would create an unnecessary risk that classified information would be disclosed and impose an undue burden on the CIA. *See* Shiner Decl. ¶¶ 3-13.

Given the complex situation created by the various declassifications of information related to the former detention and interrogation program (for example, through the SSCI Report), it can be extremely difficult for a current CIA employee to determine which facts about the program are now unclassified and which facts remain classified. *See id*. ¶ 4. This complexity is compounded for former employees, such as Mr. Rizzo and Mr. Rodriguez, who have not been employed by the CIA for several years and have not been involved in recent declassification and release decisions. *Id*.

Even CIA IROs and other CIA officials charged with making these types of classification decisions must often consult various resources, including prior release decisions and subject-matter experts within the CIA, in order to determine whether any particular fact or nuance remains classified. *Id*. ¶ 8. This comprehensive review process often takes hours to complete. *Id*. ¶ 9. Thus, CIA officers faced with making a snap judgment in response to an oral deposition question may very well be unable to accurately decide for themselves in an instant whether the answer to a particular deposition question contains currently and properly classified information. *Id*. Consequently, the structure of an oral deposition, in which the deponents are required to provide narrative responses to wide-ranging questions they have not had time to consider in advance, creates an environment in which classified information may be inadvertently disclosed. *Id.* ¶¶ 3-7, 11, 13.

In light of the difficulty associated with these classification determinations and the harm that could result from an unauthorized disclosure of classified information, several CIA officers, including an IRO, would need to attend the oral depositions in order to guide the deponents in the appropriate scope or permissible content of the deponents' answers. *See id*. ¶ 10. Although the presence of an IRO would decrease the risk of an inadvertent disclosure, it would not eliminate the risk altogether. *See id*. ¶ 11. As explained above, depending on the questions asked, the CIA IRO may be required to consult with other resources to determine whether a question can be answered at all, or whether an answer can be stated at an unclassified level. *Id*. In the event other resources must be consulted to make a classification decision, the deposition would need to stopped, potentially for an indeterminate period of time, while such a determination can be made. *Id*. This review process, which is necessitated by the Government's "compelling interest" to ensure that "information bearing on national security" is appropriately protected from harmful disclosure, is

incompatible with the format of an oral deposition. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

As one court recognized, it is far "easier and more effective to prevent the release of classified information in advance than to attempt to undo the damage of unauthorized disclosures after the fact." *See United States v. Bin Laden*, 58 F. Supp. 2d 113, 121 (S.D.N.Y. 1999). In the context of a spontaneous and unpredictable oral deposition, an inadvertent disclosure of classified is a distinct possibility and the harm from such a release would be immediate. *See* Shiner Decl. ¶¶ 7, 10; *Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) ("Once the information is disclosed, the 'cat is out of the bag'"). Disclosure of potentially privileged information is a risk in any oral deposition, of course, but this case stands apart from the normal case because of the unique status of the CIA officers being deposed as well as the fact that the depositions have the potential to touch on extraordinarily sensitive national security topics that the Government has a compelling interest to protect in order to prevent damage to the national security. *See* Shiner Decl. ¶¶ 3, 6.

Given the gravity of the harm that could come from an inadvertent disclosure of classified information, depositions by written questions strike an appropriate balance between the Government's interest in protecting national security and Defendants' discovery needs. Indeed, depositions by written questions would significantly reduce the likelihood that classified information would be inadvertently revealed. *See* Shiner Decl. ¶¶ 12-13. This process would enable the CIA to review the deponents' answers before disclosure, thereby providing an extra measure of protection that would not be present in an oral deposition. *See id*. ¶ 12. The written questions format would also enable the CIA to take more time to consult its available resources in order to make a more complete and accurate determination that that an answer does not contain classified information. *See id*.

Other courts have granted similar motions to convert oral depositions to depositions on written questions based on far less compelling reasons than the Government asserts in this case. *See, e.g., Gatoil, Inc.*, 104 F.R.D. at 582; *DBMS Consultants Ltd. v. Computer Associates Int'l, Inc.*, 131 F.R.D. 367, 370 (D. Mass. 1990) (granting motion to avoid burdens of overseas oral deposition and concluding that party should first attempt to obtain the information it seeks by taking a deposition on written questions); *In re Arthur Treacher's Franchisee Litig.*, 92 F.R.D. 429, 437-40 (E.D. Pa. 1981) (ordering that deposition of a party's attorney be conducted by written questions due to, among other things, potential ethical issues). If litigation expenses and issues related to the attorney-client privilege can serve as appropriate bases for converting an oral deposition into a deposition by written questions, then the Government has more than carried its burden here to establish the requisite good cause based on the national security reasons asserted.

The Government is not foreclosing the option of follow-up oral depositions of the CIA officers at a later stage of discovery in this case, but the unique combination of factors present at this time – namely Defendants' broad requests to elicit sensitive operational information from CIA officers that may call for the disclosure of classified information – warrants a "prudent and incremental" approach at the outset. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 538-39 (2004) (plurality) (instructing district courts to "proceed with the caution" during factfinding in cases involving matters of national security). Accordingly, Defendants should begin with depositions by written questions, with the CIA having the opportunity to perform a classification and privilege review of the deponents' anticipated responses, and then the parties can consider whether an oral deposition would be necessary, perhaps on a discrete set of follow-up topics depending on Defendants' litigation needs after they have reviewed the written answers. The propriety of asking written questions first with an option for

the party to seek an oral deposition at a later date, if necessary, is well-recognized and should be the appropriate starting point in this case. *See Olivieri v. Rodriguez*, 122 F.3d 406, 409 (7th Cir. 1997); *Hyam v. Am. Exp. Lines*, 213 F.2d 221, 223 (2d Cir. 1954).

CONCLUSION

For the foregoing reasons, the Government's motion for a protective order should be granted. A proposed order is attached.

Dated: September 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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