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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,

Defendants.

Case No. CV 04-8425 VAP (Ex)

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Date: March 15, 2010
Time: 10:00 a.m.
Courtroom: 20

Discovery Cutoff: Mar. 15, 2010
Pretrial Conference: June 7, 2010
Trial: June 14, 2010

DISCOVERY MATTER

Pursuant to Local Rule 37-2.3, plaintiff Log Cabin Republicans submits the following Supplemental Memorandum of Law in support of its Motion to Compel on certain categories of Plaintiff's First Set of Requests to Produce Documents.

1. Defendants' Efforts to Escape the Consequences of Their Failure to Respond to Discovery Should Be Rejected

The government does not deny that it did not serve written objections and responses to Plaintiff's document requests until nearly two months after the parties had attempted to meet and confer over its failure to respond. Rather, the government claims it should be excused from that failure because: (1) it "lodged objections" to discovery in "other filings"; (2) Plaintiff's motion – filed nearly four months after the discovery responses were due – was "premature"; and (3) a "holistic" analysis excuses the failure to serve responses.

The government's arguments are specious. The parties' discussion regarding the responses in question began November 18, 2009, a month after responses were due, and two days after the Court had asked the government's counsel, incredulously:

> Are you taking the position that a party can fail to respond to a request for production of documents, wait until the other side files their motion to compel, and you still haven't waived your right to object[?] [B]ecause I don't think that's the case. … [Y]ou can't fail to answer discovery, wait for the other side to move to compel, and then say, okay, but now I'm going to object.

Transcript of Proceedings, Nov. 16, 2009, 6:13-7:1. Even in the face of that clear guidance from the Court, Defendants still waited two more months, until January 12, 2010, to serve the written responses and objections that FRCP 34(b)(2) requires.

Defendants claim the parties met and conferred regarding the requests after the government "lodged objections to the type of discovery contemplated by Plaintiff." Joint Stipulation, p. 4. It is a cunning choice of words; but if Defendants mean to imply that repeatedly seeking to stymie any discovery is the procedural equivalent of serving specific objections and responses "for each item or category" as required by Rule 34(b)(2)(B), their suggestion should be soundly rejected.

Defendants sought, repeatedly and unsuccessfully, to prevent Plaintiff from engaging in discovery. They argued in their Rule 26(f) submission and at the ensuing scheduling conference that no discovery should be allowed; the Court disagreed. In connection with their motion for interlocutory appeal of the Court's order denying their motion to dismiss they requested a stay of discovery; the Court denied it. And every discovery response they have served thus far repeats the assertion that discovery is improper *in toto*. What Defendants did not do, however, was serve a timely response to Plaintiff's discovery, as the Federal Rules of Civil Procedure require. Defendants' general obstructionism may not be retroactively recharacterized as the specific objections required by the Rules.

Second, after arguing that their months-late objections should be deemed timely, Defendants turn the argument inside out and claim that the motion which Plaintiff was finally obliged to bring, to obtain the discovery the Court has permitted, is premature. They assert that Plaintiff should have returned for another meet-and-confer following the untimely objections Defendants served in January 2010, and presumably another and another, *ad infinitum*. If Defendants' argument were accepted, deficient discovery responses could never be the subject of a motion to compel, since a responding party could always demand another meet-and-confer discussion, restarting the clock after any untimely partial production of documents. The discovery rules do not require such endless discussions.

Finally, Defendants' reliance on Burlington Northern Ry. Co. v. U.S. District Court, 408 F.3d 1142 (9th Cir. 2005), is misplaced. The only "*per se* waiver rule" rejected in Burlington was a "rule that deems a privilege waived if a privilege log is not produced within Rule 34's 30-day time limit." 408 F.3d at 1149. Burlington in fact upheld the trial court's finding of a waiver of privilege objections, where the responding party timely responded to a Rule 34 document request but did not serve a privilege log for five months thereafter. Here, where Defendants did not file even a boilerplate response within the time limit of Rule 34, the justification for finding a

waiver of objections is even stronger than it was in Burlington. No *per se* rule need be invoked in this case to find that Defendants have, under any "holistic reasonableness analysis," waived their objections. The Court should reject the government's continuing efforts to duck legitimate discovery, and order it to respond without objection.

2. The Assertion of the Deliberative Process Privilege Is Merely Camouflage for Defendants' Evasion of Discovery

Defendants claim that the deliberative process privilege shields production of numerous categories of documents requested. They acknowledge that they have not complied with the formal requirement, see Hopkins v. HUD, 929 F.2d 81, 84 (1991), that the privilege be personally asserted by the agency head or his designee, supported by "precise and certain" reasons. Joint Stipulation at 11:3-12. But they now contend that Plaintiff must make some extra showing of good cause before Defendants need even deign to respond and assert the privilege. No statute, rule, or precedent requires such a thing. Contrary to Defendants' argument, Freeman v. Seligson, 405 F.2d 1326 (D.C. Cir. 1968) does not require a plaintiff in civil litigation to "bolster" its Rule 34 demands by a prior showing of relevance and good cause. Freeman involved a third-party subpoena to the Secretary of Agriculture by a bankruptcy trustee seeking a bankruptcy examination and the production of *half a million* documents to determine if the trustee had a basis for a claim for recovery from third parties. Id. at 1330-31. Freeman does not stand for any requirement that Rule 34 document requests in a regular civil case be supported by any extraordinary showing even before "the Government is put to the time and effort of formally asserting privilege"; and in any case, the Court here has already determined, at the Rule 26(f) conference, that Plaintiff's discovery is proper.

Moreover, even if the supposed privilege had been timely and properly asserted, which it was not, Defendants' assertion of this privilege is a sham. The Chairman of the Joint Chiefs of Staff himself publicly posts, on his own blog, on

Facebook, and on Twitter, his views on the Policy and its repeal. (See, e.g., http://www.dodlive.mil/index.php/2010/02/chairmans-corner-my-view-on-don't-ask-don't-tell/; http://www.facebook.com/admiralmikemullen; http://twitter.com/thejointstaff/status/8553057480.) Notwithstanding that open discussion of the military's deliberations by Admiral Michael Mullen, the seniormost officer in the nation, the government asserts this privilege in the document requests which are in issue in Categories I and II.

Category I's two requests, Nos. 2 and 4, call for drafts of the Policy, and documents relating to the drafting of the Department of Defense ("DOD") Directives. As Defendants' responses to the requests acknowledge, Plaintiff agreed during the November 18, 2009 meet-and-confer to narrow the scope of the requests to documents "housed at the Pentagon." But having agreed to those requests in such a narrowed scope, Defendants now renege on their agreements reached in the meet-and-confer, take the position that the requests impinge on the belatedly-asserted deliberative process privilege, and refuse to produce anything.

If the privilege truly applied, Defendants would have had no reason to discuss these requests in the meet-and-confer. That Defendants now take the position that they refuse to produce any documents responsive to these requests – "even in [their] narrowed form" – shows one of two things: either they did not meet and confer in good faith, proposing compromises they did not intend to live up to; or the assertion of the privilege is an afterthought concocted to evade discovery the Court has expressly permitted. Either way, Defendants' tactics should be rejected.

As for the requests in Category II, Defendants now claim that only "one subset of documents [] is responsive" to the nine requests in this category and is being withheld. But there is no way to tell from Defendants' responses to these nine requests – served long after the meet-and-confer – that only one set of documents is supposedly being withheld. And it cannot be determined from the responses whether other documents do not exist, or are simply not being shielded. The Court should order Defendants to clarify their evasive responses.

3. Sovereign Immunity and the APA Have Nothing to Do with the Scope of Discovery

Defendants have refused to search for or produce documents located outside the Department of Defense on the bizarre grounds that sovereign immunity should immunize agencies of the Federal government other than the Department of Defense from having to respond to civil discovery – as if a different executive department were a separate sovereign. The argument is nonsensical and the sole case Defendants cite, The Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518 (9th Cir. 1989), does not support it. The Presbyterian Church case addressed the plaintiffs' standing to bring claims challenging a clandestine surveillance program conducted by the government against the "sanctuary movement" aiding Central American refugees. The Court of Appeals actually reversed the trial court's holding that sovereign immunity barred the plaintiffs' equitable claims, 870 F.2d at 526; so that case would provide no support for Defendants' position even if it dealt with the question of the government's discovery obligations. But the case has nothing to do with discovery, and is completely irrelevant to this motion.

Defendants provide no authority for the proposition that in a civil lawsuit against the United States, the government may limit its discovery responses to documents fortuitously located within a single executive department, and is excused from conducting a search for materials elsewhere in the government. Plaintiff sued the United States, and is entitled to discover documents and information within the possession of the United States. The government's incoherent objections based in sovereign immunity and the Administrative Procedures Act should be rejected.

Dated: March 4, 2010

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