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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA,
et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 6:15-cv-01517-TC

JOINT STATUS REPORT
AS OF JULY 16, 2018

The parties respectfully submit this joint status report to inform the Court of the status of discovery, experts, and other pending or upcoming matters since the last status conference on June 6, 2018.

1. Opening Statements

Plaintiffs' Separate Statement:

This Court is extremely familiar with the legal claims in this case. To update the Court on what has occurred generally following the Status Conference on June 6, Plaintiffs have been tailoring their pending discovery requests to address the respective interests and concerns of all parties and the Court. During the June 6 Status Conference, the parties and the Court discussed an alternative path of using judicial notice in lieu of the pending Requests for Admissions (“RFAs”) given the nature of the documents in issue (predominantly government documents that are public records). Defendants proposed holding their Second Motion for Protective Order in abeyance until the Court decides Plaintiffs’ motions to seek judicial notice of the documents referenced in RFAs and until the parties have further opportunity to reach agreement on substituting contention interrogatories for depositions under Rule 30(b)(6). As part of this discussion, Plaintiffs agreed that any responses of Defendants to outstanding discovery requests (currently the Rule 30(b)(6) deposition notices and those RFAs that are the subject of the Second Motion for Protective Order, as well as the subsequent sets of RFAs and Rule 30(b)(6) deposition notices that were served after Defendants filed their Second Motion for Protective Order) may also be held in abeyance during the same time period. Plaintiffs have since pursued authentication of documents referenced in their RFAs through the judicial notice process described by this Court at the June 6 Status Conference. Defendants will have an opportunity to respond to Plaintiffs’ request as part of their opposition brief, currently due July 24, 2018.

On another front, Plaintiffs have spent quite a bit of time responding to Defendants' motion practice. In the past two months, while refusing to participate in the normal discovery process, Defendants have filed seven motions with this Court (ECF Nos. 195 (Motion for Judgment on the Pleadings), 196 (Motion for a Protective Order and for a Stay of All Discovery), 207 (Motion for Summary Judgment), 216 (Motion to Stay Discovery Pending Resolution of Objections), 217 (Motion for Protective Order), 305 (Motion to Amend Schedule), 307 (Motion for a Stay Pending a Petition for Writ of Mandamus); objections to a previous ruling (ECF No. 215 (Objections to Order Denying Motion for a Protective Order and Stay of Discovery)); and three petitions to a higher court to overrule the decisions of this Court (ECF Nos. 211 (Notice of Filing Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari), 246 (Notice of Filing Application for a Further Extension of Time Within Which to File a Petition for Writ of Certiorari), 308 (Notice of Filing of Petition for Writ of Mandamus and Emergency Motion for a Stay)). At the request of the Ninth Circuit, Plaintiffs briefed the Emergency Motion for a Stay, which the Ninth Circuit denied on July 16, 2018. That litigation practice is hardly conserving the resources of the courts, or the parties, particularly when Defendants continue to make the same legal arguments they have been making since filing their motion to dismiss in 2015 without engaging with the material facts of the case.

Rather than prepare for trial, Defendants have clearly made the studied decision to unnecessarily overwhelm counsel for Plaintiffs and this Court with an avalanche of repetitive ancillary motions and not engage in the steps necessary to prepare for trial on the merits on October 29, 2018. See ECF Nos. 177, 211, 246.

Defendants' Separate Statement:

Defendants maintain that this improper case should be dismissed and have moved to terminate it on multiple jurisdictional and substantive grounds. Defendants acknowledge that this Court has either disagreed with or not yet ruled on Defendants' challenges to Plaintiffs' suit; but Defendants respectfully reaffirm their position that this case is improper for several reasons. Among other things, Plaintiffs lack standing to bring this lawsuit, Defs.' Mot. for Summ. J., ECF No.207; the Administrative Procedure Act requires Plaintiffs' lawsuit to challenge discrete government action or a discrete failure to act, which their complaint fails to do, Defs. Mot. for J. on the Pleadings, ECF 195; Plaintiffs' claims infringe on legislative and executive functions that the Constitution assigns to the political branches, *id*; and Plaintiffs' complaint fails to state legally cognizable theories of recovery, ECF No. 207. Federal Defendants' pending motions for judgment on the pleading and summary judgment are not, as Plaintiffs assert, "repetitive and ancillary motions," but, instead, go to threshold issues. The Ninth Circuit contemplated a narrowing of this case before trial and Defendants believe that the resolution of their pending motions will appropriately narrow the case, if not dispense of it altogether.

In addition to the numerous defects identified above, discovery (including expert discovery) and trial are also improper because *de novo* proceedings are presumptively improper in cases governed by the APA's judicial review provisions. Defs.' Mot. for Protective Order and Stay of Discovery, ECF No. 196. Again, Defendants recognize that this Court disagrees with Defendants' position on the applicability of the APA (Orders, ECF Nos. 212, 300) and that this Court has entered orders on the timing of discovery activity and for trial itself (Minute Order, ECF No. 192 (scheduling certain expert disclosure deadlines and setting an October 28, 2018, trial date)). Defendants' compliance with Court orders, however, cannot and should not be

viewed as a concession that discovery or trial is proper; nor can or should Defendants' compliance be viewed as a waiver of Defendants' objections to these proceedings.

Finally, Plaintiffs' accusations that Defendants are not engaging in trial preparation is incorrect. Defendants have complied with this Court's pre-trial deadlines. And motion practice seeking dismissal of this improper action or narrowing issues for trial is a proper—indeed, necessary—step in trial preparation.

2. District Court Activity since the Last Status Conference

Plaintiffs' Separate Statement:

To update the Court on what has occurred generally following the Status Conference on June 6, Plaintiffs have responded to Defendants' Motion for Judgment on the Pleadings. ECF No. 241. Plaintiffs have responded to Defendants' Motion for Summary Judgment. ECF No. 255. Both the Motion for Judgment on the Pleadings and the Motion for Summary Judgment are set for oral argument on July 18, 2018. Plaintiffs filed an unopposed Motion to Hold Defendants' Second Motion for Protective Order in Abeyance and to Suspend Briefing Schedule (ECF No. 247), which was granted by this Court. ECF No. 249. Plaintiffs filed a Motion *in Limine* Seeking Judicial Notice of Federal Government Documents. ECF No. 254.

Defendants' Separate Statement:

Since the June 6, 2018, status conference, Judge Aiken denied Defendants' motion for a stay (ECF No. 216) pending resolution of their objections to this Court's ordering denying Defendants' first motion for a protective order (ECF No.238). Judge Aiken also overruled Defendants' objections to this Court's order denying that motion for protective order. ECF No. 300. Judge Aiken further declined to certify her order overruling Defendants' objections for interlocutory appeal. *Id.* On June 12, 2018, Judge Aiken granted Defendants' unopposed motion to extend the time for responding to Plaintiffs' requests for judicial notice to and including July

24. ECF No. 313. On June 13, Judge Aiken denied Plaintiffs' motion to defer consideration of Defendants' motion for summary judgment and granted Defendants' motion to hold oral argument on July 18, 2018, simultaneously with oral argument on Defendants' motion for judgment on the pleadings. ECF No. 316.

3. Appellate Proceedings

Plaintiffs' Separate Statement:

On July 5, 2018, Defendants filed their second petition for a writ of mandamus and emergency motion for a stay in the Ninth Circuit Court of Appeals (ECF No. 308-1), and on July 10, 2018, Plaintiffs responded in opposition to the emergency motion. ECF No. 317, Attachment A. The Ninth Circuit denied Defendants' emergency motion for a stay on July 16, 2018.

Defendants continue to request extensions to file a petition or motion with the Supreme Court as to the Ninth Circuit's denial of Defendants' first Petition for Writ of Mandamus. ECF No. 306.

Should the Ninth Circuit not issue their requested emergency stay, Defendants' obvious strategy is to file a petition or motion with the Supreme Court as late in the game as possible in an effort to stop trial on October 29. Defendants state as much in their Second Petition: "Absent relief from [the Ninth Circuit] on the government's stay request or mandamus petition by Monday, July 16, the government will have little choice but to seek further relief from the Supreme Court." ECF No. 308-1 at 54.

Defendants' Separate Statement:

a. Writ of Certiorari

On July 3, 2018, the Supreme Court granted Defendants' request for an extension to and including August 4, 2018, to file a petition or motion with the Supreme Court as to the Ninth

Circuit's March 7, 2018, denial of Defendants' 2017 petition for a writ of mandamus. Not. From Supreme Ct., ECF No. 306.

b. Mandamus Petition

On July 5, 2018, Defendants' filed a petition for a writ of mandamus in the Ninth Circuit Court of Appeals. ECF No. 308-1. That petition seeks dismissal of this lawsuit or, in the alternative, a stay of trial and discovery pending resolution of Defendants' pending dispositive motions. *Id.* at Part I, II. In addition, Defendants' petition seeks a stay discovery and trial pending consideration of the petition. *Id.* at Part III; *see also id.* at i (characterizing this request as an "emergency motion" under the Ninth Circuit's local rules). Finally, the petition explains that "[a]bsent relief from [the Ninth Circuit] on the government's stay request or mandamus petition by Monday, July 16, the government will have little choice but to seek further relief from the Supreme Court." *Id.* at 54.

Plaintiffs filed their response in opposition to Defendants' emergency motion for a stay of discovery and trial with the Ninth Circuit on July 10, 2018. *In re: United States*, Case No. 18-71928 (9th Cir. July 10, 2018), ECF No. 5. Defendants filed a reply in support of their emergency motion for stay on July 11, 2018. *Id.*, ECF No. 6.

Defendants filed a FRAP Rule 28(j) letter on July 13, 2018, notifying the Ninth Circuit that the District Court had set oral argument on their Motion for Summary Judgment for July 18, 2018, and that it would be held simultaneously with oral argument on Defendants' Motion for Judgment on the Pleadings. ECF No. 7.

On July 16, 2018, the Ninth Circuit denied Defendants' motion for a stay of discovery and trial. The Ninth Circuit further stated that the panel will rule on the petition on an expedited basis. ECF No. 9.

4. Motion Practice

Plaintiffs' Separate Statement:

Defendants' Motion for Judgment on the Pleadings (ECF No. 241) is fully briefed and set for oral argument on July 18. Defendants' Motion for Summary Judgment (ECF No. 255) is fully briefed and set for oral argument on July 18. Plaintiffs filed an unopposed Motion to Hold Defendants' Motion for Protective Order in Abeyance and to Suspend Briefing Schedule (ECF No. 247), which was granted by this Court. ECF No. 249. Plaintiffs filed a Motion *in Limine* Seeking Judicial Notice of Federal Government Documents. ECF No. 254. Defendants filed a Motion for a Stay Pending a Petition for Writ of Mandamus (ECF No. 307), which is pending.

Defendants' Separate Statement:

a. Dispositive Motions

Defendants currently have two dispositive motions pending with this Court. The first is Defendants' May 9, 2018, motion for judgment on the pleadings. ECF No. 195. That motion has been fully briefed, *see* ECF Nos. 241, 302, and is scheduled for oral argument on July 18, 2018, *see* ECF No. 214. Defendants' second dispositive motion is their motion for summary judgment. ECF No. 207. That motion is also fully briefed. ECF Nos. 255, 315. Oral argument on Defendants' motion for summary judgment is also scheduled for July 18, 2018, *see* ECF No. 316.

b. Non-Dispositive Motions

There are currently three non-dispositive motions that have not been resolved in the case. Plaintiffs filed one of those motions and Defendants filed the other two. In chronological order of filing, Defendants filed a second motion for protective order on June 4, 2018. ECF No. 217. Briefing on that motion is suspended while Plaintiffs review Defendants' responses to their

requests for judicial notice and as Plaintiffs propound new discovery requests. *See generally* June 27, 2018, Order, ECF No. 249. The second pending motion is Plaintiffs' June 28, 2018, motion *in limine* seeking judicial notice of 285 exhibits. ECF No. 254. And the third pending motion is Defendants' July 5, 2018, motion to stay discovery and trial in this Court pending resolution of Defendants' petition for a writ of mandamus to the Ninth Circuit. ECF No. 307. Plaintiffs filed a response in opposition to that motion. ECF No. 317

5. Discovery

The following chart contains the status of discovery Plaintiffs have propounded, which has not been withdrawn in response to meeting and conferring.

No.	Date Propounded	Response Due	Party	Title	Status – Plaintiffs' Position	Status – Defendants' Position
1	1/20/17	5/31/17	EPA	First Set of RFAs to EPA	On July 12, 2017, EPA responded providing objections regarding their requested stay of litigation, deliberative process and other privileges, calls for legal conclusions, vague and ambiguous, calls for expert conclusions, and lack of specificity. Plaintiffs will not seek to compel further responses to these RFAs.	No further action required
2	2/11/17	After meet and confer process	All Defendants	RFPs to Defendants (documents from NARA)	Defendants have made approx. 280 boxes of unrestricted NARA documents available, and Plaintiffs are coordinating directly with NARA regarding the review of these documents. There are approx. 90 additional boxes containing "restricted" materials or materials that may	Plaintiffs will visit NARA facilities

					require screening. Defendants are sending a paralegal to oversee review of those documents.	
3	3/7/17	After meet and confer process	All Defendants	Second Set of RFPs to Defendants (documents from NARA)	Defendants have made approx. 280 boxes of unrestricted NARA documents available, and Plaintiffs are coordinating directly with NARA regarding the review of these documents. There are approx. 90 additional boxes containing "restricted" materials or materials that may require screening. Defendants are sending a paralegal to oversee review of those documents.	Plaintiffs will visit NARA facilities
4	5/4/18	6/4/18	Dep't of Interior	First Set of RFAs to Dep't of the Interior	Held in abeyance by agreement of the parties and court order until the Court decides Plaintiffs' motion to seek judicial notice of the documents referenced in the RFAs.	Held in abeyance; should be withdrawn.
5	5/4/18	6/4/18	Dep't of Agriculture	First Set of RFAs to Dep't of Agriculture	Held in abeyance by agreement of the parties and court order until the Court decides Plaintiffs' motion to seek judicial notice of the documents referenced in the RFAs.	Held in abeyance; should be withdrawn.
6	5/4/18	6/4/18	Dep't of Interior	Rule 30(b)(6) Notice of Deposition to the U.S. Dep't of the Interior	Held in abeyance by agreement of the parties and court order to give the parties an opportunity to reach agreement on substituting contention interrogatories for the pending Rule 30(b)(6) depositions.	Held in abeyance; should be withdrawn.
7	5/4/18	6/4/18	Dep't of Agriculture	Rule 30(b)(6) Notice of Deposition to the U.S. Dep't of Agriculture	Held in abeyance by agreement of the parties and court order to give the parties an opportunity to reach	Held in abeyance; should be withdrawn

					agreement on substituting contention interrogatories for the pending Rule 30(b)(6) depositions.	
8	5/11/18	6/11/18	Dep't of Transportation	Rule 30(b)(6) Notice of Deposition to the U.S. Dep't of Transportation	Held in abeyance by agreement of the parties and court order to give the parties an opportunity to reach agreement on substituting contention interrogatories for the pending Rule 30(b)(6) depositions.	Held in abeyance; should be withdrawn.
9	5/11/18	6/11/18	Dep't of Transportation	First Set of RFAs to the Department of Transportation	Held in abeyance by agreement of the parties and court order until the Court decides Plaintiffs' motion to seek judicial notice of the documents referenced in the RFAs.	Held in abeyance; should be withdrawn.
10	6/4/18	7/4/18	Dep't of Energy	First Set of RFAs to the U.S. Dep't of Energy	Held in abeyance by agreement of the parties and court order until the Court decides Plaintiffs' motion to seek judicial notice of the documents referenced in the RFAs.	Held in abeyance; should be withdrawn.
11	6/4/18	7/4/18	Dep't of Energy	Rule 30(b)(6) Notice of Deposition to the U.S. Dep't of Energy	Held in abeyance by agreement of the parties and court order to give the parties an opportunity to reach agreement on substituting contention interrogatories for the pending Rule 30(b)(6) depositions.	Held in abeyance; should be withdrawn.
12	6/4/18	7/4/18	Dep't of Defense	First Set of RFAs to the U.S. Dep't of Defense	Held in abeyance by agreement of the parties and court order until the Court decides Plaintiffs' motion to seek judicial notice of the documents referenced in the RFAs.	Held in abeyance; should be withdrawn.
13	6/4/18	7/4/18	Dep't of Defense	Rule 30(b)(6) Notice of Deposition	Held in abeyance by agreement of the parties and court order to give the parties an opportunity to reach	Held in abeyance; should be withdrawn.

				to the U.S. Dep't of Defense	agreement on substituting contention interrogatories for the pending Rule 30(b)(6) depositions.	
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Plaintiffs' Separate Statement:

Since discovery commenced, Plaintiffs have gone to great lengths to collaborate with Defendants to tailor and narrow Plaintiffs' discovery requests, thereby avoiding the need for the Court to issue any orders on any specific discovery requests. The meet and confer process is working. Most recently, through the ordinary meet and confer process, and upon the recommendations of both this Court and Defendants to streamline discovery, Plaintiffs agreed to hold in abeyance all pending discovery (the propounded RFAs and depositions noticed under Rule 30(b)(6)). In lieu thereof, Plaintiffs agreed to file motions *in limine* seeking judicial notice of publicly available government documents referenced in the RFAs and to propound limited contention interrogatories to discover the bases for Defendants' positions on certain disputed material facts, such as their denials and affirmative defenses in their Answer. Both of those alternate pathways were suggested by Defendants. The parties intend to meet and confer about substituting contention interrogatories for the pending Rule 30(b)(6) depositions on Monday, July 16, 2018.

Defendants' positions on discovery have continually evolved. Where they agreed to participate in discovery and did not object during 2017 and early 2018, in the past several months, and for the first time, they began objecting to all discovery, including expert discovery. It is Plaintiffs' position that Defendants have waived those general objections through their prior participation on which Plaintiffs relied.

a. Depositions of Plaintiffs

As agreed at the May Status Conference, to the extent Defendants wish to depose any Plaintiffs, those depositions will be during their summer vacations (June-August). Based on that agreement, the parties reached a scheduling agreement on May 11 that the Youth Plaintiffs would make themselves available for their depositions in Eugene during the following 3 weeks: June 3-9; July 15-21; and August 5-11. Plaintiffs' counsel made it clear that some Plaintiffs have limited availability and may only be available during one of these weeks. Defendants have now reneged on their agreement, not taking depositions of Plaintiffs in June and July while Defendants supposedly "pursue[] the options set forth in the Ninth Circuit's opinion denying mandamus." On June 8, Plaintiffs wrote Defendants on this issue, and Defendants responded on June 18.

Defendants are waiving their right to take depositions of the Youth Plaintiffs. As this Court stated at the June 6 Status Conference: "you are opting not to take [Plaintiffs'] deposition[s] because of your position on discovery ... But you are going to forfeit your right to take the deposition of the plaintiffs as a result if you are not right in your strategy." If Defendants notice the depositions of one or more of the 21 Youth Plaintiffs when they are no longer available during their summer vacations, then Plaintiffs will move for a protective order.

b. Service of Expert Reports

Effective April 13, 2018, Plaintiffs served all of their expert witness reports (17 reports), except for: (a) the expert witness report of James Gustave Speth, and (b) exhibits to two expert reports. After entry of the Stipulated Protective Order, Plaintiffs promptly served the exhibits to the two expert reports. As research on the issues presented by this litigation is constantly being

conducted and published, each of these experts reserved the right to amend their reports to the extent other evidence, data, or information becomes available.

On July 12, Defendants identified their experts. Defendants improperly designated their list of expert witnesses as confidential, subject to the Stipulated Protective Order. ECF No. 221. Defendants never met and conferred on the need to have a letter identifying their experts subject to the Protective Order. It will substantially impede Plaintiffs' ability to conduct research on these experts and prepare for deposition if they cannot share the identities of Defendants' experts and their proposed areas of testimony with others outside of the Protective Order. Plaintiffs will confer with Defendants on lifting the confidentiality designation on July 16 and, if needed, move the Court to remove the confidentiality designation as to the identities of Defendants' experts and their proposed areas of testimony on Tuesday during our Status Conference. Plaintiffs cannot suffer any further delay in preparing for depositions of those expert witnesses. Further, the July 12 deadline was for Defendants to identify their *testifying* experts, not their *consulting, non-testifying* experts. Indeed, Plaintiffs do not ordinarily have a right to depose consulting experts under Federal Rule of Civil Procedure 26(b)(4)(D)(ii). Defendants should have one opportunity during the status conference on July 17 to identify these experts are disclosed as *testifying* experts or waive their right to call *testifying* experts. Defendants cannot maintain confidentiality around these experts and their opinions by giving them a dual designation as both consulting and *testifying*. Defendants provide no rationale for protecting as confidential the identity of their experts, and the Stipulated Protective Order was never intended for that purpose.

After waiting over a year for Defendants to arrange for access to historical documents stored at NARA facilities, Plaintiffs began their review on June 29, 2018. Defendants' delay in allowing Plaintiffs' access to these historical documents stored at NARA facilities has prevented

the completion of James Gustav Speth's expert report. Plaintiffs intend to review more records from that facility to aid in the completion of the Speth report.

c. Depositions of Plaintiffs' Experts

Plaintiffs have been attempting to obtain dates for depositions of each of their experts. Plaintiffs' experts are working *pro bono* and have extremely busy schedules, including extended travel planned during the months of July, August, and September, so their depositions need to be scheduled well in advance. Plaintiffs have provided the dates of availability for deposition of Plaintiffs' experts. Defendants have yet to offer to schedule any expert depositions. Plaintiffs' position is that, if Defendants continue to delay in scheduling depositions of Plaintiffs' experts and ignore those experts' limited availability to sit for deposition in July, August, and September, Defendants' right to take such depositions should be waived.

d. Information from Plaintiffs' Experts

During the parties' meet and confer session on April 11, counsel for Defendants stated they would review Plaintiffs' expert reports, determine what, if any, additional information Defendants needed from Plaintiffs' experts based on that review, and identify such information for Plaintiffs by updating a spreadsheet Defendants had prepared regarding the expert reports Plaintiffs served on Defendants in July 2017. At the April 11 meet and confer, counsel for Defendants said they would send the updated spreadsheet to Plaintiffs the following week. In connection with the May Status Conference, Plaintiffs again requested the spreadsheet identifying information Defendants believe is missing from Plaintiffs' expert reports. On May 21, Defendants stated the list would be provided "as soon as practicable on a rolling basis."

On June 8, 2018, Plaintiffs wrote Defendants and "again request[ed] the spreadsheet identifying information Defendants believe is missing from Plaintiffs' expert reports. . . . The

expert reports were served almost two months ago, yet Defendants have not provided any information. When can we expect any version of the spreadsheet?” Defendants’ June 18 letter included only a passing reference to this issue in the context of expert depositions stating: “We will communicate with you separately once we have identified the additional information . . . we need to complete our preparatory review of Plaintiffs’ expert reports.” The expert reports were served over three months ago, and Defendants have yet to provide any feedback on this issue. Due to Defendants’ delay and the schedules of Plaintiffs’ experts, it will be impracticable for Plaintiffs to provide this information before August 13 when Defendants’ expert reports are due.

Defendants’ Separate Statement:

a. Pending discovery requests

Plaintiffs served requests for admission and Rule 30(b)(6) deposition notices on the Departments of Energy, Agriculture, Defense, Commerce, Interior, and Transportation. The discovery requests propounded on the Departments of Interior, Agriculture, and Energy were the subject of Defendants’ June 4, 2018, motion for protective order. ECF No. 217. Before Plaintiffs’ response to that June 4, 2018, motion for protective order was due, Plaintiffs moved to suspend briefing of Defendants’ June 4 motion for protective order—and hold Defendants’ responses to Plaintiffs’ requests for admission and Rule 30(b)(6) deposition topics in abeyance—pending resolution of Plaintiffs’ motion for judicial notice of certain government records and to give the parties the opportunity to reach agreement on substituting contention interrogatories for the pending Rule 30(b)(6) depositions. *See* ECF No. 247. This Court granted the Plaintiffs’ unopposed motion. ECF No. 249. In addition to Plaintiffs’ forthcoming written discovery requests, Defendants intend to serve formal written discovery and/or to meet and confer with

Plaintiffs on whether informal discovery requests would be the most efficient way of securing the materials Defendants believe they need to present their defense.

In addition, Plaintiffs began their review of records at the National Archives and Records Administration in College Park, Maryland, on June 29, 2018. Plaintiffs intend to review more records from that facility and the parties are conferring regarding mutually convenient dates for that review. Plaintiffs now assert that the reason they have not served Mr. Speth's report is because they have not completed their review of records at the National Archives. Defendants note that Mr. Speth submitted a declaration in support of Plaintiffs' opposition to Defendants' motion for summary judgment. ECF No. 298. Up until this joint status report, Defendants understood that Mr. Speth was awaiting the authentication of government records that Plaintiffs identified in their now-suspended requests for admission. Defendants will not be able to assess the prejudice that the delay in serving Mr. Speth's report poses until the report is served and reviewed. If and when that report is served, Defendants will meet and confer with Plaintiffs about how any resulting prejudice might be reasonably abated and, if necessary, seek relief from this Court.

b. Expert discovery

Pursuant to this Court's April 12, 2018, minute order (ECF No. 192), Defendants served Plaintiffs on July 12, 2018, with their initial identification of the experts whom they may call to testify at trial. Plaintiffs' contention that Defendants' improperly designated their disclosure as "confidential material" under the protective order is premature and lacks merit. If Plaintiffs need to enlist the aid of third parties to research the disclosed experts, Plaintiffs need only have those third parties agree to the terms of the protective order. Moreover, if Plaintiffs have a viable justification for sharing Defendants' disclosure of what are currently consulting experts to third

parties outside the protective order, the protective order itself provides a mechanism for vindication of Plaintiffs' argument; a joint status report is not a proper vehicle for re-designating documents under the protective order.

Plaintiffs have shared dates that some of their experts are available for deposition with Defendants. Defendants are reviewing those dates and the parties intend to meet and confer about the scheduling of expert depositions on Monday, July 16, 2018. Plaintiffs' supposition that Defendants will waive in the future the ability to take depositions of Plaintiffs' experts if "Defendants continue to delay in scheduling depositions of Plaintiffs' experts and ignore those experts' limited availability to sit for deposition over the next three and a half months" is erroneous for three reasons. First, this Court has not established a date for the close of discovery or a deadline for completing depositions. Second, absent a stay of discovery and/or trial, this case will already be in trial in three-and-a-half months in any event. Third, Plaintiffs' waiver invocation projects an argument based on Defendants' future conduct over the next sixteen weeks.

Similarly, Plaintiffs' assertion of that Defendants have waived their ability to seek information from Plaintiffs' experts relating to their reports is unfounded and premature. Reviewing seventeen expert reports and locating qualified experts to review and formulate at least initial opinions on those reports within the span of about twelve weeks is no small undertaking. As Defendants continue to digest the dense subject matter of Plaintiffs' seventeen reports and identify information that Defendants believe is necessary to understand the reports, they will contact Plaintiffs. Plaintiffs can then evaluate the scope of Defendants' requests and, if they feel it necessary, object on grounds of burdensomeness or waiver. Defendants can then decide whether to move this Court to order Plaintiffs to provide this information, in which

instance Plaintiffs can proffer evidence of waiver. The notion that waiver should be established three-and-a-half months before trial and through a joint status report is folly.

c. Other Depositions

By letter dated May 22, 2018, Defendants informed Plaintiffs that they would not take depositions of certain named Plaintiffs in this lawsuit during the week of June 4, 2018, because (1) discovery is improper and (2) Defendants' counsel were still reviewing Plaintiffs expert reports and were not in a position to take effective depositions during that week. Plaintiffs proposed that Defendants take depositions of other certain named Plaintiffs during the week of July 16. Defendants are not prepared to take depositions during the week of July 16 for the same reasons that were given for depositions during the week of June 4. Moreover, Defendants are also unable to take depositions during the week of July 16 because of the in-court conferences and hearings taking place July 16, 17, and 18.

Plaintiffs' preemptive invocation that Defendants waived the ability to depose named Plaintiffs' is, again, misplaced. Defendants' categorical objection to discovery is not the only reason why it has not noticed depositions of named Plaintiffs thus far. To hold now—in the context of a joint status report and before any depositions have been noticed—that Defendants waived the ability to depose Plaintiffs in the three-and-a-half months that remain between now and the commencement of trial is unfounded. Plaintiffs offer no explanation as to why their clients can testify (and be cross-examined) during trial outside the summer months, but cannot be deposed outside the summer months. Defendants discern no reasonable explanation for that inconsistency.

6. Further Status Conferences

The parties propose that a further in-person status conference be held with this Court in Eugene, Oregon on Thursday, August 16, 2018.

Respectfully submitted July 16, 2018

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Attorney for Defendants

CERTIFICATE OF SERVICE

I, Marissa A. Piropato, certify that I served the foregoing Joint Status Report on the Court and all counsel of record through the ECF/Pacer System.

Date: July 16, 2018

By /s/ Marissa A. Piropato

MARISSA A. PIROPATO
Senior Trial Attorney