IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WIKIMEDIA FOUNDATION, *Plaintiff*, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE, *et al.*, *Defendants*.	No. 1:15-cv-00662-TSE

JOINT MOTION TO SET BRIEFING SCHEDULE FOR MOTIONS TO COMPEL

The parties hereby jointly move the Court to adopt the briefing schedule set out below for the orderly resolution of the parties' forthcoming motions to compel certain discovery responses and deposition testimony, so that they may expeditiously complete jurisdictional discovery in this case. The parties anticipate completing jurisdictional discovery on or before the April 17, 2018 deadline, with the limited exception of outstanding discovery disputes that require the Court's intervention to resolve, including objections by the Government based on the state secrets privilege. As required by Supreme Court precedent and current Executive Branch practice, the state secrets privilege may be invoked only by the most senior Government officials after their personal consideration of the privilege claim. The purpose of this request, therefore, is (a) to establish an expeditious schedule for briefing the parties' motions to compel, while (b) allowing the Government time within that schedule to consider, and, if so decided, to perfect an invocation of the state secrets privilege, and (c) allowing Plaintiff sufficient time to meet the Government's anticipated privilege assertion.

As the Court is aware, this case concerns the Wikimedia Foundation's challenge to the legality of National Security Agency ("NSA") "Upstream" surveillance. The parties have been

diligently conducting jurisdictional discovery pursuant to the Court's orders of October 3, 2017, and March 15, 2018 (ECF Nos. 117, 123), and are working toward the completion of all jurisdictional discovery by the Court's April 17, 2018, deadline, with the limited exception of the discovery issues implicated by the forthcoming motions to compel. To that end the parties have agreed to or are considering various modifications to the usual rules of discovery, in order to streamline the proceedings, and have continued to meet and confer on a daily or near-daily basis to resolve or narrow their discovery disputes. Recognizing that some disputes will require the Court's resolution, the parties have agreed to procedures that will expedite that process as well. For example, the parties have agreed to accelerated service of objections to each other's final requests for written jurisdictional discovery, so that each side may file a single consolidated motion to compel addressing all objections at once, and to present their disputes concerning intended Rule 30(b)(6) depositions through the vehicles of their motions to compel, rather than filing separate, and highly duplicative, motions for protective orders.

The parties propose to file their respective motions to compel with the Court by Monday, **March 26, 2018**. As noted above, Plaintiff anticipates moving to compel Defendants to respond to requests that Defendants assert call for the disclosure of classified information. For that reason, Plaintiff's motion will require Defendants to consider invocation of the state secrets privilege in response to at least portions of Plaintiff's motion to compel.

Invocation of the state secrets privilege requires "a formal claim of privilege, lodged by the head of the department which has control over the matter," "made only 'after actual personal consideration by that officer.'" *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953)). "*Reynolds* emphasized that the state secrets privilege 'is not to be lightly invoked,' and the foregoing constraints on its assertion

give practical effect to that principle." *Id.* (quoting *Reynolds*, 345 U.S. at 7). In the instant case, responsibility for determining whether to invoke the state secrets privilege in opposition to Plaintiff's anticipated motion to compel will fall on the Director of National Intelligence ("DNI"), as head of the Intelligence Community for the United States Government. High-ranking NSA officials will need to give personal consideration to the matter as well, as an assertion of privilege over matters involving NSA intelligence-gathering activities will require a detailed, classified declaration by a senior NSA official to support the DNI's privilege assertion.

Furthermore, Department of Justice procedures require personal approval of the Attorney General in order to defend an invocation of the state secrets privilege, to ensure that assertion of the privilege is necessary to prevent disclosures of information that could cause significant harm to national security, that the privilege is being asserted only to the extent necessary to protect against that risk, and that the privilege is not being invoked for an improper purpose. *See* Ex. A, Mem. from Attorney Gen. to Heads of Executive Dep'ts and Agencies on Policies and Procedures Governing Invocation of the States Secrets Privilege (Sept. 23, 2009) ("Sept. 23, 2009 Memorandum") at 1, ¶ 4(A). That process, in turn, requires review at several levels within the Department of Justice, including the Assistant Attorney General of the Division responsible for the litigation at issue, *id.* ¶ 2(B), an internal "State Secrets Review Committee," *id.*, and the Associate and Deputy Attorneys General, *id.* ¶ 3 & n.2. These levels of review are intended to protect the public interest and the rights of litigants by ensuring a considered decision.

The necessary review and consideration of a contemplated assertion of the state secrets privilege by multiple Cabinet-level officials, and others, and the preparation of the necessary supporting documents should a decision be reached to invoke the privilege, cannot practicably be completed within the time provided by the local rules for submitting a routine opposition to a

motion to compel. That remains the case here even though Defendants, to expedite matters, have already begun to lay the foundation for a potential privilege claim over subjects on which they anticipate Plaintiff may seek to compel disclosures of classified information. Accordingly, the parties propose to file their oppositions to the motions to compel by **April 27, 2018**, to allow the Government sufficient time to complete consideration of, and, if approved, a formal invocation of the state secrets privilege.

Because Plaintiff anticipates that Defendants' opposition will defend their anticipated invocation of the state secrets privilege with declarations and extensive legal arguments that have not yet been put forward in the discovery process, the parties propose to file their replies three weeks later, by **May 18, 2018**.

For these reasons, the parties submit that the approach and schedule they propose is reasonable and expeditious, and they respectfully request that the Court grant it.[1]

[1] The parties also ask to be relieved of the requirements of District of Maryland Local Rule 104, which requires, *inter alia*, exchange of motions to compel and responsive briefing among the parties—and additional conferral thereon—before such briefing may be filed with the Court. *See* L.R. 104.7(a) and (b). Local Rule 104 also requires a memorandum submitted in support of a motion to compel to set out "[each] discovery request [to which the motion is directed], the response thereto, and the asserted basis for the insufficiency of the response." L.R. 104.7(a). The parties submit that, in the instant case, proceeding in the manner contemplated by Local Rule 104.7 would introduce needless inefficiency, delay the Court's receipt of the parties' submissions, and present the issues for decision in an unnecessarily fragmented way that would complicate matters for the parties and the Court alike.

Dated: March 22, 2018

Respectfully submitted,

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