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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf
of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the
United States; *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
RECONSIDER ORDER OF OCTOBER 19,
2017

NOTED ON MOTION
CALENDAR: NOVEMBER 14, 2017

PLAINTIFFS' OPPOSITION TO RECONSIDERATION
MOTION
(No. 2:17-cv-00094-RAJ)

137640145.1

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PLAINTIFFS’ OPPOSITION TO RECONSIDERATION
MOTION - ii
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I. INTRODUCTION

Reconsideration of this Court's order compelling disclosure of identifying information of class members, including their names and corresponding registration numbers, is not warranted. Defendants have not met the standard outlined in Local Rule 7(h) because they do not point to any new facts, intervening case law, or manifest errors. Rather, Defendants simply disagree with the Court's conclusions, which is not a proper basis for reconsideration. Contrary to Defendants' assertions, this Court accorded due consideration to the McCament Declaration and applied the correct legal standard on the law enforcement privilege, which requires specifying with particularity the protected information and why it falls within the scope of the privilege and calls for balancing the interests of disclosure against the interests of withholding. The Court's balancing was not erroneous because Plaintiffs established that they need a list of the members of the two certified nationwide classes to litigate their claims, identify witnesses, and properly represent the class members. Finally, the Court properly considered the Stipulated Protective Order when balancing the parties' respective interests. Courts routinely consider existing safeguards, such as a protective order, when weighing the risks of disclosure.

II. BACKGROUND

On June 21, 2017, the Court granted Plaintiffs' motion to certify two classes: a Naturalization Class and an Adjustment Class. Dkt. # 69. Defendants moved to reconsider the class certification order, which the Court denied. Dkt. # 85. On August 1, 2017, Plaintiffs served Defendants with discovery requests asking for, among other things, documents sufficient to identify the class members, including a list of class members, and documents relating to why Named Plaintiffs' applications were subject to CARRP. Declaration of David A. Perez in Support of Plaintiffs' Motion to Compel (Dkt. # 92) ("Perez Decl."), Ex. A at 32, 34-39, 48-51.¹

¹ Exhibit A to the Perez Declaration is Defendants' responses and objections to Plaintiffs' discovery requests, which also includes the requests themselves. Defendants served these responses on September 5, 2017.

1 Defendants objected to these discovery requests, invoking broad and largely unspecified
 2 privilege concerns. *Id.* Defendants have since clarified that the privilege they were invoking is
 3 the law enforcement privilege. After exchanging letters and conducting a meet and confer, the
 4 parties were at an impasse on this issue and several others. Accordingly, Plaintiffs filed a motion
 5 to compel (Dkt. # 91), which Defendants opposed (Dkt. # 94). After full briefing, the Court
 6 granted in part, and denied in part, Plaintiffs’ motion to compel. Dkt. # 98.

7 With respect to discovery of “information to allow Plaintiffs to identify potential class
 8 members and why Named Plaintiffs were subjected to CARRP,” the Court granted Plaintiffs’
 9 motion to compel. Dkt. # 98 at 2-4. The Court’s order specifically addressed two arguments
 10 Defendants advanced for resisting this discovery: that compiling the list would be too
 11 burdensome and that the list was subject to the law enforcement privilege. The Court rejected
 12 the burden arguments, pointing out that “the Government concedes it already compiles potential
 13 class members into searchable databases,” and “can produce it without incurring such a high
 14 expense.” *Id.* at 3. As for the law enforcement privilege, the Court applied the relevant legal
 15 standard and concluded that Defendants’ factual assertions were too vague and speculative. *Id.*
 16 at 3-4. The Court also reasoned that even if the Defendants’ contentions were sufficient,
 17 application of the privilege is not automatic, and after balancing the parties’ respective interests,
 18 the Court found “that the balance weigh[s] in favor of disclosure.” *Id.* at 4.

19 Defendants have moved to reconsider only this portion of the Court’s order, and only as it
 20 relates to their assertion of the law enforcement privilege over identification of class members.²

21 III. ARGUMENT

22 A. Legal Standard for Reconsideration Motions

23 Local Rule 7(h) emphasizes that “[m]otions for reconsideration are disfavored.” The
 24 Court “will ordinarily deny such motions” unless the moving party demonstrates “manifest

25 _____
 26 ² Defendants did not move to reconsider any other portion of the Court’s order, including the other aspect
 of Part III.A concerning the reasons why Named Plaintiffs were subjected to CARRP.

1 error” in the Court’s prior ruling or “new facts or legal authority which could not have been
 2 brought to its attention earlier with reasonable diligence.” LCR 7(h). When a motion for
 3 reconsideration “merely rehashes the same arguments made and rejected by the Court,” it “may
 4 be denied for this reason alone.” *Ledcor Indus. (USA) Inc. v. Va. Sur. Co., Inc.*, No. 09-CV-
 5 01807 RSM, 2012 WL 223904, at *1 (W.D. Wash. Jan. 25, 2012); *see also Anderson v.*
 6 *Domino’s Pizza, Inc.*, 11-CV-902 RBL, 2012 WL 2891804, at *1 (W.D. Wash. July 16, 2012)
 7 (noting reconsideration is an “extraordinary remedy” that “should not be granted . . . unless the
 8 district court is presented with newly discovered evidence, committed clear error, or if there is an
 9 intervening change in the controlling law”) (quotations omitted).

10 **B. Reconsideration is Not Warranted.**

11 Defendants fail to meet the standard for reconsideration under Local Rule 7(h). Rather
 12 than identifying manifest errors, new facts, or intervening changes in law, the motion restates the
 13 same arguments Defendants already briefed. Similarly, Defendants previously moved to
 14 reconsider the Court’s order on class certification. In denying that motion, the Court made an
 15 observation that applies equally here: “Defendants couch their motion in terms of the Court’s
 16 manifest errors but in reality the motion argues that the Court should revisit its conclusions.
 17 Parties cannot use motions for reconsideration to simply obtain a second bite at the apple, and
 18 this is what Defendants appear to be doing with this motion.” Dkt. 85 at 2.

19 **1. The Court properly considered the McCament Declaration.**

20 Defendants erroneously assert that the Court “dismissed the sworn statement of the head
 21 of USCIS,” Mr. McCament. Dkt. # 99 at 2.³ At the outset, this argument is notable for what it
 22 does not include: any *new* facts. *See Henderson v. Metro. Prop. & Cas. Ins. Co.*, C09-1723 RAJ,
 23 2010 WL 3937482, at *2 (W.D. Wash. Oct. 5, 2010) (denying reconsideration where litigant
 24 failed to “point[] to new facts that justify the court reconsidering its order”). Instead, Defendants

25 _____
 26 ³ Defendants submitted two separate declarations from Mr. McCament in support of their opposition brief.
 The one that addresses the law enforcement privilege is Dkt. # 94-5.

1 simply assert that the Court failed to analyze or properly consider the evidence already
2 presented. That is not sufficient to justify reconsideration.

3 Moreover, Plaintiffs' briefing and the Court's order each show that the McCament
4 Declaration was properly considered. Plaintiffs' reply brief highlighted several problems with
5 the McCament Declaration. First, the two certified classes are limited to individuals whose
6 applications have been languishing for at least six months; practically speaking, those individuals
7 are *already* on notice that their applications have been subject to additional scrutiny. Dkt. # 95 at
8 3-4. Second, courts previously have rejected similar concerns about disclosing the names of
9 individuals subject to the No Fly List. *See Latif v. Holder*, 28 F. Supp. 3d 1134, 1162 (D. Or.
10 2014). Third, Defendants *routinely* disclose this information in other litigation. Dkt. # 95 at 4.
11 Each of these arguments casts doubt on the McCament Declaration.

12 For its part, the Court's order makes clear that the Court expressly considered
13 Defendants' assertions "that releasing the identities of potential class members could lead
14 individuals to potentially alter their behavior, conceal evidence of wrongdoing, or attempt to
15 influence others in a way that could affect national security interests." Dkt. # 98 at 3 (citing the
16 McCament Declaration). After considering it, however, the Court concluded that these
17 assertions were too speculative and hypothetical "to claim privilege over basic spreadsheets
18 identifying who is subject to CARRP." *Id.* at 4. In other words, the Court disagreed with
19 Defendants' factual and legal arguments. Where a court has considered the factual evidence
20 presented, a litigant's disagreement with that factual analysis is not a basis for reconsideration.
21 *See Minhnga Nguyen v. Boeing Co.*, C15-793RAJ, 2017 WL 2834273, at *2 (W.D. Wash. June
22 30, 2017), *motion for relief from judgment denied sub nom. Nguyen v. Boeing Co.*, C15-793
23 RAJ, 2017 WL 4167875 (W.D. Wash. Sept. 19, 2017) (finding plaintiff did not meet her Rule
24 7(h)(1) burden for reconsideration because she did not present facts or legal authority that were
25 not previously available and instead reiterated previously pled facts). The Court similarly found
26 that the McCament Declaration's "vague, brief explanation" (Dkt. # 98 at 3) failed to meet

1 Defendants' high legal burden of "specify[ing] with particularity the information for which the
2 protection is sought, and explain why the information falls within the scope of the privilege."
3 *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 687 (S.D. Cal. 1996). Nothing in
4 Defendants' motion for reconsideration supports reversing that legal conclusion.

5 The Court also was correct to conclude that Defendants did not present "competent
6 evidence" to support invocation of the privilege. *See* Dkt. # 99 at 3; Dkt. # 98 at 3-4.
7 Defendants appear to be arguing that so long as they submit a declaration containing their view
8 for why the information should not be disclosed, the privilege automatically adheres. But that is
9 not the law. As the Court pointed out, even if the McCament Declaration was "sufficient, the
10 privilege is not automatic; the Court must balance the need for Plaintiffs to obtain this
11 information against the Government's reasons for withholding." Dkt. # 98 at 4; *see also In re*
12 *Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) ("[T]he law enforcement investigatory
13 privilege is qualified. The public interest in nondisclosure must be balanced against the need of a
14 particular litigant for access to the privileged information."). Notably, "a district court has
15 considerable leeway" in striking that balance. *Id.* Here, after Plaintiffs and Defendants each laid
16 out their needs in their respective briefs, the Court came down in favor of disclosure.
17 Defendants' disagreement with that conclusion does not demonstrate manifest error.

18 Because this argument does not demonstrate that the Court committed any legal errors, or
19 provide any new facts, it is not a basis for reconsideration.

20 **2. Plaintiffs demonstrated a need for this discovery, and the Court properly**
21 **balanced the parties' interests.**

22 Defendants similarly are mistaken in their assertions that the Court did not require
23 Plaintiffs to demonstrate a "necessity" for this discovery, and failed to balance the parties' needs.
24 Neither assertion provides a basis for reconsideration.

25 First, Plaintiffs did show a need for this information. *See* Dkt. # 91 at 4-6; Dkt. # 95 at 1-
26 2. Specifically, Plaintiffs explained that each class member is a potential witness or source of

1 information regarding, *inter alia*, unwarranted denials and other impacts of CARRP and
2 successor extreme vetting programs. Such testimony will be critical to establishing Plaintiffs'
3 assertions that CARRP is unlawful and extra-statutory by highlighting those individuals who are
4 plainly eligible for the benefits for which they are applying, and yet still have not been approved.
5 Likewise, such information bears directly upon Plaintiffs' claims under procedural due process
6 (*e.g.*, that class members had a right to notice and a meaningful explanation for their
7 classification) and equal protection (*e.g.*, demonstrating discrimination and disparate treatment
8 on the basis of religion). Moreover, class counsel now represent such class members and are
9 entitled to know who they are. *See Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1207
10 n.28 (11th Cir. 1985) ("Class counsel represents all class members as soon as a class is
11 certified."). Indeed, class counsel must be able to respond to inquiries from potential class
12 members seeking assistance.

13 As outlined above, the Court explicitly "balance[d] the need for Plaintiffs to obtain this
14 information against the Government's reasons for withholding." Dkt. # 98 at 4. After doing so,
15 the Court considered the parties' protective order (which will protect particularly sensitive
16 information) and concluded "the balance weigh[s] in favor of disclosure." *Id.* Given the
17 importance of this information to Plaintiffs' case, and the considerable leeway afforded to district
18 courts in striking this balance, that conclusion was not erroneous. *See Hemstreet v. Duncan*, CV-
19 07-732-ST, 2007 WL 4287602, at *2 (D. Or. Dec. 4, 2007) (privilege is overcome "[w]hen the
20 records are 'both relevant and essential' to the presentation of the case on the merits") (citation
21 omitted). Defendants may disagree with the Court's conclusion, but the assertion that "the Court
22 failed to balance [the parties'] litigation needs," Dkt. # 99 at 6, is just wrong.

23 Second, the cases Defendants cite for its "necessity" argument have nothing to do with
24 the law enforcement privilege. For instance, they cite *United States v. Valenzuela-Bernal*, 458
25 U.S. 858, 870 (1982), for the notion "that evidence must be 'essential,' or meet an equally high
26 threshold, to justify piercing the privilege." Dkt. # 99 at 4. But *Valenzuela-Bernal* is not about

1 the law enforcement privilege. The case concerned a criminal defendant's right to confront a
2 witness under the Sixth Amendment, and when denying access to a witness becomes so material
3 to a defense that it violates the right to a fair trial. 458 F.3d at 870.

4 Defendants' citation to *Roviaro v. United States*, 353 U.S. 53 (1957) and other cases that
5 deal with disclosing the identities of *informants* are similarly inapposite because an informant's
6 privilege is categorically different from the law enforcement privilege. *See In re Perez*, 749 F.3d
7 849, 855-56 (9th Cir. 2014) (explaining that the informant's "privilege protects 'the identity of
8 persons who furnish information of violations of law to officers charged with enforcement of that
9 law' from 'those who would have cause to resent the communication'" (citing *Roviaro*, 353
10 U.S. at 59-60)). Disclosure of a list of class members is not the same as disclosure of an
11 informant in a criminal case. It was not error for the Court to apply the correct legal standard,
12 rather than the one governing a different privilege. Nevertheless, to the extent the informant's
13 privilege provides guidance here, the key is that it, too, is qualified: "the privilege will give way
14 [w]here the disclosure of an informer's identity, or of the contents of his communication, is
15 relevant and helpful to the defense of an accused, or is essential to a fair determination of a
16 cause." *Id.* (quotation omitted).

17 And finally, Defendants misapply the discovery rules by trying to shift the burden onto
18 the party seeking discovery. Though there is a balancing of needs, the party resisting discovery
19 at all times bears the burden of proving the privilege applies. *See In re Anthem, Inc. Data*
20 *Breach Litig.*, 236 F. Supp. 3d 150, 166 (D.D.C. 2017) ("The Government bears the burden of
21 proving the information for which the law enforcement privilege is claimed falls within the scope
22 of the privilege."); *Cable & Comput. Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650
23 (C.D. Cal. 1997) ("The party who resists discovery has the burden to show that discovery should
24 not be allowed, and has the burden of clarifying, explaining, and supporting its objections.").

25 In sum, Plaintiffs established why this information is essential their case, and in
26 concluding that disclosure was appropriate, the Court properly balanced the parties' interests.

1 **3. The Court properly considered the Stipulated Protective Order when**
2 **balancing the parties' litigation needs.**

3 Given that Defendants regularly released information about whether an individual falls
4 under CARRP in response to FOIA requests and in litigation without any protection, there is no
5 need to shield the identities of class members pursuant to a protective order. But, to the extent
6 any protection is needed, the Court appropriately noted that the protective order is sufficient to
7 protect any confidentiality interests. None of the cases cited by Defendants undermine the
8 appropriateness of the Court's consideration of the protective order in making this determination.

9 Two of the three cases Defendants cite involve litigation under the Freedom of
10 Information Act (FOIA): *Islamic Shura Council of Southern California v. F.B.I.*, 635 F.3d 1160,
11 1168 (9th Cir. 2011) and *Arieff v. U.S. Department of Navy*, 712 F.2d 1462 (D.C. Cir. 1983). In
12 both cases, the courts' reasoning was specific to the FOIA context where attorneys are retained
13 for the express purpose of obtaining information that may be released to the public at large; in
14 that context, it makes little sense, and would "strain" the attorney-client relationship, to permit
15 only the attorney to view "the very data he has been retained to acquire." *Islamic Shura Council*,
16 635 F.3d at 1168 (discussing *Arieff*, 712 F.2d at 1470). Neither case dealt with the discovery law
17 enforcement privilege, and neither case discussed how a protective order may be used to inform
18 a court's balancing of interests when applying that privilege.

19 Similarly, *In re City of New York*, 607 F.3d 923 (2d Cir. 2010) is also inapposite. In that
20 case, the Second Circuit concluded that an attorneys' eyes only protective order was inadequate
21 "in the circumstances of this case," in large part because there was reason to believe that
22 materials already disclosed on an "attorneys' eyes only" basis . . . were used as the source of a
23 newspaper article discussing the secret operations" at issue. *Id.* at 936. Here, there is no
24 suggestion that anything produced in this case has been or will be "leaked" in violation of the
25 parties' Stipulated Protective Order. And far from stating a categorical rule that protective
26 orders are always inadequate, the Second Circuit made clear that in other cases involving the law

1 enforcement privilege “the court is free to tailor the protective order to the circumstances
2 presented.” *Id.* at 949. In other words, after finding the protective order inadequate *in that case*,
3 the Second Circuit expressly stated that in other cases a protective order may be adequate.

4 This case is distinguishable from *In re City of New York* for several reasons. For starters,
5 Defendants already have shown that the government does not treat the identification of CARRP
6 cases or the reasons why individuals are subjected to CARRP as privileged. *See, e.g.*,
7 Declaration of Stacy Tolchin in Support of Plaintiffs’ Motion to Compel (Dkt. # 93), Exs. 1 and
8 2; Perez Decl. Ex. E at 276:15-17; *id.*, Ex. F; Declaration of Jay Gairson in Support of Motion to
9 Compel (Dkt. # 97), Exs. A, B, and C. Defendants now assert those disclosures were mistakes.
10 But the disclosures cast significant doubt on the Government’s contention that producing a class
11 list would so compromise national security that the list should not be disclosed. Additionally,
12 although the Second Circuit in *In re City of New York* had “no difficulty in concluding that
13 plaintiffs do not have a need, much less a compelling need” for the information sought, 607 F.3d
14 at 946, here, the Court has expressly found that the information is relevant to Plaintiffs’ case.
15 Dkt. # 98 at 3. Furthermore, in contrast to *In re City of New York*, where the plaintiffs argued
16 they were entitled to the documents “regardless of their showing of need,” 607 F.3d at 946, here
17 Plaintiffs explained at length why this information is both relevant and essential to litigating their
18 claims, *see* Dkt. # 91 at 4-6; Dkt. # 95 at 1-4.

19 Plenty of courts expressly and appropriately consider protective orders when balancing
20 parties’ interests under the law enforcement privilege. For instance, in *Floyd v. City of New*
21 *York*, the court explained that when “balancing the interests favoring and disfavoring disclosure”
22 the court “must consider the effect of a protective order restricting disclosure to the plaintiff and
23 the plaintiff’s attorney..... Such an order can mitigate many if not all of the oft-alleged injuries
24 to the police and to law enforcement.” 739 F. Supp. 2d 376, 381 (S.D.N.Y. 2010) (quotation
25 omitted). *See also In re Anthem, Inc. Data Breach Litig.*, 236 F. Supp. 3d at 167 (Despite law
26 enforcement privilege, “disclosure of these materials simply does not carry the risks the

1 Government anticipates. First and foremost, all the materials to be disclosed will be covered by
2 the protective order in the underlying litigation.”); *Ibrahim v. Dep’t of Homeland Sec.*, C 06-
3 00545 WHA, 2009 WL 5069133, at *15 (N.D. Cal. Dec. 17, 2009), *vacated and remanded on*
4 *other grounds by*, 669 F.3d 983 (9th Cir. 2012) (finding “law enforcement privilege balancing
5 test militates in favor of authorizing disclosure” given “safeguards, such as a protective order”);
6 *MacNamara v. City of New York*, 249 F.R.D. 70, 88-89 (S.D.N.Y. 2008) (ordering disclosure,
7 even after finding that law enforcement privilege applied, because “disclosure of the documents
8 subject to the restrictions of the Protective Orders will sufficiently mitigate the risks, if any, that
9 may arise from disclosure”); *Nat’l Cong. for Puerto Rican Rights ex rel. Perez v. City of New*
10 *York*, 194 F.R.D. 88, 96 (S.D.N.Y. 2000) (ordering disclosure, despite both law enforcement and
11 “official information” privileges, “in light of the carefully crafted protective order already in
12 place”).

13 The Court’s decision to consider the parties’ Stipulated Protective Order when balancing
14 the parties’ interests was not a “manifest error.”

15 IV. CONCLUSION

16 The Court should deny Defendants’ motion for reconsideration.
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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER ORDER OF OCTOBER 19, 2017 via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 14th day of November, 2017, at Seattle, Washington.

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