ECF No. 92

*** * * * * S E A L E D * * * * ***

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * * *

IN RE:	)	GJ 18-41
Grand Jury Subpoena 7049	)	
	)	
Interested Parties,	)	February 15, 2019
[redacted],	)	11:02 a.m.
UNITED STATES OF AMERICA.	)	Washington, D.C.

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TRANSCRIPT OF HEARING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES:

FOR THE MOVANT: BRIAN BOONE
Alston & Bird
90 Park Avenue
New York, NY 10016
(212) 210-9400

FOR THE GOVERNMENT: ZAINAB N. AHMAD
U.S. Department of Justice
Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036
(202) 804-7000

ALSO PRESENT: [redacted]

Court Reporter: Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter
Washington, D.C. 20001

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

PROCEEDINGS

THE DEPUTY: Matter before the Court, Grand Jury Matter No. 18-41, in regards to Grand Jury Subpoena No. 7049. Interested parties: [redacted] and the United States of America.

Counsel, please come forward and identify yourselves for the record.

MS. AHMAD: Good morning, Your Honor. Zainab Ahmad for the United States. And I am joined at counsel table by [redacted].

THE COURT: Yes. Good morning.

MR. BOONE: Good morning. Brian Boone from [redacted].

THE COURT: Yes. Good morning.

All right. So we're here on the Government's motion for an evidentiary hearing. So, Ms. Ahmad, let me just ask you some questions about this since, obviously, [redacted] opposes and feels that there is no need for an evidentiary hearing.

I really just want to find out from you, if I granted the motion for an evidentiary hearing, precisely what would we be inquiring about that couldn't be found out through alternative means?

I know that you are seeking -- you are making a request for an evidentiary hearing to have somebody with

knowledge of how the search was conducted within [redacted] to come forward and explain that because, based on my review of your papers, [redacted]. So I appreciate that that's made the Government somewhat uncomfortable as to whether this one really is fully responsive. And the questions that you have raised about [redacted] -- I understand that you have got those questions.

But to the extent that [redacted] keeps saying: If you ask us -- if you point out to us where you think there are gaps and issues, we have followed up; we have done some additional searches. And, voilà, in February we produced additional documents with respect to what happened; so we have been responsive.

So why -- do you feel that you have exhausted your ability to pose informal -- more informal follow-up questions to [redacted] and that's why you think we need to have the evidentiary hearing?

MS. AHMAD: Yes, Your Honor.

And we also believe that there are limitations on

[redacted] counsel's ability to fully represent what [redacted] has done. This is based on our experience posing questions to counsel and getting evolving answers on the searches [redacted] has conducted.

So, for example, in December of 2018, when we first became aware through [redacted]

Then, after further consultation with [redacted], counsel told us that their understanding had been incorrect and in fact [redacted], which is in the February production but [redacted]

So I assume good faith on counsel, in terms of engaging with their client and trying to address our questions, but it shows that the Government's questions being answered through this game of telephone are not being

answered necessarily reliably or correctly. So we are trying to cut through that and speak directly to [redacted].

There is, frankly, nothing in the record about the search that [redacted] has conducted. The only thing that we have are counsel's representations about that process. And the process that they represent occurred is somewhat ad hoc; and that might have been what was required, and that's fine.

But certainly, in that sort of procedure, where you're setting up [redacted] and you are having some people search [redacted] there is the potential for things to be missed; and we would like to be assured that things were not missed. The reasons we have that questions are yes, as you pointed out, the [redacted]

THE COURT: That you think might go beyond just [redacted] --

MS. AHMAD: I believe so, Your Honor.

THE COURT: -- that [redacted] alluded to.

MS. AHMAD: I believe so because [redacted]

* * * * * SEALED * * * * *

[redacted] might not be sufficient in order to answer and provide a comprehensive review of how documents responsive to the subpoena were identified, searched for, collected, and then produced. But your papers were a little bit coy about -- so who are you asking for?

* * * * * SEALED * * * * *

Do you have a person in mind that you think should be produced at the evidentiary hearing you are requesting to provide a more fulsome explanation of how the documents were found?

MS. AHMAD: We're somewhat limited in our ability to suggest such a person because we have such a minimal understanding of [redacted] search process. [redacted]. In order to design the search process, we would think a representative of that [redacted] would be the best situated person. [redacted], we're happy to accept that and see if, upon questioning, the person that turns out to be true or not.

Again, since some of the records produced were [redacted]. But, nonetheless, if that's the person [redacted] puts forward, we're happy to ask them sufficient questions to determine if they are the right person.

THE COURT: So the posture of your request for the evidentiary hearing is somewhat interesting because the Longshoremen case that the Government cited -- no, it's not

"Longshoremen" -- it's *The Brotherhood of Local Firemen versus Bangor Railroad*.

I mean, what happened in that case -- why do I think it was Longshoremen? I don't know. I guess it was *Locomotive Firemen*.

MS. AHMAD: Yes.

THE COURT: Okay. What happened in that case is firemen -- the railroad firemen hadn't returned to the job, they were held in contempt until they did, and then there was a judgment assessing that contempt. And the judge said I am going to embody all of the contempt fines that have accrued today in a judgment and, boom, here is my judgment; no hearing. Nothing.

So what the Circuit said is, before you take all of those accrued contempt fines and put them in a judgment, I need to give the contemnor a hearing because, in that case, the train firemen said it was too much. We were actually -- we had purged our contempt at a certain point, and we shouldn't be assessed any contempt fines; so the judgment is wrong. And before you entered that judgment, you should have given us an opportunity to contest the precise amount. And that's where the court -- the Circuit said you really need to have a hearing before you embody that into a judgment.

So, in some ways, we're sort of close to that but

we're not quite there yet. And I am not sure it makes a difference because, for right now, the contempt fines of $50,000 a day have been held in abeyance, sort of stopped as of, I think, February 8, until you could assess whether or not the full -- there was full subpoena compliance.

I think where you are at right now -- the Government is at a place where you are not persuaded that there was full compliance. And so one of the things -- although you don't say this in your motion papers, one of the things that I would expect for you to be asking me for at some point, if not today is: No longer hold those accrued sanctions in abeyance; lift them nun pro tunc back to February 8 because there wasn't full compliance and, thereby, put the contemnor who bears the burden of demonstrating full compliance in the position of the railroad firemen of them asking for the hearing to demonstrate the full compliance. We sort of have the request for an evidentiary hearing on the wrong party because you don't have the burden.

So maybe we ought to take this a little bit more in order -- just a suggestion -- of dealing with the Government's assessment, some unexplained gaps; absolutely no explanation, other than [redacted] -- nothing in counsel's papers, no declarations or sworn testimony support, to back

up the full compliance with the subpoena, and have a request to the Court to re-trigger accrual of sanctions, $50,000 a day, possibly make them nun pro tunc back to February 8th because they were only held in abeyance because the Government was testing the veracity of [redacted] compliance. And then we'll just continue the accrual until and when [redacted] asks for an evidentiary hearing to demonstrate its responsiveness. That's one option.

MS. AHMAD: Your Honor, we have no objection to that option.

I would ask now that the sanctions no longer be held in abeyance. I would ask that that ruling be nun pro tunc just until Tuesday because the time between February 8th and --

THE COURT: Tuesday, February 12th.

MS. AHMAD: Yes. The time between February 8th and February 12th the Government was reviewing whether or not it believed the response was sufficient, and so we are happy for the sanctions not to accrue for that time period. But now, in light of our view that [redacted] has not complied with the subpoena, we believe that sanctions should continue to accrue.

I would only add that --

THE COURT: Of course that -- I'm sorry to interrupt you.

But of course that leaves the Government in the position of just getting accrued sanctions as opposed to the evidentiary hearing you are requesting; but that may be where we're at.

MS. AHMAD: Yes. I understand that, Your Honor.

I understand that the *Brotherhood of Locomotive Firemen* case is not quite on all fours but, nonetheless, it did at least suggest that in order for a contempt to be purged there needs to be fact-finding and that a hearing is an appropriate way to conduct that fact-finding.

I think [redacted] has been somewhat coy here about whether they are actually seeking to be purged of contempt, and that has contributed to the strangeness of the procedure. But, in any event, our view assuming -- our view, regardless of what [redacted] position is on whether it should be purged of contempt, is that it should not because it has not complied with the subpoena. And we are happy to leave it at that and have sanctions continuing to accrue.

We were hoping to move the matter forward to a resolution, especially on [redacted] representation that they want to cooperate and propose the hearing as the best way to do that. But if we are not able to move forward any speedier, than we simply are not. But we certainly don't believe that [redacted] has complied. On that basis, there is

no reason for the sanctions not to continue to accrue.

THE COURT: Okay. Before I grant this modified request on the accrual of sanctions, I will hear from [redacted].

MS. AHMAD: Okay.

THE COURT: Thank you.

MR. BOONE: Thank you, Your Honor.

I guess I will start by saying that at this point my client is exasperated. It's frustrated. It's telling me: We don't know what else we can do. We have looked in any way that we know to look for records that would be responsive to the subpoena.

THE COURT: Let me make a suggest to you.

Why don't you have a declaration submitted that one says -- which your most recent declaration from the custodian of records doesn't say: All of these records -- the productions that have been made to date are fully responsive to the subpoena; the declaration doesn't say that. So you could start with a declaration that says that.

Two, you could have a declaration from somebody who is [redacted] that, in far more detail than your general description, explains the specific process and names and how the identification of locations of responsive records were found -- how and who was tasked to review those records and collect those records, compile

those records, Bates stamp the records, and then produce them -- that would be one start.

MR. BOONE: It would be. We have cited cases saying that we don't need to submit a declaration affirming what we have already said on the record a few times now and what we continue to say in our papers --

THE COURT: Why haven't any declarations said that the productions that have been made to date are fully responsive to the subpoena? That's sort of the most simple of requests.

MR. BOONE: Sure.

THE COURT: The one that was dated -- excuse me.

The one that was sent February 10th doesn't say that. There is another one that you submitted of the declaration of the custodian of records from February 12th, 2019; that doesn't say it. I mean --

MR. BOONE: Well, I guess I have a question as to whether the special counsel would be satisfied with a declaration saying: To the best of [redacted] knowledge it has turned over voluntarily any records responsive to the subpoena without that caveat "to the best of its knowledge" because that's all [redacted] could ever give. Right? And, again, the standard is not perfection; it is substantial compliance and reasonable effort, which [redacted] surely has undertaken at this time.

THE COURT: Okay. Let me tell you right now that I share the Government's skepticism about full compliance with the subpoena, so you can right now cut out all of the hyperbole about prosecutorial overreach, and all those other words, and be on your soap box about: We don't have to provide perfection. I'm sorry. [redacted]. Really? That's it?

MR. BOONE: [redacted] --

THE COURT: On its face?

What the Government calls with, I think, great reserve -- reserve as an unexplained gap in documents to me is far more glaring.

So you can get off your soap box. You should understand that I am viewing --

MR. BOONE: I don't mean to be on a soap box.

THE COURT: -- I am viewing the unexplained gap as a quite glaring gap -- as just one glaring gap that raises significant question about the compliance of [redacted] with the subpoena.

MR. BOONE: Understood.

Just to be clear, I didn't mean to get on a soap box. You asked why we hadn't provided declarations to the effect that special counsel had asked for. So I was

answering --

THE COURT: Well, it is clear to me --

MR. BOONE: I was answering honestly, that's all I was trying to say.

THE COURT: Well, it's clear to me, based on the unexplained gaps, why none of the declarations produced by the custodian of records for [redacted] to date has made any effort with any word choice you want to make that the production to date has been fully compliant with the subpoena because there are such significant and glaring unexplained gaps.

MR. BOONE: Well, I would disagree that there are significant and unexplained glaring gaps.

I guess I would hearken back to your mention of [redacted]

Ms. Ahmad, I think, also said --

THE COURT: Okay. What is your -- let's deal with the request right now to no longer hold the accrual of sanctions in abeyance and have them begin accruing as of

February 12th.

MR. BOONE: Well, I guess I would ask if the special counsel would be satisfied with the declaration from [redacted] saying that: To the best of its ability and knowledge, it has fully complied or voluntarily turned over documents responsive to the subpoena.

Of course, we're still pressing arguments at the Supreme Court that we don't want to give up that might explain some of the strangeness that she's talking about; that's really all that is. There is no game going on here. I think I have --

THE COURT: I mean, we could ask Ms. Ahmad if the addition of that "to the best of the knowledge" would be appropriate. But if you are --

MR. BOONE: Because that is where we are.

THE COURT: But I can tell you that I can anticipate the answer is a big fat no because the custodian of records [redacted]

So what he can say as to his knowledge may be totally insufficient.

MR. BOONE: Well, I wasn't even suggesting it would be him --

THE COURT: So I would expect that Ms. Ahmad would say no. We're -- just adding "to the best of my knowledge" to [redacted] good enough because we don't have a full enough understanding of the process that was used in order to think that that -- is it all reliable and indicating full compliance at all?

MR. BOONE: Well, I wasn't suggesting necessarily that the declaration would come from [redacted]. I was just --

THE COURT: [redacted]

MR. BOONE: I would have to confirm that with my client.

THE COURT: [redacted]

MR. BOONE: I don't know standing here today.

THE COURT: [redacted]

MR. BOONE: I don't. And I would also say, in responding to other subpoenas in the past that --

THE COURT: Have you talked to people --

MR. BOONE: -- we haven't -- I have never had to give that sort of detailed information about the process to collect documents, so you can understand why we wouldn't

think that you would need to give that kind of precision in a declaration or even in a brief.

But let's say that we have somebody else that was [redacted] and can speak to the process, and they would be willing to put in a declaration saying: To the best of my knowledge and our ability, we have voluntarily turned over records responsive to the subpoena -- I would ask Ms. Ahmad if she would be satisfied with that. I can't -- there is nothing else that [redacted] can do in its view.

If I can take a minute to talk about the [redacted], she mentioned it earlier. Part of the pitch from the special counsel is that [redacted], and so that raises some question about -- [redacted]

MR. BOONE: It's that.

But I would also say that, after we produced these documents, we had conversations with Ms. Ahmad and her team

and said: [redacted] wants to work in good faith to give you what you need voluntarily, maintaining our arguments before the Supreme Court. We're very careful in our language for that reason, only that reason.

She sent an email back one day saying: Well, we need you to [redacted]. We got on the call and I said: [redacted]. We want to work with you. She wouldn't. She just wouldn't. So that's where we are.

We are reaching out saying: Tell us what you think is missing, and we will look for it; but we haven't heard anything back.

THE COURT: All right. Well, based on that, and what I have said about what I review as sort of "glaring unexplained gaps," I am going to start the sanctions accruing again as of February 12.

And then, with respect to the pending motion in front of me for an evidentiary hearing, I think [redacted] position is --

MR. BOONE: It's unusual.

THE COURT: -- we've done what we can do --

MR. BOONE: We've never heard of something like that happening. They haven't cited a case suggesting the

kind of review or the kind of hearing that they're proposing here.

The case that you cited was the contemnor saying: Let me be heard, not the other way around. It's unusual.

I mean, I am a young man. I have been doing this for so-so long, but I have never heard of anything like this happening with a subpoena.

THE COURT: Well, not to compare ages, but I have never seen a declaration of a custodian of records that is so anemic. [redacted]

MR. BOONE: Understood, Your Honor.

THE COURT: All right. So let me hear from Ms. Ahmad.

One of her requests has already been granted about -- what I haven't decided yet is on whether or not there should be an evidentiary hearing in this somewhat peculiar circumstance where it's the contemnor's burden to have an evidentiary hearing -- you know, to demonstrate that compliance has been complete and full in order to avoid continuing sanctions. And [redacted] seems to want to rest on

its papers to date and assume additional accrual of sanctions rather than demonstrate that it has purged the contempt.

MS. AHMAD: Your Honor, again --

THE COURT: So if I, for example, set up an evidentiary hearing for [redacted] to demonstrate to me that it has purged its contempt and directed [redacted], how would I know the person they would bring would be the person on [redacted]? How do you know -- do I have the power for them to bring somebody [redacted]? Because it's their burden that they don't want to step up to the plate to carry -- do you see what I mean?

MS. AHMAD: I do, Your Honor. And again --

THE COURT: Maybe -- the contempt power is one where it's supposed to be coercive.

So, you know, [redacted] -- from the papers that you submitted a long time ago, [redacted]. But so...

MS. AHMAD: Your Honor, I think --

THE COURT: What would be your suggestion?

MS. AHMAD: So the difficulty here has been that [redacted] will not be straight as to whether or not it is

seeking to purge itself of contempt.

If [redacted] is not seeking to purge itself of contempt, has produced these documents to the Government out of the goodness of its heart but is happy to remain in contempt then, no, I don't think the Government can force an evidentiary hearing on the question of whether [redacted] has purged itself of contempt.

THE COURT: Bingo. That's how I see this.

MS. AHMAD: Right. But because, at our last status conference, it was [redacted] who asked that the sanctions be held in abeyance because they had produced everything, we understood that to mean that they were saying: We're no longer in contempt.

If they are now withdrawing that --

MR. BOONE: That is what I'm saying. That is what we're saying.

MS. AHMAD: So if [redacted] is saying that they want to be purged of contempt, then I actually think it is fine for the Government to request a hearing on their motion to be purged of contempt because the Government is the one that is saying there are factual issues that need to be resolved.

THE COURT: Or the Court can say: Based on what I have seen, there are material issues of fact in doubt and in dispute about [redacted] representation it is in full

compliance and, therefore, I am not going to purge [redacted] from contempt; and, therefore, [redacted] has to do more to show me that it should be purged from contempt.

Now, how [redacted] wishes to do that -- one easy way is to have an evidentiary hearing. Otherwise, [redacted] has the alternative of producing declarations that address some of the glaring unexplained gaps in documentation.

MS. AHMAD: Yes, Your Honor.

THE COURT: So, at this point, I am going to deny the Government's request for an evidentiary hearing.

And to the extent that [redacted] has requested that it be purged of contempt, that is also denied.

And I -- as I have already stated, I am going to resume the accrual of sanctions at $50,000 a day accruing as of Tuesday, February 12th, and then we'll see what happens.

Maybe the Government wants to -- it had intimated that it might want to accelerate some of the fines.

[redacted] may wish to consider what other information it can produce about the method of identifying locations for responsive records, collecting those, identifying those records, and so on, and how it can demonstrate that to -- fully demonstrate that it has fully complied; but I don't have either one of those requests in front of me right now.

All right. Is there anything further today,

Ms. Ahmad?

MS. AHMAD: No, Your Honor. Thank you.

THE COURT: Mr. Boone.

MR. BOONE: Yes. Just briefly.

Understanding that there is not going to be an evidentiary hearing in the short-term, I would ask: What else, in your view, does [redacted] need to do to purge itself of contempt? I really want to know. [redacted] wants to do that.

I mean, you have got to understand the position. We're seeking certiori. We are trying to preserve those arguments for obvious reasons. That's the only reason that we have said what we have said in the papers, to try to preserve those arguments.

[redacted] has worked in good faith; it has done nothing wrong. I can tell you that. It wants to --

THE COURT: One thing it can do is have a declaration from appropriate custodians -- demonstrably appropriate custodians who can say that: All records responsive to the subpoena have been produced.

MR. BOONE: And I will talk to my client about that. I just want to make sure that that will be enough if that happens.

There is nothing else it can do at this point. I mean, it's told me in every way that it possibly could --

THE COURT: There are so many other things [redacted] can do. There are so many other things [redacted] can do.

MR. BOONE: Well, I am all ears actually. I want to know.

THE COURT: Oh. Well, [redacted] could ask the Court for time for an evidentiary hearing to produce a [redacted], however many there are, of [redacted] that studied the subpoena, [redacted].

MR. BOONE: For reasons that we have said in our papers and as you might imagine, we think that would be unreasonable and overly burdensome, [redacted]. Again, as I said earlier, that would be quite unusual in this kind of context I would submit.

THE COURT: They could submit a declaration.

They could make themselves available via Skype or whatever other kind of telephonic videotaped use of our sophisticated telecommunications apparatus [redacted]

[redacted], I am sure, have and special counsel's office has for an informal interview to assure the special counsel of what has been said, starting with a written declaration, follow it up with that kind of informal interview. There are so many ways --

MR. BOONE: It would be helpful --

THE COURT: -- to get to an end point.

MR. BOONE: -- it would be helpful -- I'm sorry, Your Honor.

It would be helpful for [redacted] if the special counsel would say precisely: This is what we think is missing. Because [redacted] keeps asking me: Just ask them what are they looking for. We don't have anything else. They say that all the time. And so when we ask --

THE COURT: And I am sure you have explained to [redacted] that the special counsel's office is investigating highly sensitive materials, and so detailing exactly and precisely what they're looking for and why may not be something the special counsel's office is comfortable in doing. I am telling you --

MR. BOONE: Except that they're asking for the records.

THE COURT: -- there are glaring gaps.

MR. BOONE: Understood that that's your position -- your understanding, Your Honor.

Except that they're saying that records that we should possess we haven't turned over. So I don't understand how that would bear on grand jury secrecy, for them to tell us: We think you have these documents and you haven't turned them over. That's all we have asked. That's really all we have asked, and they haven't told us.

We could avoid a lot of time and expense if they would have just told us that.

THE COURT: Mr. Boone, let me ask you a question. [redacted]?

MR. BOONE: I have. A fair amount.

THE COURT: [redacted]

MR. BOONE: [redacted]

I think if you did research you would understand -- or your clerks would understand that [redacted]. This is not just some show that we're putting on to try to explain why there is, in your view, some glaring gap in the production. [redacted]. And [redacted]

* * * * * SEALED * * * * *

THE COURT: [redacted]

[redacted]

MR. BOONE: [redacted]

[redacted]

THE COURT: That's what you believe. That's what you believe.

MR. BOONE: Yes.

THE COURT: And perhaps you have to say that.

MR. BOONE: Actually, I wouldn't just say it.

THE COURT: I hope not.

MR. BOONE: I wouldn't.

THE COURT: I hope not.

MR. BOONE: Yeah. I wouldn't.

THE COURT: But you have said it.

MR. BOONE: I have said it.

THE COURT: So I think we're done here.

MR. BOONE: Thank you, Your Honor.

THE COURT: You are all excused.

Ms. Ahmad, did you have something else you wanted to say?

MS. AHMAD: I just wanted to make one quick point,

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Your Honor, which would be to say that: If there were an evidentiary hearing in this matter, the Government would not object to witnesses testifying via video teleconferencing subject to the Court's approval.

THE COURT: Thank you. And that's something that you can confer with Alston & Bird about. But it seems like Alston & Bird is perfectly comfortable with [redacted] responses, so there you go.

All right. Thank you, all.

(Whereupon, the proceeding concludes, 11:41 a.m.)

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 17th day of February, 2019.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

ECF No. 94

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Subpoena	Case No. 1:18-gj-00041-BAH Chief Judge Beryl A. Howell

MOTION TO UNSEAL

The Reporters Committee for Freedom of the Press ("Reporters Committee") is a nonprofit organization dedicated to defending the First Amendment and the newsgathering rights of journalists. Pursuant to Local Criminal Rule 6.1, the Reporters Committee respectfully moves this Court to direct the prompt, public filing of redacted versions of the briefs, record, transcripts, and orders in this action. The Reporters Committee further requests that the Court direct that the public versions of filings identify the contemnor in this proceeding. The government stated it is "not opposed, in principle, to the public filing of redacted versions of certain documents" but declined "blanket consent" to this motion. The contemnor took no position on this motion.

For the reasons set forth above, and explained more fully in the accompanying Memorandum of Points and Authorities, the Reporters Committee for Freedom of the Press requests that this Court grant this Motion to Unseal.

Dated: February 26, 2019

Respectfully submitted,

_____
Theodore J. Boutrous, Jr., (D.C. Bar No. 420440)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.,
Los Angeles, California 90071
Tel: (213) 229-7804
tboutrous@gibsondunn.com

Counsel for Movant
Reporters Committee for Freedom of the Press

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Subpoena	Case No. 1:18-gj-00041-BAH Chief Judge Beryl A. Howell

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS'S MOTION TO UNSEAL

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The Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee has an interest in protecting the public's First Amendment and common law rights of access to judicial documents. The Reporters Committee hereby moves to unseal the orders, briefs, transcripts, and underlying record filed in this proceeding pursuant to Local Criminal Rule 6.1, which provides that "[p]apers, orders and transcripts of hearings subject to this Rule, or portions thereof, may be made public . . . on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury."

PRELIMINARY STATEMENT

Although this case started and proceeded in secret, it is gradually—by court order and party agreement—coming into the public domain. Multiple filings in the Supreme Court have been made public. The D.C. Circuit issued a 28-page opinion that detailed the parties' legal arguments and the court's conclusions on important issues of law and further ordered the appellant there to file redacted briefs. This Court has partially unsealed the docket and has indicated that it may release further documents to the public. And the public now knows which lawyers represent each side in this case—including that members of Special Counsel Robert Mueller's office have represented the government in this matter. Despite the gradual unsealing of these proceedings, however, the filings in this Court remain shielded from public view.

The parties, the Supreme Court, the D.C. Circuit, and this Court have all recognized that the public should have access to at least some subset of the filings in this matter. The public

filings made available in the D.C. Circuit and Supreme Court since the new year confirm that continuing this proceeding under seal, without access to the underlying materials, is not narrowly tailored to serve any compelling governmental interest. Indeed, even if preserving the secrecy of a matter before the grand jury is a compelling interest, that interest alone is not enough to abrogate entirely the public's right of access to the documents submitted to this Court in this contempt proceeding. Nor does the fact that this is a contempt proceeding limit the public's right of access: Contempt proceedings in particular—including those arising from grand jury investigations—are presumed open to the public just like any other court proceeding.

In response to the Reporters Committee's D.C. Circuit motion to unseal the appellate record in this matter, the government asked the D.C. Circuit to refer unsealing of the record to this Court. The Reporters Committee did not oppose that request, but respectfully requested the opportunity to challenge any redactions proposed by the parties and to assert the public's right of access in this Court. To that end, the Reporters Committee brings this motion to unseal pursuant to Local Criminal Rule 6.1, the First Amendment, and the common law, all of which require at least some form of publicly accessible documents in this contempt matter. The Reporters Committee respectfully requests that the Court direct the public filing of the Court's orders, motions and briefing, transcripts, and other judicial records in this case, redacted only to the extent necessary to preserve a compelling governmental interest.

STATEMENT OF FACTS

I. This Action Commences Under Seal.

This case was commenced in this Court in August 2018. The case—including the docket—was filed entirely under seal. *Sealed v. Sealed*, No. 1:18-gj-00041 (D.D.C. Aug. 18, 2018). In September 2018, this Court issued a ruling under seal, which was appealed. *In re Grand Jury Subpoena*, No. 18-3068 (D.C. Cir. Sept. 25, 2018). The D.C. Circuit dismissed that

appeal for lack of jurisdiction on October 3, 2018. *Id.* One week later, a new appeal ensued from this same action. *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Oct. 10, 2018).

Almost immediately, these proceedings captured the public's and press's attention. *See* Katelyn Polantz, et al., *Mystery Mueller mayhem at a Washington court*, CNN (Dec. 15, 2018), https://www.cnn.com/2018/12/14/politics/mueller-grand-jury-mysterious-friday/index.html (reporting on courthouse activity contemporaneously with district court proceedings); Josh Gerstein & Darren Samuelsohn, *Mueller link seen in mystery grand jury appeal*, Politico (Oct. 24, 2018), https://www.politico.com/story/2018/10/24/mueller-investigation-grand-jury-roger-stone-friend-938572; Michael S. Schmidt, *Mueller Is Fighting a Witness in Court. Who Is It?*, N.Y. Times (Dec. 15, 2018), https://www.nytimes.com/2018/12/15/us/politics/special-counsel-subpoena.html. And the interest only grew when the D.C. Circuit held sealed oral argument on December 14, closing not just the courtroom but the entire floor of the courthouse. Darren Samuelsohn & Josh Gerstein, *Reporters shooed away as mystery Mueller subpoena fight rages on*, Politico, Dec. 14, 2018, https://www.politico.com/story/2018/12/14/mystery-mueller-subpoena-fight-1065409.

II. The D.C. Circuit Publishes a Judgment and Redacted Opinion Revealing Additional Detail About the Case.

Four days after oral argument, the D.C. Circuit issued an unsealed three-page judgment, providing some factual and legal information about the proceedings. *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Dec. 18, 2018) ("Op."). The judgment affirmed this Court's order holding a foreign-owned company (the "Corporation") in contempt, with monetary fines increasing each day it refused to comply. Op. 1. The D.C. Circuit rejected the Corporation's argument that, as an entity owned by a foreign country, denominated "Country A," it was immune from a grand jury subpoena under the Foreign Sovereign Immunities Act ("FSIA").

The court reviewed the government's sealed and *ex parte* submissions and concluded that the subpoena fell within the Act's exception for commercial activities. Op. 2-3. The court also held that it had subject matter jurisdiction, rejecting the Corporation's written arguments and "a new theory" introduced at oral argument. Op. 2. Finally, the D.C. Circuit concluded that it was "unconvinced that Country A's law truly prohibits the Corporation from complying with the subpoena." Op. 3. While not revealing which country's laws were at issue, the court stated that "[t]he text of the foreign law provision the Corporation relies on does not support its position" and that the Corporation's submissions (including from a foreign regulator) "lack[ed] critical indicia of reliability." *Id.* Later that month, the D.C. Circuit issued a 28-page, redacted opinion, expanding on its earlier judgment. *In re Grand Jury Subpoena*, 912 F.3d 623 (D.C. Cir. 2019) (per curiam).

The D.C. Circuit's decision deepened public interest in this matter, offering "tantalizing clues to a mystery that has riveted Washington journalists and legal insiders." Charlie Savage, *Washington's Mystery Witness Turns Out to Be a Corporation*, N.Y. Times (Dec. 18, 2018), www.nytimes.com/2018/12/18/us/politics/mystery-witness-corporation-robert-mueller.html. But the clues only continued the "guessing game" surrounding the case. Devlin Barrett, *Prosecutors win court fight over secret subpoena of a foreign company*, Wash. Post (Dec. 18, 2018), https://www.washingtonpost.com/world/national-security/prosecutors-win-court-fight-over-secret-subpoena-of-a-foreign-company/2018/12/18/b56dafac-0315-11e9-b5df-5d3874f1ac36_story.html?utm_term=.098ccd82d846.

In late 2018, the Corporation applied to the Supreme Court both for a stay of the contempt ruling and for leave to file its application under seal. On January 8, 2019, the Supreme Court denied the Corporation's stay application. The next day, the Reporters Committee filed a

motion to intervene in the Supreme Court and motions to unseal in both the Supreme Court and the D.C. Circuit.

III. The Courts Grant Additional Public Access To The Case.

In the Supreme Court, the petitioner was granted leave to publicly file a redacted version of its petition for a writ of certiorari. *See In re Grand Jury Subpoena*, No. 18-948 (S. Ct. Jan. 7, 2019); Docket Entry Granting Motion, *id.* (S. Ct. Jan. 22, 2019). Meanwhile, the government opposed the Reporters Committee's motion to intervene, arguing it was "unnecessary" because "a substantial amount of information about the filings in this case has already been unsealed"; the government agreed that "redacted versions of those filings" under seal in the Supreme Court "may now be made on the public record without compromising grand jury secrecy." *See* Government's Opp'n to Mot. to Intervene 1-2, *id.* (S. Ct. Jan. 25, 2019).

Simultaneously with its opposition to the Reporters Committee's motion to intervene, the government filed a motion for leave to file a redacted copy of the application for a stay, the government's response, and the reply. *See id.* at 2-4. The government also requested that the Supreme Court allow the D.C. Circuit to address the motion to unseal the record. *Id*. In the Supreme Court, the government also revealed the names of counsel for the petitioner—disclosing for the first time that the petitioner had been represented by Brian Boone of Alston & Bird. Reply in Supp. of Mot. to Intervene 3, *id.* (S. Ct. Jan. 28, 2019). The Supreme Court has since denied the Reporters Committee's motion to intervene but only after granting the government's request to file redacted versions of its papers publicly.

In the D.C. Circuit, the court issued an order granting the Corporation's motion to file publicly its response to the Reporters Committee's motion to unseal. Order, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Feb. 1, 2019). The Corporation's response took no position on the motion to unseal, which indicates that the Corporation does not oppose the unsealing of its

identity. Reply in Further Supp. of Mot. to Unseal 1 ("Reporters Committee Reply Br."), *id.* (D.C. Cir. Feb. 4, 2019).

The government responded to the Reporters Committee's motion to unseal in the D.C. Circuit on February 5. As in the Supreme Court, the government "agree[d] that certain redacted materials can be unsealed," including the "transcript," the "government's brief," and the appellant's briefs, Gov't Resp. 1, *id.* (D.C. Cir. Feb. 5, 2019), but maintained that no right of access attached to any judicial records "beyond what the government is offering to release." *Id.* at 5. The government "propose[d] referring the request for record redactions to the district court." *Id.* "Given [the district court's] familiarity with the record and the volume of materials," the government asserted, "it is well positioned" to balance the need for public access with the need for redactions. *Id.* at 4-5. The government made no effort to continue shielding the names of its counsel—revealing to counsel for the Reporters Committee and asking the D.C. Circuit to unseal filings showing that the government in this case is represented by members of the office of Special Counsel Robert Mueller. *See* Reporters Committee Reply Br. 3-4. On February 13, the D.C. Circuit ordered the unsealing of multiple briefs relating to the original motion to unseal. Order (Feb. 13, 2019) (per curiam). Further, the D.C. Circuit ordered that appellant file a copy of its opening and reply briefs under seal with proposed redactions by February 22, 2019. *Id.* The Reporters Committee's D.C. Circuit motion to unseal remains pending.

This Court has also begun to unseal these proceedings. In recognition of the fact that a significant amount of "information [has been] made available through the D.C. Circuit's and the Supreme Court's docket," on January 23, this Court directed the parties to submit "a joint status report advising the Court whether . . . the docket in this matter may be unsealed with redactions and proposing redactions to be made prior to any unsealing." Minute Order (D.D.C. Jan. 23,

2019). The parties submitted that Status Report on January 28. Dkt. No. 66. On January 30, 2019, this Court made the currently available PDF version of the docket in this proceeding available for public viewing. *See* Dkt. No. 72. The Court has also directed the parties to submit a joint status report "advising the Court" whether five orders or opinions "may be unsealed." Minute Order (Jan. 31, 2019). As of the date of this filing, no documents reflected on the redacted docket made public by the Court are publicly available.

ARGUMENT

I. This Court Should Unseal The Filings In These Proceedings Pursuant To Local Criminal Rule 6.1.

This Court should unseal these proceedings pursuant to Local Criminal Rule 6.1, which provides that:

> All hearings on matters affecting a grand jury proceeding shall be closed, except for contempt proceedings in which the alleged contemnor requests a public hearing. Papers, orders and transcripts of hearings subject to this Rule, or portions thereof, may be made public by the Court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury.

Local Criminal Rule 6.1; *see In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998) (noting that Local Rule 302—now Local Criminal Rule 6.1—authorizes access to "pleadings and papers" and comports with the public's "constitutional claim" of access). Local Criminal Rule 6.1 applies to all proceedings in this case—starting with the witness's Motion to Quash, Dkt. No. 3 *et seq.*, as well as the contempt proceedings that followed the witness's failed compliance with the Court's order, Mot. to Hold Witness in Contempt, Dkt. No. 27, *et seq.*

As this Court has recognized in the recent minute orders reflected on the publicly released docket, it is no longer "necessary" to seal the documents filed in these proceedings. Minute Order (Jan. 28, 2019); Minute Order (Jan. 31, 2019). The public now has access to

numerous filings at the D.C. Circuit and Supreme Court which provide some detail as to what these proceedings are about. *See, e.g.*, *In re Grand Jury Subpoena*, 912 F.3d 623. And the government has expressly recognized in responding to the Reporters Committee's motions in the D.C. Circuit and Supreme Court that it is no longer necessary to seal all documents filed in these proceedings. Gov't Opp'n to Mot. to Intervene 1-2, *In re Grand Jury Subpoena*, No. 18-948 (S. Ct. Jan. 25, 2019); Gov't Response 1, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Feb. 5, 2019). For its part, the grand jury witness—the Corporation or "Country A"—has taken no position on unsealing, suggesting it has no interest in preserving any secrecy here. Appellant's Resp. to Mot. to Unseal 1, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Jan. 16, 2019).

Everyone therefore appears to agree: there is no longer any need to seal these proceedings wholesale. *See Dow Jones*, 142 F.3d at 504 (remanding for district court to reconsider "why, in light of [Criminal Rule 6.1], there has been such a blanket sealing of the docket"). Accordingly, the Reporters Committee respectfully requests that the Court continue to direct the unsealing of the filings in this proceeding—including more than the docket and the first batch of documents that this Court has indicated should be unsealed. *See* Minute Order (Jan. 31, 2019) (directing the parties to advise whether Court's Memoranda & Orders at Dkt. Nos. 30, 48, 57, 65, and 72 may be filed publicly).[1]

[1] If this Court denies the Reporters Committee's request, it should "offer some explanation . . . [that] bear[s] some logical connection to the individual request. In other words, it must rest on something more than the administrative burdens that justified the denial of across-the-board docketing, and it must be more substantial than, say, an arguable possibility of leaks." *In re Sealed Case*, 199 F.3d 522, 527 (D.C. Cir. 2000). The Reporters Committee also respectfully reserves the right to challenge redactions the parties propose to the filings in this matter.

II. This Court Should Unseal The Filings In This Proceeding Pursuant To The First Amendment And Common Law Rights Of Access.

This Court should also unseal these proceedings in accordance with the public's right of access to them. The First Amendment creates a presumptive "right of access" to a wide range of judicial proceedings. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*") (preliminary hearings); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press Enterprise I*") (voir dire); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (criminal trials). Building on these seminal cases, the D.C. Circuit has declared that "[t]he first amendment guarantees the press and the public a *general right of access to court proceedings and court documents* unless there are compelling reasons demonstrating why it cannot be observed." *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (emphasis added).

"[T]wo complementary considerations" govern whether a particular judicial proceeding is subject to the First Amendment presumption of access. *Press-Enterprise II*, 478 U.S. at 8. The first is "whether the place and process have historically been open to the press and general public." *Id*. The second is "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* Where a qualified public right of access exists, "the proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id*. at 13–14 (quoting *Press-Enterprise I*, 464 U.S. at 510).

A. The First Amendment And The Common Law Grant The Public A Right Of Access To Contempt Proceedings.

Under the *Press-Enterprise* test, history and logic dictate that a right of public access applies to the contempt proceedings at issue in this case. The right of access to contempt proceedings begins with the indisputable right of access to criminal trials. Since the Norman

Conquest, public criminal trials have allowed "people not actually attending [to] have confidence that standards of fairness are being observed . . . and that deviations will become known." *Press-Enterprise I*, 464 U.S. at 508. "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-71 (1980)).

Following this historic tradition, courts have recognized that the public has a qualified First Amendment right of access to numerous types of judicial proceedings. The right applies to nearly all facets of a criminal trial. *See, e.g.*, *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 297-98 (2d Cir. 2012) (collecting cases); *see also Wash. Post*, 935 F.2d 282 (public access to plea agreements). And "[e]very circuit to consider the issue has concluded" that same "right of public access applies to civil" proceedings, too. *Dhiab v. Trump*, 852 F.3d 1087, 1099 (D.C. Cir. 2017) (Rogers, J., concurring in part and concurring in the judgment) (collecting cases).

There is also a long history of requiring that contempt proceedings be public to check a court's power, which the Supreme Court has recognized can potentially be "arbitrary in its nature and liable to abuse." *Levine v. United States*, 362 U.S. 610, 615 (1960) (citing *Ex parte Terry*, 128 U.S. 289, 313 (1888)); *In re Oliver*, 333 U.S. 257, 265-73 (1948). And because the distinction between civil and criminal contempt is "elusive" and often without a difference, *see Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 830–31 (1994), numerous courts have held that the public's right of access applies equally to civil and criminal contempt proceedings. *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1092 (9th Cir. 2014) (unsealing civil contempt docket, while "consider[ing] any redactions the government may request"); *Newsday LLC v. Cty. Of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013); *In re Iowa*

Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983); *see also In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3d Cir. 1990) (holding that right attaches where incarceration is a possible penalty); *cf. Dow Jones*, 142 F.3d at 502, 506 (directing district court to consider what redacted documents could be publicly filed in grand-jury subpoena litigation). Indeed, the "First Amendment 'does not distinguish between criminal and civil proceedings,'" *Newsday LLC*, 730 F.3d at 164 (quoting *N.Y. Civil Liberties Union*, 684 F.3d at 298) (holding that public right of access applies to civil contempt proceedings); because "civil contempt proceedings . . . carry the threat of coercive sanctions," the right of public access attaches. *Id*. Contempt proceedings that arise from grand jury investigations are not immune from the public's right of access. *Index Newspapers LLC*, 766 F.3d at 1095-97.

Logic makes clear why public access to grand jury contempt proceedings in particular causes no injury, as a general matter, to grand jury secrecy. Grand jury secrecy represents four "distinct interests." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218-19 (1979). Those four interests are that, in the absence of secrecy, (1) witnesses might not come forward, "knowing that those against whom they testify would be aware" of their testimony; (2) because of this same fear of retribution, witnesses who do appear "would be less likely to testify fully and frankly"; (3) individuals about to be indicted "would flee, or would try to influence individual grand jurors to vote against indictment"; and (4) persons accused, but ultimately "exonerated by the grand jury," might be "held up to public ridicule." *Id*. at 219.

If anything, recognition of the public's right of access to contempt proceedings *serves* these interests. Allowing tailored public access will *encourage* a reticent witness to comply with a grand jury investigation by making clear the potential penalties for failing to do so. Such a witness would even be less likely to flee, because the penalty for flight is being held in contempt.

Moreover, matters occurring before a grand jury could be preserved through redaction if necessary, *see infra* Pt. I.B. Likewise, any risk that a vindicated accused could be "ridicule[d]" can be mitigated through appropriate, limited redactions, *see id*.

The D.C. Circuit's opinion in *Dow Jones* is not to the contrary. There, the D.C. Circuit held that no First Amendment or common law right of access attaches to proceedings "ancillary" to a grand jury investigation, like objections to a subpoena. *See* 142 F.3d at 500. But the Court did not pass on whether the First Amendment right of access attaches to contempt proceedings, and, in fact, acknowledged that Local Rule 302 (now Local Criminal Rule 6.1) provides that contempt proceedings must be held in the open when "the alleged contemnor requests a public hearing." *Id.* at 501 (quotation marks omitted).[2]

The Federal Rules of Criminal Procedure underscore that *Dow Jones*' holding regarding ancillary proceedings does not limit the public's right of access to contempt proceedings. In fact, Rule 6(e)(5)—relied on in *Dow Jones*, 142 F.3d at 502-03—acknowledges that sealing contempt proceedings is "[s]ubject to any right to an open hearing in a contempt proceeding," and that district courts "must close any hearing" only "to the extent necessary to prevent disclosure of a matter occurring before a grand jury." Rule 6(e)(5) thus codifies the public right of access to contempt proceedings, recognizing that such a right can be rebutted as "necessitated" to justify the compelling interest of preserving grand jury secrecy. *See Press-Enterprise I*, 464 U.S. at 510 (quotation marks omitted). District courts also possess "inherent authority to unseal and disclose grand jury material." *In re Unseal Dockets*, 308 F. Supp. 3d 314, 323 (D.D.C. 2018). Maintaining the seal of documents filed in this action—hardly the least-restrictive means

[2] It is not clear whether the Corporation here requested a public hearing or not. The *public's* right of access, however, does not turn on whether the alleged contemnor wishes its hearing to be open or closed. *Cf. United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995).

available as all parties and courts have agreed—cannot be necessary here, particularly after release of the D.C. Circuit's judgment and its more fulsome, redacted opinion.

"Public access" to contempt proceedings "provides a check on the process by ensuring that the public may discover when a witness has been held in contempt and held in custody." *Index Newspapers*, 766 F.3d at 1093; *see Levine*, 362 U.S. at 615-16.[3] And contempt proceedings may well be attenuated from the actual content of a grand jury investigation, meaning that "[l]ogic favors greater public access to these transcripts and filings because they are less likely to disclose sensitive matters relating to the grand jury's investigation." *Index Newspapers*, 766 F.3d at 1094-95 (discussing filings regarding continued confinement proceedings). At bottom, the public has a right of access to contempt proceedings. There can thus be no doubt that the public has a right of access to the orders, briefs, transcripts, and underlying record in the proceedings before this Court.[4]

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[3] It is of no moment that the Corporation was not incarcerated. Any argument that a qualified right of access can never apply to monetary penalties would require the conclusion that the public *never* has a right of access to any corporate contempt proceeding because corporations cannot be jailed. Likewise, monetary penalties can have serious implications and unquestionably cannot be imposed without constitutional safeguards. *See Int'l Union*, 512 U.S. at 831–32; *cf. S. Union Co. v. United States*, 567 U.S. 343, 360 (2012) (holding that *Apprendi* applies to criminal fines).

[4] The public's common law right of access provides further justification to unseal the filings in this action. "The common law right of access to judicial records antedates the Constitution." *United States v. El-Sayegh*, 131 F.3d 158, 161-62 (D.C. Cir. 1997). It provides a "right to inspect and copy public records and documents, *including judicial records and documents*." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978) (emphasis added). The documents the Reporters Committee asks this Court to unseal were introduced during the judicial proceedings for the purpose of persuading judges, which lies at the core of the common law right of access. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 668-69 (D.C. Cir. 2017) (holding common law right of access attached to district court briefs and record). "Given" that the factors on balance favor unsealing "and the strong presumption in favor of public access," the documents filed in this proceeding should be unsealed. *EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1410 (D.C. Cir. 1996).

B. Continued Blanket Sealing of these Proceedings Cannot Serve Any Compelling Governmental Interest.

The public's First Amendment right of access to contempt proceedings does not necessarily mandate disclosure of the entire record in and of itself—nor does the Reporters Committee argue that it does. The "presumption of openness," *Press-Enterprise I*, 464 U.S. at 510, is just that—a presumption. But where the government attempts to overcome the public's constitutional right of access to judicial proceedings or records it must demonstrate that closure "'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'" *Id.* (quoting *Globe Newspaper Co.*, 457 U.S. at 606-07). "The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

At this stage, there has been no public explanation as to why the documents in these proceedings must be sealed, limiting the Reporters Committee's ability to challenge the sealing of particular documents. *See In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 95 (3d Cir. 1990). Nonetheless, there can be no compelling interest that justifies withholding the parties' motions, briefs, and all other filings in this matter in full, as this Court has already recognized, *see* Minute Order (Jan. 31, 2019). Indeed, the D.C. Circuit's ability to file a judgment and redacted version of its opinion publicly, outlining the parties' legal arguments and at least part of the underlying factual circumstances of the appeal, demonstrates that at least some portions of these contempt proceedings may be open to public view without jeopardizing any compelling governmental interest. So does the public redacted petition for certiorari in the Supreme Court, the government's opposition to the petition—which was filed completely unredacted on February 21, 2019—the forthcoming redacted briefs in the D.C. Circuit, and the public version of this Court's docket. Even the government agrees that "versions

of the briefs and sealed oral argument transcript" in the D.C. Circuit "may now be made public, with appropriate redactions, without compromising grand jury secrecy." Gov't Response 2, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Feb. 5, 2019). So, too, can materials in this Court.

Because at least some of the materials under seal in this Court can "only . . . confirm to the public what [is] already validated by [] official source[s]," keeping such information under seal is not necessary—or justifiable. *Wash. Post*, 935 F.2d at 292; *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154-55 (D.C. Cir. 2007) (ordering the "release" of "those redacted portions of [the] concurring opinion and the two ex parte affidavits that discuss grand jury matters" where "the 'cat is out of the bag'" given that one grand jury witness "discusse[d] his role on the CBS Evening News"); *Dow Jones*, 142 F.3d at 505 (noting that when grand jury witness's attorney "virtually proclaimed from the rooftops that his client had been subpoenaed," that fact was no longer protected by grand jury secrecy). And redacting portions of documents is a more narrowly tailored (and thus less-restrictive) alternative to withholding them wholesale. *See United States v. Doe*, 356 F. App'x 488, 490 (2d Cir. 2009) (Where "a party seeks to seal the record of criminal proceedings *totally* and *permanently*, the burden is heavy indeed."); *In re Knight Publ'g Co.*, 743 F.2d 231, 234 (4th Cir. 1984) (*citing Press-Enterprise I*). In *Dow Jones*, for instance, the D.C. Circuit recognized that the trial court must consider whether redactions, rather than sealing whole documents, would be possible. 142 F.3d at 502, 506. This Court should do the same for orders, briefs, transcripts, and record in these proceedings, particularly since the Court is well positioned to avoid inadvertent disclosure of secret grand jury information.

III. The Contemnor's Identity Should Be Unredacted.

Finally, pursuant to Local Criminal Rule 6.1, the First Amendment, and common law, this Court should direct that any publicly filed documents do not redact the name of the Corporation held in contempt. Requiring continued redaction of the identity of the Corporation can no longer be considered "necessary" or narrowly tailored to support any compelling governmental interest. Indeed, the nature of this proceeding and the fact that it emanates from Special Counsel Mueller's investigation are already matters of public record. The Corporation itself has not opposed sharing its identity with the public. Appellant's Resp. to Mot. to Unseal 1, *In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir. Jan. 16, 2019). And, indeed, prohibiting a grand jury witness who has been held in contempt—and fined significant sums—from revealing its identity and the nature of its punishment to the public would itself present grave First Amendment and due process concerns.

As a general matter, the public is not prohibited from learning the names of grand jury witnesses. Rule 6(e) contemplates that a witness itself is not prohibited from revealing its own participation in a grand jury proceeding. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983); *Judith Miller*, 493 F.3d at 154-55; *Dow Jones*, 142 F.3d at 505. Rule 6(e) expressly provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Moreover, "[t]he original advisory committee note" for Rule 6(e) "specifically states that '[t]he rule does not impose any obligation of secrecy on witnesses,' and that a 'seal of secrecy on witnesses seems an unnecessary hardship.'" *In re United States for an Order Pursuant to 28 U.S.C. § 1651(a) for Order Precluding Notice of Grand Jury Subpoena*, 2017 WL 3278929, at *2 (D.D.C. July 7, 2017) (Howell, C.J.) (quoting Rule 6 Advisory Committee Notes, 1944 Note to Subdivision (e)).

This Court has noted that in "rare" circumstances and upon "a demonstration of compelling necessity . . . shown with particularity," a witness may be barred from revealing that it is a grand jury witness. *Id*. at *3. It is not apparent on the face of the public docket whether this Court issued such a non-disclosure order or what the basis for such an order would have been, though presumably the existence of a non-disclosure order should be publicly available at least in redacted form. *Nat'l Children's Ctr.*, 98 F.3d at 1409 ("A court's decrees, its judgments, its orders, are the quintessential business of the public's institutions."); *Metlife*, 865 F.3d at 668; *In re Sealed Case*, 199 F.3d at 527. But even if this Court previously determined that there was once a "compelling necessity . . . shown with particularity" to justify sealing the identity of the witness here, and preventing the Corporation from identifying itself publicly, this Court should reassess whether such compelling necessity still exists in light of the contempt order as well as the substantial public information that has since been disclosed regarding this action. The Court should also consider whether such a non-disclosure order, if it exists, is still warranted given that the grand jury proceeding at issue appears to be concluding. *See* Evan Perez, Laura Jarrett & Katelyn Polantz, *Justice Department Preparing for Mueller Report as early as next week* (Feb. 20, 2019), https://www.cnn.com/2019/02/20/politics/special-counsel-conclusion-announcement/index.html (noting that Special Counsel Mueller's grand jury "hasn't apparently convened since January 24").

Accordingly, this Court should direct that the identity of the contemnor here be publicly released. Redacting the name of the Corporation does not appear "necessary," Local Crim. R. 6.1, or narrowly tailored to support a compelling governmental interest such that limiting the public's right of access to the nature of these civil contempt proceedings is justified.

CONCLUSION

For the foregoing reasons, the motion to unseal the filings in this proceeding, including the orders, briefs, transcripts, and record, should be granted.

February 26, 2018 Respectfully submitted,

_____

THEODORE J. BOUTROUS [DC Bar 420440]
Counsel of Record
THEANE EVANGELIS (*pro hac vice* pending)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
(213) 229.7000
tboutrous@gibsondunn.com
tevangelis@gibsondunn.com

LEE R. CRAIN (*pro hac vice* pending)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York City, New York
(212) 351.2454
lcrain@gibsondunn.com

KATIE TOWNSEND
D.C. Bar No. 1026115
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
ktownsend@rcfp.org

Counsel for Movant Reporters Committee for Freedom of the Press

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Subpoena	Case No. 1:18-gj-00041-BAH Chief Judge Beryl A. Howell

[PROPOSED] ORDER

Upon consideration of the Reporters Committee for Freedom of the Press' Motion to Unseal and the Memorandum of Points and Authorities filed in support thereof, it is hereby

ORDERED that the Reporters Committee for Freedom of the Press' Motion to Unseal is **GRANTED**.

SO ORDERED this _____ day of _____, 2019.

_____
Beryl A. Howell
Chief Judge

cc:
Brian D. Boone
Edward T. Kang
Emily Seymour Costin
Karl Geercken
ALSTON & BIRD
Bank of American Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
704.444.1106
brian.boone@alston.com
Edward.kang@alston.com

Scott A.C. Meisler
Zainab Naeem Ahmad
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., NW
Washington D.C. 20530
202.616.0800
SACM@usdoj.gov
ZNA@usdoj.gov

ECF No. 102

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	Case No. 18-gj-0041 **UNDER SEAL** UNDER LCrR 6.1

[redacted] **MOTION TO PURGE CONTEMPT AND STOP THE CONTEMPT FINES' ACCRUAL**

In accordance with this Court's suggestion at the February 15, 2019 status conference, [redacted] submits declarations from two of its [redacted]. *See* Exs. 1, 2.

The declarations touch on the following topics, among others: [redacted]; why several pages of produced documents [redacted] policy on record retention in the normal course; and [redacted] efforts to find documents concerning topics that the Special Counsel and the Court have raised. The declarations also confirm that [redacted] has voluntarily produced all documents that are responsive to the subpoena.

Given that testimony, this Court should hold that [redacted] has purged its contempt of this Court's September 19, 2018 order.[1] The Court should also hold that the contempt fines stopped accruing on February 8, 2019—the day that [redacted] produced its last set of documents (other than updated courtesy translations). There is no reason why contempt fines should have accrued after [redacted] voluntarily provided all responsive documents.

* * *

[redacted] emailed the declarations to the Special Counsel on February 27. In a March 1 call, the Special Counsel outlined for [redacted] counsel several follow-up questions relating to the declarations. On March 5, as another gesture of [redacted] good faith, its attorneys proffered written responses to those questions on [redacted] behalf.

The Special Counsel also expressed a concern in the March 1 call about the declarations' not being written [redacted] But the declarants (who have adequate working proficiency in English) affirmed that they have personal knowledge of the matters in the declarations and that their representations are "true and correct." Ex. 1 at 1, 5; Ex. 2 at 1, 11. It was not incumbent on them to provide additional representations about their language skills or to make their declarations [redacted] In all events, on March 7, [redacted] accommodated the Special Counsel once more by sending a third declaration, this time from [redacted]. In that declaration, [redacted] attests to his translation qualifications and explains that he orally translated both declarations [redacted] (in the declarants' presence) before the declarants executed the documents. *See* Ex. 3.

[1] As [redacted] continues to argue before the Supreme Court, it is immune from criminal proceedings in American courts and this Court did not have subject-matter jurisdiction to enter the September 19 order or any other order in this case.

This Court should hold that given [redacted] productions and its three declarations, the contempt fines have stopped accruing.

Respectfully submitted on March 7, 2019.

ALSTON & BIRD LLP

Brian D. Boone (D.C. Bar 987633)
101 S. Tryon Street, Suite 4000
Charlotte, North Carolina 28280
T: (704) 444-1100
F: 704.444.1111
Email: brian.boone@alston.com

Edward T. Kang
950 F Street, NW
Washington, DC 20004
Telephone: 202-239-3000
Facsimile: 202-239-3333
E-mail: edward.kang@alston.com

CERTIFICATE OF SERVICE

I certify that today I served this **Motion** by email on the following:

Robert S. Mueller III, Special Counsel
Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
Special Counsel
950 Pennsylvania Ave NW
Room B-103
Washington, D.C.

Respectfully submitted on March 7, 2019.

ALSTON & BIRD LLP

Brian D. Boone
Bank of America Plaza, Suite 4000
101 S. Tryon St.
Charlotte, NC 28280
Phone: 704.444.1000
Fax: 704.444.1111
brian.boone@alston.com

[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	Case No. 18-gj-0041 **UNDER SEAL** UNDER LCrR 6.1

[PROPOSED] ORDER

[redacted] produced documents responsive to the subpoena during the week of February 4, 2019. On February 8, the Court held the contempt fines in abeyance pending the Special Counsel's position on [redacted] productions. On February 15, the Court restarted the fines *nunc pro tunc* as of February 12. On March 7, [redacted] filed a motion to purge contempt and stop the fines' accrual, which attached three declarations by [redacted].

Having considered all of the papers filed in connection with that motion, the Court GRANTS the motion. Accordingly, the contempt fines stopped accruing on February 8, 2019, the date of [redacted] last production.

Dated: March __, 2019.

BERYL A. HOWELL
Chief Judge

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

ECF No. 103

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	Case No. 18-gj-0041 **UNDER SEAL** UNDER LCrR 6.1

COUNTRY A'S RESPONSE TO THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS'S MOTION TO UNSEAL

On February 26, 2019, the Reporters Committee for Freedom of the Press moved this Court "to direct the prompt, public filing of redacted versions of the briefs, record, transcripts, and orders in this action." Mot. 1. This Court ordered the parties to respond to that motion by March 15.

Country A takes no position on the Reporters Committee's motion.

Respectfully submitted on March 15, 2019.

ALSTON & BIRD LLP

Brian D. Boone (D.C. Bar 987633)
101 S. Tryon Street, Suite 4000
Charlotte, North Carolina 28280
T: (704) 444-1100
F: 704.444.1111
Email: brian.boone@alston.com

Edward T. Kang
950 F Street, NW
Washington, DC 20004
Telephone: 202-239-3000
Facsimile: 202-239-3333
E-mail: edward.kang@alston.com

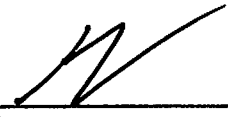
CERTIFICATE OF SERVICE

I certify that today I served this **Response** by email on the following:

Robert S. Mueller III, Special Counsel
Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
Special Counsel
950 Pennsylvania Ave NW
Room B-103
Washington, D.C.

Respectfully submitted on March 15, 2019.

ALSTON & BIRD LLP



Brian D. Boone
Bank of America Plaza, Suite 4000
101 S. Tryon St.
Charlotte, NC 28280
Phone: 704.444.1000
Fax: 704.444.1111
brian.boone@alston.com

Counsel for Country A

ECF No. 104

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	**No. 18-gj-041**

GOVERNMENT'S OPPOSITION TO MOTION TO UNSEAL

Asserting that there is a First Amendment right of access "to contempt proceedings," the Reporters Committee for Freedom of the Press maintains (at 13) that there "can thus be no doubt that the public has a right of access to the orders, briefs, transcripts, and underlying record in the proceedings before this Court." But this is not a "contempt proceeding[]." This is an ancillary judicial proceeding relating to an ongoing grand jury investigation. Accordingly, there is no right of access to the materials sought by the Reporters Committee, and its motion should be denied.

BACKGROUND

Seeking information from a corporation owned by Country A, the grand jury issued a subpoena directing that Corporation to produce the information. *In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019). The Corporation, however, moved to quash the subpoena, arguing that it was immune pursuant to the Foreign Sovereign Immunities Act and that production of the information would violate Country A's laws. *Id.* After a hearing, this Court denied the motion to quash. *Id.* Following more briefing and another hearing, this Court held the Corporation in contempt but stayed any penalty while the Corporation appealed to both the D.C. Circuit Court of Appeals and the United States Supreme Court. *Id.*

ARGUMENT

"Unlike typical judicial proceedings, grand jury proceedings and related matters operate under a strong presumption of secrecy." *In re Sealed Case*, 199 F.3d 522, 526 (D.C. Cir. 2000).[1] The D.C. Circuit has thus "held that there is no First Amendment right of access to grand jury ancillary proceedings," *id.* at 523, which are "judicial proceedings relating to the grand jury," as when a judge is "called upon to decide" a motion "to quash the subpoena," *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 498 (D.C. Cir. 1998), or when a judge must adjudicate a contempt motion because a party has refused to produce evidence, *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1088-94 (9th Cir. 2014), or when an appellate court denies an appeal by a witness found in contempt, *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007).

Because a "proceeding in the district court to quash a subpoena" would "almost invariably reveal matters occurring before the grand jury," it "may properly be closed to the public." *Dow Jones*, 142 F.3d at 502; *see also* Fed. R. Crim. P. 6(e)(5).[2] Further, "there is no First Amendment public right of access to the filings and transcripts related to a motion to quash a grand jury subpoena while the grand jury investigation is ongoing." *Index Newspapers*, 766 F.3d at 1088;

---

[1] "Encompassed within the rule of secrecy are 'the identities of witnesses or jurors, the substance of testimony' as well as actual transcripts, 'the strategy or direction of the investigation, the deliberations or questions of jurors,' and the like." *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998) (citations omitted).

[2] Rule 6(e)(5) provides that, "[s]ubject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury." If a court can "allow some public access without risking disclosure of grand jury matters," Rule 6(e)(5) thus "contemplates that this should be done," but "it will be done because the Federal Rules of Criminal Procedure confer this authority on district courts, not because the First Amendment demands it." *Dow Jones*, 142 F.3d at 502. "Recognizing a First Amendment right to force ancillary proceedings to be conducted without referring to grand jury matters would create enormous practical problems in judicial administration, and there is no strong history or tradition in favor of doing so." *Id.*

see also In re Grand Jury Subpoenas Dated March 2, 2015, 2016 WL 6126392, at *3 (S.D.N.Y. Oct. 19, 2016) ("litigation of a motion to quash may require the Government to reveal a great deal about the inner workings of the grand jury, the theories it is exploring, the targets it is investigating, and the testimony it has received or wishes to receive"); Fed. R. Crim. P. 6(e)(6) ("Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.").

Similarly, "there is no First Amendment public right of access" to those "closed portions of contempt proceedings containing discussion of matters occurring before the grand jury." *Index Newspapers*, 766 F.3d at 1084; *see also Levine v. United States*, 362 U.S. 610, 618 (1960).[3] There is also no First Amendment right of access "to a motion to hold a grand jury witness in contempt while the grand jury investigation is ongoing" because such a motion "will likely recite some information related to the grand jury as support for the government's request that the witness be held in contempt" and public access to the motion could "'frustrate criminal investigations.'" *Index Newspapers*, 766 F.3d at 1093 (citation omitted). "In contrast," because public access plays a positive role in the functioning of the portion of a contempt hearing when a witness is held in contempt and confined, "the public does have presumptive First Amendment rights of access" to "orders holding contemnors in contempt and requiring their confinement." *Id.* at 1085, 1093.

[3] When a witness asks for a public contempt hearing, however, a court must open the proceeding so that "the act of contempt * * * and the consequent adjudication and sentence might occur in public." *Levine*, 362 U.S. at 618. "A grand jury witness's right to, and the public's interest in, an open contempt hearing arises in part because a civil contempt hearing 'better resembles a criminal trial . . . than it does a grand jury proceeding.'" *Index Newspapers*, 766 F.3d at 1089 (citation omitted); *see also* Local Rule 6.1 ("All hearings on matters affecting a grand jury proceeding shall be closed, except for contempt proceedings in which the alleged contemnor requests a public hearing.").

Local Rule 6.1 "provides a limited means for disclosing non-secret" grand jury matters beyond the First Amendment, *Dow Jones*, 142 F.3d at 504, providing that a court may unseal portions of "[p]apers, orders and transcripts of hearings * * * upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." To facilitate that unsealing, there is a presumption against "blanket sealing" of the *docket* for an ancillary grand jury proceeding. *Id.* Accordingly, upon request, a district court should produce a "redacted public docket" for an ancillary proceeding so that interested parties might invoke Rule 6.1. *In re Sealed Case*, 199 F.3d at 527.

This Court has adhered to these constitutional and rule-based access principles and, contrary to the Reporters Committee's claim (at 9), it need not further "unseal these proceedings in accordance with the public's right of access to them." First, this Court has issued a redacted public docket. *See* Dkt. ## 72, 76. And, that docket confirms, this ancillary proceeding relates to an ongoing grand jury investigation, namely the Corporation's motion to quash the grand jury's subpoena, *e.g.*, Dkt. ## 3, 4, 5, 6, 8, 9, 12, 20, and the government's motion to hold the Corporation in contempt following this Court's denial of the motion to quash, *e.g.*, Dkt. ## 27, 28, 29, 30, 45, 48, 58, 59.[4] Because the "grand jury context presents an unusual setting where privacy and secrecy are the norm," *In re Sealed Case*, 199 F.3d at 526, the Reporters Committee has no First Amendment right of access to the materials relating to those motions. *See Dow Jones*, 142 F.3d at 501-04; *Index Newspapers*, 766 F.3d at 1083-94. Similarly, this Court properly closed the hearings that addressed those motions because, "[i]f a hearing is about something 'affecting' a

[4] The Reporters Committee claims (at 14) that "there has been no public explanation as to why the documents in these proceedings must be sealed." But the necessity for sealing is evident from the docket itself, which makes clear that this ancillary proceeding relates to a grand jury matter.

grand jury investigation, there will nearly always be a danger of revealing grand jury matters." *Dow Jones*, 142 F.3d at 501; *see* Dkt. ## 15, 31.[5] Finally, this Court recently released six opinions and orders—63 pages in all—addressing, among other things, the Corporation's motion to quash, the government's motion to hold the Corporation in contempt, and the Corporation's claim that this Court's contempt order was unenforceable. Consistent with Rule 6.1, this Court redacted these opinions and orders to omit references to secret grand jury material, including the witness's identity. In sum, this Court's disclosures reflect its assiduous balancing of the continuing need for grand jury secrecy against the Reporters Committee's "limited right of access pursuant to Rule 6.1," *In re Sealed Case*, 199 F.3d at 526.

Nonetheless, the Reporters Committee seeks additional disclosures, contending (at 14) that there "can be no compelling interest that justifies withholding the parties' motions, briefs and all other filings in this matter in full." But a "compelling interest" need only be shown if "there is a First Amendment right of access to any of the documents," *Index Newspapers*, 766 F.3d at 1084, and, as explained, "there is no First Amendment right of access to grand jury ancillary proceedings," *In re Sealed Case*, 199 F.3d at 523. Accordingly, the applicable standard is whether "continued secrecy" is "necessary to prevent disclosure of matters occurring before the grand jury." Local Rule 6.1. Such continued secrecy *is* necessary in this ancillary proceeding because the grand jury's investigation is ongoing and, for example, neither the direction of the investigation nor the witness's identity has yet been revealed. Moreover, as the Reporters Committee concedes (at 1-2), much substance has already "com[e] into the public domain," including (i) "[m]ultiple

[5] Although it does not appear that this Court opened any portion of the contempt hearing, it also does not appear that the Corporation asked for a public hearing and, in any event, this Court has now released a redacted version of its contempt opinion, which adequately explains the Corporation's "act of contempt" and the "consequent adjudication and sentence," *Levine*, 362 U.S. at 618; *see* discussion *infra*.

filings in the Supreme Court"; (ii) the D.C. Circuit's "28-page opinion that detailed the parties' legal arguments"; (iii) the parties' redacted D.C. Circuit briefs and a transcript of that oral argument; (iv) this Court's six opinions and orders; (v) the identities of the "lawyers represent[ing] each side in this case"; and (vi) the redacted docket. Any attempt to redact the *remaining* filings would yield little additional substance and risk inadvertently revealing matters that are protected by Rule 6(e). *See Index Newspapers*, 766 F.3d at 1095 ("if the record is sufficiently voluminous, the consequences of disclosure sufficiently grave or the risks of accidental disclosure great, the balance may well tip in favor of keeping records sealed"); *Dow Jones*, 142 F.3d at 505 (where "'matters occurring before the grand jury' may have been woven tightly into the ancillary proceeding, * * * 'redaction is simply not possible'" (citations omitted)); *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569, 574 (8th Cir. 1988) ("line-by-line redaction of the sealed documents was not practicable").

At a minimum, the Reporters Committee asserts (at 16-17), this Court should reveal the Corporation's identity pursuant to Rule 6.1 because the "Corporation itself has not opposed sharing its identity with the public." But that is not true. As noted in this Court's January 30, 2019, redacted Memorandum and Order, the "'parties agree that the docket sheet can be partially unsealed and that the identity of the witness should remain under seal.'" This Court should thus reject the Reporters Committee's request (at 17) that "the identity of the contemnor here be publicly released." *See Dow Jones*, 142 F.3d at 500 ("Encompassed within the rule of secrecy are 'the identities of witnesses * * * .'").[6]

[6] Contrary to the Reporters Committee's claim (at 13 n.4) there is also no "common law right of access" to the materials from this ancillary grand jury proceeding. The common law right of access does not extend to matters that "have traditionally been kept secret for important policy reasons," and it has not been extended to "preindictment, pretrial proceedings involving a grand jury." *Dow Jones*, 142 F.3d at 504 (citation omitted). But "even if there were once a common law right of

CONCLUSION

For the foregoing reasons, this Court should deny the Reporters Committee's Motion to Unseal.

Respectfully submitted,

JESSIE K. LIU
United States Attorney

/s/
David B. Goodhand, D.C. Bar 438844
Zia M. Faruqui, D.C. Bar 494990
Peter Lallas, N.Y. Bar 4290623
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20001
(202) 252-6601 (Goodhand)
(202) 252-7117 (Faruqui)
(202) 252-6879 (Lallas)
david.goodhand2@usdoj.gov
zia.faruqui@usdoj.gov
peter.lallas@usdoj.gov

access to materials of the sort at issue here, the common law has been supplanted by Rule 6(e)(5) and Rule 6(e)(6) of the Federal Rules of Criminal Procedure," which, as explained *supra*, this Court has adhered to.

ECF No. 106

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	**No. 18-gj-041** **UNDER SEAL**

GOVERNMENT'S OPPOSITION [redacted] MOTION TO PURGE CONTEMPT AND CROSS MOTION TO ACCELERATE FINES AND FOR AN EVIDENTIARY HEARING

BACKGROUND

The government presumes the Court's familiarity with the procedural background of this matter, including the "glaring unexplained gaps in documentation," Tr. Feb. 15, 2019 at 23, that this Court previously identified with respect to [redacted] subpoena compliance. As we explain below, these gaps persist.

ARGUMENT

A. [redacted] Has Failed to Comply with the Extant Subpoena

Because there remain "material issues of fact in doubt and in dispute about [redacted] representation it is in full compliance," this Court should not "purge [redacted] from contempt," Tr. Feb. 15, 2019 at 22-23. [redacted] has still not met its burden of proving that it has "done all within its power" to comply with the subpoena. *Pigford v. Veneman*, 307 F. Supp. 2d 51, 57 (D.D.C. 2004). Rather, relying on supplementary declarations of [redacted] claims (at 1) that nearly six months after it was held in contempt it has "voluntarily produced all documents that are responsive to the subpoena," *id.* This production does not "amount to full and actual compliance." *In re Various Grand Jury Subpoenas*, 248 F. Supp. 3d 525, 527 (S.D.N.Y. 2017). Although these supplemental declarations add much needed detail, they still contain "glaring

gap[s] that raise[] significant question[s] about the compliance of [redacted] with the subpoena," Tr. Feb. 15, 2019 at 14. In fact, [redacted] to-date production and its declarations raise many additional questions, including the following:

- [redacted]

[redacted]

[1] [redacted].

[redacted]

- [redacted]
- [redacted]
- [redacted]

2 [redacted]

[redacted] production does not amount to a good faith effort to comply, let alone the required full and actual compliance. As such, [redacted] has not satisfied its burden in order to purge contempt. *See Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1017 (D.C. Cir. 1997). Although [redacted] produced some records and supporting declarations, their production remains incomplete. [redacted]

[redacted]

3 [redacted]

[redacted]

Given that the $50,000 per day contempt fine has failed to coerce full compliance, the government renews its request to accelerate the daily fine. *See* Tr. Jan. 10, 2019 at 23. Specifically, the government respectfully requests that, beginning April 1, 2019, the fine increase to $100,000 per day and, on April 8, 2019, the fine increase to $300,000 per day.

B. An Evidentiary Hearing Is Necessary to Question One or More [redacted]

As described, [redacted] recent declarations do not resolve important questions about the completeness and accuracy of [redacted] document productions. Because the "alternative of producing declarations" has failed, as government counsel previously suggested, the "factual issues that need to be resolved" require a hearing on [redacted] motion to purge contempt. Tr. Feb. 15, 2019 at 22-23.[4] Therefore, before [redacted] can be purged of contempt, it should submit to an evidentiary hearing involving one or more [redacted] competent to testify as to the completeness and authenticity of the document productions. *See Food Lion*, 103 F.3d at 1019 ("[e]very civil contemnor who asserts a genuine issue of material fact is entitled to a full, impartial hearing.").

[4] In an effort to preclude the necessity of such an evidentiary hearing—which could be done by "video teleconferencing," Tr. Feb. 15, 2019 at 29—the government asked to interview [redacted] declarants, but [redacted] declined to make them available.

CONCLUSION

For the foregoing reasons, this Court should deny [redacted] Motion to Purge Contempt, and enter the Proposed Order which accelerates the fine and sets an evidentiary hearing to be attended by one or more [redacted].

Respectfully submitted,

JESSIE K. LIU
United States Attorney

By: /s/
Zia M. Faruqui, D.C. Bar 494990
Peter Lallas, N.Y. Bar 4290623
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20001
(202) 252-7117 (Faruqui)
(202) 252-6879 (Lallas)
zia.faruqui@usdoj.gov
peter.lallas@usdoj.gov

Certificate of Service

I certify that on the 21st day of March, 2019, service was made of the foregoing motion via electronic mail to Brian D. Boone, c/o Alston and Bird, 101 S. Tryon Street, Suite 4000, Charlotte, N.C. 28280, brian.boone@alston.com.

/s/
Zia M. Faruqui
Assistant United States Attorney

EXHIBIT A

EXHIBIT B

FILE COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	**No. 18-gj-041** **UNDER SEAL**

[PROPOSED] ORDER

Upon Consideration of the Government's Cross Motion to Accelerate Fines and for an Evidentiary Hearing, it is, on this ____ day of _____, 2019, hereby **ORDERED** that the Motion is **GRANTED**, and it is

FURTHER ORDERED that, on April 1, 2019, the civil contempt sanctions against [redacted] shall increase to $100,000 per day; and it is

FURTHER ORDERED that, on April 8, 2019, the civil contempt sanctions against [redacted] shall increase to $300,000 per day; and it is

FURTHER ORDERED that the deputy clerk shall schedule an evidentiary hearing at a time convenient to the Court and the parties at which [redacted] shall present one or more witnesses competent to testify as to the completeness and authenticity of [redacted] document productions.

SO ORDERED this ____ day of _____, 2019

_____
HON. BERYL A. HOWELL
CHIEF JUDGE,
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Copies to:

Zia M. Faruqui
Peter C. Lallas
U.S. Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530

Brian D. Boone
Edward T. Kang
Emily Seymour Costin
Karl Geercken
Alston & Bird
101 South Tryon Street, Suite 4000
Charlotte, N.C. 28280

ECF No. 108

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Subpoena	Case No. 1:18-gj-00041-BAH Chief Judge Beryl A. Howell

REPLY MEMORANDUM IN SUPPORT OF
THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS'S MOTION TO UNSEAL

The Reporters Committee for Freedom of the Press ("Reporters Committee") hereby submits this reply in support of its motion to unseal the orders, briefs, transcripts, and underlying record filed in this proceeding.

PRELIMINARY STATEMENT

This Court should unseal the "papers, orders and transcripts" filed in these proceedings pursuant to Local Criminal Rule 6.1 because "continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." Contrary to the government's arguments, continued secrecy is not necessary solely because of the existence of an ongoing grand jury investigation. Nor is continued secrecy necessary because information that could be released in currently sealed documents is already public. Local Rule 6.1 contemplates public access even where grand jury proceedings have yet to conclude and especially when the content of sealed filings has been made public. Continued sealing here is affirmatively *un*necessary.

The public's right to access the papers, orders, and transcripts in this case under the First Amendment and common law compels the same conclusion. Where, as here, such a right attaches, sealing documents can only be justified where sealing is narrowly tailored to support a compelling governmental interest. Just as continued sealing of the "papers, orders and transcripts" in this proceeding is no longer "necessary," so, too, is sealing not narrowly tailored to support a compelling governmental interest. The government in its opposition simply errs in contending that the First Amendment has no role to play here. Contempt proceedings are unquestionably subject to the presumption of public access, and the Reporters Committee seeks materials in this proceeding that, as a matter of history and logic, are presumptively open to the public.

This Court should grant the Reporters Committee's motion.

ARGUMENT

I. The Government Does Not Demonstrate That Continued Secrecy Is "Necessary" Under Local Criminal Rule 6.1.

This Court should unseal these proceedings pursuant to Local Criminal Rule 6.1. That rule provides that "Papers, orders and transcripts of hearings subject to this Rule, or portions thereof, may be made public by the Court . . . upon a finding that continued secrecy *is not necessary* to prevent disclosure of matters occurring before the grand jury." Local Criminal Rule 6.1 (emphasis added). As the D.C. Circuit has held—and as the government recognizes, *see* Opp'n at 2 n.2—the accompanying Local Rule, along with Federal Rule of Criminal Procedure 6(e), provide a mandate: "if the [district court] can allow some public access without risking disclosure of grand jury matters . . . Rule 6(e)(5) contemplates that this *shall be done*." *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502 (D.C. Cir. 1998) (emphasis added).

Public access to broad swaths of the briefs and record underlying this Court's orders does not risk disclosure of grand jury matters, and the Reporters Committee's motion should be granted on this basis alone. This Court has recognized that it can permit public access to materials in this case: it released to the public five orders in redacted form. But that alone does not satisfy Local Rule 6.1: Local Rule 6.1 on its face requires public access to underlying materials too. In *Dow Jones*, the D.C. Circuit held that the press "ha[d] no basis for complaint" as to "pleadings and papers" not because public versions of those materials were unnecessary but rather because the district court was already providing the public access to those materials. 142 F.3d at 500-01. The D.C. Circuit noted approvingly that the district court had been "implementing Rule 302"—Rule 6.1's predecessor—"by redacting documents" for public access, including "certain papers filed by President Clinton in connection with his motion for an order to show cause." *Id.* at 501. The

Reporters Committee asks only for the same here: redacted versions of party filings and transcripts of hearings.

The government nevertheless asks this Court to provide public access to the docket and the Court's orders alone. The government asserts that continued, blanket secrecy of the rest of the filings here is necessary because "the grand jury's investigation is ongoing" and "much substance has already" been published with redactions. Opp'n at 5-6. Neither rationale suffices under either Local Rule 6.1 or Rule 6(e).

First, the pending nature of the grand jury's investigation alone does not justify broad, continued sealing. The plain text of Rule 6(e)(5) and Local Rule 6.1 expressly contemplates that proceedings may be made public regarding matters "occurring" before the grand jury. The Rules' use of "occurring"—rather than "that occurred"—signals their application to ongoing matters. Indeed, courts regularly unseal documents, or portions of documents, even where they relate to ongoing grand jury proceedings. In *Dow Jones*, for example, the D.C. Circuit considered the district court's denials of motions to unseal and a denial of a motion to govern access to "all *future* ancillary proceedings stemming from the grand jury's investigation." 142 F.3d at 498 (emphasis added). The appellate court held that certain parts of the record could and should be unsealed in the ongoing matter, with no mention of the necessary predicate the government proposes—that the investigation conclude before the public has the ability to see what its government is doing. *See id.* at 500-06. And although the court in *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) recognized that the ongoing nature of a grand jury investigation was a consideration, the D.C. Circuit unsealed those materials that contained already known information and materials upon which it had relied so that the public could "see what informed [our] reasoning" even though the "special counsel's investigation is *ongoing*." *Id.* at 1140-41 (emphasis added). In

short, blanket sealing of these proceedings isn't justified only because a grand jury investigation is ongoing.[1]

Second, that "much substance has already" been made public, Opp'n at 5, only underscores why continued secrecy of the parties' filings is not "necessary," Local Criminal Rule 6.1. *See In re Unseal Dockets Related to Indep. Counsel's 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314, 322-23 (D.D.C. 2018) ("Nevertheless, 'grand jury secrecy is not unyielding when there is no secrecy left to protect.'") (citation omitted); *see also In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154-55 (D.C. Cir. 2007) (ordering the "release [of] those redacted portions of [the] concurring opinion and the two ex parte affidavits that discuss grand jury matters" where "the 'cat is out of the bag'" given that one grand jury witness "discusse[d] his role on the CBS Evening News"); *Dow Jones*, 142 F.3d at 505 (noting that when grand jury witness's attorney "virtually proclaimed from the rooftops that his client had been subpoenaed," that fact was no longer protected by grand jury secrecy); *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994) (noting that "information widely known is not secret" and "when information is sufficiently widely known" it "los[es] its character as Rule 6(e) material"); *see also Pitch v. United States*, 915 F.3d 704, 712 (11th Cir. 2019) ("The interest in continued secrecy [of grand jury records] is also undercut if details in the records have been publicized."); *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1004 (D.C. Cir. 1999) ("Where the general public is already aware of the information

[1] Even if the ongoing nature of the grand jury's investigation mattered in this case, unsealing would be appropriate in short order, as the investigation is "close to being completed," according to the former Acting Attorney General. Sharon LaFraniere & Katie Benner, *Mueller Investigation Nearing Its End, Whitaker Says*, N.Y. Times (Jan. 28, 2019), https://www.nytimes.com/2019/01/28/us/politics/mueller-investigation-whitaker.html; *see also, e.g.*, Katie Benner, *Mueller Report Expected to Go to Justice Department Within Weeks*, N.Y. Times (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/us/politics/mueller-report-ending.html.

contained in the prosecutor's statement, there is no additional harm in the prosecutor referring to such information.").

Opinions from all three courts that have considered this case—the Supreme Court, the D.C. Circuit, and this Court—have been released in some form. Filings and briefs in the Supreme Court and the D.C. Circuit have also been released to the public with redactions. The filings and briefs in this Court should be, too. Allowing public access to filings in this Court poses no greater danger to secrecy than public access to the filings and briefs in the Supreme Court and the D.C. Circuit did—yet those courts found no reason to keep those filings under wraps. This Court was also able to publish 63 pages of opinions and orders, *see* Notice (Feb. 28, 2019), without "inadvertently revealing matters that are protected by Rule 6(e)," as the government worries in opposing publication of any of the "remaining filings," Opp'n at 6.[2] Allowing public access to already disclosed information does not "risk[] disclosure of" prohibited matters, *Dow Jones*, 142 F.3d at 502, as the government argues. Local Rule 6.1 requires public access. This Court should continue to direct the unsealing of the filings in this proceeding.[3]

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[2] This Court has recognized that secrecy is no longer necessary where information has already become public. Specifically, the Court rejected a proposal to ban the parties' counsel from providing any statement to the press other than "No Comment" and instead allowed public statements regarding "the public information about the matter reflected in the public versions of" court decisions. Mem. & Order at 3 (Jan. 15, 2019). Under the government's theory advanced in its Opposition—*i.e.*, because such information is already public, there is no need to disclose more—a continued restriction on public statements would be warranted. This Court concluded otherwise, *see id.*, and should reject the government's similar argument regarding filings and the record now. At the very least, the filings and record can be published in redacted form, consistent with the public information about the matter already reflected in public versions of court filings.

[3] If this Court denies the Reporters Committee's request, it should "offer some explanation . . . [that] bear[s] some logical connection to the individual request. In other words, it must rest on something more than the administrative burdens that justified the denial of across-the-board docketing, and it must be more substantial than, say, an arguable possibility of leaks." *In re Sealed Case*, 199 F.3d 522, 527 (D.C. Cir. 2000) (referring to requests under Local Rule 6.1).

II. This Court Should Unseal The Filings In This Proceeding Pursuant To The First Amendment And Common Law Rights Of Access.

As the Reporters Committee demonstrated in its opening brief, the First Amendment and common law rights of access also attach to these proceedings and provide an additional reason to unseal the filings in this case. Both history and logic compel such a conclusion. *See* Mot. to Unseal at 9-14. The government argues this proceeding is "ancillary" to a grand jury investigation, a matter to which the First Amendment does not attach. Opp'n at 1-2. That is wrong. Although the First Amendment's right of public access does not attach to "grand jury proceedings" themselves, *Dow Jones*, 142 F.3d at 499, and the First Amendment does not require public attendance at ancillary grand jury hearings, *id.* at 501, the D.C. Circuit has never held that the First Amendment has absolutely no role to play in any and all matters that touch upon grand jury investigations—let alone contempt proceedings.

In fact, as *Dow Jones* recognized, there is little to no daylight between Local Rule 6.1 and the First Amendment when it comes to the materials the Reporters Committee requests in this motion—briefs, transcripts, and the record. The D.C. Circuit observed that, as to "pleadings and papers"—what the Reporters Committee seeks here—the press's "constitutional claim" was coextensive with the Local Rule authorizing disclosure of pleadings and papers. 142 F.3d at 500 (noting that Local Rule 6.1's predecessor rule gives the press "the most it could expect from its constitutional claim"). And, in any event, the government cannot argue that contempt proceedings are ancillary to grand jury investigations: contempt proceedings are far removed from core "grand jury proceedings" and their unique history of secrecy. The public has long had a right of access to

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The Reporters Committee also respectfully reserves the right to challenge redactions the parties propose to the filings in this matter.

contempt proceedings. *See* Mot. to Unseal at 9-14; *United States v. Index Newspapers*, 766 F.3d 1072, 1091-94 (9th Cir. 2014) (ordering release of contempt order and related transcript).[4]

The Government makes no attempt to show that keeping sealed every document the parties have filed in this Court is narrowly tailored to a compelling interest under the First Amendment. Nor could the government make such a showing, given that it is plainly not "necessary" to keep such documents fully under seal to protect the secrecy of a matter before the grand jury. *See supra* Arg. Pt. I. As noted, much of the information that will be disclosed is public already, meaning that secrecy is unwarranted. The government's position—essentially contending that it is not worth the burden to release public versions of documents that no longer need be sealed—is contrary to law. *See In re Sealed Case*, 199 F.3d at 527.

As the government emphasizes, this Court has now released to the public 63 pages of its opinions in this matter. Now that those decisions are public, the briefs and record underlying the court's decision-making process should be too. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 666-67 (D.C. Cir. 2017) (holding public right of access attached to briefs and joint appendix underlying district court opinion); *see also In re Grand Jury Subpoena*, 438 F.3d at 1140 ("If the public is to see [the Court's] reasoning, it should also see what informed that reasoning."); *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (stating that public confidence in

[4] The common law right of access to contempt proceedings has not been displaced. *Contra* Opp'n 6 at n.6. As noted, Local Rule 6.1 expressly contemplates that disclosure will be appropriate where, *inter alia*, "secrecy is not necessary to prevent disclosure of matters occurring before the grand jury," and Rule 6(e) itself expressly provides that it is "[s]ubject to any right to an open hearing in a contempt proceeding," belying any intent to displace the public's right to access contempt proceedings. *Cf. Metlife*, 865 F. 3d at 669 ("[W]e can reasonably assume that Congress would not have overturned the longstanding presumption favoring judicial transparency . . ."); *id.* at 673 (rejecting the contention that the common law right of access is displaced "whenever a statute commands an agency to keep materials confidential").

judicial proceedings depends on "access to . . . documents that are used in the performance of Article III functions").

III. The Contemnor's Identity Should Be Unredacted.

The government argues that the identity of the witness should remain under seal, noting that it "does not appear that the Corporation asked for a public hearing" and citing to this Court's January 30, 2019 Memorandum and Order, which simply quoted the government's joint status report that, at least as of that date, the contemnor agreed its identity should remain under seal. Opp'n at 5-6, n.5. But the public has no knowledge of whether the witness ever asked for an open hearing. Nor is it clear whether the witness's agreement that its identity should remain under seal is a reflection of the realities of prior orders in this case or an affirmative desire to keep its identity secret. Indeed, the contemnor has yet to oppose the Reporters Committee's motions to unseal in *any* court. Instead, as this Court has noted publicly, the witness asserted its First Amendment rights when the government tried to silence it previously. Mem. & Order at 1-3 (Jan. 15, 2019). The heavily redacted record to date does not demonstrate to the public that the witness has voluntarily kept its identity secret.

And the witness's identity is of public concern: the primary issue in this case to date apparently has been whether the witness has sovereign immunity under the Foreign Sovereign Immunities Act. That issue hinges on whether the contemnor is a country or a corporation, yet the competing arguments in this Court about why the witness is properly considered one or the other remain almost entirely under seal. The Government's circular logic that the identity of the witness cannot be revealed because "the witness's identity has [not] yet been revealed" fails to justify—under either Local Rule 6.1 or the First Amendment—the necessity of keeping this information secret; *see* Mot. to Unseal at 16-18. Accordingly, this Court should direct that the identity of the contemnor here be publicly released.

CONCLUSION

For the foregoing reasons, the motion to unseal the filings in this proceeding, including the orders, briefs, transcripts, and record, should be granted.

March 22, 2019

Respectfully submitted,

/s/ Theodore J. Boutrous

THEODORE J. BOUTROUS [DC Bar 420440]
Counsel of Record
THEANE EVANGELIS (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
(213) 229.7000
tboutrous@gibsondunn.com

LEE R. CRAIN (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York City, New York
(212) 351.2454
lcrain@gibsondunn.com

KATIE TOWNSEND
D.C. Bar No. 1026115
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
ktownsend@rcfp.org

Counsel for Movant Reporters Committee for Freedom of the Press

ECF No. 109

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	Case No. 18-gj-0041 **UNDER SEAL** UNDER LCrR 6.1

[redacted] COMBINED REPLY SUPPORTING ITS MOTION TO PURGE CONTEMPT AND OPPOSITION TO THE GOVERNMENT'S CROSS-MOTION FOR INCREASED SANCTIONS AND AN EVIDENTIARY HEARING

For the past seven weeks, [redacted] has gone to extraordinary lengths to document its good faith belief that it has found and voluntarily produced all documents responsive to the subpoena. It has given the Special Counsel sworn testimony—18 pages in total—from three of [redacted]. It has submitted written responses to the Special Counsel's follow-up questions. It has provided [redacted] translations free of charge. And it has explained to the Special Counsel many times that it has nothing to hide. That is far beyond what the average subpoena recipient does to prove compliance with a subpoena. Indeed, [redacted] has done more than [redacted] outside counsel has ever seen any subpoena recipient do to demonstrate compliance.

The Government has responded by ignoring [redacted] sworn testimony, raising issues that say nothing about the adequacy of [redacted] searches, and asking the Court to increase fines to coerce the production of non-existent documents.

[redacted] is at a loss. It has searched for documents high and low and has produced every document that it has found. Under the governing legal standards, that is more than enough. *See, e.g.*, *Stewart v. O'Neill*, 225 F. Supp. 2d 6, 10 (D.D.C. 2002) (party must show "substantial compliance" to avoid contempt, which means that it "took all reasonable steps within its power to comply with the court's order") (internal citations and alterations omitted); *see also Gucci Am. v. Bank of China*, 768 F.3d 122, 142 (2d Cir. 2014) (party moving for contempt must prove that "the contemnor has not diligently attempted to comply in a reasonable manner."). And yet the Government's assault on [redacted] sovereign dignity continues. Enough is enough.

* * *

[redacted] hopes that the Court sees its good-faith efforts to comply for what they are. But if the Court doesn't—and either allows the fines to continue or increases them—then [redacted] will immediately appeal to the D.C. Circuit and pursue any other steps necessary to stop the fines' accrual. *Cf. United States v. Gewin*, 759 F.3d 72, 78 (D.C. Cir. 2014) ("[contemnor] may bring a challenge to the district court's decision not to purge the contempt"); *Consol. Rail Corp. v. Yashinsky*, 170 F.3d 591, 594 (6th Cir. 1999) (reviewing denial of motion to purge contempt).

I. [redacted] HAS PROVED ITS COMPLIANCE BEYOND WHAT THE GOVERNING LEGAL STANDARDS REQUIRE.

Since early February, [redacted] has proved over and over that it has looked everywhere that it can think of for documents responsive to the subpoena. [redacted]—with searching for responsive documents. Mot. Ex. 1 at 1. It produced four sets of documents during the week of February 4. It voluntarily gave the Special Counsel hundreds of pages of courtesy [redacted] translations. And when the Special Counsel asked, it also provided updated translations, a revised custodial declaration, and even documents from outside the subpoena's timeframe.

[redacted] has also followed this Court's advice about purging its contempt. At the February 15, 2019 hearing, the Court suggested that [redacted] could submit declarations outlining [redacted] search processes, explaining why certain documents do not exist, and confirming whether [redacted] has produced all documents responsive to the subpoena. *See* Tr. 12, 13, 23 (Feb. 15, 2019). [redacted] has done exactly that. After the hearing, [redacted] counsel went [redacted] met with [redacted] and obtained declarations from two of [redacted] Through those declarations, [redacted] confirmed that [redacted] "has found no responsive documents other than those that it has produced" and that [redacted] has "voluntarily produced all information responsive to the Subpoena." Mot. Ex. 1 at 10–11 ([redacted]); *see also* Mot. Ex. 2 at 5 ("To the best of my knowledge and information, [redacted]

voluntarily produced all documents responsive to the Subpoena . . . .") ([redacted]).

[redacted] went even further. They testified about who comprised [redacted] tasked with responding to the subpoena (Mot. Ex. 1 at 1), where [redacted] searched for responsive documents (Mot. Ex. 1 at 1–3; Mot. Ex. 2 at 1–2), what [redacted] found (*id.*), why [redacted] searches did not reveal [redacted] (Mot. Ex. 1 at 4; Mot. Ex. 2 at 4–5), how long [redacted] in the normal course (*id.*), why [redacted] (Mot. Ex. 2 at 2–4 & Ex. A), [redacted] (*id.* at 3), why [redacted] (Mot. Ex. 1 at 7), [redacted] (*id.* at 8–9), [redacted] *Id.* at 10.

That was more than enough to show compliance, but [redacted] did not stop there. After [redacted] counsel returned from [redacted] gave the Special Counsel written responses—which the Government fails to mention—to follow-up topics that the Special Counsel identified during a March 1 phone call. *See* Mot. 2.[1] On top of that, when the Special Counsel expressed concern about [redacted] declarations' not having been written in [redacted] submitted a declaration from its General Counsel explaining his qualifications for [redacted] translations and that he translated the declarations word for word in the declarants' presence before they executed the documents. *See* Mot. 2; Mot. Ex. 3 at 1. Only after submitting the three declarations and written responses did [redacted] move this Court to purge [redacted] contempt.

Those efforts show beyond question that [redacted] "took all reasonable steps within its power to comply with the court's order." *Stewart*, 225 F. Supp. 2d at 10. The standard is reasonableness (*id.*); [redacted] efforts have been exhaustive. Indeed, courts in this district often

[1] Those responses concerned the location of documents that [redacted]

deny motions to compel when the producing party did far less to show that additional responsive documents do not exist. *See Harris v. Koenig*, 271 F.R.D. 356, 371 (D.D.C. 2010) (citation omitted) ("Lack of evidence showing that a producing party is in fact in possession of a document is grounds to deny a motion to compel."); *id.* at 370 (denying "motion to compel what does not exist"); *see also Barnes v. District of Columbia*, 289 F.R.D. 1, 25 (D.D.C. 2012) (citation omitted) ("To find that a production is incomplete, the Court requires more than a mere theoretical possibility that more documents exist . . . to justify additional discovery.") (internal citation omitted); *Alexander v. FBI*, 194 F.R.D. 305, 311 (D.D.C. 2000) ("[S]uspicion is insufficient to support their motion to compel. Plaintiffs must demonstrate that the documents they seek to compel do, in fact, exist and are being unlawfully withheld."); *Evans v. Atwood*, 177 F.R.D. 1, 9 (D.D.C. 1997) ("the supposition that [documents] must [exist] is an inadequate basis to compel their production"); *see also Unites States v. Rizzo*, 539 F.2d 458, 466 (5th Cir. 1976) (reversing civil-contempt order when defendant "testified to going through the files . . . several times" and holding that defendant's finding certain documents in later searches "is no proof that [defendant] did not initially make a good faith effort to produce all of the cards sought."); *Eulich v. United States*, No. 3:99-CV-1842-L, 2006 U.S. Dist. LEXIS 2227, at *23 (N.D. Tex. Jan. 23, 2006) (holding that "[s]peculation or suggestion by [the party seeking to uphold contempt], or even testimony by a preponderance of the evidence, that other documents ought to exist, without more, is not enough").

II. THE GOVERNMENT'S QUESTIONS ABOUT [redacted] DO NOT CALL INTO DOUBT THE ADEQUACY OF [redacted] SEARCHES.

The Government ignores the governing legal standards and [redacted] good-faith efforts to assuage the Special Counsel's purported concerns. Instead, the Government argues that the Court should deny [redacted] motion based on speculation about the [redacted]. Opp. 2–4. But two of [redacted] have already testified under oath that [redacted] looked everywhere for records relating to that issue and produced

everything that it found. [redacted] cannot produce what does not exist. *See Madan v. Chow*, No. 02-cv-2016, 2004 U.S. Dist. LEXIS 27401, *1–3 (D.D.C. Dec. 17, 2004) ("Obviously, stating that the responding party does not have the documents sought is a perfectly legitimate response. The ancient maxim, *nemo dat quod non habeat*, says it all: one cannot give what one does not have.").

In all events, none of the Government's purported concerns with [redacted] call into question the adequacy of [redacted] searches. Most don't relate to [redacted] search process at all. For instance, the Government speculates that [redacted]. But that speculation says nothing about [redacted] searches. It is also false: [redacted] Mot. Ex. 1 at 7. And as his second declaration (attached as Ex. 4) confirms, [redacted] *See* Ex. 4 at 1.[2] [redacted]

[redacted]

The Government also questions why a [redacted]. Opp. 2. But the Government ignores that the [redacted] Mot. Ex. 1 at 10.

The Government's remaining arguments are also beside the point. [redacted]

[redacted]

The Government suggests in the end that [redacted] has not answered the "basic question" of [redacted] Opp. 4. That is false insofar as it relates to [redacted] Mot. Ex. 1 at 7–8, 10; Mot. Ex. 2 at 3. [redacted] has nothing left to produce, so this Court should reject the Government's speculation about nonexistent documents.

III. THE COURT SHOULD REJECT THE GOVERNMENT'S REQUESTS FOR INCREASED FINES AND AN EVIDENTIARY HEARING.

For the same reasons, the Court should reject the Government's cross-motion to escalate the fines. *Cf.* Opp. 4. In the ordinary course, courts have little trouble rejecting motions to compel a party to produce documents that the party has represented do not exist. *See, e.g.*, *Harris*, 271 F.R.D. at 371. There are additional reasons for that result to obtain here: [redacted] is a foreign sovereign and suffers harm to its sovereign dignity harm every day that the contempt order remains in place, every day that sanctions accrue, and every time that the Government rejects [redacted] compliance efforts as insufficient—not to mention every time that the Government challenges [redacted] truthfulness.[7] *See, e.g.*, *In re Papandreou*, 139 F.3d 247, 251 (1998) (contempt order of foreign state's officials "offends diplomatic niceties"); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("[a]ctions against foreign sovereigns in [American]

[redacted]

[7] The U.S. Government would rightly be outraged if a foreign country in litigation argued that Jerome Powell or Mike Pompeo had lied about the existence of documents.

courts raise sensitive issues concerning the foreign relations of the United States . . . ."). There is no basis for this Court to continue the fines, much less increase them to coerce the production of documents that do not exist.

Nor is there any basis for requiring an evidentiary hearing. [redacted] has done far more than necessary to prove its compliance. *Cf. Caudle v. District of Columbia*, 263 F.R.D. 29, 38–39 (D.D.C. 2009) (declining to require defendant to "provide a sworn list of responsive documents that Defendant cannot locate or that no longer exist" after defendant "indicated that it conducted a good faith search but was unable to locate any additional responsive documents"); *Franks v. Delaware*, 438 U.S. 154, 171 (1978) (holding that in search-and-seizure context, "[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine"). As important, the Government still has not cited a single case requiring an evidentiary hearing under similar circumstances.

In any event, this Court's holding an evidentiary hearing would add nothing: The Government wants a hearing so that a [redacted] can "testify as to the completeness and authenticity of the document productions" (Opp. 5), but [redacted] has already given that testimony through three declarations.

* * *

The Government is asking this Court to fine [redacted] $100,000 per day (and soon $300,000 per day) until [redacted] produces unidentified documents that do not exist. That will accomplish nothing other than further straining [redacted] relations with the United States.

And for what? The Special Counsel has issued his report; his investigation is over. And the U.S. Attorney has replaced him on the Government's most recent filings in this Court. Those developments provide all the more reason for this Court to stop the harm to [redacted] sovereign dignity.

CONCLUSION

The Court should hold that [redacted] has purged its contempt and that the contempt fines stopped accruing on February 8, 2019, the date of [redacted] last production. The Court should also deny the Government's cross-motion for escalated fines and an evidentiary hearing.

Respectfully submitted on March 26, 2019.

ALSTON & BIRD LLP

Brian D. Boone (D.C. Bar 987633)
101 S. Tryon Street, Suite 4000
Charlotte, North Carolina 28280
T: (704) 444-1100
F: 704.444.1111
Email: brian.boone@alston.com

Edward T. Kang
950 F Street, NW
Washington, DC 20004
Telephone: 202-239-3000
Facsimile: 202-239-3333
E-mail: edward.kang@alston.com

CERTIFICATE OF SERVICE

I certify that today I served this **Reply** by email on the following:

Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
Special Counsel
950 Pennsylvania Ave NW
Room B-103
Washington, D.C.

Zia M. Faruqui
Peter Lallas
Assistant United States Attorneys
555 46 Street, N.W.
Washington, D.C.

Respectfully submitted on March 26, 2019.

ALSTON & BIRD LLP

Brian D. Boone
Bank of America Plaza, Suite 4000
101 S. Tryon St.
Charlotte, NC 28280
Phone: 704.444.1000
Fax: 704.444.1111
brian.boone@alston.com

[redacted]

EXHIBIT 4

ECF No. 114

* * * * * S E A L E D * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * * *

IN RE:	)	GJ 18-41
Grand Jury Subpoena 7049	)	
	)	
Interested Parties:	)	March 27, 2019
CORPORATION,	)	9:59 a.m.
GOVERNMENT.	)	Washington, D.C.
	)	

* * * * * * * * * * * * * * * * * * *

*** SEALED ***

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES:

FOR THE CORPORATION:
BRIAN BOONE
KARL GEERCKEN
EDWARD T. KANG
LEE DENEEN
Alston & Bird
90 Park Avenue
New York, NY 10016

FOR THE GOVERNMENT:
DAVID B. GOODHAND
ZIA M. FARUQUI
PETER C. LALLAS
U.S ATTORNEY'S OFFICE
555 4th St., N.W.
Washington, D.C. 20530
(202) 252-7117

Court Reporter:
Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter
Washington, D.C. 20001

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

* * * * * S E A L E D * * * * *

PROCEEDINGS

THE DEPUTY: Matter before the Court, grand jury No. 18-41, in regards to grand jury subpoena 7049. Interested party and government participating.

Counsel, please come forward and identify yourselves for the record.

MR. FARUQUI: Good morning, Your Honor. Zia Faruqui. With me at counsel's table I have David Goodhand and Peter Lallas. Also present in the courtroom are Deborah Curtis and Chad Byron on behalf of the Government.

THE COURT: Good morning.

MR. BOONE: Good morning, Your Honor. Brian Boone. Also with me from [redacted] today are Karl Geercken, Ted Kang, and Lee Deneen, also from Alston & Bird.

THE COURT: All right. So on my agenda, to deal with the sealed portion of the hearing, is [redacted] motion to purge contempt, with declarations from [redacted] -- two declarations from [redacted] including the declaration submitted yesterday, and [redacted] as well as [redacted] I also have the Government's motion to accelerate fines and the Government's request for an evidentiary hearing. Then, I wanted to go over some ground rules for the public part of this hearing with the Reporters Committee on the Reporters

Committee motion after this. So that's what is on my agenda.

Is there anything else that either party would like to put on the agenda to discuss?

MR. FARUQUI: Nothing from the Government, Your Honor.

MR. BOONE: Nothing from us, Your Honor.

THE COURT: All right. So even though the hearing started with [redacted] motion to purge -- and I usually start with the initial moving party -- I think it's appropriate to start with the Government first off here, since the main question I had was the question that [redacted] ended with, in its reply papers which, notably, was far more extensive and thorough than its opening papers, which is never helpful to a Court, to save substantive arguments until reply the night before a hearing; it's not appreciated. You have got substantive arguments and points to make, make it in your opening brief. I don't know what sly, clever activity it is to save everything substantive until the reply, but it doesn't work for me.

But the first question I am going to ask the Government is in the last paragraph of their reply which is: What are we doing here? Why isn't this whole matter over as of 5 p.m., March 22, when Mr. Mueller delivered his report?

MR. FARUQUI: Your Honor, I can say with absolute

certainty that the case is robust, ongoing; we are working within our office. The matter was transferred back in fact to the U.S. Attorney's Office. We have met numerous times with agents. We have reviewed materials, and our plan is to go forward with our investigative steps. We are in constant communication with the special counsel's office.

It's very different, I think, to the outside world; but, within the Government, theoretically we are one Government. One AUSA may leave, one prosecutor; but, when there is a case of this import, there is no reason that it would stop because a separate focused matter has been presented with a letter and report.

THE COURT: Well, correct me if I'm wrong, but this matter was presented to the Court as one part of the investigation into whether there was Russian influence with the 2016 election, presidential election; and that's been resolved by the -- at least the summary of the special counsel's report. So there are other aspects of that investigation that led in other directions. So I thought this part -- this particular subpoena and leg of the investigation was also related precisely to what Mr. Mueller said he resolved in his report delivered at 5 p.m. on March 22.

So are you saying that this is a different aspect of this investigation related to different inquiries than

that?

MR. FARUQUI: Yes. That's correct, Your Honor. I am happy to approach. I think it's --

THE COURT: Well, there's been nothing submitted that -- in the Government's opposition papers that provides any detail about how these records have continuing relevancy to something subject to investigation by the grand jury to warrant continued fines to coerce additional compliance, which we're going to get to in a minute, or whether there is anything all relevant to an ongoing grand jury investigation from these records that the Government's continuing to seek.

MR. FARUQUI: So if we can have an opportunity now, or we can refer to portions of the ex parte prior affidavits of the special counsel, I think we can either now or file supplemental briefing to Your Honor to try to further elucidate that. Certainly, the special counsel's remit, I think, allowed them to take this investigation in.

The investigation initially came into our office and was passed to the special counsel at that time because I think there was a question within the realm of their remit. However, I think it's very clear I think the matter --

THE COURT: So are you saying that this investigation started with the D.C. U.S. Attorney's Office, spent some time within the special counsel's jurisdiction, so to speak, and is now being given back to the U.S.

Attorney's Office?

MR. FARUQUI: That is correct, Your Honor. And it does in fact involve issues that have not or are in any way close to being resolved and very much is a live issue that requires, I think, a great of deal resources, time, and attention by the Government, which is why we believe the subpoena is in fact still a live controversy that requires contempt because it goes to the core of the question of this investigation.

THE COURT: All right. Well, before I got the Government's opposition, I didn't know whether the Government's opposition was going to be, oh, forget the whole thing. I have read all of the ex parte filings, and I am puzzled.

MR. FARUQUI: We can supplement --

THE COURT: What's still going on here?

MR. FARUQUI: We can certainly supplement, Your Honor, with an additional ex parte supplement that will go into greater detail explaining what is being investigated and how it is in no way resolved by what may or may not be in the Mueller report or in AG Barr's letter to Congress and the public.

These are live issues that require immediate attention from the U.S. Attorney's Office and from which the grand jury -- because the grand jury matter is still alive

and being thoroughly investigated, we require the Court to intervene and assist us as we try to force the contemnor to comply fully with our subpoena.

THE COURT: So are you still presenting evidence to this grand jury that was being used by the special counsel's office?

MR. FARUQUI: We -- yesterday, anticipating that that grand jury may or may not -- what its life cycle is, it's a little unclear.

THE COURT: Well, I am very aware of its life cycle.

MR. FARUQUI: We are unaware. I apologize, Your Honor. Yes. It's your grand jury; you certainly know.

We are trying to sort those issues out with the special counsel. However, we have reopened it yesterday in the grand jury, understanding that the current grand juries that are soon to expire; but with the intention that, when those expire, we will reopen a new one. We do plan to seek additional records, both in -- and, potentially, additional testimony as well.

THE COURT: All right. Well, let's turn -- assuming that their records continue to be relevant to an ongoing grand jury investigation, let's turn to [redacted] position here which is: We have given everything that we can find, and you are beating a dead horse at this point.

What else can we do? They sort of have a point from where I sit.

The Government's opposition identifies a number of, you can say, oddities, suspicious elements [redacted]

But despite their oddity or suspicious character, what precisely do those circumstances suggest about the fact that [redacted] has other documents that it's not sharing with the Government in response to the subpoena? So, I mean, one thing that the Government has talked about, [redacted]

But putting aside what the response is, the veracity of the response and [redacted] which is beyond my expertise as a mere lawyer with a J.D., what difference does that make to whether or not [redacted] has any additional records? So that's your point one.

MR. FARUQUI: Yes, Your Honor.

THE COURT: Anything there that I'm missing that would indicate [redacted] got additional records that they need to disclose to you?

MR. FARUQUI: Your Honor, I think that what we believe and what is -- I think, as you rightly called it, just they're so odd that they seem implausible and makes us believe that we have had interlocutory throughout this proceeding, if I can include myself with the special counsel, where the Government has tried to get information from [redacted] And I think that if we ignore the tortured history of getting to this moment and as it continues to be -- the Court puts questions to counsel, counsel is able to draw that information out of [redacted] there are a variety of stories that have come forward.

We are where we are at today which, I agree, sitting here today we have more information by orders of magnitude than prior. But the problem is that there are conflicting stories or stories that don't make sense. And I think it leaves the Government and the grand jury with real concerns about --

THE COURT: Well, let me slow you down there --

MR. FARUQUI: Okay.

THE COURT: -- because you are using the words "conflicting stories." I am not sure that I have seen conflicting stories.

I have seen odd stories that [redacted] counsel then comes forward with additional declarations or additional explanations to explain some certain circumstances underlying the oddity, the fact that there are no email communications. [redacted] -- well, okay; that may be odd. It may be implausible in 2019, 2018, 2017, [redacted], but --

MR. FARUQUI: That's something --

THE COURT: -- I mean, at what point am I supposed to say this is so implausible you must have other records because I just don't know that that -- that that is the leap that I should be taking, let alone can take; but that's number one.

MR. FARUQUI: Okay.

THE COURT: That's odd. But I don't really want to go into [redacted] You know, frankly, if I had to say, okay, that sounds plausible, I would say that doesn't indicate to me any evidence -- certainly strong evidence that [redacted] has any further documents to show the Government.

Your next point is the [redacted]

* * * * * SEALED * * * * *

[redacted]

MR. BOONE: That's right, Your Honor.

THE COURT: [redacted]

[redacted]

MR. BOONE: I would have to check on that. I don't recall that name.

THE COURT: Is that [redacted] person?

MR. BOONE: I think it's [redacted] person.

THE COURT: Okay. [redacted]

[redacted]

MR. GEERCKEN: I believe that's the -- forgive me, Your Honor. [redacted]

[redacted]

THE COURT: And that's the only -- it's a signature.

* * * * * SEALED * * * * *

MR. GEERCKEN: It's a signature. I don't have the document in front of me, but that's my recollection.

THE COURT: You didn't bring copies of documents with you to a hearing on motion papers?

MR. GEERCKEN: I am sure we have it right here. I don't have it right in front of me.

THE COURT: Well, why don't you take a moment and find it and answer my question.

MR. GEERCKEN: I will do that right now, Your Honor. Thank you. Yes.

I believe the top of the middle of the page is [redacted]

Thank you.

THE COURT: All right. So you are right, this is very odd [redacted]

MR. FARUQUI: Yes, Your Honor.

THE COURT: But despite that oddity, it worked within [redacted] So that's very odd.

MR. FARUQUI: Yes.

THE COURT: What does that tell me; that there might be certainly more documents?

MR. FARUQUI: I think it tells us that this document -- when something is so odd that it reaches, I think, the precipe of being implausible, it's that we can't take this at its face value. We don't even understand what this means.

Previously, the Court has had to ask the attorneys to say what [redacted] would tell us about the records that they were obligated to come and produce with an in-person custodian of records to the grand jury, and that we can't continue to ask these questions that we cannot be sure of the answers of unless we have someone to give us some sworn testimony because the declarations will continue to come, I am sure --

THE COURT: Okay. Well, this is my problem with that, before I go to the rest of these.

MR. FARUQUI: Okay.

THE COURT: The person who was in [redacted]

MR. FARUQUI: Yes.

THE COURT: [redacted]

MR. FARUQUI: Certainly.

THE COURT: So they could put forward [redacted] And even if they made that person available to you by telephone the day of the teleconference or in person in my court under oath, what would that get you?

MR. FARUQUI: Yes, Your Honor. I [redacted]

They are attempting to undo the contempt that's been put upon them. They have attempted by putting --

stacking by as little as possible, block by block, of declarations to undo that burden.

I think what the oddities and implausibilities do is they devalue these declarations when there is no opportunity, under oath or cross-examination -- or anything that in a normal hearing one would take to undo contempt.

The only cases they cite, *Rizzo*, and the second case that they cite as well in their briefs -- both were ones where contempt was purged after a hearing. Granted, it was purged, but their own parentheticals reference them. They don't try to hide the ball, or anything like that, that there was testimony. I think that's because Your Honor needs testimony at this point to understand that there are too many oddities stacked together that would back the question --

THE COURT: What if [redacted] comes back and says: We can put forward [redacted] We can give you another -- a third declaration from [redacted] He can say all of that in a declaration, so you don't need to bring him here to say that. He can tell you right off the bat, really, this is not typically how [redacted] So where does that get you?

So we have a very odd situation here.

MR. FARUQUI: Yes.

THE COURT: But that still doesn't indicate that [redacted] has more documents to share.

MR. FARUQUI: I think that we would beg the question that if they come and say: [redacted] --

THE COURT: Let's look at the special circumstance here, that one of these declarations indicate that [redacted]

MR. FARUQUI: That's right, Your Honor.

THE COURT: So maybe [redacted] What if he says that?

MR. FARUQUI: Well, [redacted] has had, I think, now three bites at the apple and so, at some point, maybe he will say that.

THE COURT: And if he says that -- if he says that, because they have almost -- I mean, they have disclosed that -- although, I guess they say that [redacted] Given that fact, which

appeared in [redacted] declarations, how much further do you think you are really going to get in answering -- in pursuing additional questions?

MR. FARUQUI: I think that would put us -- bring us near to a closed door, Your Honor; but it is odd that --

THE COURT: Well, why aren't you at that closed door now?

MR. FARUQUI: Because he hasn't said it yet. He has had multiple opportunities to say it.

THE COURT: To say what?

MR. FARUQUI: To say that the reason the oddities occur is [redacted] In fact, they say it in other places; but the most important piece: [redacted] They have never once invoked this.

THE COURT: Well, let's get precisely to what it is you want.

They have shown where [redacted]

[redacted] --

MR. FARUQUI: No.

THE COURT: Do you have those documents, that documentation?

MR. FARUQUI: We do. And it is consistent with --

THE COURT: So you know [redacted]

MR. FARUQUI: Your Honor, I think that would be one of the most important documents. But, also, perhaps, if they went back and looked, there would be additional documentation about [redacted] or anything else. Because we don't believe it's -- based on what the agents have seen and what they have consulted with -- [redacted] -- that this is so implausible to not be possible, to not be truthful, so that there ought to be additional records. We would just seek the opportunity to have someone further explain why there aren't. We believe there should be those records.

[redacted] --

THE COURT: So really what you are curious about is [redacted]

MR. FARUQUI: [redacted]

THE COURT: [redacted]

MR. FARUQUI: [redacted]

THE COURT: [redacted] who wasn't there, may or may not know that. He has provided information from his conversation [redacted]

MR. FARUQUI: Yes.

THE COURT: [redacted]

MR. FARUQUI: Yes. I think this is a constant issue for the grand jury, Your Honor. We have to make due with who the custodian of records is and make what we can of them. So [redacted] appears to be who [redacted] has put forward as the most competent witness, and so that's who we

will have to make due with. Obviously he will have arguments as to: I don't know; it's beyond me.

[redacted]. But the burden is on the party who is attempting to put forward this implausible story. We think that their implausible story doesn't lift them from their burden.

THE COURT: All right. So moving on down your list, [redacted]

MR. FARUQUI: Yes, Your Honor.

THE COURT: And it is a puzzle why [redacted] didn't ask that question, but we'll find out when I get to Mr. Boone.

Why wasn't that question asked, Mr. Boone?

[redacted]

[redacted] Yes, it's odd. Yes, it might raise a red flag. [redacted] It's odd, but it doesn't demonstrate that there are additional documents that [redacted] hasn't disclosed.

MR. FARUQUI: Your Honor, I think that -- you know, we take your refrain well. When we were drafting our document, the first thing that my colleague, Mr. Goodhand, said is: Are these oddities ones that show that there are additional documents?

Essentially, our answer -- because I don't like that he took your side -- but our answer to Your Honor: If a witness goes before the grand jury and tells -- gives answers and says A, B, C, but we believe that they are not truthful -- what we would do is then come forward to Your Honor and say: They said these documents exist. They say this thing existed, but we don't believe it's true.

We'd ask Your Honor to make a finding based on your thoughts and impressions of the people, of the record, is it a truthful statement or not?

So I am happy to give additional background on the [redacted] if we can approach because there are

some issues I think that we would not be comfortable with. But I don't think -- to your point, I don't think, at the end of the day, even if it was --

THE COURT: Let me tell you, if there are additional -- I mean, you didn't have time after the points were raised in the reply, in [redacted] -- the second declaration that was submitted to submit anything additional. I like to have everything in paper so there is -- so I have absolute clarity as to what the representations are. So if you have additional representations to make regarding the underlying facts, you should present it in a supplemental filing.

MR. FARUQUI: Understood.

THE COURT: So that the record is absolutely clear, at least to me.

MR. FARUQUI: Yes, Your Honor.

THE COURT: All right. Now, [redacted] There is nothing about this [redacted] issue to me that suggests, let alone provides strong evidence that [redacted] has additional documents.

MR. FARUQUI: So it, again, goes to the

implausibility of their story, Your Honor. So that their own arguments cut against them. Truly, that this was -- [redacted] Our records do not comport with their records. Our records show, in fact, questions that have to be answered by a custodian of records.

[redacted]

The declarations were presented to Your Honor to avoid having to bring a witness, so we can avoid these factual discrepancies, and they can put forward a truthful statement that says: Here is the universe, Your Honor.

What we're telling you is that this can't be the universe because we are seeing conflicting things with what they have presented us. So it can mean there are additional

records, or they may need to come back again and attempt to show us that this is in fact the universe. But it can't be done with these -- I mean, it can't continue to be done with these declarations because you will keep asking questions. We will ask them, and they will ably respond to them; but that inverts the grand jury process.

THE COURT: Well, this is one of those situations where -- I have sort of outlined this before.

It's undisputed it's [redacted] burden to show full compliance. And instead of the party with the burden demanding -- stamping its feet -- not over dignity, but stamping its feet calling for an evidentiary hearing to prove its point, to prove its full compliance, I have the Government asking for the evidentiary hearing. So it's a little bit of a twisted universe I am in, including --

MR. FARUQUI: I am just trying to get up to speed.

THE COURT: -- with this request for an evidentiary hearing.

MR. FARUQUI: Your Honor --

THE COURT: And I suppose that if I look at the accumulation of oddities and weird circumstances and, as you say, discount the declarations because of those as implausible and, as a consequence, find implausible the statements in the declarations that there are no more records that can be uncovered, I guess I could then just

continue the fines or accelerate the fines until [redacted] says: Please give us a hearing so we can actually prove our point. Because it may be that no one currently working at [redacted] can provide any additional information. And that the person who might, [redacted]

MR. BOONE: Absolutely, Your Honor.

THE COURT: So it could be that [redacted] Then where would you be? Then you would say closed door?

MR. FARUQUI: I think, again, we'd look at the statements or -- have to look at the declarant's statement. It's difficult to do that in a vacuum with no person there. But if that's all we get, then I think, as with anyone who testifies before the grand jury and presents this record, we

look at the records and try our best to assess whether it's complete and whether they're truthful.

I think Your Honor is certainly right, where it's an inverted process here where normally -- in fact, uniformly in the cases, the contemnor is begging for a hearing to undo the burden here.

Our hands are just tied because I think -- we can't, unfortunately, encourage them to ask for one. All we can do is certainly ask for an increase of the fine. That appears to be the only way that, perhaps, then we'll have them come and put someone forward. It is perplexing why they don't even just informally don't want to have an interview so that we can try to put this issue to bed.

THE COURT: Yes. Could you provide more detail about that?

I saw that both parties sort of mentioned in their papers that the Government had suggested a teleconference, a video teleconference. Precisely, what had the Government suggested? Who did the Government seek to speak to? And what was the response?

MR. FARUQUI: Yes. So as I understand it, Your Honor, the special counsel requested -- we were a party to the email conversations, not to any -- we came in for one phone conversation, that the -- the opportunity to just help iron out these issues. So we talked about these, raised

some of these issues before, about [redacted] and things like that, before we came to court.

We also said we'd like to speak with someone and that we are available to do it via video teleconference or Skype. We can presume it to be [redacted] but if it was someone else, we'd also talk to them. Counsel then took an opportunity, for a day or so, to contemplate much of that, a laundry list of questions that we had. They felt comfortable with some of them. They provided the additional declaration with [redacted] to answer that question. However, they were unwilling to present someone for an informal out-of-court conference or teleconference.

THE COURT: For what reason?

MR. FARUQUI: I don't want to speak for [redacted] Your Honor. I think it will be better if they explain that. I don't think they ever told us.

THE COURT: And the declarations -- in addition to indicating that [redacted]

MR. FARUQUI: Yes.

THE COURT: Does the Government [redacted]

MR. FARUQUI: Yes. Yes, Your Honor. We do. It

is also convenient timing, we believe, that [redacted]

Again, I mean, there is asymmetry of information here. We don't know what is going on [redacted] The only people we can ask are counsel who are, presumably, limited by what they are told by their clients. So this, again, seems -- the timing is very disturbing.

I mean, [redacted] is well aware, given that [redacted]

THE COURT: Is that something that you could pursue with [redacted]?

MR. FARUQUI: We can ask [redacted] absolutely.

I think he's there now. Presumably, [redacted]

[redacted]

The timing -- is this something that regularly happens, every few years [redacted]? Maybe it was [redacted] we don't know. These are the questions that we're left with.

We take with great understanding that -- your point that every case says that they should be asking for that, not you. But our concern is that we will just continue to increase the fine and that [redacted] will just say: Tough luck. I mean, either then we have to -- special counsel can escalate and try to get a judgment or think of other forms of contempt because [redacted], these fines are -- clearly, as they are today -- not enough to push them forward to just close this matter out. I mean, ultimately, I think that's what the Court wants. I believe that's what counsel wants; certainly what we want for our investigation because we need to get these answers so we can continue to --

THE COURT: And just so we're all clear, since [redacted], via counsel, seems to be quite responsive when

suggestions are made about how to close the matter out -- just to be clear, my understanding, based on your responses to my queries this morning, is that this matter would be closed out if there was representation or a declaration that more clearly lays out than these declarations that [redacted]

MR. FARUQUI: So I'm smart enough to know not to say "it depends" and to say that, before I give my rights to speak forever and hold my peace, I would like to take a moment to speak with counsel very briefly.

THE COURT: Yes.

MR. FARUQUI: Court's indulgence.

(Whereupon, Government counsel confer.)

MR. FARUQUI: So, Your Honor, I think that it's better than "it depends." I will say that if we believe the declaration, absolutely, that that could be that closed door. But given that the declarant hasn't said this, has been happy to trumpet it in other contexts, it is -- without the opportunity for cross-examination or to be sure that it's truthful -- unless the declaration is so fulsome to put that to rest, it's hard for me to say for sure.

I think Your Honor is certainly right, that takes us down a path that answers all of the oddities. But if it's a one-sentence declaration from [redacted] that says,

oh, yeah, I remember because [redacted] I think that we would be back before you. We would understand why Your Honor would say: Well, I thought the door is closed now. But it's hard for me to answer the hypothetical of what [redacted] will seem to do which is seemingly, after every hearing, they go back and get a declaration that answers the questions when it's their burden. They ought to, first of all, do that on their own sua sponte, not from the Court's prodding and ours. But without seeing whatever that minimal declaration is to be, it's very hard for me to say. But I certainly will concede, Your Honor, that --

THE COURT: Well, from [redacted] perspective, they've done more than -- to quote them, paraphrase them -- more than any other [redacted] has ever been expected to do, which is -- you know, usually t[redacted] Thank you very much. Have a good day.

Here, they have taken all of these extra steps to respond to questions and made efforts to explain the oddities the best they can, either because [redacted] Lots of oddities, as I

have said.

But they have made all of these re-doubled efforts to respond to questions which is more, from their perspective, than [redacted] has been required to do. Okay. So [redacted] clearly, does not want to bring somebody here to testify in an evidentiary hearing and have that person open him or herself up to cross-examination by the Government, in whatever setting, in order to purge the contempt.

MR. FARUQUI: Your Honor, for us, that's the crucible of truth, cross-examination.

I would not credit them -- not -- to be clear, not counsel, but I would not credit [redacted] for voluntarily providing these declarations. They're only doing it because they were not sufficiently complying with the grand jury subpoena and found to be in contempt.

They may say it's odd to have [redacted] give -- submit this information. I would say it's odd, in my experience as a prosecutor -- I speak for my colleagues as well -- to have [redacted] provide documents in a ready and timely fashion to answer a grand jury subpoena.

[redacted] that was this insistent and militant about not fully complying and forcing literally to almost -- not "literally" -- forcibly trying to get --

THE COURT: Well, let me just make it clear. I really don't appreciate people sort of saying "in my vast experience," either on one side or the other; you are far too young to have so much experience.

MR. FARUQUI: Okay.

THE COURT: Okay. So anything further?

MR. FARUQUI: No, Your Honor. But thank you.

THE COURT: All right. Mr. Boone.

MR. BOONE: Thank you, Your Honor.

I will start by addressing your comments about our reply brief. We weren't trying to sandbag anybody or to be sly. We were responding to --

THE COURT: It's just not appreciated. You've got arguments, make them in your opening brief.

MR. BOONE: And we thought that we had.

Honestly, we thought that, when we submitted our original brief, that the Government would agree with us and say, yes, we can agree that the Government can purge contempt. So when the Government came back --

THE COURT: Let me ask you, Mr. Boone: [redacted]

[redacted]

MR. BOONE: [redacted]

[redacted]

And if you are asking about [redacted]

[redacted] we talked to Ms. Ahmad before that happened. So she was fully aware of what was going to happen and did not object. And my friend may not have known that standing up here today.

Again, we were not trying to sandbag; that's the last thing that we would want to do. We were really just trying to respond to new material.

We also thought we were going to have until March 28th under the original briefing schedule that got cut short, which is fine. So we were on a compressed time schedule. I wanted you to know that, we were not trying to lodge stuff in at the last minute.

THE COURT: All right. So the Supreme Court has denied [redacted] petition. So does that, to your mind, change the posture of this case in any way?

MR. BOONE: Well, we don't have an outstanding Cert Petition or arguments pending before the Supreme Court; otherwise, I think we're in the same spot. And what I said back to you in February remains true today, [redacted] has nothing else to produce. It has produced every document it believes it can find that would be responsive to the subpoena. It's looked high and low.

Mr. Geercken can speak to [redacted] if you would like to hear from him. But we are at a loss. We don't really have

anything else.

I know there has been some talk about oddities and how some things don't make sense. Well, I would suggest that it really [redacted] So they are not oddities when you consider [redacted] I would push back against that.

THE COURT: Can you explain, with all of the declarations and the conversations that [redacted] -- I am probably butchering his name -- had with [redacted] why it is that there was no question of [redacted] -- the simple, straightforward question which seems to be the real focus right now of the Government's inquiry: [redacted]

MR. BOONE: I think, from our perspective, this is the first that we have heard that that is the crucial question. I don't know of any discussions with Ms. Ahmad or any of her colleagues before that they ever raised that and

* * * * * SEALED * * * * *

said: [redacted]

[redacted] So it was never an issue before today.

THE COURT: Well, it's been very clear from the beginning, though, that [redacted]

[redacted] -- it's just so odd.

MR. BOONE: [redacted]

* * * * * SEALED * * * * *

THE COURT: You think from [redacted] perspective this would not be odd, too?

MR. BOONE: We don't understand it to have been odd to him. I am not sure that we asked him that precise question: Is this odd? We've asked him: Well, what's the deal with [redacted] I know you don't want to hear about that.

THE COURT: But what I am understanding from you right now is that [redacted] counsel has not really focused on [redacted] in its conversations with [redacted] in order to obtain as much information as possible from [redacted]

MR. BOONE: So I would disagree with that.

We have done everything that we think we need to do to comply with the subpoena to voluntarily turn over all of the information responsive to the subpoena.

We were looking for documents. Now we are talking about questions. There are a field of documents -- I think that you have said that a few times today.

I think I would also, I guess, correct Mr. Faruqui's suggestion that it was [redacted] Based on our understanding, it was

[redacted] And we're saying there are no other records.

THE COURT: [redacted]

MR. BOONE: It's what [redacted] has in the way of records responsive to the subpoena, which is why we're here. We're talking about documents responsive to the subpoena. [redacted] has put in, I think, six declarations, a total of 18 pages, from some of its highest [redacted].

THE COURT: But doesn't the Government have a point that when there are such oddities associated with the documents that are produced, that's when -- in order to test the veracity of those oddities in the documents the custodian has to come forward to authenticate and explain why they should be accepted?

MR. BOONE: Well, we have provided testimony through the declarations. We think that we have done more than any Government legal standard would ever require of us.

So it is not incumbent on us to take yet another step beyond what we have already done. We think we have already done more than what the law would require.

And there is no hint, no inconsistency -- my friend talked about conflicts; I don't think there are any conflicts here. We have been responding to questions as they come to us over the months, really trying to show our good faith when responding to the --

THE COURT: Mr. Boone, [redacted] seems anxious to close out this matter. I am pretty anxious about that, too. I would like to --

MR. BOONE: Understood, Your Honor.

THE COURT: I mean, you are always welcome to come to my court. It's always pleasant to see you all.

But why can't [redacted] just take the simple step of producing [redacted] to respond to the questions that spring forward from this production, given the oddities?

MR. BOONE: Well, we would argue that, under the governing legal standards, we don't need to do that.

The declarations -- even the declarations themselves are more than the average subpoena recipient needs to do in the normal course to show that they have complied with the subpoena. And so we have already gone way beyond what would normally happen --

THE COURT: I know that's your perspective of it.

MR. BOONE: But the other thing is, we have just heard from the --

THE COURT: Let me just say to you, we can take -- I am not going to -- I will be honest. I am not going to grant the Government's request for a hearing. I think it's very odd for the Government to be asking for an evidentiary hearing when it's the Government's job to point out all of the problems with the production, the oddities in the production, that make it raise sufficient red flags and questions that the authenticity, the completeness, the veracity of the production is in question such that the contempt is not purged, and then leave it to the contemnor to say: Give us an opportunity to demonstrate -- that despite the red flags and oddities, we're going to explain it in a way that will satisfy everybody that we should purge.

MR. BOONE: And that's the question. Right.

THE COURT: But I am not getting a request from [redacted] for that. So I am really left with a question of: Are there sufficient red flags, oddities, weirdnesses here that are crying out for explanations, and the explanations sort of compound some of the oddities such that I just continue the contempt until [redacted] decides to -- not ask, not request -- stand in front of me and stamp their feet and

demand a hearing to purge contempt. So I don't have that situation here.

MR. BOONE: Understood, Your Honor.

THE COURT: So from my perspective, that's my -- that's where I am coming from.

Why isn't [redacted] embracing the Government's invitation to inquire of [redacted] short of a hearing via video teleconference?

MR. BOONE: Honestly, we suspect that, if that happened, the Government would still walk away with questions.

We heard earlier my friend say -- when you asked him if [redacted] talked to [redacted] and got the story about [redacted] would that be enough? His answer is: Well, I can't say that that is enough. In our experience, that would be the answer from them; so we would be back in the same place we're in today, in the same mode: That's still not good enough for us.

We know today -- we believe today that we have complied with any governing legal standard. So why take that extra step when we know it's not going to be sufficient for them?

And, again, going back to the oddities that we're talking about. I really think that they're oddities only [redacted] I really do believe that.

We're talking about -- the Government argues that [redacted] during this period. We have put in declarations saying that's not true. It's certainly not true of [redacted] You can look on -- you can Google it. It's just not true. It's not true that [redacted] as of this time. Again, I am not going to get into [redacted] theory.

They also say it's sort of squirrelly that [redacted] Well, it's actually not true, as it turns out [redacted] By the way, it's not true in the United States either. Jeff Bezos, Steve Jobs, Steve Wozniak -- they started their billion-dollar businesses in garages. So it's not so strange to think about it in those terms.

We've talked about [redacted]

THE COURT: Come on. It's pretty strange to have [redacted]; that's odd.

MR. BOONE: [redacted]

From what I understand, from looking at [redacted] declarations, from what [redacted] it's not. It's just part of their --

THE COURT: Well, you have heard that the Government wants to submit some supplemental information on

that, so perhaps your colleague actually went and saw [redacted] of --

MR. BOONE: Well, this was before we got the Government's brief last Thursday. So we didn't know that the Government --

THE COURT: Hold on a second. Did you?

MR. GEERCKEN: I did not see that. [redacted].

THE COURT: You haven't done your own [redacted]

MR. GEERCKEN: I have not done [redacted]

MR. BOONE: Again, we're not talking about documents anymore. We're talking about [redacted] We're not talking about --

THE COURT: And I appreciate that. But I also appreciate the Government's argument that all of these oddities on their own may not indicate that there are more documents; but it does raise questions about how much credence to give to the declarations that there has been full compliance.

MR. BOONE: I would argue -- I would suggest that the Government is really only speculating which -- again,

under the applicable legal standards -- is never enough to keep the fines accruing.

They're saying: Well, this just doesn't seem right to us [redacted] But we're talking about [redacted] --

THE COURT: Mr. Boone, let me go back to my question about why not have a video conference or a teleconference with [redacted] and your concern that it will go fairly far afield and --

MR. BOONE: It would be completely afield at this point, I would say.

THE COURT: So at that point, if you don't want to do that -- if you actually have an evidentiary hearing with me supervising and keeping it focused on the issues, perhaps that would be a better option then, than a more informal, free-wheeled interview. Has [redacted] considered that?

MR. BOONE: I can talk to my client about that to see -- to take its temperature on that, something like that

happening.

Standing here today, our position is: We have done everything we possibly can do to look for documents, and we're talking about documents. If that's not enough, we're happy to appeal. That's really where we are. We have a right to appeal, as you have seen in other cases, and we're going to.

I think that's going to be a waste of time and money for everybody. I'll see if it comes to that. This is -- we have given everything that we have. This should be it.

And by the way, as you have led off the hearing with, the Mueller report is in. I don't know what's in the ex parte filings. I don't know what else they might be talking about; it seemed sort of vague to me, to be honest with you. It's done.

We don't have the subpoena with us today. We didn't bring every document that's amassed or accrued over the course of this case; but I think it was issued by the special counsel. So it's done. There is nothing else for us to give.

THE COURT: All right. I am going to give the Government an opportunity to submit whatever supplemental information they have about why this is still ongoing and not closed as of 5:00 p.m. on March 22, and any other

supplemental information that I think is relevant to why the gaps, oddities, explanations provided by [redacted] exacerbate, rather than resolve, those oddities that leads to a point that's sufficient for the Court to say: You are beating a dead horse at this point. And I will then reserve decision on whether or not there should -- well, I'm going to deny the Government's request for an evidentiary hearing; that's not happening at the Government's request.

But I will resolve [redacted] pending motion to purge and the Government's request for acceleration of the fines. Until after I see that, I would ask the Government to give me its filing -- can you do that by Monday to move this along?

MR. FARUQUI: Absolutely, Your Honor.

MR. BOONE: Your Honor, will this be an ex parte filing?

THE COURT: Well, from the Government's perspective, is this going to be an ex parte filing or not?

MR. FARUQUI: I imagine, Your Honor. Certainly, Your Honor, as to the questions of what the grand jury is investigating, that would be ex parte. There is no reason [redacted] needs to know that.

As to the question about perhaps the oddities, and things like that -- to the extent we can, we will endeavor to make things not ex parte because, obviously, we want to

bring this to a resolution, and I understand that gums up the process. But certain things -- if we do, we will do it very judiciously and obviously justify it to Your Honor before we do so.

THE COURT: All right.

MR. BOONE: If there is anything that we can see in their filings, we would an like an opportunity to respond if you --

THE COURT: How much time would you like to respond?

MR. BOONE: If it comes in on Monday, maybe by Wednesday, Thursday.

MR. GEERCKEN: If we can have until Thursday.

MR. BOONE: Thursday.

THE COURT: Okay. Thursday, that's fine.

All right. Before we turn to the Reporters Committee motion, I did want to just set some ground rules. I think we will just call [redacted] the "corporation," as the D.C. Circuit did.

And I do want to get some things clear because [redacted] has taken no position on the Reporters Committee motion for unsealing [redacted] identity in particular, in all of the documents, filings, and transcripts in the case. I was just curious. [redacted]

[redacted]

Is that -- I mean, am I interpreting that correctly?

MR. BOONE: [redacted] would prefer that its name not be disclosed at this time.

THE COURT: All right. So that's --

MR. BOONE: We were just trying to stay out of the fight between the Reporters Committee --

THE COURT: I see. Okay. That's very important, and that is my plan for this hearing -- is to call upon [redacted] first to clarify a couple of things; and I don't want you-all to be surprised.

I want to clarify that, in the contempt proceedings, [redacted] has not exercised its right to request an open courtroom.

MR. BOONE: That's correct.

THE COURT: Number two, that [redacted] despite taking its position that it has no position on the Reporters

Committee petition, prefers to keep its identity secret.

MR. BOONE: That is correct. I mean, there is a nuance there when you're talking about the legal standards. So we don't think that [redacted] identity necessarily is secret information in the grand jury sense.

THE COURT: I know. It's not subject to 6(e) secrecy under the rule.

MR. BOONE: Right. But, as a practical matter, we would rather not have our name out there as the contemnor.

THE COURT: Right. I just wanted to make that clear.

Give me a second to make sure -- because I don't want you to be surprised by my questions.

I am also going to ask whether the corporation would be willing to participate in the redaction of the briefs and transcripts that are being requested to be disclosed as the corporation is already participating in that process, both before the D.C. Circuit and the Supreme Court.

MR. BOONE: And I will answer that we will, yes.

THE COURT: I am going to ask whether you feel comfortable explaining this in some vague terms, whether the corporation can articulate any of its concerns about it being identified publicly as the grand jury subpoena witness.

MR. BOONE: I [redacted]

[redacted]-

THE COURT: [redacted]

[redacted]

MR. BOONE: [redacted]

THE COURT: [redacted]

[redacted] --

MR. GEERCKEN: [redacted]

THE COURT: [redacted]

[redacted]

[redacted]

[redacted]

MR. BOONE: Understood, Your Honor. I was sort of thinking through it as you were asking me the question.

THE COURT: All right. The D.C. Circuit opinion talked about the dignity and concern about holding in contempt a corporation wholly-owned by a foreign government, so that is public; [redacted]

[redacted]

[redacted]

MR. BOONE: Understood. I was exactly just thinking that as you were saying it.

THE COURT: Okay. I think that's it.

Any other ground rules we should all be aware of?

And then, after I do those questions, you can

stick around, or not.

MR. BOONE: Thank you, Your Honor.

THE COURT: Okay. Any other ground rules that the Government would consider?

MR. GOODHAND: Your Honor, just quickly. David Goodhand for the United States.

THE COURT: Yes, Mr. Goodhand.

MR. GOODHAND: [redacted]

THE COURT: [redacted]

MR. GOODHAND: That's all I was identifying. I am not going to be talking about that. We didn't talk about it in our opposition.

THE COURT: And I don't think Mr. Boone is going to talk about that at all either because it would reveal that [redacted] --

MR. GOODHAND: Exactly.

THE COURT: -- and I just want it to be clear that we're not going there.

MR. GOODHAND: Exactly. If the Reporters

Committee makes argument about identity, that's -- I assume the Court's knowledgeable on all of that material, and that's right. Thank you.

MR. BOONE: One other question. Where should we sit during this proceeding? It's sort of a strange setup.

THE COURT: You can sit at the back tables. It's usually where the marshals sit, but I will give the Reporters Committee that table. You can move your documents, which will all be covered. You may sit -- it's a smaller table, but you will be comfortable enough.

MR. BOONE: Thank you.

THE COURT: All right. You are all excused until 11:30.

MR. GEERCKEN: Thank you, Your Honor.

MR. FARUQUI: Thank you, Your Honor.

(Whereupon, the proceeding concludes, 11:14 a.m.)

* * * * *

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 29th day of March, 2019.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

ECF No. 119

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	**No. 18-gj-041** **UNDER SEAL**

GOVERNMENT'S SUPPLEMENTAL OPPOSITION TO [redacted] MOTION TO PURGE CONTEMPT AND SUPPLEMENTAL CROSS MOTION TO ACCELERATE FINES

A grand jury subpoena depends upon a witness's good faith compliance—including a diligent search for responsive records and production of any records that are found. Whether a witness has complied must ordinarily be judged by looking at the records that have been produced, the witness's sworn statements (sometimes before a grand jury and subject to examination) about its search and production, and any other extrinsic evidence that may bear on judging those steps. Based on the evidence that is currently in the record, [redacted] has failed to meet its burden to show good faith and substantial compliance. The production to date contains significant and glaring gaps. [redacted] seriatim explanations for the gaps are insufficient to overcome the serious questions about the completeness and authenticity of the records produced. And [redacted] other litigation conduct only underscores the government's concern. To be clear, if [redacted] has taken all reasonable steps and produced all responsive records, the Court should purge contempt. But viewing the record as a whole, [redacted] declarations and conduct reflect that it has failed to meet its burden.

I. Concerns About The Search and Production

Some of the most glaring open questions and "oddities" (cast in the light most favorable to [redacted]) include (a) [redacted]

[redacted]

A. [redacted]

[redacted] The declarations are silent on this point. [redacted] counsel incorrectly suggested that [redacted]

Second, neither the letter nor the declaration [redacted]

[redacted] counsel stated that [redacted]

[1] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]These individuals might possess or, at least, know of additional responsive documents. [redacted]

[redacted]

[redacted].

B. [redacted]

As part of a [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. [redacted]

[redacted]

[redacted]

[redacted]

[2] [redacted]

[redacted]

II. Extrinsic Concerns

Separate and aside from the apparent gaps in [redacted] search process, production, and declarations, other questions exist about [redacted] good faith compliance [redacted] and the litigation of this matter.

A. [redacted]

[redacted]

[redacted]

Additionally, [redacted] And when [redacted] approached the government about soliciting *amici* in the Court of Appeals, the government raised similar concerns. Nonetheless, on November 15, 2018, [redacted] submitted to the Court of Appeals a seven-page, single-spaced, English-language letter [redacted]

[3] [redacted] counsel stated that [redacted] Counsel then appeared to imply that the Special Counsel's Office consented to [redacted] process. *Id.* at 34. At no point did the Special Counsel's Office permit [redacted] The Special Counsel's Office was aware that [redacted] but that Office took no position on that process and [redacted].

[redacted] This too raises questions about whether [redacted] is proceeding in good faith.

B. Other Litigation Conduct

A number of other aspects of [redacted] litigation conduct raises similar questions.

First, [redacted] has long argued (in this Court and the Court of Appeals) that it was prohibited by [redacted] from complying with the subpoena. On February 1, 2019, the government submitted recently-discovered documents [redacted]

Second, [redacted] has made a series of arguments about the exceptions to immunity and execution of judgment under the Foreign Sovereign Immunities Act, without disclosing its prior consent to [redacted] has tried to explain away this document, *see, e.g.,* Feb. 6, 2018 Response, but has not explained why [redacted] did not acknowledge these materials until the government discovered them and brought them to the Court's attention.

III. Failure to Make a Complete Production Is a Basis for Continued Contempt

The grand jury's mandate is "not fully carried out until every available clue has been run down," *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (internal quotation marks and citation omitted). [redacted] relies on a series of civil cases in which a party to a discovery dispute moved to hold the other party in contempt (at 4). *See, e.g.*, *Harris v. Koenig*, 271 F.R.D. 356, 371 (D.D.C. 2010) (holding "Rule 34 of the Federal Rules of Civil Procedure clearly indicates that parties are only required to produce documents that are already in existence.") (internal quotation marks and citation omitted). Unlike here where [redacted] bears the burden to purge its contempt, in a motion to compel, the party seeking discovery has the "burden of showing that the [producing party's] production is incomplete," *Barnes v. D.C.*, 289 F.R.D. 1, 25 (D.D.C. 2012). Concrete proof is not necessary to show an incomplete production. Rather, "the Court must be able to make a 'reasonable deduction' from the documents that exist that "other documents may exist or did exist and have been destroyed.'" *Id.* quoting (*Hubbard v. Potter*, 247 F.R.D. 27, 31 (D.D.C.2008)). The "oddities" described herein amply provide a reasonable basis for this Court to conclude other documents "may exist," *id.* Just as an unfounded "suspicion is insufficient to support [a] motion to compel," *Alexander v. F.B.I.*, 194 F.R.D. 305, 311 (D.D.C. 2000), so too do documented inconsistencies in a production foreclose a successful motion to purge contempt. The cases cited by [redacted] related to purging contempt (at 4)[4] only serve to further call attention to [redacted] inexplicable opposition to live testimony, as those decisions followed live testimony and cross-examination of a contemnor's witness.

[4] Citing to *Unites States v. Rizzo,* 539 F.2d 458, 466 (5th Cir. 1976) and *Eulich v. United States,* No. 3:99-CV-1842-L, 2006 WL 176543, at *7 (N.D. Tex. Jan. 23, 2006).

CONCLUSION

The declarations submitted by [redacted] describe a series of events that is as incredible as it is convenient for explaining the lack of additional documentation related to [redacted]. The questions and oddities raised herein and in other pleadings provide this Court with an ample basis to discount the veracity and/or completeness of the declarations submitted by [redacted] Until [redacted] provides additional evidence, in the form of verifiable documentary evidence or witness testimony, of its compliance with the subpoena, this Court should continue to hold [redacted] in contempt and should also accelerate the contempt fines in order to coerce compliance. This Court should therefore deny [redacted] Motion to Purge Contempt and grant the government's Cross Motion to Accelerate Contempt Fines.

Respectfully submitted,

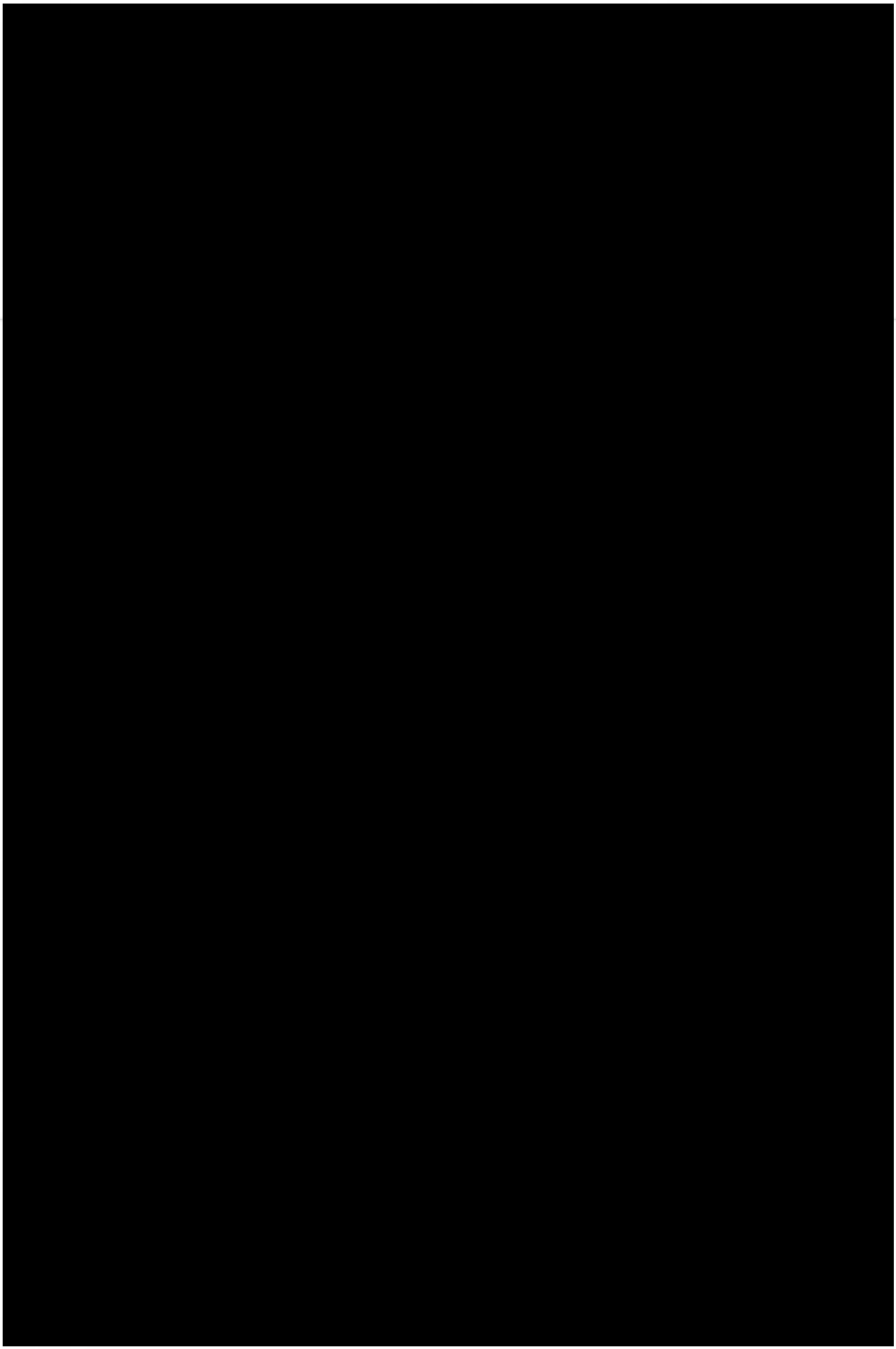
JESSIE K. LIU
United States Attorney

By: /s/

Zia M. Faruqui, D.C. Bar 494990
Peter Lallas, N.Y. Bar 4290623
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20001
(202) 252-7117 (Faruqui)
(202) 252-6879 (Lallas)
zia.faruqui@usdoj.gov
peter.lallas@usdoj.gov

EXHIBIT A

EXHIBIT B



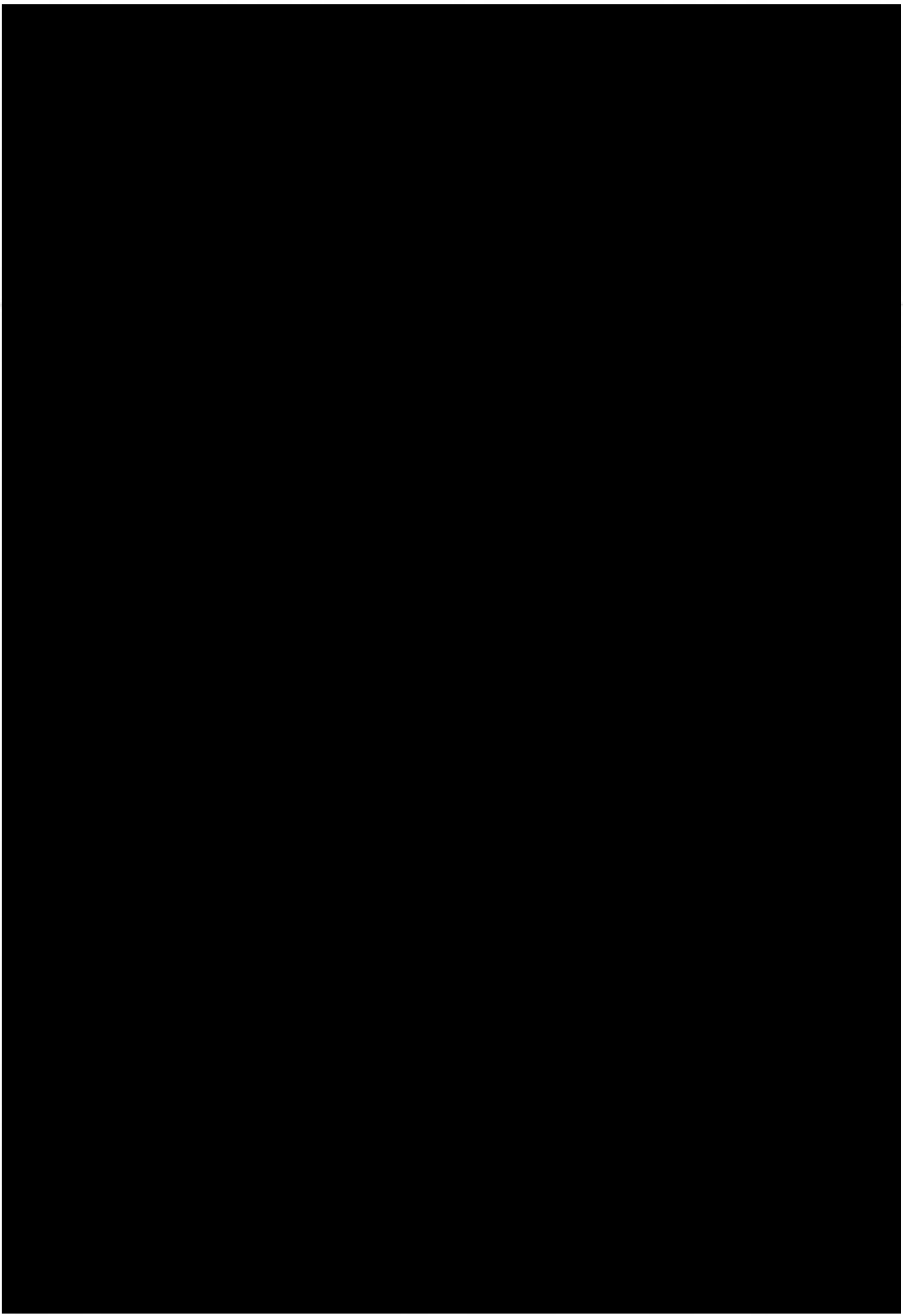


EXHIBIT C

EXHIBIT D

ECF No. 120

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	Case No. 18-gj-0041 **UNDER SEAL** UNDER LCrR 6.1

[redacted] RESPONSE TO THE GOVERNMENT'S SUPPLEMENTAL OPPOSITION TO [redacted] MOTION TO PURGE CONTEMPT

The Government's supplemental opposition adds nothing. None of the Government's new arguments calls into doubt [redacted] sworn testimony that it has looked everywhere for responsive documents, that it has produced everything that it has found, and that its [redacted] have seen to [redacted] full compliance.

Indeed, the Government's new arguments don't relate to [redacted] searches at all. The Government's observation that [redacted] says nothing about [redacted] search process. The same is also true of the Government's speculation about whether [redacted]

What was true last week remains true today: [redacted] has nothing else to produce. The Government is beating a dead horse over and over. Continuing the fines would achieve nothing except further straining relations with [redacted]

I. [redacted] HAS ANSWERED ALL OF THE GOVERNMENT'S QUESTIONS RELATING TO [redacted].

The Government's handful of questions and observations relating to [redacted] do not bear on [redacted] searches for documents. Even so, [redacted] has answered those questions throug[redacted] new declaration (attached as Ex. 5).

The Government first faults [redacted] for not having submitted testimony about [redacted] (Supp. Opp. 2), but before the March 27 hearing, the Government had never asked [redacted] to submit evidence on that question. Nor did [redacted] have reason to

volunteer that information; it is not relevant to the adequacy of [redacted] searches. In all events, when [redacted] counsel discussed the issue with [redacted] after the hearing, [redacted] confirmed that the two men who signed the bottom half [redacted]

The Government also gratuitously faults [redacted] counsel for mistaking [redacted] Supp. Opp. 2 (citing [redacted] counsel's comment at March 27 hearing). That was of course an honest mix-up at an oral hearing—[redacted] are, well, the same last name—but it also says nothing about [redacted] searches. At any rate, because that misunderstanding led the Court to conclude that it was odd [redacted] (Tr. 11 (03/27/2019)), [redacted] clearing up the misunderstanding erases the perceived oddity.

The Government also wants to know [redacted] Supp. Opp. 2; *see also id.* (the Government arguing that [redacted]. In his declaration, [redacted] answers that question, too. According to [redacted] sworn testimony, [redacted]—[redacted] Ex. 5 at 2. [redacted]

The Government's last observation vis-à-vis [redacted]—also has no bearing on [redacted] searches. Regardless, [redacted] in his new declaration has testified that to the best of his knowledge, [redacted]

[1] That purported concern also does not relate to [redacted] searches. Before last week's hearing, [redacted] didn't know that it needed to submit testimony on that issue to prove that it complied with a subpoena for *documents*.

[redacted]

[redacted]. Ex. 5 at 2.

II. THE GOVERNMENT'S SPECULATION ABOUT [redacted] DOES NOT SPEAK TO [redacted] COMPLIANCE.

The Government's suggestion that [redacted] is also irrelevant to [redacted] searches for documents. Besides that, the Government's [redacted] Here again, we're far afield of questions about the adequacy of [redacted] searches.

The Government's argument about [redacted] Supp. Opp. 4. That speculation is irrelevant to the adequacy of [redacted] document searches and in any event ignores that [redacted]

[2] The Government also suggests that [redacted]

[redacted]

III. THE GOVERNMENT'S SPECULATION ABOUT [redacted] COMPLIANCE WITH [redacted]

The Government stretches the most in its last two arguments, which purportedly relate to [redacted] good faith in this litigation.

The circumstances surrounding [redacted] are irrelevant to the adequacy of [redacted] document searches. Indeed, if those circumstances said anything about [redacted] searches, the Government would have raised them before now. In all events, [redacted]

[redacted]

3 [redacted]

4 [redacted]

The Government argues in the end that [redacted] documents call into question its good faith in this litigation. Supp. Opp. 6. But those documents have no bearing—*none*—on the adequacy of [redacted] searches. In any case, [redacted] never could have known that the Government would misconstrue those documents in the way that it has.[5]

* * *

[redacted] is optimistic that the Court will understand that there is nothing left to produce. But if the Court doesn't see things that way, then [redacted] will immediately appeal and will consider pursuing parallel relief through diplomatic channels.

CONCLUSION

The Court should grant [redacted] motion to purge contempt, hold that contempt fines stopped accruing on February 8, 2019, and deny the Government's cross-motion to escalate fines.

Respectfully submitted on April 4, 2019.

ALSTON & BIRD LLP

Brian D. Boone (D.C. Bar 987633)
101 S. Tryon Street, Suite 4000
Charlotte, North Carolina 28280
T: (704) 444-1100
F: 704.444.1111
Email: brian.boone@alston.com

Edward T. Kang
950 F Street, NW
Washington, DC 20004
Telephone: 202-239-3000
Facsimile: 202-239-3333
E-mail: edward.kang@alston.com

[5] [redacted] And [redacted] primary argument all along has been that American courts lack subject-matter jurisdiction over this case, so [redacted] could not waive that argument even if it wanted to.

CERTIFICATE OF SERVICE

I certify that today I served this **Response** by email on the following:

Zia M. Faruqui
Peter Lallas
Assistant United States Attorneys
555 46 Street, N.W.
Washington, D.C.

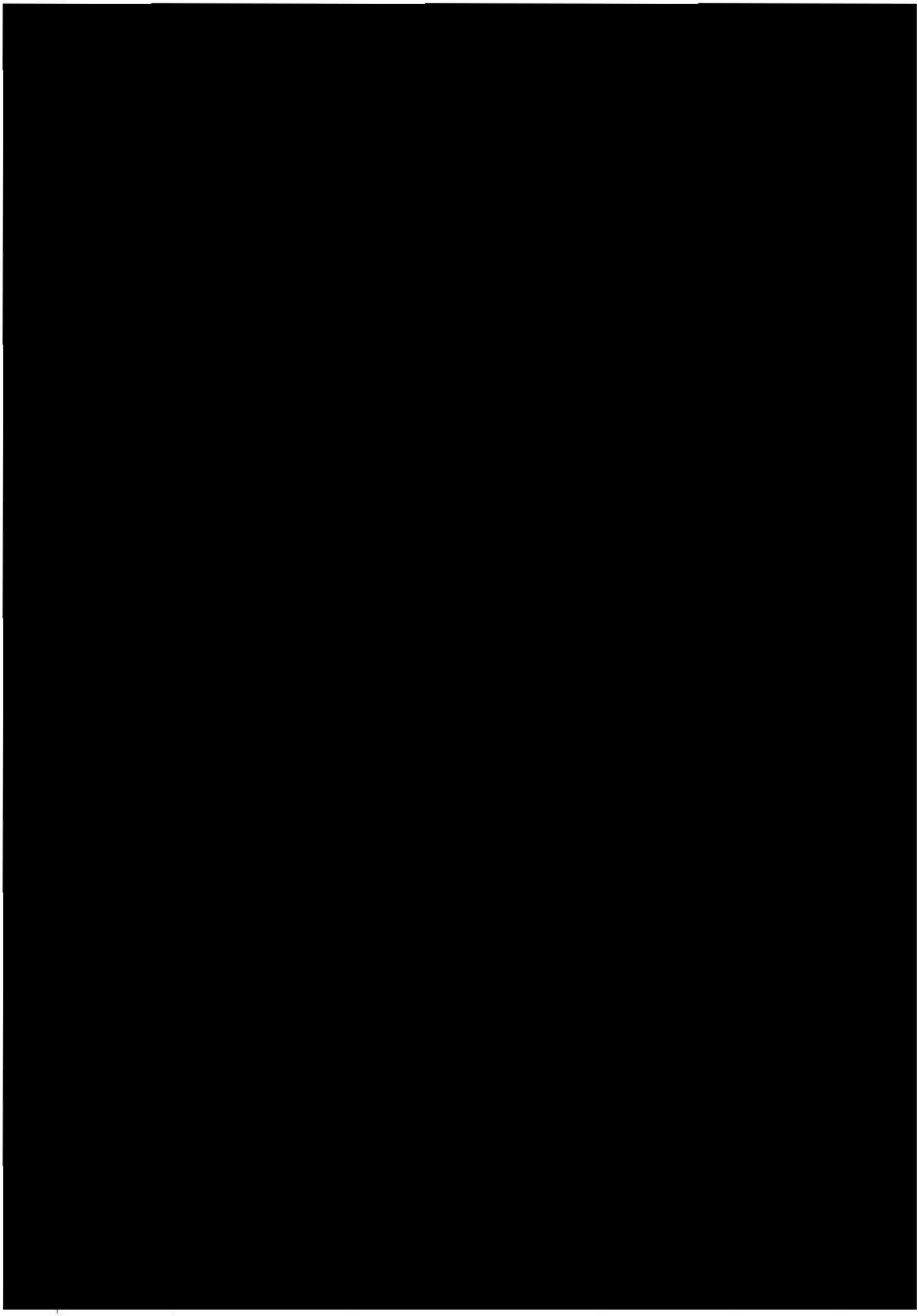
Respectfully submitted on April 4, 2019.

ALSTON & BIRD LLP

Brian D. Boone
Bank of America Plaza, Suite 4000
101 S. Tryon St.
Charlotte, NC 28280
Phone: 704.444.1000
Fax: 704.444.1111
brian.boone@alston.com

Counsel for [redacted]

EXHIBIT 5



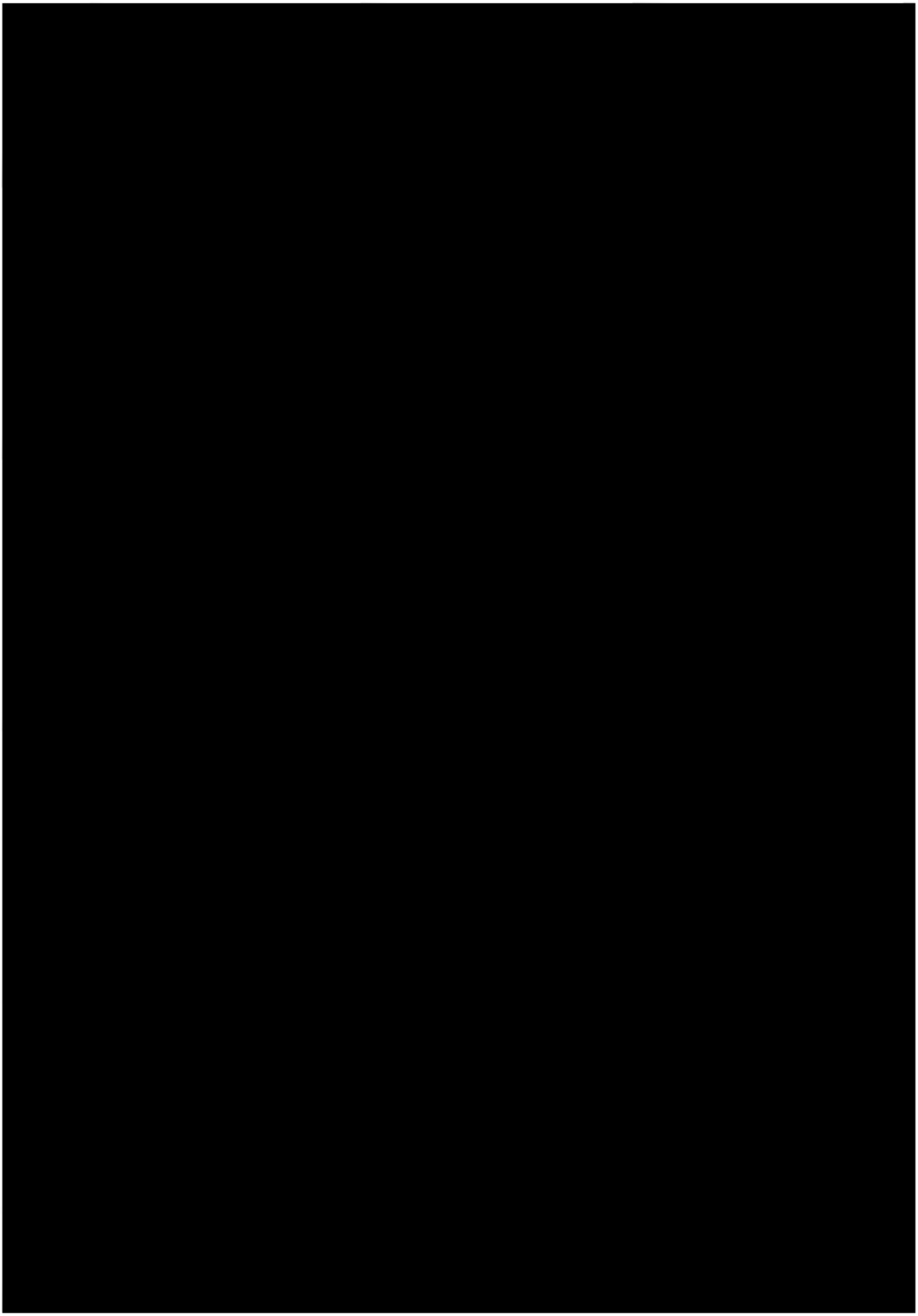
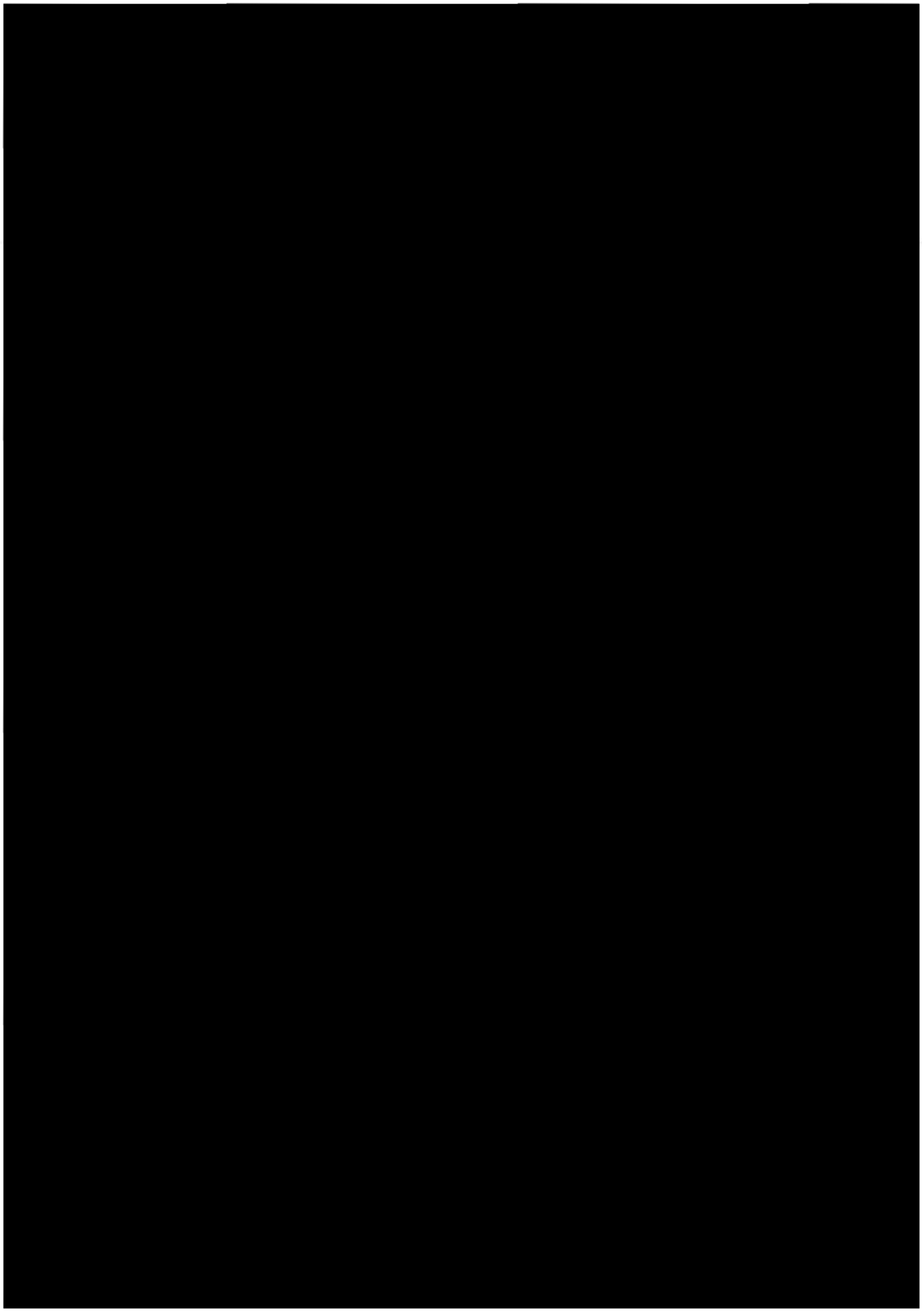


EXHIBIT A



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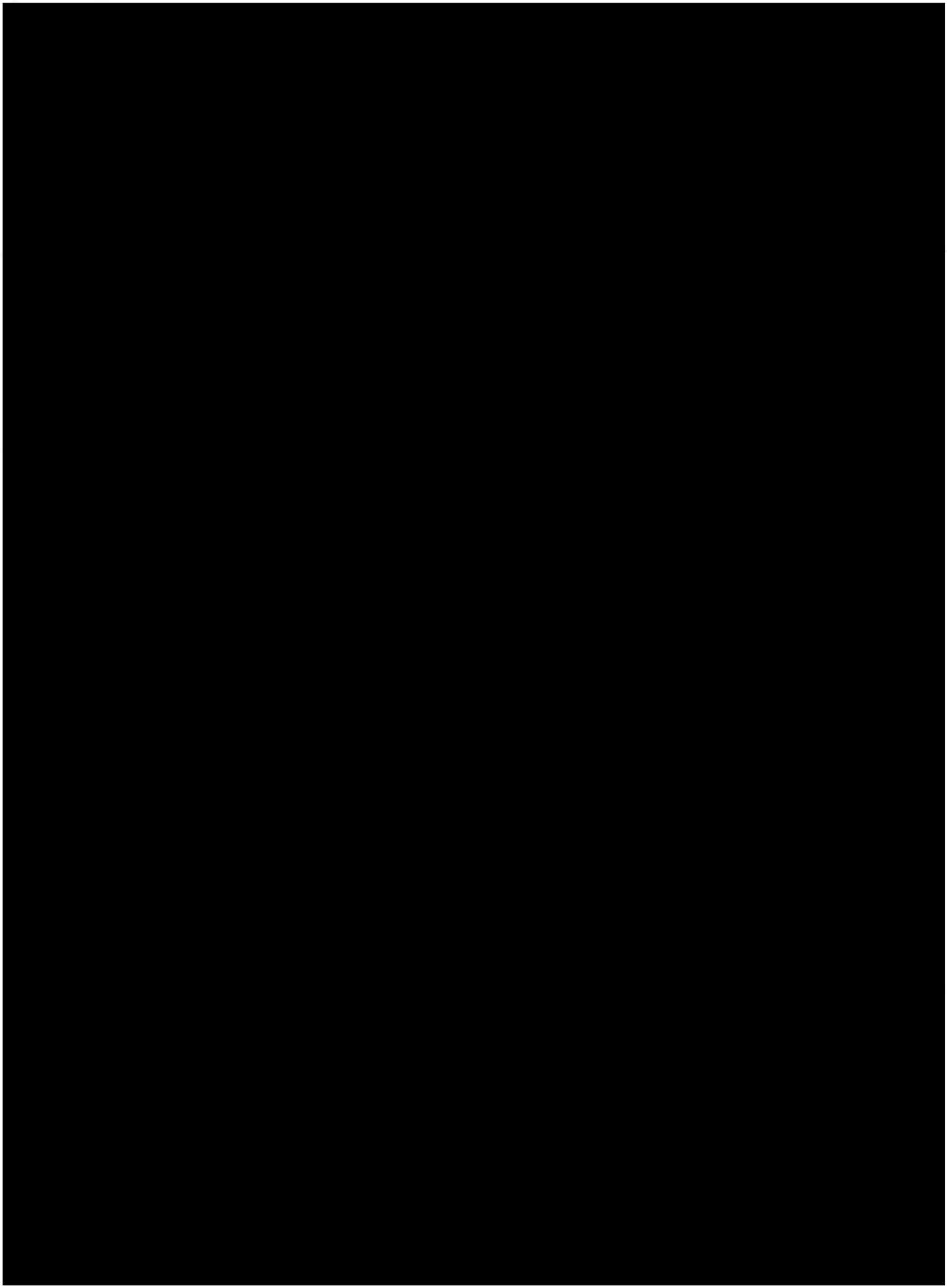
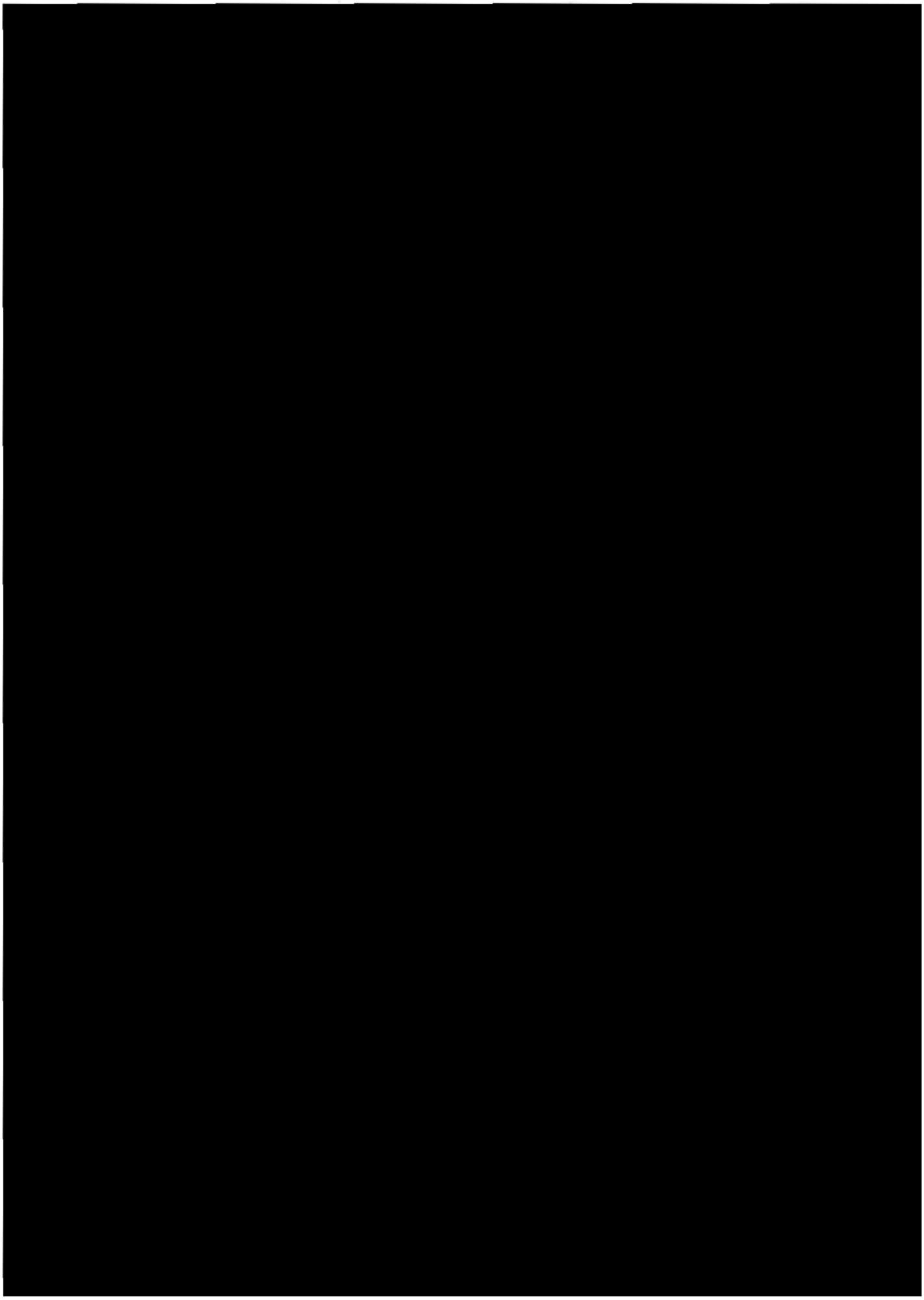


EXHIBIT C



ECF No. 125

* * * * * SEALED * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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IN RE:	)	GJ 18-41
Grand Jury Subpoena 7049,	)	
	)	
Interested Parties:	)	February 8, 2019
[redacted]	)	3:12 p.m.
UNITED STATES OF AMERICA.	)	Washington, D.C.

* * * * * * * * * * * * * * * * * * *

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES:

FOR THE MOVANT:
BRIAN BOONE
LEE DENEEN
Alston & Bird
90 Park Avenue
New York, NY 10016
(212) 210-9400

FOR THE GOVERNMENT:
ZAINAB N. AHMAD
MICHAEL DREEBAN
SCOTT MEISLER
ADAM JED
U.S. Department of Justice
Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036
(202) 804-7000

Court Reporter:
Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter
Washington, D.C. 20001

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * * *

IN RE:	)	GJ 18-41
Grand Jury Subpoena 7049,	)	
	)	
Interested Parties:	)	February 8, 2019
[redacted]	)	3:12 p.m.
UNITED STATES OF AMERICA.	)	Washington, D.C.

* * * * * * * * * * * * * * * * * * *

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* * * * * SEALED * * * * *

PROCEEDINGS

THE DEPUTY: Matter before the Court, grand jury matter 18-41, in regards to Grand Jury Subpoena No. 7049. Interested parties: [redacted] and the United States of America.

Counsel, please come forward and identify yourselves for the record.

MS. AHMAD: Good afternoon, Your Honor. Zainab Ahmad, Michael Dreeben, Scott Meisler, and Adam Jed for the United States.

THE COURT: Thank you.

Good afternoon, Ms. Zainab.

MR. BOONE: Good afternoon, Your Honor. Brian Boone and Lee Deneen for [redacted]

THE COURT: Yes. Good afternoon, gentlemen and lady.

All right. So I had scheduled this status conference, but it does seem that we have a few things to talk about. So let me just put down what's on my agenda.

Certainly, as the supplemental responses filed today indicate, I am very curious to find out what the status of the production is. And then I also want to talk about -- basically, based on the status of the production and whether the subpoena has been complied with or not -- the immediate follow on discussion of the status of the

civil contempt sanctions. So because -- are the sanctions continuing, or have they perjured themselves of the contempt or not?

So, Ms. Ahmad, I take it, from your supplemental response today, that you are sort of clarifying that you might have overstated [redacted] representation that their production was the entirety of the records sought by the subpoena because their letters don't precisely say that.

MS. AHMAD: That is correct, Your Honor. Although, [redacted] attorneys has represented that to us.

THE COURT: Represented that to you orally.

MS. AHMAD: Orally. The other thing --

THE COURT: I see. Can you just -- I'm sorry to interrupt you. I just had a puzzle.

I see one letter from Alston & Bird from February 4th and one letter from February 7th, and they both appeared to be the same. What is the difference?

MS. AHMAD: They were -- they are the same letter, but different productions were attached to each letter. They gave us the same cover letter for separate --

THE COURT: I see. Okay. Got it.

MS. AHMAD: So to answer Your Honor's immediate question, the other goal of our supplemental submission this morning was to clarify that we may have overstated our view that [redacted] understood itself to have complied with the

subpoena because, when we carefully parsed [redacted] language, they're characterizing this as a voluntary disclosure. The significance of that distinction I am not fully aware of, but maybe [redacted] can shed some light on that. But that was the purpose of that submission.

On Monday, a few hours after Your Honor's minute order in this case, [redacted] produced to us, by the February 4th letter, [redacted] Those [redacted] in the instant subpoena.

On Thursday, just yesterday, by the February 7th letter, [redacted] produced to us [redacted] Those [redacted] called for by the subpoena.

We spoke with [redacted] attorneys yesterday and identified certain concerns we had regarding the completeness of the records which, they said, they would take back to their client.

THE COURT: Is the completeness based on date scope or some other kind of scope?

MS. AHMAD: The completeness, Your Honor, is based on knowledge in the Government's possession from various sources as to what the records should contain, and comparing that knowledge to what the records do contain.

In addition, there were some obvious deficiencies. For example, [redacted] did not provide a declaration from the custodian of records that the subpoena itself requires. So some questions that were just internal to the records and some questions that arose because of other knowledge the Government has.

We raised those questions with [redacted] yesterday. They today, by phone, addressed some of them and promised to provide additional documents. We received some additional documents today. And I am told that more are forthcoming, perhaps as soon as Sunday.

We -- the Government is working to act as expeditiously as possible to review these documents, again, looking at them to address whether they're internally consistent and have everything that we would expect [redacted] to have and, also, comparing them to knowledge we have from other sources to determine whether we think this is the full universe of documents.

We intend and hope to have a view for the Court on that question by early next week, hopefully, no later than Tuesday.

With respect to the accrual of the --

THE COURT: Okay.

MS. AHMAD: I was going to say -- with respect to the accrual of the contempt sanctions, I think once [redacted]

has fully produced to us everything that they say belongs in those records, we would agree that the sanctions should be held in abeyance for our review process. There is no need for that to result in fines to [redacted] So that would be our proposition as to how to move forward on that issue.

THE COURT: But even [redacted] -- because of its multiple productions on Monday and then, again, on Thursday -- I guess isn't making any representation that the production is complete at this point. So the civil sanction should -- contempt sanction should continue to be accruing up to this point.

MS. AHMAD: I don't want to speak for [redacted] on that. I assume that that would be their position, at least up until yesterday. Because they told us Monday that there were [redacted] or that there were [redacted] [redacted] forthcoming. I don't know what their position is regarding the, sort of, additional documents that we asked for and that they have agreed to give.

THE COURT: All right. Thank you.

Mr. Boone.

MR. BOONE: Yes, Your Honor.

So, by [redacted] view, it has voluntarily turned over all information responsive to the subpoena as of today. There is another production letter that just went out, I guess, maybe two hours ago.

THE COURT: I see.

MR. BOONE: We have turned over additional documents. And so when Ms. Ahmad --

THE COURT: Is that going to be on the same cover letter or is that cover letter going to be clear, in [redacted] view, that it is now a complete production responsive to the subpoena?

MR. BOONE: I think it's the same cover letter.

THE COURT: Why is the cover letter so coy about saying whether or not it's -- from [redacted] view, the production is complete, fully responsive, or not?

MR. BOONE: Well, I don't think we were meaning to be coy.

I'm saying now, on the record, that, by [redacted] view, it has voluntarily turned over all information responsive to the subpoena.

Ms. Ahmad mentioned other documents. I am not sure what she has in mind. Say perhaps the declaration that we're working on and, perhaps, some translations [redacted] But, other than that, I don't know what she would have in mind.

So, by our view, the sanctions should stop. Of course, we have always argued that they should never have started. I am not going to repeat those arguments.

THE COURT: Thank you.

MR. BOONE: But they should stop today.

THE COURT: Okay. Well, I am going to -- does the Government -- the Government isn't in a position, having not seen the production yet, to opine about that -- or, Ms. Ahmad, are you able to opine on that -- to hold in abeyance the sanctions from today onward until you have an opportunity to finish reviewing everything?

MS. AHMAD: We would agree to that, Your Honor.

THE COURT: Okay. So I will enter an order to that effect, that they will be held in abeyance as of today. Until when, Ms. Ahmad?

MS. AHMAD: Your Honor, we intend to be able to present our view to the Court by Tuesday as to whether the production is complete. And we can, in that submission, perhaps also take an opinion as to whether the sanctions should continue accruing from that date or not.

THE COURT: All right.

MR. BOONE: I have nothing else.

THE COURT: Okay. Anything further from the Government or any issues that we should take up today, given the amount of briefing I got on multiple issues?

MS. AHMAD: Your Honor, we are prepared to argue, if Your Honor wishes to hear argument, the question of whether the consent [redacted] constitutes a waiver of immunity pursuant to the FSIA.

THE COURT: Well, I am not going to -- I don't know that I necessarily need to resolve that since I don't know what the resolution of that will get us, in terms of any type of different end result.

In fact, if there's been a complete production in response to the subpoena, is the litigation going to continue at the Supreme Court or not?

MS. AHMAD: I would direct that question to [redacted]

THE COURT: I guess I'll ask Mr. Boone.

MR. BOONE: So we don't think that the litigation is moot just by our voluntarily turning over the information responsive to the subpoena.

There is, of course, still a contempt order on the books. It's our view that [redacted] continues to suffer the dignity harm every day that that contempt order stays on the books. So it doesn't really change anything, by our view, by what's happening at the Supreme Court.

THE COURT: Well, that's going to be for the Supreme Court to determine, mootness or not.

Has information about [redacted] compliance with the subpoena been communicated to the Supreme Court yet?

MR. BOONE: We haven't communicated anything to the Supreme Court about our voluntary productions which has all just happened in the last few days.

THE COURT: Mr. Dreeben.

MR. DREEBEN: Your Honor, the United States will respond to the Certiori Petition. And I believe our response is due the 21st. And in connection with that response, we'll apprise the Court of the procedural developments that have occurred here and express any view that we have on their relevance to the Cert Petition.

THE COURT: Okay. Thank you.

All right. So I will wait and see what I hear from you all next week.

All right. Anything further today from the Government?

MS. AHMAD: No. Not from the Government, Your Honor.

THE COURT: And from [redacted]

MR. BOONE: No, Your Honor.

THE COURT: All right. You are all excused.

THE DEPUTY: All rise. This Honorable Court stands in recess for five minutes.

(Whereupon, the proceeding concludes, 3:23 p.m.)

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 15th day of April, 2019.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

ECF No. 126

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	**No. 18-gj-041** **UNDER SEAL**

GOVERNMENT'S STATUS REPORT

The United States, by and through its attorney, the United States Attorney for the District of Columbia respectfully responds to this Court's April 17, 2019 Minute Order as follows:

The Court's order directed the government to file a status report advising whether the government's position on the witness's Motion to Purge Contempt and Stop the Contempt Fines' Accrual has changed in light of Exhibit 5 to the witness's Response to the Government's Supplemental Opposition.

As noted by this Court, the government previously stated that [redacted] Mar. 27, 2019 Tr. at 17. The Court further noted the "real focus right now of the Government's inquiry: [redacted] *id.* at 35. The witness (hereinafter [redacted] attempts to answer that question in its most recent filing [redacted]

The government continues to have concerns about the accuracy of [redacted] As noted in its prior filing, there remain unexplained gaps in the records as well as what appear to be [redacted] Moreover, the government continues to have grave concerns that [redacted].

However, because [redacted] declarants have: (1) answered the questions put to [redacted] by the Court and the government; (2) sworn that the records are complete; (3) described the search process; and (4) sworn to have [redacted] the government believes that it cannot ask for continued contempt. The government plans to take further investigative steps to elucidate the veracity of [redacted] statements. If the government obtains new evidence drawing into question [redacted] prior disclosures, the government will renew its request for contempt.

In sum, the government withdraws its opposition to [redacted] Motion to Purge Contempt and it Cross Motion to Accelerate Contempt Fines.

Respectfully submitted,

JESSIE K. LIU
United States Attorney

By: /s/
Zia M. Faruqui, D.C. Bar 494990
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20001
(202) 252-7117 (Faruqui)
zia.faruqui@usdoj.gov

ECF No. 130

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	**No. 18-gj-041** **UNDER SEAL**

JOINT STATUS REPORT

The United States and Corporation A submit this Joint Status Report in accordance with this Court's April 1, 2019 Memorandum Opinion and Order (Dkt. 116). In that order, the Court asked the parties to "advis[e] the Court which of [certain listed docket entries] may be unsealed with redactions, and propos[e] redactions to be made prior to any unsealing." Dkt. 116 at 11 (listing Dkts. 3, 4, 5, 8, 9, 12, 16, 27, 28, 29, 38, 45, 51, 52, 53, 55, 56, 58, 59, 66, 67, 68, 69, 70, 71, 73, 74, 78, 79, 80, 81, 82, 84, 87, 92, 94, 102, 103, 104, 106, 108, and 109). In late April, the Court also asked the parties to propose redactions to five more docket entries. *See* Minute Order (Apr. 30, 2019) (listing Dkts. 114, 119, 120, 125, and 126).

In accordance with those orders, the parties submit that the Court can unseal Dkts. 71, 73, 94, 103, 104, and 108 with no redactions. The parties believe that the Court can unseal the remaining docket entries with the joint proposed redactions attached to this status report.

Most of those attachments include the original versions of any exhibits. Within four of those attachments, the parties have either deleted an exhibit or replaced an exhibit with a redacted version that this Court or another court has already approved. Those changes are as follows:

- Dkt. 29: In this response brief, Corporation A attached the Court's September 19, 2018 order in two places—as Exhibit A to Corporation A's motion to stay with the D.C. Circuit and as Exhibit A to Corporation A's petition for rehearing with the D.C. Circuit. Because this Court released a redacted version of its September 2018 order earlier this year, the parties have replaced the original, unredacted order in Dkt. 29 with the redacted version.

- Dkt. 45: Exhibit A to Dkt. 45 is Corporation A's sealed petition for certiorari. The parties have replaced that exhibit with the redacted version of the petition that is publicly available at present.
- Dkts. 66 and 67: In both filings (Dkt. 66 for the Corporation, Dkt. 67 for the Government), the parties attached as Exhibit A their proposed redactions to this Court's docket sheet. The Court has since released a redacted version of the docket sheet. To avoid any inconsistency with that version, the parties have deleted Exhibit A to Dkts. 66 and 67.
- Dkt. 74: This filing originally included a sealed version of this Court's January 30, 2019 Memorandum and Order (as Appendix B). Because this Court released a redacted version of the order earlier this year, the parties have replaced the original, unredacted order in Dkt. 74 with the redacted version.

Dated June 3, 2019.

Respectfully submitted,

JESSIE K. LIU
United States Attorney

By: /s/
Zia M. Faruqui, D.C. Bar 494990
Peter Lallas, N.Y. Bar 4290623
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20001
(202) 252-7117
(202) 252-6879
zia.faruqui@usdoj.gov
peter.lallas@usdoj.gov

ALSTON & BIRD LLP
/s/
Brian D. Boone
Bank of America Plaza, Suite 4000
101 S. Tyron St.

Charlotte, NC 28280
(704) 444-1000
brian.boone@alston.com

Counsel for Corporation A