

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,
Plaintiffs,

vs.

DONALD J. TRUMP, et al.,
Defendants.

Case No. 1:17-cv-02459-GLR

Hon. A. David Copperthite

**PLAINTIFFS' MOTION TO SET A DATE CERTAIN FOR
COMPLIANCE WITH DISCOVERY ORDER**

More than two months have passed since Judge Copperthite granted Plaintiffs' Motion to Compel and ordered all Defendants other than President Trump to produce three discrete categories of documents and interrogatory answers they are withholding solely on the basis of deliberative process privilege. *See* ECF 204, 205. Defendants have informed Plaintiffs that they do not intend to comply with the Court's order.

Defendants have appealed Judge Copperthite's discovery order and asked the District Court to stay the order pending appeal, but the District Court has not acted on their stay request. Defendants now refuse to comply with Judge Copperthite's order and insist that they need not produce a single document or supplemental interrogatory answer until their pending Objections to the order and Motion to Stay are resolved. *See* ECF 208, 209; Kies Decl. (attached hereto) ¶ 5, Ex. B at 1. Defendants are mistaken. "In the context of an order entered by a magistrate judge, neither filing objections to the order nor filing a motion to stay enforcement of the order relieves a party of its duty to comply with the order." *Holly v. UPS Supply Chain Sols., Inc.*, 2015 WL 2446110, at *4 (W.D. Ky. May 20, 2015). And it is well settled that "the mere filing

of a motion to stay does not effect a stay.” *Alston v. Becton, Dickinson & Co.*, 2014 WL 338804, at *2 (M.D.N.C. Jan. 30, 2014). Plaintiffs request that this Court set a date certain by which Defendants must begin production of compelled documents and information and establish a schedule for when production will be completed. Plaintiffs further request an expedited briefing schedule for this motion and request that the Court direct Defendants to respond to this motion within seven calendar days.

BACKGROUND

1. On August 14, 2018, Magistrate Judge A. David Copperthite granted Plaintiffs’ Motion to Compel (ECF 177-1). Judge Copperthite also denied in part and granted in part Defendants’ Motion for a Protective Order (ECF 179) and dismissed as moot Plaintiffs’ Motion for Judicial Determination of Privilege (ECF 178).

2. Judge Copperthite held that the deliberative process privilege does not apply to the three discrete categories of documents identified in Plaintiffs’ Motion to Compel, finding that “each of the categories of compelled documents is likely to contain evidence reflecting Defendants’ intent,” which “is at the very heart of this litigation.” ECF 204 at 5–6.

3. Plaintiffs’ Motion to Compel applies only to documents withheld on the basis of deliberative process privilege and only with respect to discovery served on Defendants other than President Trump. Plaintiffs have expressly stipulated that their Motion to Compel does not seek information: (1) that is within the custody of the President or the Executive Office of the President or (2) that Defendants contend is subject to the presidential communications privilege but is within the custody of Defendants other than the President. ECF 185-2 at 2 (¶ 5). Judge

Copperthite granted the motion that incorporated that stipulation on June 29, 2018. ECF 185-2, 187; *see also* ECF 208 at 1.¹

4. Judge Copperthite's August 14, 2018 order granting Plaintiffs' Motion to Compel did not identify a specific date by which Defendants other than President Trump must produce documents withheld solely on the basis of deliberative process privilege. *See generally* ECF 205. At the same time, the order was clear that Defendants were under an obligation to produce those documents.

5. On August 17, 2018, Defendants moved to stay Judge Copperthite's order pending the District Court's resolution of Defendants' forthcoming Objections, ECF 208, subsequently filed on August 28, 2018, ECF 209.

6. Defendants' Motion to Stay and Objections have been fully briefed and pending for over three weeks. *See* ECF 208, 211, 215 (Motion to Stay); ECF 209, 216, 221 (Objections).

7. On September 21, 2018, Plaintiffs asked Defendants to explain the steps Defendants had taken to comply with Judge Copperthite's August 14, 2018 ruling requiring Defendants other than President Trump to produce documents withheld solely on the basis of deliberative process privilege. Kies Decl., Ex. A.

8. On October 1, 2018, Defendants' counsel responded that Defendants are devoting "significant time and resources" toward preparing for the potential production of the compelled documents. However, Defendants' counsel took the position that Defendants were not under a present obligation to produce documents, but that these documents would be produced only "if

¹ Although Judge Copperthite denied Defendants' Motion for Protective Order allowing them to withhold documents protected by the presidential communications privilege, Plaintiffs have not served any motion to compel production of such documents.

the motion to stay is denied, subject to the Government considering appellate options.” Kies Decl., Ex. B at 1.

9. On October 12, 2018, the parties conferred. Marianne Kies and David Zionts attended for Plaintiffs. Andrew Carmichael and Courtney Enlow attended for Defendants. Defendants confirmed that they contemplate that if ultimately required to produce the compelled documents they would make rolling productions of the documents and stated that, as a practical matter, they would be ready to begin productions in the near future. Kies Decl. ¶ 5. However, Defendants’ counsel stated that Defendants will not produce a single document encompassed by Judge Copperthite’s August 14, 2018 order unless and until their Motion to Stay and Objections are finally resolved, including any appeal. *Id.*

10. During the conference, Plaintiffs’ counsel inquired about various aspects of Defendants’ production preparations and anticipated production timeline and logistics. *Id.* Defendants’ counsel was unable to provide specific answers to these questions during the conference. On October 16, 2018, Plaintiffs memorialized their questions in an email to Defendants. *Id.*, Ex. C. Defendants have not yet responded.

ARGUMENT

The Court should order Defendants to immediately comply with Judge Copperthite’s August 14, 2018 ruling on Plaintiffs’ motions by beginning productions of the compelled documents and information within seven calendar days of grant of the enforcement order and establishing a schedule for when production will be completed. Plaintiffs do not insist on a particular timetable and are ready and willing to work with Defendants to establish a schedule that takes into account Defendants’ legitimate practical constraints in completing a rolling production of the compelled documents. The reason for this motion is that Defendants are

refusing to produce documents they *are* able to produce, on the apparent view that Judge Copperthite's order is a mere recommendation that lacks force.

Under Local Rule 301.5(a), “the filing of objections to the magistrate judge’s order shall not operate as a stay of any obligation or deadline imposed by the order.” The mere fact that Defendants have *filed* a Motion to Stay does not relieve them of their compliance obligation: “[A]ll orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, *absent a stay*, he must comply promptly with the order pending appeal.” *Maness v. Meyers*, 419 U.S. 449, 458 (1975) (emphasis added); *see McLean v. Cent. States, Se. & Sw. Areas Pension Fund*, 762 F.2d 1204, 1210 (4th Cir. 1985) (same); *U.S. Home Corp. v. Settlers Crossing, LLC*, 2012 WL 3536691, at *14 (D. Md. Aug. 14, 2012) (“A court’s order remains in force until it is vacated or stayed.” (quoting *New Pac. Overseas Grp. (USA) Inc. v. Excal Int’l Dev. Corp.*, 2000 WL 377513, at *7 (S.D.N.Y. Apr. 12, 2000))); *Alston*, 2014 WL 338804, at *2 (“[T]he mere filing of a motion to stay does not effect a stay.”); *see also Holly*, 2015 WL 2446110, at *4; *Jeld-Wen, Inc. v. Nebula Glass Int’l, Inc.*, 2007 WL 1625721, at *2 (S.D. Fla. May 26, 2007); *Am. Rock*

Salt Co., LLC v. Norfolk S. Corp., 371 F. Supp. 2d 358, 360 (W.D.N.Y. 2005).²

It has been more than two months since the Magistrate Judge ordered Defendants to produce documents encompassed by Plaintiffs' Motion to Compel and Motion for Judicial Determination of Privilege. ECF 204, 205. Because Defendants are "apparently under the impression that the mere filing of [their] motion will excuse their compliance" with that order, *Jeld-Wen*, 2007 WL 1625721, at *1, Plaintiffs request that the Magistrate Judge enforce the order by ordering that Defendants begin their productions of compelled documents and information within seven calendar days of grant of the enforcement order and establish a schedule for when production will be completed. Again, Plaintiffs are prepared to work with Defendants on a reasonable schedule for the compelled production, but it is clear from Defendants' statements that they do not consider themselves bound by Judge Copperthite's order that some binding schedule is necessary.

CONCLUSION

Plaintiffs respectfully request that the Court enforce its August 14, 2018 Memorandum Opinion and Order granting Plaintiffs' Motion to Compel and dismissing Plaintiffs' Motion for

² Defendants have asserted that an order requiring production while their Motion to Stay is pending would "moot" that motion. Kies Decl. ¶ 5. That is incorrect. Should Defendants produce documents and information and their Motion to Stay is subsequently granted or their Objections are sustained, Defendants can claw back the documents and information and a court can exclude them from being used as evidence. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 n.2 (2011) (noting that the government's production of allegedly privileged documents while appeal of the discovery order was pending "did not affect [the Court's] review" because the Court could "still provide effective relief by preventing further disclosure and by excluding the evidence from trial"); 13B Charles Alan Wright et al., *Federal Practice & Procedure* § 3533.2.2 at n.68 and accompanying text (3d ed. 2018) (noting that "[p]roduction of information in response to a court order is a common occurrence" and that "many decisions have denied mootness after compliance with court discovery orders"). In any event, the concerns raised by Defendants are the precise purpose of a stay motion, which Defendants have filed but the Court has not granted.

Judicial Determination of Privilege by ordering that Defendants begin their productions of compelled documents and information within seven calendar days of grant of the enforcement order and establish a schedule for when production will be completed.

Plaintiffs further request that the Court set an expedited briefing schedule for this motion and direct Defendants to respond within seven calendar days of this motion. Plaintiffs are prepared to file a reply in support of this motion within five calendar days of Defendants' response.

Dated: October 22, 2018

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Respectfully submitted,

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CERTIFICATE OF CONFERENCE OF COUNSEL

Pursuant to Local Rule 104.7, I hereby certify that, on October 12, 2018, Plaintiffs and Defendants met and conferred via phone. David Zionts and Marianne Kies attended for Plaintiffs. Andrew Carmichael and Courtney Enlow attended for Defendants. Defendants indicated that, as a practical matter, they could begin rolling productions in the near future. However, Defendants' counsel stated that Defendants will not produce a single document encompassed by Judge Copperthite's August 14, 2018 order unless and until their Motion to Stay and Objections are finally resolved. Accordingly, the parties were unable to resolve their dispute and the issue is ripe for the Court's consideration.

/s/ Peter J. Komorowski
Peter J. Komorowski

CERTIFICATE OF SERVICE

I hereby certify that, on October 22, 2018, a copy of the foregoing and its attachments were served on Defendants via CM/ECF. In addition, courtesy copies will be delivered to the Chambers of Judge Copperthite.

/s/ Peter J. Komorowski
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