UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, *Plaintiff*, vs. BOOZ ALLEN HAMILTON, INC., *et al.*, *Defendants*.	Case No. 1:22-cv-01603-CCB

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR EMERGENCY RELIEF

The Department of Justice ("DOJ") apparently views this Court's orders as mere suggestions, not requirements. The Court ordered the parties to complete their production by August 22. Without asking this Court for relief from its order, DOJ ignored that deadline. It is now September 1, and the hearing is two weeks away. Defendants are still expecting about half of DOJ's document production—at some point.

In responding to Defendants' Motion for Emergency Relief (ECF No. 133) ("Mot."),[1] DOJ refuses to tell this Court how many documents are left to produce and tells the Court that it "cannot commit to a certain date" to produce discovery. ECF No. 141 ("Opp.") at 5. The time has passed for "we will do what can" statements. This Court should reject DOJ's arguments and require DOJ to comply with its obligations under the case-management order and the Federal Rules.

First, there is nothing "draconian" about requiring DOJ to complete its production by September 2, nearly two weeks past the deadline. *See* Opp. at 1. As the Court said at the hearing: "I do expect that requiring things to be finished by Friday is not going to be unreasonable." Hearing Tr. 62:1–3. And, although DOJ insists that it is acting in "good faith," Defendants cannot defend themselves with DOJ's good intentions. *See* Opp. at 1, 5. As this Court explained at the hearing, "the fact is that the defendants need certain documents. We all need certain information to make an informed decision [at the hearing]." Hearing Tr. 11:21–25.

Second, DOJ blames national-security review for its non-compliance, and Defendants are certainly sensitive to national-security concerns. But DOJ brought a case centered around NSA, knew that this was going to be a part of the process, and still told this Court that it was ready to proceed on a *far more* expedited schedule. In fact, rather than take efforts to mitigate any delays

[1] Even in filing its response, DOJ could not follow this Court's instructions. *Compare* Hearing Tr. 61:24–25, 62:1 (asking DOJ to file the response "by the close of business") *with* Opp. (filed at 9:22 p.m.).

inherent in the process, DOJ exacerbated them. Just by way of example, there is no dispute that (1) DOJ chose to start its review on the NSA system containing *the least* amount of relevant information, *see* Mot. 8, or (2) one of its witnesses *did not even start* searching his documents until around August 11, *see* Hearing Tr. at 14:13–17.

Third, DOJ says its admitted violation of this Court's order has caused "no prejudice." Opp. 2. That is specious. Defendants' expert had to produce a report this Monday—on an incomplete record. Defendants will have to depose DOJ's expert tomorrow—on an incomplete record. Defendants must make their deposition designations next week—but many of DOJ's witnesses may need to be deposed again next week.[2] Defendants' final witness lists are due tomorrow—on an incomplete record and with more depositions still outstanding. Defendants' exhibit lists are due next Wednesday—even though DOJ refuses to guarantee that it will have completed its production with enough time for Defendants to identify which exhibits to choose. At bottom, without any apparent remorse, DOJ has thwarted this Court's case-management order and seriously impaired Defendants' ability to prepare for a major and potentially dispositive hearing only two weeks away. *See* Hearing Tr. 11:21–25; *id.* 12:17–19 ("And then what do we do if [Defendants] don't have [the sought documents] for their experts or for the reopened fact depositions.").

In support of its remarkable "no prejudice" claim, DOJ even suggests that "the documents from NSA are at best tangential" to the case. Opp. at 2. Not so. As this Court knows, DOJ alleges that NSA is the sole customer at issue here. As this Court explained only yesterday, NSA and its

[2] DOJ suggests that only two of its witnesses will be available for re-deposition. Opp. at 6 n.13. But Defendants cannot make any determination regarding which witnesses will need to be re-deposed until receiving all the documents. Notably, Defendants received custodial documents for most of NSA's witnesses after they were deposed.

documents are at the center of this case. ECF No. 138 at 3 ("[A]ny details about the Proposed Acquisition's potential to harm the NSA are especially important because the NSA is the only customer in the Government's proposed market.").[3] Indeed, after the discovery cut off, Defendants have received very significant documents including (1) documents related to the parameters of OPTIMAL DECISION and (2) documentation of the *thousands* of contracts involving "modeling and simulation" the government has entered into over the last 10 years—each of which, under DOJ's theory, is presumably an antitrust "market."

At bottom, DOJ's failure to comply with the Court's order is simply unfair. Defendants expended significant effort and expense to ensure that they complied with the Court's order and that DOJ had the documents it needed. DOJ now has the benefit of Defendants' compliance and the nearly 28,000 documents it produced. This one-sidedness gives DOJ a distinct and unfair advantage in preparing for the hearing. There is no apparent dispute that:

- Defendants have only 786 documents from DOJ responsive to Defendants' requests; DOJ is only about halfway through its production; and DOJ refuses to commit to a final production date, even though the hearing is only two weeks away.
- Defendants are still missing attachments for parent documents and *vice versa*, making the documents they do have significantly less useful.
- DOJ produced most of its witnesses' documents after their depositions.
- DOJ has offered nothing other than its say-so to rebut its witnesses' testimony that they ran search terms different from the ones the parties had agreed to and made their own responsiveness determinations without attorney supervision.

[3] For the same reason, DOJ's explanation as to why it has identified so few responsive documents (1,291 compared with Defendants' 27,776) falls flat. *See* Opp. at 6.

- DOJ's production does not comply with the Federal Rules and basic e-discovery protocols, even though DOJ never asked this Court for relief from these Rules. *See* Opp. 7 (admitting no metadata was produced).

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It is telling that DOJ starts its response *not* with any attempted justification of its discovery failures, but with a desperate and misleading attempt to spin facts in support of its flailing case. The reality is that DOJ brought this case hoping to make new law on Section 1 "incentives," but its own witnesses from the NSA refuted the foundational elements of the Complaint. In any event, DOJ's "merits" arguments are wholly beside the point—regardless of whether DOJ will win or lose, it must meet its discovery obligations.

Defendants have already been severely prejudiced by DOJ's non-compliance. Tomorrow, September 2, is the absolute latest DOJ can finish its production if Defendants are to have any hope of being able to fairly present a defense at the September 15–16 hearing. The Court should grant Defendants' motion, along with any other remedy the Court deems necessary to ensure DOJ complies with the Court's orders.

Dated: September 1, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2022, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, and served one copy, by ECF to counsel of record in this matter.

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