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14 **UNITED STATES DISTRICT COURT**  
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN FRANCISCO DIVISION**

17 ELECTRONIC FRONTIER FOUNDATION, ) NOS. 08-1023 JSW & 08-2997 JSW  
18 Plaintiff, )  
19 v. ) OPPOSITION TO EMERGENCY FILING  
20 OFFICE OF THE DIRECTOR OF NATIONAL ) FOR TEMPORARY STAY PENDING  
21 INTELLIGENCE and DEPARTMENT OF ) DECISION BY SOLICITOR GENERAL  
22 JUSTICE, ) REGARDING APPEAL AND IMMEDIATE  
23 Defendants. ) ADMINISTRATIVE STAY

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1 Plaintiff Electronic Frontier Foundation (“EFF”) respectfully requests that this Court deny  
2 the defendants’ “emergency filing” seeking a 45-day stay pending a decision by the Solicitor  
3 General regarding an appeal and an immediate administrative stay.<sup>1</sup> On October 7, 2009, the Court  
4 denied the government’s motion for a 60-day stay pending the Solicitor General’s determination  
5 whether to appeal this Court’s September 24, 2009 order granting summary judgment in favor of  
6 EFF. The Court was “not persuaded that it should exercise its discretion to stay its order pending  
7 ‘necessary consultations and deliberations to determine whether to appeal’ the Court’s Order.”  
8 Oct. 7 Order 2:4-5.

9 Last night, after filing an Emergency Motion with the Ninth Circuit (08-1023 Dkt. 101-2;  
10 08-2997 Dkt. 83-2), the government filed a “protective” notice of appeal. (08-1023 Dkt. 98; 08-  
11 2997 Dkt. 80). However, the defendants continue to represent that they are requesting only a  
12 temporary stay so that the Solicitor General can decide whether to actually prosecute an appeal of  
13 these cases. This Court considered and rejected that argument in the October 7 Order. Equally  
14 unimpressed with the government’s novel arguments, the Ninth Circuit denied the defendants’  
15 motion today. The government adds no new facts or law in this afternoon’s filing.<sup>2</sup>

16 The Ninth Circuit order issued today calls for “presentation to the district court” of a  
17 “motion for stay pending appeal of the district court’s October 7, 2009 order.” (08-1023 Dkt. 101-  
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19 <sup>1</sup> There is no motion styled as an “emergency filing” in the Federal Rules of Civil Procedure or the  
20 Local Rules. Ordinarily, if a litigant wants the Northern District to revisit a denial of a motion to  
21 stay, the litigant would file a motion for reconsideration after obtaining leave pursuant to Civil L.R.  
22 7-9. *See, e.g., Tokuyama Corp. v. Vision Dynamics, LLC*, No. C 08-2781SBA, 2008 WL 4532565  
(N.D. Cal. 2008). The government has not attempted to comply with this rule, and the filing is not  
a proper administrative motion pursuant to Civil L.R. 7-11.

23 <sup>2</sup> In its reply in support of the Emergency Motion, the government argues that EFF “makes no  
24 effort to defend the district court’s specific errors, or the government’s grounds for withholding of  
25 the various categories of documents, that were identified in the stay motion.” Gov’t Reply at 3-4  
26 (08-1023 Dkt. 101-3; 08-2997 Dkt. 83-3). EFF has addressed these arguments at length before this  
27 Court, and will not repeat those arguments here. *See* Opposition to Consolidated Motion for  
28 Summary Judgment and Cross Motion for Summary Judgment (08-2997 Dkt. 43); Reply in  
Support of Cross Motion for Summary Judgment (08-2997 Dkt. No. 67). The Court has made clear  
that it does not accept the government’s arguments on the merits. Sept. 24 Order. Moreover, the  
Court has already addressed the government’s objections to its conclusions in the Oct. 7 order  
denying leave to file a motion for reconsideration. EFF has no desire to burden this Court by  
arguing these issues a third time. If the Court wishes to revisit these arguments, however, EFF is  
happy to provide additional briefing.

1 1; 08-2997 Dkt. 83-1). The order specifically points to Federal Rule of Appellate Procedure 8(a).  
2 Pursuant to that Rule, prior to filing a motion to stay with the Ninth Circuit, a “party must  
3 ordinarily move first in the district court for the following relief: (A) a stay of the judgment or  
4 order of a district court pending appeal.” Otherwise, the party must “show that moving first in the  
5 district court would be impracticable.” A motion before this Court would not have been  
6 impracticable. This Court specifically noted that its October 7 order “made no finding as to  
7 whether a stay pending appeal would be appropriate,” and reminded the defendants of the  
8 applicable standard should they “decide to appeal the Court’s Order and to seek a stay from this  
9 Court.”

10 Nevertheless, the government still has not moved for a stay pending appeal of this Court’s  
11 September 24 order, which was the subject of its original motion, or the October 7 order denying  
12 that motion.<sup>3</sup> *See, e.g.,* Gov’t Reply at 4 (“the government is not seeking a conventional stay  
13 pending appeal”). Instead of following the Ninth Circuit’s instructions, the government persists in  
14 seeking a stay to allow the Solicitor General more time to contemplate whether or not to appeal.  
15 The procedurally ungrounded “emergency filing” submitted by the government today is still not a  
16 proper motion for a stay pending appeal under Federal Rule of Civil Procedure 62(c) and, absent an  
17 actual decision to pursue an appeal by the Solicitor General, is still premature. Oct. 7 Order at 2:11-  
18 12. Its request should be denied.

19 It is unclear what the defendants hope to gain by this filing. The government asserted to the  
20 Ninth Circuit that “no purpose whatsoever would be served by requiring the government to return  
21 to the district court with respect to the present request for a temporary stay,” Gov’t Reply at 5,  
22 acknowledging its lack of new arguments. Moreover, this emergency filing fails to comply with  
23 the Ninth Circuit’s instructions, leaving the government with a challenging road ahead on any  
24 subsequent appeal. It is time for the government to either commit to an appeal (and file an  
25 appropriate motion) or to follow its own policy guidelines on open government and release the

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27 <sup>3</sup> While the government filed a notice of appeal last night, this act does not mean it has decided to  
28 appeal. The government has represented to EFF that it is only seeking more time for the Solicitor  
General to decide whether to pursue the appeal.

1 disputed documents.

2 For these reasons, in addition to the reasons that it denied the government's motion for a  
3 60-day stay, this Court should deny the defendants' motion for a temporary stay.

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5 DATED: October 9, 2009

Respectfully submitted,

6  
7 /s/ Marcia Hofmann

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