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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	Nos. 08-2997 JSW & 08-1023 JSW **REPLY IN SUPPORT OF MOTION FOR A 60-DAY STAY PENDING APPEAL DETERMINATION BY SOLICITOR GENERAL** Date: Oct. 9, 2009 Time: 9:00 a.m. Courtroom: 2, 17th Floor

Defendants Office of the Director of National Intelligence and the Department of Justice respectfully file this short reply in support of their Motion for a 60-Day Stay Pending Appeal Determination by Solicitor General in order to rebut certain misleading arguments made by plaintiff in its opposition brief:

1. Contrary to plaintiff's argument, the Court absolutely has the power to grant a 60-day stay of its September 24, 2009 disclosure order to preserve the status quo pending a determination by the Solicitor General as to whether an appeal of that order should be taken.

Plaintiff's argument that our motion is premature under Fed. R. Civ. P. 62(c) in the absence of a valid appeal misses the mark entirely. We did not move for a stay pending appeal pursuant to Fed. R. Civ. P. 62(c), but rather moved only for a 60-day stay to give the Solicitor General the time she is entitled to under Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure to engage in the necessary consultations and deliberations to determine whether to appeal the Court's September 24, 2009 order. Our motion is brought pursuant to the Court's inherent and unquestionable power to stay its own order pending an appeal determination by the Solicitor General. See, e.g., United States v. Robertson, 110 F.3d 1113, 1116 (5th Cir. 1997) (noting that district court granted Government stay so that it could appeal court's decision, and that Government filed notice of appeal after court granted stay); Marriott Int'l Resorts, L.P. v. United States, 63 Fed. Cl. 144, 145 (2004) (granting Government's motion to certify an interlocutory appeal and noting that court had previously granted stay to enable Government to "make an orderly and considered decision whether to file an interlocutory appeal . . . ."); rev'd on other grounds, 437 F.3d 1302 (Fed. Cir. 2006) (reversing decision that Government appealed). It is not a Rule 62(c) motion, although we argued that we did in fact meet the standard for a stay pending appeal.

In addition, the All-Writs Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In this case, the compelled disclosure of the withheld documents will divest the Court of its Article III jurisdiction to resolve the pending Motion for Leave to File Motion for Reconsideration, since disclosure will moot the controversy over the documents. For that reason, the All-Writs Act provides the Court with additional authority to issue an order staying disclosure while the Motion for Leave to File Motion for Reconsideration is under consideration.

Plaintiff's own cases establish the Court's authority to grant our motion. In Davila v. Texas, 489 F. Supp. 803, 810 (S.D. Tex. 1980), despite stating that "[t]echnically, Rule 62(c) is not properly invoked until 'an appeal is taken,'" the Court nonetheless heard the plaintiff's stay motion and granted him a 30-day stay in which to file an appeal, because the case would have

been effectively mooted in the absence of a stay. Similarly, in Corpus Christi People's Baptist Church, Inc. v. Texas Dep't of Human Resources, 481 F. Supp. 1101, 1111-12 (S.D. Tex. 1979), the court considered the plaintiffs' request for an injunction preserving the status quo during the pendency of their possible appeal, even though it recognized that "[b]y its express terms," Rule 62(c) applies only when an appeal has been taken.

It is ironic that plaintiff concedes that if we filed a protective notice of appeal, we "may" be entitled to a "short" stay because "disclosure of the requested documents would render an appeal moot." Pl.'s Opp. at 8. As an initial matter, it is hard to imagine how a stay pending appeal, even an expedited appeal, would be of a shorter duration than the requested 60-day stay. Moreover, the Government should not be penalized for seeking the time to which it is entitled to reach a thoughtful, considered decision on whether to appeal the complex legal issues involved in the Court's order.

2. Contrary to plaintiff's claim, the Court's Sept. 24 order nowhere addresses the applicability of Exemption 5 to documents exchanged within and between ODNI and DOJ, nor does the Exemption 5 discussion make any reference to exchanges between the agencies and the White House. Plaintiff fails to dispute this. Indeed, its argument on this point is baffling. Pl.'s Opp. at 5-6 ("The government first argues that the Court did not address the government's claims of privilege over documents exchanged between and among agency representatives and other Executive branch officials. Mot. to Stay at 5:17-7:7. However, the Court's holding on this point is clear: 'The Court . . . finds that Exemption 5 does not extend to communications that have been shared with government bodies or private corporations outside an Executive branch agency because these entities are not considered "agencies" within the meaning of FOIA.' Order at 7:17-19. The government's argument reflects disagreement with the Court's decision, nothing more."). Plaintiff's unclear position lends further support to our Motion for Leave to File a Motion for Reconsideration, and underscores the practical difficulty that defendants would have in determining what the "improperly withheld documents" are in order to disclose them on October 9, per the Court's order. Order at 10.

3. Plaintiff's Exemption 3 argument boils down to a narrow challenge to the

withholding under Exemption 3 of the identities of telecommunications carrier "lobbyists." Pl.'s Opp. at 6. Assuming arguendo that this interpretation of plaintiff's position in its summary judgment submissions is accurate, plaintiff makes no argument that the Court's decision was so limited, nor could it. The Court addressed "the identities of the carrier employees and their agents . . . .", not some undefined subgroup of "lobbyists." Order at 9; see also id. at 10 (referring to the "identities of the private individuals and entities who communicated with the ODNI and DOJ in connection with the FISA amendments."). Even under plaintiff's construction of its challenge, the Court's order as to what we must produce is, at best, ambiguous. Plaintiff's construction also cannot be squared with its claim to not be challenging the withholding of information that would reveal the government's intelligence sources and methods. (Pl.'s Opp. at 6). Our Exemption 3 assertion sought to protect the identities of the representatives of telecommunications companies who communicated with ODNI and DOJ as revelatory of which entities were assisting the Government and, therefore, of the government's intelligence sources and methods. See McConnell decl. at ¶¶ 23-27; Steele decl. at ¶¶ 18-19.

4. Contrary to plaintiff's argument, plaintiff will not be irreparably harmed by a 45-day extension of the Court's disclosure order. Whatever plaintiff's interest may be in obtaining information about negotiations on pending legislative proposals, the order at issue compels disclosure of negotiations by a previous Administration about prior legislative amendments that have already been enacted into law. Any prior finding by the Court of irreparable harm was made at a different time under different circumstances. It is speculation on plaintiff's part that Congress's consideration of the pending bills to repeal the telecommunications carrier immunity provision will be complete by November 23, 2009, the end of the stay period sought by the Government. Nor is the immunity provision set to expire on December 31, 2009, or at any time.

Defendants respectfully request that the Court stay its order for 60 days to give the Solicitor General sufficient time to determine whether to appeal the Court's Sept. 24, 2009 order.

Dated: Oct. 7, 2009

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