THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al*., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States; *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW

NOTED FOR: April 20, 2018

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I. INTRODUCTION

On April 11, 2018, the Court made clear that "orders from the federal bench are mandatory, not voluntary." Dkt. 148 at 10. "The executive branch does not stand alone in the federal system; the Government may not usurp the judicial branch and decide itself when or if it will produce documents." *Id*. That was not the first time the Court has had to emphasize the Court expects compliance with its orders. *See id*. (citing Dkt. 115, 121 (hearing and hearing transcript regarding discovery disputes)).

Despite the Court's repeated warnings, late Friday, with less than two hours' notice to Plaintiffs, Defendants filed what they style an "emergency motion for stay." Defendants demand a decision from this Court by the end of the day Monday, April 23, or else they will seek immediate review from the Ninth Circuit. This motion should be denied for several reasons.

First, despite framing their motion as an "emergency" request, Defendants do not even try to meet the standard set forth in LCR 7(j). During a telephone conference with Plaintiffs, Defendants did not identify any emergency (despite the title of their motion), and made clear that they were *not* moving under LCR 7(j), or pursuant to any of the Local Rules governing motions. Declaration of David A. Perez, ¶ 4. The Federal Rules of Civil Procedure and this Court's Local Rules are not guidelines; they are rules that the parties must obey. Defendants cannot proceed as if they are subject to a different set of rules altogether.

Second, Defendants' alternative request for reconsideration should be denied because it does not meet the standard outlined in LCR 7(h). Far from showing any manifest error, intervening change in the law, or new facts, Defendants simply insist that they "continue to believe that information identifying individuals on the class list . . . is protected under the law enforcement privilege." Dkt. 156 at 2. That is not a new argument. The Court tailored its April 11, 2018 order in a reasonable manner that was well within its discretion and rightfully placed the burden on Defendants as the designating party.

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Third, setting aside these procedural defects, on the merits Defendants have not shown that they are entitled to a stay. Rather than show that they will likely succeed on the merits of their mandamus petition, Defendants simply rehash the same arguments the Court already has rejected in three separate orders spanning six months. Far from demonstrating a likelihood of success on the merits, Defendants' motion is just another example of their delay tactics and refusal to accept the Court's orders as "mandatory, not voluntary." Dkt. 148 at 10. The Court should deny Defendants' motion.

Plaintiffs additionally request the Court strike Exhibits A and B to Defendants' motion from the Court's consideration. Defendants offer no reasons why they should now be able to supplement the record with evidence they could have previously offered the Court.

II. RELEVANT FACTUAL BACKGROUND

The Court is aware of the procedural history leading up to this motion, which Plaintiffs will not reprise in detail here, except to highlight a few key facts. Plaintiffs asked Defendants to produce the Class List on August 1, 2017, which Defendants refused to do, leading to a motion to compel, and the Court's order of October 19, 2017. Dkt. 98. In that order, the Court considered and rejected Defendants' arguments against disclosure of "the class members' specific identities." *Id*. at 3. Specifically, the Court considered and rejected Defendants' assertion of the law enforcement privilege over the Class List, and explained that the privilege is "qualified" and that "the balance weigh[s] in favor of disclosure." *Id*. at 3-4.

Defendants moved to reconsider this portion of the Court's order, which the Court denied on November 28, 2017. Dkt 102. The Court explained that it had "exercised its discretion in balancing the needs of Plaintiffs versus those of Defendants and found that the balance weighed in favor of disclosure." *Id*. at 2. In doing so, the Court expressly considered the "Government['s] argu[ments] that grave national security threats could materialize were the Government forced to reveal the individuals subject to CARRP." *Id*. The Court explained that the "Government may not merely say those magic words—'national security threat'—and automatically have its

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requests granted in this forum." *Id*. at 3. In neither its opposition to Plaintiffs' motion to compel, nor in its motion for reconsideration, did Defendants argue that a new protective order was necessary. Nor did Defendants move for further relief from the requirement to disclose the specific names of the Class Members.

Defendants now assert that after these two orders, "counsel for the Defendants attempted in good faith to find an acceptable solution by which the government could protect its national security and law enforcement interests while disclosing the class list to Plaintiffs' attorneys." Dkt. 156 at 2. But in the intervening months, Defendants did no such thing. Plaintiffs repeatedly asked about the status of the Class List, and Defendants avoided providing any dates by which the Class List would be produced. *See, e.g.*, Dkt. 128 (Perez Decl. ISO Plaintiffs' Opposition to Defendants' Motion for Protective Order). Finally, on February 13, 2018, the parties filed a joint status report where Defendants expressly committed to produce the Class List by March 5, 2018. Dkt. 114 at 4.

The next day, during a hearing, the Court noted that Defendants had "agreed to a deadline for production [of the Class List] by March 5th." Dkt. 115 (hearing); Dkt. 121 at 26 (hearing transcript). The Court emphasized that "the court expects full compliance, because that fits within the context of two prior orders that have already been issued by this court." Dkt. 121 at 26. Plaintiffs' counsel predicted (accurately) that Defendants would not comply, and that "this court will have to issue a third order on the class list." *Id*. at 27. The Court "reemphasize[d] . . . that two orders have already been issued," and that "unless there's something extraordinarily different . . . [the court] expect[s] full compliance in a timely fashion without further delay." *Id*. at 28.

Rather than heed the Court's instructions, and comply with the Court's two written orders and its oral rulings, Defendants opted for further delay, filing a motion for protective order on the eve of their deadline to produce the Class List. Dkt. 126. In the meantime, and in direct violation of the Court's order compelling disclosure of "the class members' specific identities," Dkt. 98 at

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3, Defendants unilaterally decided to produce a redacted Class List that omitted the identities of the Class Members.

In its April 11, 2018 order, the Court concluded that Defendants had not supported their argument "that the class list, generally, must be subject to an 'attorney eyes only' provision." Dkt. 148 at 9. Acknowledging that "potential national security risks may exist as to specific individuals," the Court explained that "the burden is on the Government to make such case-by-case determinations . . . with sufficient detail and specificity," and if the Government does so then those individuals' identities "must be protected by the 'attorney eyes only' protections described by the Government in its brief." *Id*. at 9-10. In other words, the Court granted in part Defendants' request to designate certain individuals' identities under "attorney eyes only," but ordered Defendants to "do their homework" for each designation, rather than apply that designation to the entire Class List.

More than six months after the Court's initial October 19, 2017 order, Defendants have moved to stay the Court's order compelling the production of a Class List.

III. ARGUMENT

A. Legal Standard and Summary of Argument.

Defendants frame their request as an "emergency motion," asking the Court to stay its discovery orders related to the Class List pending Defendants' petition for a writ of mandamus. In effect, Defendants ask for relief from the Court's deadline to produce the Class List by April 25, 2018. Dkt. 148 at 10 (ordering that the class list "must be produced" by April 25). Defendants alternatively ask the Court to reconsider its orders regarding the Class List and protective order.

LCR 7(j) provides that a "motion for relief from a deadline should, whenever possible, be filed sufficiently in advance of the deadline to allow the court to rule on the motion prior to the deadline." The rule makes clear that "[i]f a true, unforeseen emergency exists that prevents a party from meeting a deadline, and the emergency arose too late to file a motion for relief from

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the deadline, the party should contact the adverse party, meet and confer regarding an extension, and file a stipulation and proposed order with the court." *Id*. As outlined below, Defendants do not even try to establish that "a true, unforeseen emergency exists," much less one that requires the Court to rule within one business day.

As for Defendants' alternative request—that the Court reconsider its prior orders—LCR 7(h) emphasizes that "[m]otions for reconsideration are disfavored." The Court "will ordinarily deny such motions" unless the moving party demonstrates "manifest error" in the Court's prior ruling or "new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." LCR 7(h). It follows that when a motion for reconsideration "merely rehashes the same arguments made and rejected by the Court," it "may be denied for this reason alone." *Ledcor Indus. (USA) Inc. v. Virginia Sur. Co., Inc.*, No. 09-CV-01807 RSM, 2012 WL 223904, at *1 (W.D. Wash. Jan. 25, 2012); *see also Anderson v. Domino's Pizza, Inc.*, 11-CV-902 RBL, 2012 WL 2891804, at *1 (W.D. Wash. July 16, 2012) (noting reconsideration is an "extraordinary remedy" that "should not be granted . . . unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law") (quotations omitted). Here, there is no basis for reconsideration. Rather than identify any manifest errors, new facts, or intervening change in law, the motion simply rehashes the same arguments Defendants already briefed.

Procedural defects aside, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Id*. (quoting *Virginian*, 272 U.S. at 672-73) (alterations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433-34. A court's decision to grant or deny a stay application is guided by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether

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the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434). "The first two factors . . . are the most critical," and the last two steps are reached "[o]nce an applicant satisfies the first two factors." *Nken*, 556 U.S. at 434-35. The factors considered in determining whether a stay pending petition for writ of mandamus is warranted are the same as a stay pending appeal." *Powertech Tech. Inc. v. Tessera, Inc.*, No. C 11-6121 CW, 2013 WL 1164966, at *1 (N.D. Cal. Mar. 20, 2013) (internal quotation marks omitted).

By this standard, Defendant's request for a stay pending review of their mandamus petition should be denied. Defendants cannot demonstrate a likelihood of success on the merits of their mandamus petition or irreparable injury by simply rehashing the same arguments the Court has considered and rejected three times over six months. Continued disagreement and persistent refusals to comply with the Court's decisions do not provide any basis for a stay.

B. Defendants' Motion Is Improper Because Defendants Have Not Established an Unforeseen Emergency.

LCR 7(j) provides that emergencies must be "unforeseen." But Defendants have known about their obligation to produce the Class List, including the specific identities of those on the Class List, since at least October 2017. Dkt. 98.

Moreover, "[t]here is no provision in the Local Rules for the Western District of Washington for an 'emergency motion' or for a motion on shortened time." *Does 1-10 v. Univ. of Washington*, C16-1212JLR, 2016 WL 11066699, at *1 (W.D. Wash. Aug. 18, 2016). Defendants' "motion does not fall within the category of motions that the court's Local Rules permit counsel to note for the same day the motion is filed." *Id*. (citing LCR 7(d)(1) (listing motions that may be noted on the same day filed)).

Ultimately, Defendants ask for relief from the Court's deadline to produce the Class List, and the reasons for subjecting certain identifies on that class list to "attorney eyes only"

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protection, by April 25, 2018. The Court's Local Rules provide that motions for relief from a deadline "may be noted for consideration no earlier than the second Friday after filing and service of the motion." LCR 7(d)(2). Defendants have provided no reason for their failure to abide by the Local Rules, and their motion should be denied for that reason alone.

C. The Court Should Deny Defendants' Request for Reconsideration.

Defendants previously opposed Plaintiffs' request for a Class List, and waited six months before filing a motion for a protective order, which the Court denied in part. As the Court previously explained when denying a separate reconsideration request: "Defendants couch their motion in terms of the Court's manifest errors but in reality the motion argues that the Court should revisit its conclusions. Parties cannot use motions for reconsideration to simply obtain a second bite at the apple, and this is what Defendants appear to be doing with this motion." Dkt. 85 at 2; *see Minhnga Nguyen v. Boeing Co.*, C15-793RAJ, 2017 WL 2834273, at *2 (W.D. Wash. June 30, 2017) (denying reconsideration where the litigant did not "present new facts or legal authority that were not also available to her earlier"); *Henderson v. Metro. Prop. & Cas. Ins. Co.*, C09-1723 RAJ, 2010 WL 3937482, at *2 (W.D. Wash. Oct. 5, 2010) (same).

Here, Defendants repeat their argument that disclosing the Class List to Plaintiffs' counsel "may lead dangerous individuals to attempt to evade the immigration system to obtain benefits for which they are not eligible." Dkt. 156 at 4. The Court already considered and rejected this argument three times. *See* Dkt. 98, 102, and 148. Even if that reasoning was sufficient to invoke the law enforcement privilege, the Court explained that it still "must balance the need for Plaintiffs to obtain this information against the Government's reasons for withholding." Dkt. 98 at 4; *see also In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988). Notably, "a district court has considerable leeway" in striking that balance. *Id.* Here, after Plaintiffs and Defendants each laid out their needs in their respective briefs, the Court has come down in favor of disclosure. Defendants disagree with that conclusion, but fail to show how it was manifestly erroneous.

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The Court has afforded Defendants the protection they want—attorney eyes only—but only if they "do their homework" by showing with particularity why each name should be subject to that designation. Defendants assert, in a conclusory fashion, that justifying this designation is even worse than not having it in the first place. But they never explain how or why that is the case. They simply assert it, and expect the Court to believe them. But, as this Court has already observed, the "Government may not merely say those magic words—'national security threat'—and automatically have its requests granted in this forum." Dkt. 102 at 3.

The Court should deny Defendants' alternative request asking the Court to reconsider its April 11, 2018 order concerning the use of the "attorneys' eyes only" provision.

D. Defendants Are Not Entitled to a Stay.

Defendants intend to file a petition for a writ of mandamus requesting vacatur of the Court's orders regarding production of the Class List, *see* Dkt. 156 at 2, but to obtain stay relief pending review of their mandamus petition, Defendants must establish that they are likely to succeed on the merits of that petition. Defendants cannot show that the Court's orders are "clearly erroneous as a matter of law"—the dispositive factor in obtaining mandamus relief. *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1146 (9th Cir. 2005). Nor is Defendants' hypothetical harm sufficient to show that they will be irreparably harmed absent the stay. Defendants are not entitled to a stay.

1. Defendants are not likely to succeed on the merits because they do not identify clear error.

As to the merits, Defendants must show that they are likely to obtain mandamus relief. But mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes," and "only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004). The Ninth Circuit has established five factors for use in deciding whether mandamus is appropriate, but this Court should focus on whether its "order[s]

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[are] clearly erroneous as a matter of law." *Burlington*, 408 F.3d at 1146. The absence of clear error "is dispositive." *Id.*

Rather than explain why Defendants are likely to succeed on the merits of their mandamus petition, Defendants cursorily state that they continue to "believe that the class list is protected by the law enforcement privilege[.]" Dkt. 156 at 4. But this Court has thrice ordered Defendants to produce the Class List, *see* Dkt. 98, 102, 148, rejecting Defendants' law enforcement privilege argument each time. Defendants make no separate arguments as to how the Court committed *clear error* in its orders, and they simply incorporate by reference these prior arguments. Losing the same argument three times does not entitle the moving party to a stay. To hold otherwise would eliminate Defendants' burden to establish this first stay factor.

Moreover, this Court has consistently held that Defendants' arguments are "vague and speculative" and sensitive information is already protected by the Stipulated Protective Order. Dkt. 148 at 9. The Court should apply the law of the case doctrine and follow this holding through the pendency of this matter. *See Arizona v. California*, 460 U.S. 605, 618 (1983); *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). All of the Defendants' contentions were previously argued and rejected when the Court granted Plaintiffs' motion to compel, denied Defendants' motion for reconsideration, and denied in large part Defendants' motion for a supplemental protective order. The Court should affirm its prior rejections of these arguments because Defendants have failed to identify substantially different evidence, a change in the controlling legal authority, or other changed circumstances. *See Alexander*, 106 F.3d at 876 (explaining when a court has discretion to depart from the law of the case).

In addition, Defendants' mandamus petition is not likely to succeed on the merits because it is barred by laches. Laches can bar a petition for a writ of mandamus if the petitioner "slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the [other party], or to the rights of other persons." *Chapman v. Bd. of Cty. Comm'rs of Douglass Cty.*, 107 U.S. 348, 355 (1883). Here, Defendants' posture of delay makes the application of

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laches appropriate. The Court denied Defendants' motion for reconsideration on November 28, 2018. Defendants neglect to explain why they could not then assert their rights and instead waited until the eve of their production deadline months later to modify the protective order.

2. Defendants do not demonstrate irreparable injury to support a stay.

Defendants must show more than a mere "possibility" of irreparable harm. They must "demonstrate that irreparable injury is likely in the absence of [a stay]." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "Speculative injury cannot be the basis for a finding of irreparable harm." *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007). Defendants have not shown that a stay is necessary to avoid irreparable injury.

The stipulated protective order already restricts disclosure of confidential information to a select category of persons and with strict conditions. *See* Dkt. 86 at 5-6; *id.* at 4-5 ("[Confidential Information] shall not be disseminated outside the confines of this case, nor shall it be included in any pleading, record, or document that is not filed under seal with the Court or redacted in accordance with applicable law.").

Defendants' arguments fall short for several additional reasons. First, the two certified classes are limited to individuals whose applications have been languishing for at least six months; practically speaking, those individuals would already be on notice that their applications have been subject to additional scrutiny. *See* Dkt. 95 at 3-4. Second, courts previously have rejected similar concerns about disclosing the names of individuals on the No Fly List. *See Latif v. Holder*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014). Third, Defendants have routinely disclosed this information without any restrictions in response to Freedom of Information Act requests and in other litigation. *See* Dkt. 95 at 4. Each of these arguments casts doubt on Defendants' belated arguments about national security concerns.

Fourth, the Court's previous orders each make clear that the Court expressly considered Defendants' assertions "that releasing the identities of potential class members could lead individuals to potentially alter their behavior, conceal evidence of wrongdoing, or attempt to

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influence others in a way that could affect national security interests." Dkt. 98 at 3 (citing the McCament Declaration). The Court concluded that these assertions were too speculative "to claim privilege over basic spreadsheets identifying who is subject to CARRP." *Id*. at 4. In other words, the Court disagreed with Defendants' factual arguments. *See* Dkt. 148 at 9 ("[T]he risks cited by the Government are vague and speculative—there is no evidence that any individuals on the class list are or were subjects of investigations or are, generally, 'bad actors.'").

Finally, Defendants cite *Washington v. Trump*, to assert that their interest in "combating terrorism is an urgent objective of the highest order." Dkt. 156 at 7 (citing 847 F.3d 1151, 1168 (9th Cir. 2017)). But the Ninth Circuit admonished the federal government that it must do more "than reiterate that fact." *Washington*, 847 F.3d at 1168; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (explaining that "national-security concerns must not become a talisman used to ward off inconvenient claims—a label used to cover a multitude of sins"). Here, the Court carefully weighed potential national security risks in crafting the requirements Defendants must meet to designate specific individuals under an "attorney eyes only" provision and rightfully placed the burden of using this designation on the designating party. *See* Dkt. 148 at 9.

3. Plaintiffs' injuries and the public interest weigh against a stay.

Because Defendants have shown neither irreparable harm nor that they are likely to succeed on the merits of their mandamus petition, the Court need compare Plaintiffs' injuries or weigh the public interest. *See Mount Graham Coal. v. Thomas*, 89 F.3d 554, 558 (9th Cir. 1996).

But should the Court consider these final two factors, they further weigh against Defendants' stay application. First, the Court's balance of equities in denying the stay is similar to the Court's prior analyses determining that Plaintiffs' need for the Class List outweighs Defendants' reasons for withholding it. *See* Dkt. 98 at 4; Dkt. 102 at 3. As Plaintiffs have explained, Plaintiffs' counsel need the Class List and class members' personally identifiable information for two least main reasons: (1) to communicate with class members who may be witnesses and sources of information that is directly relevant to Plaintiffs' claims, and (2) to

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respond to inquiries from potential class members and inform them if their interests are represented in this case. *See* Dkt. 127 at 11; Dkt. 91 at 5; Dkt. 95 at 1-2. Granting the stay would further delay Plaintiffs' and class members' access to this critical information, and continue to impair counsel's ability to fully represent all class members and factually develop this case. In the meantime, Plaintiffs continue to suffer harm as their immigration benefit applications remain improperly delayed by Defendants' unlawful CARRP and successor extreme vetting programs.

The public interest weighs against a stay. The public would benefit from prompt adjudication of this case, and further delay harms the public, "particularly where the substance of the case itself implicates the public interest." *Richards v. Ernst & Young LLP*, No. C-08-04988 RMW, 2012 WL 92738, at *4 (N.D. Cal. Jan. 11, 2012); *see Nken*, 556 U.S. at 427 (regarding a stay as "an intrusion into the ordinary processes of administration of judicial review").

E. The Court Should Strike Defendants' Declarations.

Plaintiffs request the Court strike the Declarations of Tatum King and Tracy Renaud—which Defendants filed as Exhibits A and B to Defendants' stay motion—from the Court's consideration. Defendants provide no reasons why they should now be able to supplement the record in this case with evidence that could have been provided before this Court made its decisions on Plaintiffs' motion to compel, Defendants' motion for reconsideration, and Defendants' motion for a limited protective order. *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) ("A [motion for reconsideration] may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation."); *ThermoLife Int'l, LLC v. Myogenix Corp.*, No. 13-CV-651 JLS (MDD), 2017 WL 4792426, at *2 (S.D. Cal. Oct. 24, 2017) (striking declaration and exhibits attached to motion).

IV. CONCLUSION

The Court should deny Defendants' motion for stay or for reconsideration of the Court's orders as they pertain to disclosure of the Class List, and strike Exhibits A and B from the record.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 23rd day of April, 2018, at Seattle, Washington.

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