UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, and AMERICAN CIVIL LIBERTIES UNION OF DELAWARE, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, and U.S. CUSTOMS AND BORDER PROTECTION, Defendants.	Case No.: 1:17-cv-00441-LMB-IDD

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO STAY PROCEEDINGS PENDING DECISION ON MOTION TO TRANSFER

INTRODUCTION

In their Motion to stay the proceedings, Defendants requested that this Court impose a brief stay of the proceedings—likely only for a matter of weeks—while their motion to transfer this and twelve other related actions filed by ACLU affiliates is pending before the Judicial Panel on Multidistrict Litigation. Plaintiffs spend the bulk of their Opposition arguing against consolidation. Plaintiffs repeatedly argue that this case is unrelated to the others, Pls.' Opp'n at 3, 5-6, 8, 11 (ECF No. 30)—even though all of them were brought by ACLU affiliates as admittedly "coordinated" lawsuits and even though they all concern parallel FOIA requests for identical or nearly identical categories of records, *see* Transfer Mot. at 4-7 (ECF No. 21-3)—because the plaintiffs are different ACLU affiliates and because the requests seek records from different CBP field offices. Such arguments should instead be addressed to the JPML, which is considering whether consolidated or coordinated pretrial proceedings would be appropriate (and which has previously centralized FOIA actions over similar objections).

As Defendants have explained, a temporary stay of proceedings until the JPML can decide Defendants' motion to transfer serves the interests of judicial economy and avoids any significant burden to either party. The JPML is likely to hear and decide the transfer motion only a few weeks after the first deadline in this case. Plaintiffs have not explained why this Court should now expend its resources on pretrial proceedings—including status reports, scheduling conferences, and possible discovery—when those issues would duplicate those in the twelve other related actions and would need to be re-litigated before the transferee court. Moreover, the strategic behavior of Plaintiffs and the other ACLU affiliates in unnecessarily bringing the related actions as thirteen separate cases clearly imposes a burden on Defendants from having to engage in parallel proceedings in thirteen courts. And any stay of this duration would have no

effect on the timing of Defendants' release of responsive records, and thus Plaintiffs will suffer no prejudice.

Stays pending a JPML motion, while not automatic, are routine. *See, e.g.*, Defs.' Mem. at 4 (ECF No. 25) (collecting authorities); *see also, e.g.*, *San Diego Unified Port Dist. v. Monsanto Co.*, No. 15-cv-00578-WQH-JLB, 2016 WL 4496826, at *1 (S.D. Cal. Feb. 1, 2016) ("majority of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings"); *Automated Transactions, LLC v. Bath Sav. Inst.*, No. 2:12-cv-393-JAW, 2013 WL 1346470, at *2 (D. Me. Mar. 14, 2013) (courts grant stays "frequently") *Bonenfant v. R.J. Reynolds Tobacco Co.*, No. 07-60301-CIV, 2007 WL 2409980, at *1 (S.D. Fla. July 31, 2007) ("common practice" to grant stays). Contrary to Plaintiffs' suggestion, there is no exception to the typical practice when the government seeks transfer of FOIA cases. Indeed, as discussed below, stays pending a decision of the JPML have been granted in numerous FOIA cases, and Plaintiffs identify no FOIA case in which such a stay was denied. In light of the limited duration of any potential stay here, the ACLU affiliates' strategic approach to the litigation, and the burden that a piecemeal approach imposes on the government and the courts, this Court should grant Defendants' request for a temporary stay.

I. A TEMPORARY STAY WOULD NOT AFFECT THE TIMING OF THE RELEASE OF RESPONSIVE RECORDS

Throughout their Opposition, Plaintiffs invoke the specter of delay, arguing that staying the proceedings in this action will ultimately lead to a delay in the release of responsive documents. In particular, Plaintiffs suggest that it is a "mere hope" that the JPML will hear Defendants' motion to transfer on July 27, 2017, Pls.' Opp'n at 6; *id.* at 7, that "there is no telling when the JPML will rule on the matter," *id.* at 12, and that it will delay "the public's access to these crucial records," which is inconsistent with the purposes of FOIA, *id.* at 7; *id.* at 9-12.

Plaintiffs claim that because of this delay, a stay would not serve the interests of judicial efficiency and would prejudice Plaintiffs. *Id.* at 6-7, 9-12.

However, these warnings of delay are exaggerated and unsupported by anything other than Plaintiffs' speculation. First, Plaintiffs' concerns that the JPML will not promptly decide Defendants' motion to transfer are based on nothing but conjecture. Briefing on the motion will be complete today. Plaintiffs identify no reason to believe that the JPML will not hear Defendants' fully briefed motion at its next hearing, scheduled for July 27, 2017, or that it will not act expeditiously to decide the motion. Indeed, though Plaintiffs have requested oral argument before the JPML, Defendants have not requested oral argument. If the JPML rules on the papers, Defendants' motion could be decided sooner than July 27, 2017. In any event, Plaintiffs' speculation that Defendants' motion to transfer will languish on the JPML's docket does not justify denying a stay here. *See, e.g.*, *San Diego Unified Port Dist. v. Monsanto Co.*, No. 15-cv-00578-WQH-JLB, 2016 WL 4496826, at *1 (S.D. Cal. Feb. 1, 2016) (granting stay where movant "requested oral argument at the next JPML hearing" two months after filing of motion and expected that the JPML would rule "[w]ithin a short period of time after the hearing").

Second, contrary to Plaintiffs' suggestion, stays pending JPML decisions are not inconsistent with FOIA. Defendants are aware of two instances in which the government sought centralization of FOIA actions by the JPML. *See* Transfer Mot. at 9-10. In both, transferor courts granted motions to stay the proceedings pending the JPML's decision, and Defendants are not aware of any transferor court in these actions that denied a stay motion. *See, e.g.*, *Freedom Magazine v. IRS*, No. 91-cv-6813 (S.D. Fla.) (ECF No. 10); *Freedom Magazine v. IRS*, No. 91-cv-2921 (D. Md.) (ECF No. 6); *Freedom Magazine v. IRS*, No. 91-cv-12598 (D. Mass.) (ECF

entry Feb. 7, 1992); *Freedom Magazine v. IRS*, No. 91-cv-704 (S.D. Ohio) (ECF No. 6); *Bach v. IRS*, No. 91-cv-20184 (N.D. Cal.) (ECF No. 13); *Chandler v. IRS*, No. 91-cv-20183 (N.D. Cal.) (ECF No. 15); *Kimmich v. IRS*, No. 91-cv-20182 (N.D. Cal.) (ECF No. 13); *Licciardi v. IRS*, No. 91-cv-148 (D.N.H.) (ECF No. 5).[1] Plainly, then, stays pending JPML decisions are equally justified in FOIA cases.

Third, notwithstanding their conclusory assertions of "delay," Pls.' Opp'n at 12, Plaintiffs fail to explain how a temporary stay would have any effect on the timing of the release of responsive records in this case. Currently, Defendants' response to the complaint is due July 7, 2017. (ECF No. 23.) Defendants anticipate that their motion to transfer will be heard by the JPML on July 27, 2017 and decided shortly thereafter. As Defendants explained in their Motion, even if a stay is imposed, Defendants will continue to compile and review records during the pendency of the stay. Defs.' Mem. at 8. Indeed, Defendants recently granted Plaintiffs' request for expedited treatment and have placed the coordinated requests of all the ACLU affiliates in the expedited processing queue, ahead of all non-expedited requests and later expedited requests.[2] Thus, Defendants' response to Plaintiffs' request will proceed on the same track with or without the stay.

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[1] On June 6, 2017, the Western District of Washington denied Defendants' motion to stay in one of the related actions. *See* Order of June 6, 2017, *ACLU of Washington v. DHS*, No. 17-0562 (RSL) (ECF No. 20). This Court is not bound by that decision and should decline to follow it, as it ignores many of the key considerations justifying a stay here. Contrary to that court's decision, no delay in the production of documents will result from granting a stay because Defendants' processing of the ACLU affiliates' FOIA requests is ongoing and will continue with or without a stay. *See infra* Pt. I.

[2] Plaintiffs spend several pages of their Opposition discussing their entitlement to expedited processing. *See* Pls.' Opp'n at 10-11. As Plaintiffs acknowledge, their request for expedited treatment has been granted. (*See* ECF No. 30-1.)

Further, Plaintiffs do not identify anything that will occur in this Court before the JPML's decision that would actually hasten the release of responsive documents. Though Defendants will process Plaintiffs' request "as soon as practicable," 6 C.F.R. § 5.5(e)(4), there is no reason to believe—particularly in light of the substantial volume of recent FOIA requests received by Defendants and the complexity of Plaintiffs' request—that production of all responsive records will be complete by the time the JPML decides Defendants' transfer motion. In other words, staying the proceedings in this case will have no effect on when Plaintiffs receive the records responsive to their request.

II. A STAY WOULD SERVE JUDICIAL ECONOMY BY AVOIDING UNNECESSARY AND DUPLICATIVE PROCEEDINGS

Plaintiffs try to minimize the waste of judicial resources from duplicative proceedings in the related cases by arguing essentially that there are no duplicative proceedings because this action has nothing to do with the other related actions. Pls.' Opp'n at 5-6. As Defendants have explained, Plaintiffs are simply wrong. *See also* Transfer Mot. at 4-8. In any event, Plaintiffs' argument speaks more to whether transfer is appropriate than to whether this Court should stay proceedings while the JPML considers the appropriateness of transfer. There can be no doubt that, if the case is transferred, any time this Court has devoted to pretrial proceedings will have been for naught. Any proceedings regarding issues such as production schedules and the availability of possible discovery will be substantially similar in each of the related actions, and, if Defendants' transfer motion is granted, any ruling by this Court on those issues would ultimately be vitiated by the transferee court. *See* Defs.' Mem. at 5. A stay would make it unnecessary for the Court to devote its time to resolving any disputes over such pretrial matters. *Cf. Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997) (granting stay in

interests of judicial economy because absent stay "this Court will have needlessly expended its energies familiarizing itself with the intricacies of a case that would be heard by another judge").

Relying on the Court's decision in *Sehler v. Prospect Mortgage, LLC*, No. 1:13cv473 (JCC/TRJ), 2013 WL 5184216 (E.D. Va. Sept. 16, 2013), Plaintiffs also argue that no stay should be granted here because "it is uncontrovertable [sic] that no MDL exists" and Defendants' "'anticipation' [that the JPML will hear Defendants' motion in July] is little more than hope at this point." Pls.' Opp'n at 6. Contrary to Plaintiffs' suggestion, courts do not only grant stays pending JPML decisions in tag-along cases where conditional transfer orders have already been issued. *See, e.g.*, *Wittman v. Aetna Health, Inc.*, No. 14-cv-00322-JAW, 2014 WL 4772666, at *1 (D. Me. Sept. 24, 2014) (granting stay pending decision on motion to transfer where no MDL previously existed); *Bonenfant v. R.J. Reynolds Tobacco Co.*, No. 07-60301-CIV, 2007 WL 2409980, at *1 (S.D. Fla. July 31, 2007) (same); *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1359 (C.D. Cal. 1997) (same).[3] Indeed, in the FOIA cases discussed below, transferor courts granted stays pending the JPML's decision even though no MDL existed at the time. *See infra* Pt. III.

Further, Plaintiffs misread *Sehler*. Though they suggest a stay was denied solely because "the JPML ha[d] not heard oral argument on the transfer, or consolidated any of the cases addressing the same matter," Plaintiffs omit the crucial factors that justified the denial of the stay

[3] Plaintiffs rely on case law interpreting J.P.M.L. Rule 2.1(d) which provides that the "pendency of a motion, order to show case, conditional transfer order or conditional remand order before the Panel" does not by itself "affect or suspend orders and pretrial proceedings in any pending federal district court action." *See* Pls.' Opp'n at 4-5. Rule 2.1(d) itself draws no distinction between the effect of a motion to transfer and a conditional transfer order on a district court action. That suggests that a court should address a motion to stay proceedings pending a decision on a motion to transfer no differently than a motion to stay after a conditional transfer order has been issued.

there. In that case, the Court denied the defendant's motion to stay the proceedings pending the JPML's decision for two primary reasons. First, the related litigation had initially been brought as a class action, but the class was subsequently decertified by stipulation of both parties. *Sehler*, 2013 WL 5184216, at *1. When individual actions were filed, the defendant then moved to transfer "the 37 cases filed by former opt-in plaintiffs" in the class action for consolidated treatment. *Id.* The Court held that the defendant suffered no hardship from a denial of the stay because the defendant itself had agreed to decertify the class. *Id.* at *3 ("[A]ny prejudice to the Defendant caused by these multiple actions stems largely from Defendant's own stipulation to the decertification of the *Sliger* matter. Defendant had an opportunity to defend this suit as a collective action; it agreed not to and now cannot claim prejudice on these grounds."). Second, the Court held that a stay would not serve judicial economy and would prejudice the plaintiffs because the entire "action could be resolved in this Court before the JPML rules on the transfer motion." *Id.* By the defendant's own expectation, the JPML was not likely to decide the motion to transfer for "four to six months," and the Court had already set a deadline for the completion of discovery and a final pretrial conference before the JPML would even hear the defendant's motion. *Id.* Moreover, the defendant's requested transfer would only be to coordinate discovery, so "the parties would still eventually be required to litigate the merits of their claim in this Court." *Id.*

This case is nothing like *Sehler*. Unlike in *Sehler*, Defendants are not responsible for the decentralized nature of the related actions. Rather, it was the strategic decision of Plaintiffs and the other ACLU affiliates to structure the litigation in an artificially gerrymandered way, when this case could have been brought as a single action. *See* Transfer Mot. at 6. Moreover, unlike in *Sehler*, this case will not be resolved in the weeks before the JPML decides Defendants'

motion to transfer. Indeed, Plaintiffs identify nothing that will occur in this Court before the JPML decides Defendants' transfer motion that would hasten the release of responsive, non-exempt records. *See supra* Pt. I.

III. SIMULTANEOUS AND DUPLICATIVE PROCEEDINGS IN THIRTEEN PARALLEL ACTIONS WILL IMPOSE AN UNNECESSARY BURDEN

As Defendants explained, proceeding in this case (and the other related cases) while their motion to transfer is pending forces Defendants to engage in simultaneous proceedings in thirteen separate cases before thirteen different courts. *See* Defs.' Mem. at 6-7. Plaintiffs disregard this burden as not a "real hardship." Pls.' Opp'n at 8.

Plaintiffs' attempt to minimize the obvious burden to Defendants requires looking at this case in isolation from the other related actions. But, as a direct result of the ACLU's coordinated strategy to gerrymander these FOIA requests into thirteen separate cases, *see* Transfer Mot. at 4-8, Defendants must simultaneously answer complaints, appear in status conferences, confer with opposing counsel, and submit joint status reports in the thirteen related actions. In this action in particular, Defendants would, at a minimum, be required to respond to the complaint and confer with Plaintiffs on a joint status report, and possibly to participate in a Rule 16 conference. This work would be duplicated in the other related actions and in the transferee court, and "litigating essentially the same claims in courts all over the country is no doubt burdensome." *Bd. of Trustees of Teachers' Retirement Sys. of Illinois v. Worldcom, Inc.*, 244 F. Supp. 2d 900, 905 (N.D. Ill. 2002); *see also Virginia ex rel. Integra Rec LLC v. Countrywide Sec. Corp.*, No. 3:14CV706, 2015 WL 222312, at *3 (E.D. Va. Jan. 14, 2015) (noting that defendant would suffer hardship "without a stay, including their 'need to monitor and defend cases in multiple jurisdictions, on different schedules, when the cases may be consolidated to avoid that burden'"

(quoting *Wood v. Johnson & Johnson*, No. WDQ-12-1572, 2012 WL 3240934, at *3 (D. Md. Aug. 3, 2012))).

Moreover, Plaintiffs do not disclaim any intent to request either discovery or a production schedule while Defendants' transfer motion is pending. Any decision that this Court may reach on these issues clearly may conflict with those of other courts and/or the transferee court. Defs.' Mem. at 5-6. Plaintiffs argue that discovery in this case would not "overlap with discovery in other FOIA cases," Pls.' Opp'n at 8, but this misses the point. Because of the overlapping nature of the categories of documents Plaintiffs and the other ACLU affiliates seek, any pretrial proceedings regarding the applicability and scope of discovery would raise substantially similar if not identical issues in each of the related actions. This is particularly true given CBP headquarters' coordination of the responses to FOIA requests at issue in the related actions. *See* Defs.' Mem. at 5-6. And any inconsistency in rulings on discovery or on production schedules would be plainly prejudicial—it would likely place competing demands on the same agency personnel responsible for processing the responses to the requests in each of the related cases. *Id.* Moreover, if Defendants' motion to transfer is granted, Defendants would be forced to re-litigate these exact same issues before the transferee court. *Id.*[4]

Further, Plaintiffs ignore the effect that consolidation would have on this case. If the cases are consolidated, Defendants may not need to answer thirteen individual complaints at all,

[4] Although Plaintiffs here stress how different this case is from all of the other related actions, ACLU affiliates in another related action have argued that Defendants will not be burdened precisely because the proceedings will be "substantially similar." *See* Pl.'s Opp. To Mot. to Stay at , *ACLU of Ariz. v. U.S. Dep't of Homeland Sec'y*, No. 2:17-cv-01083-PHX-DJH (ECF NO. 19) ("But for differing captions and party names, it is highly unlikely one would be able to differentiate between the answers to any of the complaints filed in the actions Defendants seek to consolidate. . . . Like the answer, a proposed scheduling order and any initial disclosures will be substantially similar.").

because the transferee court would likely require all of the ACLU affiliate plaintiffs to file a single amended consolidated complaint, which would require only one answer. *See, e.g.*, Manual for Complex Litigation § 20.132, at 224 n.668 (4th ed. 2004). And if the cases are transferred to Defendants' proposed forum, this action would be exempt under the local rules from any requirement to engage in a Rule 16 conference or to confer on initial disclosures. *See* Transfer Mot. at 15. Thus, absent a stay, Defendants will be required to undertake time-consuming work—in as many as thirteen separate cases—that may otherwise prove unnecessary.

In addition, again relying on *Sehler*, Plaintiffs suggest that Defendants will not suffer a hardship because "there is no pre-existing MDL for FOIA requests related to the Executive Orders" and "the JPML has not scheduled a hearing on Defendants' motion." Pls.' Opp'n at 7. However, as discussed above, Plaintiffs' misread *Sehler*, *see supra* Pt. II, and have no basis for their speculation that the JPML will not hear Defendants' motion on July 27, 2017 or that it will not promptly rule on it, *see supra* Pt. I.

Courts routinely find that the burden in time and expense from rearguing the same issues in different courts and the potential for inconsistent rulings justify a temporary stay pending a decision by the JPML on a motion to transfer. *See id.* (collecting cases); *see also, e.g.*, *Cooper v. Siddighi*, No. EDCV 13-00345 JGB (SPx), 2013 WL 12140988, at *4 (C.D. Cal. May 8, 2013); *Oregon ex rel. Kroger v. Johnson & Johnson*, No. 11-CV-86-AC, 2011 WL 1347069, at *6 (D. Or. Apr. 8, 2011); *Paul v. Aviva Life & Ann. Co.*, No. 09-1038, 2009 WL 2244766, at *2 (N.D. Ill. July 27, 2009); *Palmer v. Am. Honda Motor Co.*, No. CV 07-1904-PHX-DGC, 2008 WL 54914, at *1 (D. Ariz. Jan. 3, 2008). For those same reasons, a stay is warranted here as well.

IV. PLAINTIFFS WILL NOT SUFFER HARDSHIP FROM A TEMPORARY STAY

Plaintiffs do not dispute that this case is in the early stages of litigation and that any stay would likely be of a brief duration—likely a matter of weeks, not months. Courts have readily found that plaintiffs suffer no prejudice in similar circumstances. *See* Defs.' Mem. at 7.

The only supposed prejudice Plaintiffs identify is a delay in the release of responsive records. *See* Pls.' Opp'n at 9-12. However, as discussed above, granting a stay here will likely have no effect on when records are released, *see supra* Pt. I, and thus, Plaintiffs would suffer no prejudice from a temporary stay of the proceedings here.

CONCLUSION

For the foregoing reasons and those stated in Defendants' opening Memorandum, this Court should grant Defendants' request for a temporary stay of proceedings.

Dated: June 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2017, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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