



U.S. Department of Justice

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Southern District of New York

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By fax: 212.805.6191

July 2, 2007

The Honorable Barbara S. Jones
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: Wilson v. McConnell, 07 Civ. 4595 (BSJ)

Dear Judge Jones:

This Office represents defendants (the "government") in the above-named action. I am writing in response to plaintiffs' counsel's letter dated July 2, 2007.

Plaintiffs' letter is both unnecessary and inappropriate. It appears to raise a question of whether information in the classified administrative record has been properly designated by the government as classified. That issue is at the heart of the underlying litigation, and is not properly before the Court at this time. The question of the propriety of the government's classification will be fully briefed on the motions for summary judgment and should not be the subject of a preliminary ruling. The government respectfully requests that the Court defer consideration of this issue until the government has had a fair opportunity to respond to plaintiffs' arguments according to the briefing schedule already in place.

Second, plaintiffs' letter amounts to an objection to the stipulation that plaintiffs themselves requested. The government requires no stipulation to treat classified information as classified. Rather, plaintiffs sought a stipulation that would preserve their rights to challenge the status of the information at issue, that would state that they have not waived certain arguments, and that would permit the proprietary manuscript to be filed under seal. The government agreed to those terms. However, to the extent plaintiffs no longer accept the stipulation as written, the government would respectfully request that, rather than accepting the inchoate modifications plaintiffs' counsel suggests, the Court simply decline to enter the order.

The stipulation, like all stipulations, was the product of negotiation between the parties, a process that took place over several days and in which the government engaged in good faith. Yet two business days after the stipulation was executed and submitted to the Court, plaintiffs write to express their belief that "unintended legal consequences" may arise from language they agreed to, and ask the Court to "ensure that the proposed stipulation . . . cannot be construed so as to permit the government" to file certain documents as classified. Letter at 2. This is wholly

Hon. Barbara S. Jones
July 2, 2007

page 2

improper. First, as a factual matter, the government informed plaintiffs' counsel of the contents of the classified administrative record as early as June 22, 2007, by electronic mail.¹ Thus, counsel was aware of what the government had designated as classified during the entire time the stipulation was being discussed between the parties, and had every opportunity to seek to modify the language to avoid any consequences deemed undesirable. Second, as a legal matter, it was plaintiffs' obligation, in the course of negotiating the terms of the stipulation, to "ensure" whatever they believed needed to be ensured. Having entered the stipulation, they are bound by it, *PPX Enterprises, Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 123 (2d Cir. 1984), and their effort to unilaterally change its terms by requesting judicial intervention should not now be heard.

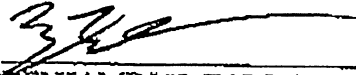
Accordingly, the Court should decline to modify the stipulation. To the extent plaintiffs seek to have the Court do so, the government withdraws its consent to that stipulation and respectfully requests that the Court decline to enter it. To the extent plaintiffs seek to litigate the propriety of certain classification decisions at the present time, the government respectfully requests the Court refer to its forthcoming brief.

Thank you for your consideration.

Respectfully,

MICHAEL J. GARCIA
United States Attorney

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¹ The contents were disclosed by means of a list of documents to be filed, but the documents themselves were not provided. Plaintiffs state that they have "sought to cooperate . . . in seeking to safeguard" classified information. Letter at 2. The government disputes this characterization. Plaintiffs' counsel is not authorized to possess any classified information; accordingly, no person may disclose such information to him. *E.g.*, 18 U.S.C. § 798. Thus, the government has not provided him with any classified information to "safeguard," nor requested his "cooperation" in doing so.