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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE**

STATE OF WASHINGTON, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY, a
federal agency, et al.,

Defendants.

NO. 4:19-cv-05210-RMP

PLAINTIFF STATES'
OPPOSITION TO DEFENDANTS'
MOTION FOR STAY OF ORDER
TO PRODUCE PRIVILEGE LOG
OR, IN THE ALTERNATIVE, FOR
EXTENSION OF TIME

NOTED FOR: June 4, 2020
Without Oral Argument

I. INTRODUCTION

Defendants' (DHS) motion for stay of the Court's Order to produce a privilege log should be denied. The main basis for DHS's motion has been rejected by the Ninth Circuit, which recently held that a motions panel's decision on a motion to stay an injunction "provides 'little guidance as to the appropriate disposition on the merits.'" *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1262 (9th Cir. 2020) (citation omitted). Further, given DHS's admission that it has not even begun to identify and assemble purportedly privileged documents, a stay of DHS's obligation to produce a privilege log risks serious harm to the Plaintiff States from routine deletion, inadvertent loss, and destruction of relevant e-mails, text messages, and other documents. Finally, DHS's motion omits any mention of the Plaintiff States' efforts to reach an agreeable compromise. The Plaintiff States respectfully request that DHS be ordered to produce its privilege log on a rolling basis with periodic status reports.

II. ARGUMENT

A. Standard of Review

"It is well-established that a party seeking a stay of discovery carries the heavy burden of making a strong showing why discovery should be denied." *Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 503 (D. Nev. 2013) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). Blanket motions to stay discovery pending a decision on a motion to

1 dismiss are disfavored. *Mlejnecky v. Olympus Imaging Am., Inc.*, No. 2:10-CV-
2 02630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011). Further, a party’s
3 “conclusory [argument] . . . that its motion to dismiss will succeed” does not
4 justify a stay because “[s]uch general arguments could be said to apply to any
5 reasonably large civil litigation.” *Skellerup Indus. Ltd. v. City of Los Angeles*, 163
6 F.R.D. 598, 600 01 (C.D. Cal. 1995). District courts stay discovery when
7 “convinced that the plaintiff will be unable to state a claim for relief.” *Wood v.*
8 *McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (emphasis added); see *Palmason v.*
9 *Weyerhaeuser Co.*, No. C11-0695RSL, 2011 WL 13101278, at *1 (W.D. Wash.
10 Oct. 13, 2011) (denying motion to stay discovery pending resolution of motion
11 to dismiss and noting “statutory presumption in favor of discovery”); *Twin City*
12 *Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989)
13 (denying protective order); *Turner Broad. Sys., Inc. v. Tracinda Corp.*, 175
14 F.R.D. 554, 555 (D. Nev. 1997) (same).

15 **B. The Basis for Defendants’ Motion for Stay is Flatly Wrong**

16 DHS contends that it should not be required to produce a privilege log—
17 as already ordered by this Court—because the Ninth Circuit motions panel’s
18 decision on DHS’s motion to stay is essentially law of the case, and no
19 “conceivable argument that Plaintiffs could raise” could dislodge that decision.
20 ECF No. 213 at 6. This argument misunderstands appellate procedure.

1 The motions panel decided only whether DHS had met its burden to obtain
2 a stay of the preliminary injunction; it did not dictate the outcome of appellate
3 review of the injunction itself, much less a decision on the merits of the Plaintiff
4 States' claims. DHS's argument was expressly rejected recently in *E. Bay*
5 *Sanctuary Covenant*, 950 F.3d at 1242. In that case, a panel hearing an appeal of
6 the merits of a district court injunction concluded that it was not bound by a
7 published motions panel opinion addressing a motion to stay the injunction
8 pending appeal. "[M]erits panels of this court frequently depart from published
9 decisions issued by motions panels in the same case." *Id.* at 1262. Further, the
10 reasons for this "are particularly heightened" where—as here—"the motions
11 panel considered whether to grant the government's request for a stay of the
12 district court's preliminary injunction," because "there are important differences
13 between a preliminary injunction and a stay pending review." *Id.* at 1264. DHS
14 is wrong in its assumption that the motions panel's opinion on its stay request
15 will govern the panel considering the merits of its appeal of the injunction. Its
16 assumption is even further attenuated when applied to this Court's consideration
17 of the ultimate merits of this case.

18 Further, DHS's position would be particularly unfair to the Plaintiff States
19 because the motions panel rendered its decision without the benefit of the
20 administrative record. "The record before a motions panel, much like the record
21 before a district court deciding a preliminary injunction, is often incomplete."
22

1 *E. Bay Sanctuary Covenant*, 950 F.3d at 1263. If the record before subsequent
2 panels differs, “the first panel’s decision . . . provides ‘little guidance as to the
3 appropriate disposition on the merits.’” *Id.* at 1262 (quoting *Sports Form, Inc. v.*
4 *United Press Intern., Inc.*, 686 F.2d 750, 753 (9th Cir. 1982)). Particularly in the
5 early stages of record review cases, “[u]nilaterally binding later merits panels to
6 the preliminary decisions made by motions panels prevents litigants from fully
7 vindicating their appellate rights.” *E. Bay Sanctuary Covenant*, 950 F.3d at 1263.

8 Here, DHS did not produce the administrative record until after the
9 preliminary injunction had been issued. *Compare* ECF No. 162 (Order Granting
10 Mot. for Section 705 Stay and Preliminary Inj. entered Oct. 11, 2019) *with* ECF
11 No. 193 at 2 (reporting that Defendants produced the administrative record on
12 November 25, 2019). The record before the motions panel therefore did not
13 include the agency’s administrative record. Yet this Court will next consider
14 Plaintiffs’ arbitrary and capricious claims with the benefit of the administrative
15 record.¹ If DHS’s position were to prevail—that a ruling made before it even
16 produced the administrative record precluded any further consideration of
17 Plaintiffs’ APA claims—it would entirely frustrate the record review required by
18 the APA. *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d
19 1534, 1548 (9th Cir. 1993) (“Section 706 of the APA provides that judicial

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21 ¹ Plaintiffs note, however, that they still are disputing the completeness of
22 DHS’s administrative record.

1 review of agency action shall be based on ‘the whole record,’” and “[i]f the record
2 is not complete, then the requirement that the agency decision be supported by
3 ‘the record’ becomes almost meaningless”).

4 *In re United States*, 138 S. Ct. 443 (2017), does not support DHS’s
5 position. In arguing otherwise, DHS overlooks two critical distinctions. First, the
6 Court here ordered production only of a privilege log, while the district court in
7 *In re United States* ordered DHS to begin producing documents, including
8 documents DHS apparently believed were privileged. *Id.* at 444-45. Thus, the
9 Supreme Court insisted that “the District Court may not compel the Government
10 to disclose any document that the Government believes is privileged without first
11 providing the Government with the opportunity to argue the issue” (*id.* at 445)—
12 a risk completely absent here.

13 Second, the bases for DHS’s motion to dismiss in *In re United States* were
14 jurisdictional—whether the challenged agency action was unreviewable because
15 it was committed by statute to agency discretion, and whether the INA deprived
16 the district court of jurisdiction. *Id.* at 445. DHS makes neither argument in this
17 case. Apart from an unsuccessful challenge to state standing (which was rejected
18 by every district court and motions panel that considered it), DHS has not
19 disputed this Court’s jurisdiction. Thus, unlike in *In re United States*, there is no
20 prospect here that the Court will lack jurisdiction to hear the Plaintiff States’ APA
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1 claims. For these reasons, the Supreme Court’s decision in *In re United States*,
2 which it limited to the “specific facts of this case,” *id.* at 445, does not control.

3 **C. The Plaintiff States Would Be Injured by a Stay or Further Delay**

4 DHS’s motion should be denied for the further reason that a stay of its
5 obligation to prepare a privilege log will seriously harm the Plaintiff States and
6 is contrary to securing the just and speedy determination of this action. Fed. R.
7 Civ. P. 1. Alarming, Defendants state in their motion that they have not yet
8 even begun to identify and compile assertedly privileged documents. ECF No.
9 213 at 6 (“Defendants must now search the records of numerous custodians
10 across multiple components of DHS for materials to be included on the privilege
11 log”). Despite numerous cases in this District and elsewhere rejecting DHS’s
12 position, DHS admits that its standard practice is to not even identify or review
13 documents withheld from the administrative record on the basis of privilege when
14 initially compiling the administrative record. *Id.* at 6 (“Consistent with” its view
15 of the law, “. . . which has been overruled by the Court in its Order[], Defendants
16 did not assemble such materials when compiling the administrative record”).
17 How DHS compiled the administrative record is opaque, but what is clear is that
18 document custodians—who may be non-lawyers—were not required to maintain
19 a collection of purportedly privileged, and therefore withheld, documents. It is
20 not clear that individuals who possess documents DHS unilaterally deemed

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1 privileged and excluded from the administrative record, such as e-mails between
2 drafters and decision-makers, have even been ordered to preserve them.

3 As a result, currently unsegregated documents over which the Plaintiff
4 States may dispute privilege, and on which they may prevail, may be vulnerable
5 to DHS's routine deletion protocols, inadvertent loss, or other destruction. This
6 case was filed on August 14, 2019. ECF No. 1. Over the past nine months, it
7 appears that documents DHS unilaterally deemed privileged were left
8 unsegregated in the custody of DHS employees. In the Motion to Stay, DHS
9 makes no representations to the contrary. The longer Plaintiff States are required
10 to wait for the start of the production of a privilege log, the greater the risk of
11 routine deletion, inadvertent loss, and destruction of documents. It therefore is
12 critical that DHS promptly begin the process of compiling a privilege log,
13 including notifying custodians of their duty to segregate documents for logging.

14 **D. DHS Misstates the Plaintiff States' Position as to the Requested**
15 **Extension, and the Court Should Order DHS to Begin Its Work**

16 The Plaintiff States did not oppose DHS's request for an extension of time
17 to produce the privilege log in its entirety. *See* Declaration of Jeffrey T. Sprung
18 in Opposition to Motion for Stay, ¶¶ 1-2 and Exhibit 1. However, instead of a 90-
19 day extension running from the date of the Court's Order on DHS's pending
20 motion for stay, Plaintiffs proposed a rolling production of the privilege log. *Id.*
21 Plaintiffs continue to advocate that solution as a reasonable compromise here.

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1 As noted in the parties' correspondence, Plaintiffs are extremely sensitive
2 to COVID-related hardships and stand ready to work with DHS to reach a
3 solution. *Id.* But in light of DHS's alarming statement that it has not even begun
4 to segregate assertedly privileged documents, it is critical that DHS immediately
5 *begin* the work of producing the privilege log this Court has already ordered. To
6 do otherwise continues the unacceptable risk of loss or destruction of documents.
7 Consequently, the Plaintiff States ask that the Court order DHS to produce its
8 privilege log on a rolling basis starting on June 12, 2020—an extension of over
9 three weeks from the current deadline (May 17). Plaintiffs also request that DHS
10 make reports to the Court and Plaintiffs every other Friday, beginning June 12,
11 on its progress toward completion of the privilege log. This report should include
12 DHS's progress on (1) notifying potential custodians of their obligation to
13 preserve potentially relevant documents, even if assertedly privileged, (2)
14 segregating all assertedly privileged documents for review, and (3) logging
15 privileged documents pursuant to Fed. R. Civ. P. 26(b)(5)(A). The numbers DHS
16 reports should be stated in absolute terms and as a percentage of the whole, so
17 Plaintiffs and the Court can assess DHS's progress toward completion.

18 A proposed order is submitted herewith.

19 III. CONCLUSION

20 For the foregoing reasons, DHS's motion to stay its obligation to produce
21 a privilege log should be denied, and any extension of the date to produce the
22

1 privilege log should require a rolling production and bi-weekly status reports to
2 the Court and Plaintiffs.

3 RESPECTFULLY SUBMITTED this 11th day of May, 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 1st day of May 2020, at Seattle, Washington.

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8 **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF WASHINGTON
9 **AT SPOKANE**

10 STATE OF WASHINGTON, et al.,

11 Plaintiffs,

12 v.

13 UNITED STATES DEPARTMENT
14 OF HOMELAND SECURITY, a
federal agency, et al.

15 Defendants.

NO. 4:19-cv-05210-RMP

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION FOR
STAY OF ORDER OR, IN THE
ALTERNATIVE, FOR
EXTENSION OF TIME TO
PRODUCE PRIVILEGE LOG
[PROPOSED]

NOTED FOR: June 4, 2020
Without Oral Argument

16
17 This matter came before the Court on Defendants' Motion for Stay of
18 Order Or, in the Alternative, for Extension of Time to Produce Privilege Log.
19 Having considered Defendants' motion, Plaintiffs' opposition, and Defendants'
20 reply, and the entire record in the above-captioned matter, and being fully
21 apprised of the matter, now, therefore, it is hereby:

1 ORDERED that Defendants’ Motion for Stay of the Court’s April 17, 2020
2 Order requiring the production of a privilege log is DENIED. Defendants’
3 Motion for Extension of Time to Produce Privilege Log is GRANTED IN PART
4 AND DENIED IN PART, as specified below.

5 It is ORDERED that Defendants shall produce a privilege log on a rolling
6 basis starting on June 12, 2020.

7 It is further ORDERED that Defendants shall make reports to the Court
8 and Plaintiffs every other Friday, beginning June 12, on their progress toward
9 completion of the privilege log. This report should include Defendants’ progress
10 on (1) notifying potential custodians of their obligation to preserve potentially
11 relevant documents, even if assertedly privileged, (2) segregating all assertedly
12 privileged documents for review, and (3) logging privileged documents pursuant
13 to Fed. R. Civ. P. 26(b)(5)(A). The numbers of custodians notified and documents
14 segregated and logged that are reported in Defendants’ report should be stated in
15 absolute terms and as a percentage of the whole, so Plaintiffs and the Court can
16 assess DHS’s progress toward completion.

17 It is SO ORDERED.

18 ISSUED this _____ day of _____, 2020.

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ROSANNA MALOUF PETERSON
United States District Judge

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 11th day of May 2020, at Seattle, Washington.

/s/ Jeffrey T. Sprung
JEFFREY T. SPRUNG, WSBA #23607