

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)
U.S. Army, xxx-xx-9504)
Headquarters and Headquarters Company, U.S.)
Army Garrison, Joint Base Myer-Henderson Hall,)
Fort Myer, VA 22211)

**DEFENSE RESPONSE TO
GOVERNMENT MOTION
FOR MODIFICATION OF
PROTECTIVE ORDER**

DATED: 6 July 2012

RELIEF SOUGHT

1. The Defense requests that this Court deny the Government's motion for modification of the current protective order to the extent that the Government submits that the Defense should now be permitted to redact and post filings unilaterally. The Defense will voluntarily agree to redact an individual's job title or position if that individual is not a party to the trial and only one individual holds that job title or position.

WITNESSES/EVIDENCE

2. The Defense would request the Court to consider the following Attachments:

- a) Attachment A: 23 March 2012 Email from MAJ Fein to the Court;
- b) Attachment B: 2 April 2012 Email from MAJ Fein to the Court;
- c) Attachment C: 2 April 2012 Email from the Court to MAJ Fein;
- d) Attachment D: 29 March 2012 Email from Mr. Coombs to MAJ Fein;
- e) Attachment E: 29 March 2012 Email from MAJ Fein to Mr. Coombs;
- f) Attachment F: 5 April 2012 Email from MAJ Fein to Mr. Coombs;
- g) Attachment G: 16 April 2012 Email from MAJ Fein to Mr. Coombs;
- h) Attachment H: 14 March 2012 Email from Mr. Coombs to MAJ Fein; and
- i) Attachment I: 30 May 2012 Email Exchange between Mr. Coombs and MAJ Fein.

FACTS

3. When the Defense first notified the Court that it intended to publish its motions on the internet, the Government strenuously opposed. On 23 March 2012, MAJ Fein sent the following email to the Court:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See Attachment A.

4. Prior to a final protective order being in place, the Defense published a synopsis of the upcoming motions arguments on Mr. Coombs' blog. The blog contained a general description of the types of issues that would be litigated. MAJ Fein objected to the Defense's blog post and on 2 April 2012 wrote to the Court:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See Attachment B.

5. The Court dismissed MAJ Fein's concerns, stating "The intent of the interim order was to ensure no information was published outside of court that included information from discovery via protective order, information subject to privilege under MRE 505 and 506, and PII to protect

witness/participant privacy and safety. The interim order was not intended to prevent the defense from publishing their legal theory for upcoming motions.” *See* Attachment C.

6. Prior to beginning its redactions, the Defense emailed the Government to get the Government’s position on what information needed to be redacted. The Defense wrote on 29 March 2012:

I am in the process of conducting my redactions. I would like to get the Government’s position on whether you would have any objection to the following:

- a) Quoting statements by Government counsel during arguments;
- b) Quoting from Government Pleadings;
- c) Quoting emails from the Government to the Court and/or the Defense; and
- d) Quoting Court Rulings.

See Attachment D.

7. The Government responded, “[REDACTED].” The Government provided no further elaboration on this statement. *See* Attachment E.

8. On 5 April 2012, MAJ Fein wrote to the Defense (copying the Court) and stated:

[REDACTED]

See Attachment F. The Defense complied with the Government’s request and has since highlighted all proposed redactions in yellow to facilitate the review by the Government. Because many of the motions are purely legal, they have not required any redactions.

9. Since April 2012, the Defense has made redactions in utmost good faith – and has in fact redacted more than it considers necessary so as to avoid any litigation over the issue. The Government has not once expressed any concerns with the Defense’s redactions.

ARGUMENT

10. The Defense does not understand how the Government can go from its position in April 2012 (“ [REDACTED] ”) to its position today (“ [REDACTED] ”).

11. In early April, the Government was concerned about the parade of horrors that would befall the proceeding and the United States if the Defense were to publish its motions publicly:

[REDACTED]

See Attachment A. In fact, the Government was so concerned about all these bad things happening that it requested thirty days to review a given Defense filing. *Id.* Apparently, the Government is not concerned about any of these things anymore and is prepared to risk “irreparable prejudice to the United States” and “materially prejudicing the proceeding” simply because the process of reviewing the redactions has gotten “overly burdensome.” See Appellate Exhibit CLXIII at p. 3.

12. In April 2012, MAJ Fein stated that “[REDACTED]” See Attachment B. Apparently, the Government is prepared to abdicate that duty because it’s just too hard on them.

13. Prior to addressing the substance of the Government’s motion, the Defense submits that the current motion shows the hypocrisy of the Government’s litigation positions in this case. The Government often makes the-world-will-end-if-this-happens arguments, undermining the Government’s credibility in the eyes of the Court and the public at large. For instance, the Government argued that the Defense should have to prepare all of its motions (classified and unclassified) from a trailer on Fort Meade – any other order would compromise national security and cause grave danger to the United States. This latest motion shows just how much credence the Court should give to these types of arguments.

14. First and foremost, the Government's position simply does not make sense. The Government states that it is required to "coordinate the approval" of Defense filings with various equity holders. *See* Appellate Exhibit CLXIII, p. 2 ("

”). However, the Government is prepared to cede responsibility for the motions and allow the Defense to review/redact/file motions on its own. This obviously means that *it is not necessary to have equity-holders' approval* in order to review and publish the motions. In other words, if the Government is now prepared to allow the Defense to post its motions unilaterally, then the Government is undertaking a wholly unnecessary process in getting approvals from various agencies. It is hard to believe that the Government does not see the fatal flaw in its own argument – it is asking the Court to relieve it from an obligation (consulting with equity holders and getting approvals) that it does not actually have. If agency approval is not necessary, why can't a team of five Government lawyers review a document, which they have to read anyway, and make the determination on their own as to whether anything contained therein is problematic?

15. The Government's excuse for no longer wanting to be subject to the protective order *that it requested* is that the process has become "overly burdensome." *See* Appellate Exhibit CLXIII, p. 3. The Government says that " ” *Id.* The Defense submits that with a prosecution team the size of a starting football lineup, the Government should be able to keep on track of redactions (conveniently highlighted in yellow) *and* prepare for argument *and* ensure the accused gets a fair trial.

16. The Government then complains that the process is " ” *Id.* The Government already tried a variation of this argument with respect to producing a witness from the Department of State; the Court did not buy it then, nor should it buy it now.¹

17. What is troublesome is the Government's next sentence. The Government states, " ” *See* Appellate Exhibit CLXIII at p. 3 (emphasis added). To the Defense, this looks like a not-so-veiled threat: If you make us continue with reviewing redactions, we will slow down your discovery.

18. This is not the first time the Government has resorted to subtle threats. When the Court ordered the Government to review the hard drives of the computers for certain specified programs, the Government decided at the last-minute it would rather turn over the hard drives

¹ The Court's reaction to this over-the-top argument was, "It's one witness, MAJ Fein."

than produce to the Defense the results of the forensic searches ordered by the Court. The Defense opposed and asked the Government to produce the forensic searches as per the Court's timeline, as well as the computer hard drives. MAJ Fein implied that if the Defense did not agree to waive the forensic results, it would take much longer for the Defense to get access to the hard-drives. In this respect, MAJ Fein stated:

[REDACTED]

[REDACTED]

See Attachment G. Thus, it appears that, much like the computers, the Government is using the threat of delay in order to achieve its intended result.

19. Once one gets past the silly "this is just too hard for us" argument, one is left to wonder *why* the Government would want to allow the Defense the ability to post motions on its own, without any review or input from the Government. After all, the Government did say "[REDACTED] See Attachment B. The answer is obvious: the Government is waiting for a "gotcha" moment, where it can claim that the Defense has violated a protective order and caused grave and irreparable damage to the United States.

20. The Defense believes that the Government is setting the Defense up for another "spillage" incident, much like the one in March 2012.² Although this was never addressed on the record, the Defense believes that a spillage did *not* occur and that the Government misrepresented to the Court that an OCA had determined that a spillage occurred. See Attachment H ("I just got off the phone with CPT Fein. I called him to clarify whether there was a new claim of possible spillage. CPT Fein told me that there was not. His email simply referred to the claimed spillage from several weeks ago and possible issue he raised yesterday. Although not in his email, CPT

² To refresh the Court's memory, this is the incident where the Government submitted that the Defense had committed a spillage by inference. The Defense's motion did not contain any classified information. A separate attachment to the Defense's motion did not contain any classified information. However, the Government maintained that by reading these two separate documents together, one could infer classified information.

Fein represented to me that the OCA concluded the latest incident constituted spillage. I have asked CPT Fein to provide copies of any emails to the Defense and the Court that he sent to the OCA and received from the OCA regarding this issue. He did not indicate that he would provide the correspondence, or any portion thereof. ...”). The clear proof that a spillage did not occur is the fact that no remediation measures were ever taken after the alleged spillage. If indeed a spillage did occur, it was incumbent on the Government to take remediation measures. As such, the Defense submits that the Government misrepresented that a spillage had occurred in order to make the Defense look like it could not be trusted.

21. The risk that the Defense will post a motion that contains something that the Government deems objectionable is very real. This is evidenced by the Government complaining to the Court about the Defense’s posting of a wholly innocuous description of what motions were to be argued at the upcoming motions argument. *See* Attachment B (“[REDACTED]”). So even though the Government did not have any actual concerns with “THIS” posting, it felt the need to tattle on the Defense.³

22. Moreover, the Government held the Defense to unreasonable standards with respect to the Court’s protective order. The Government maintained that the Defense had to provide specific notice of its intent to publish individual motions; a blanket notice that the Defense would publish every motion that it filed was not enough. The following email exchange between the parties occurred on 30 May 2012 in respect of a motion that the Defense apparently did not give the Government specific notice of:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³ The Government had a similar “over the top” response when the Defense offered a redacted copy of the Grand Jury testimony into evidence. The Government complained that the Defense was waiving protected information around and that the information had to be under seal.

[REDACTED]

[REDACTED]

[REDACTED]

See Attachment I.

23. The Defense does not believe that the Court's order requires the Defense to specifically provide notice of each and every motion it intends to file publicly, given that it has already stated that it will file *every* motion publicly. The bigger point here is that the Government continually adopts unreasonable litigation positions – and the Defense expects to see this behavior continue if the Defense permitted to file motions publicly without the Government's input.

24. Aside from the Court's Protective Order, the Defense has had no guidance from the Government on what may or may not be objectionable. To date, the Defense has over-redacted its filings simply because it does not feel like getting into an irrational debate with the Government over the redactions. However, the Defense still does not know what information (aside from information subject to a protective order) the Government might suddenly deem problematic. Consequently, the Defense does not want to risk the near-certain fate that will result if the Defense files a motion without the Government's blessing: the infamous "gotcha" moment. This is of particular concern since the Protective Order still does not specify the circumstances under which the Government might decide to report Defense counsel to their state bar association.

25. The Government's final request is that the Court "[REDACTED]
[REDACTED]" The Defense does not object to this. However, with so much in the public domain already and the individuals being referred to by title and name in open court, the request appears to be pointless. Moreover, the proffered reason for the redaction – "to protect the safety of potential witnesses" – seems far-fetched to say the least. Nonetheless, the Defense will endeavor to comply with the Government's request.

CONCLUSION

26. Since the Court's Protective Order has been in place, there have not been any subsequent claims of spillage or violations of the Court's Protective Order by the Government. The motions practice is almost completed. The Government would seek to fix what is not broken at this point. For the reasons stated above, the Defense respectfully requests that this Court deny the Government's motion.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel