IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD A. HORN, Plaintiff, v. FRANKLIN HUDDLE, JR., *et al.*, Defendants.	No. 1:94-cv-1756 (RCL)

DEFENDANT ARTHUR M. BROWN'S OPPOSITION TO UNITED STATES' EMERGENCY MOTION FOR STAY PENDING APPEAL

Defendant Arthur M. Brown hereby opposes the United States' Emergency Motion for a Stay Pending Appeal from this Court's August 26, 2009 order, for the following reasons:

1. The United States completely overlooks the possibility of irreparable harm to Brown. The United States appears to seek a stay of only that portion of the August 26, 2009 Order permitting the parties to disclose classified information to their counsel. It says nothing about the portions of the August 26, 2009 Order that would require Brown to file a motion stating the information that he intends to use during discovery and/or present during trial. As we have previously stated, Brown needs the assistance of his counsel to make the submissions the Court has requested. How can counsel advise Brown about negating plaintiff's claims and supporting his defenses if the vast majority of potential evidence cannot even be discussed? How can counsel advise Brown regarding which witnesses to depose and/or call at trial if Brown cannot identify for counsel the potential witnesses and discuss their roles and responsibilities? How can counsel formulate document discovery requests without input from Brown regarding what materials to ask for? If Brown were forced to do so while the stay requested by the United

States is in place, he would be deprived of the assistance of counsel and his ability to defend himself in this case – irreparable harms that the Court's August 26, 2009 Order attempts to address.

2. The United States' likelihood of success is dubious, given the arbitrary and capricious nature of its position. Brown respectfully submits that the United States has already made a determination that his counsel has a need to know classified information. When Brown was represented by Assistant United States Attorneys, he was permitted to discuss classified information with them. Indeed, the Central Intelligence Agency even facilitated those discussions. Thus, the United States clearly had determined that Brown's counsel had a need to know. There is no legitimate reason for the United States to take a different position now that Brown is represented by private counsel who have been favorably adjudicated for access to classified information. With respect to Brown's counsel's need to know and their ability to communicate with Brown, nothing has changed.

3. The position that the United States has unfettered discretion to decide who is entitled to receive classified information leaves no role whatsoever for the judiciary in accommodating the interests of litigants and ensuring against abuse of discretion, as contemplated by the Court of Appeals in *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007), and *Stillman v. Central Intelligence Agency*, 319 F.3d 546 (D.C. Cir. 2003). Moreover, we do not understand the Government's position that although *In re Sealed Case* does not foreclose CIPA-like procedures, it does not authorize them. Emergency Mot. at 10-11.

Respectfully submitted,

/s/ Michael V. Sachdev

Adam S. Hoffinger (D.C. Bar No. 431711)
Robert A. Salerno (D.C. Bar No. 430464)
Michael V. Sachdev (D.C. Bar No. 979102)
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006-1888
Telephone: (202) 887-1500
E-mail: AHoffinger@mofo.com
RSalerno@mofo.com
MSachdev@mofo.com

Counsel for Defendant Arthur Brown

CERTIFICATE OF SERVICE

I certify that on this 4th day of September, 2009, I caused true and correct copies of the foregoing DEFENDANT ARTHUR M. BROWN'S OPPOSITION TO UNITED STATES' EMERGENCY MOTION FOR STAY PENDING APPEAL to be served on all parties by filing a copy electronically with the court's ECF system:

Paul G. Freeborne
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 6108
Washington, DC 20001
paul.freeborne@usdoj.gov

John L. McPherson
Office of the General Counsel
Central Intelligence Agency
Washington, DC 20505
Johnlm0@ucia.gov

Donald M. Remy
David M. Maria
Latham & Watkins LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
Donald.Remy@lw.com
David.Maria@lw.com

Brian C. Leighton
701 Pollasky Avenue
Clovis, CA 93612
kbarker@arrival.net
bleighton@arrival.net

Elizabeth Sarah Gere
Jimmy R. Rock
Troutman Sanders LLP
401 9th Street, NW
Suite 1000
Washington, DC 20004
elizabeth.gere@troutmansanders.com

Roger M. Adelman
Law Office of Roger M. Adelman
1100 Connecticut Avenue, NW
Suite 730
Washington, DC 20036
radelman@erols.com

E. Lawrence Barcella, Jr.
Paul Hastings
875 15th Street, NW – 12th Floor
Washington, DC 20005
larrybarcella@paulhastings.com

Howard M. Shapiro
Shirley Woodward
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
howard.shapiro@wilmerhale.com

Charles S. Leeper
Drinker Biddle & Reath LLP
1500 K Street, NW
Suite 1100
Washington, DC 20005
Charles.Leeper@dbr.com

/s/ Michael V. Sachdev
Michael V. Sachdev