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16
17 **UNITED STATES COURT OF APPEALS**
18 **FOR THE NINTH CIRCUIT**

19 JOHN C. EASTMAN,
20
21 *Plaintiff - Appellant,*
22 vs.
23 BENNIE G. THOMPSON, *et al.*
24 *Defendants - Appellees*

Case No.: 22-56013

25 **SUPPLEMENT IN SUPPORT OF MOTION TO STAY PENDING APPEAL**

26 Plaintiff-Appellant Dr. John Eastman, through undersigned counsel,
27 provides this update as a supplement in support of his motion to stay pending
28 appeal.

1 On October 27, 2022, Dr. Eastman filed a motion for reconsideration or, in
2 the alternative, for a stay pending appeal of the district court’s order directing Dr.
3 Eastman to produce by 2 pm Pacific time on October 28, 2022, eight privileged
4 documents that the court had (erroneously in our view) found to be subject to a
5 crime-fraud exception.
6

7 At 11:48 am Pacific time on October 28, 2022, counsel for Dr. Eastman
8 submitted to a single Ninth Circuit Judge an Emergency Motion for Stay pursuant
9 to Federal Rule of Appellate Procedure 8(a)(2)(D), which allows such a motion to
10 be “made to and considered by a single judge” when “time constraints” make the
11 normal procedure of filing with a court for consideration by a panel
12 “impracticable.” Counsel for Defendants-Appellees were copied on the transmittal
13 of that motion.
14

15 Having received no ruling on either the Motion for Reconsideration or Stay
16 filed in the district court or the Emergency Motion for Stay filed with the Ninth
17 Circuit Judge, at 1:29 pm PDT, counsel for Dr. Eastman filed in the district court a
18 motion for extension of time to produce the eight contested documents and a notice
19 of appeal.
20

21 At 1:48 pm PDT, the district court denied Dr. Eastman’s motion for
22 reconsideration or, in the alternative, stay pending appeal. At 1:50 pm PDT, the
23 district court denied Dr. Eastman’s motion for extension of time to produce the
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1 eight privileged documents while the Motion to Stay remained pending in the
2 Ninth Circuit.

3 At 1:53 p.m. PDT Dr. Eastman’s counsel provided to Defendant-Appellee
4 U.S. House of Representatives Select Committee to Investigate the January 6th
5 Attack on the United States Capitol (“Select Committee”) twenty-five documents
6 that the district court had ordered produced that were not the subject of Dr.
7 Eastman’s motion for reconsideration or stay.
8

9 In order to comply fully with the district court’s production order, counsel
10 for Dr. Eastman provided to the Select Committee at 2:04 pm PDT a link to a drop
11 box folder containing the remaining eight documents that were the subject of the
12 Motion to Stay that was at the time (and is still) pending before the Ninth Circuit.
13 In the email transmitting that link, counsel for Dr. Eastman requested that the
14 documents not be accessed until the Ninth Circuit had had a chance to rule on the
15 Motion for Stay pending appeal.
16

17 Instead of honoring that request, counsel for the Select Committee notified
18 Dr. Eastman’s counsel at 6:26 pm PDT and 6:40 pm PDT that the Select
19 Committee had “downloaded and examined” the disputed documents, falsely
20 asserting that there was no motion for stay pending before the Ninth Circuit at the
21 time. (Exhibit A, Attached). (The motion for stay was electronically filed through
22 the Ninth Circuit’s ECF system at 6:08 pm PDT once the case had been docketed,
23 but as noted above, it had been transmitted to a single Ninth Circuit Judge pursuant
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1 to F.R.A.P. 8(a)(2)(D) via an email on which counsel for the Select Committee was
2 copied, several hours *before* the documents were “downloaded and examined” by
3 the Select Committee). As a consequence of their having already downloaded and
4 examined the eight disputed documents, the Select Committee has asserted that the
5 dispute is now moot.
6

7 Dr. Eastman disagrees. If, on appeal, this Court holds that the district court’s
8 crime-fraud ruling was erroneous, those privileged documents should not have been
9 ordered produced to, and examined by, the Select Committee. While a stay barring
10 the *production* is no longer available, an order directing the return or destruction of
11 the documents and barring further use of them pending the appeal remains a viable
12 remedy, as “courts have repeatedly ordered the return of privileged or wrongfully
13 obtained documents as part of their inherent equitable authority ‘over their own
14 process, to prevent abuses, oppression, and injustices.’” *Doe v. Fitzgerald*, No.
15 CV2010713MWFRAOX, 2022 WL 4596557, at *5 (C.D. Cal. Sept. 21, 2022); *see*
16 *also, e.g., Gabana Gulf Distribution v. Gap Int’l Sales Inc.*, No. C-06-02584 CRB
17 (EDL), 2007 WL 2729863, at *1 (N.D. Cal. Sept. 19, 2007); *cf. KL Grp. v. Case,*
18 *Kay & Lynch*, 829 F.2d 909, 917 (9th Cir. 1987) (upholding district court’s grant of
19 a protective order requiring return and barring use of inadvertently produced
20 privileged documents).
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EXHIBIT A

From: "Letter, Douglas" <Douglas.Letter@mail.house.gov>
Subject: RE: Eastman v. Thompson
Date: October 28, 2022 at 9:40:40 PM EDT
To: Charles Burnham <charles@burnhamgorokhov.com>
Cc: "Tatelman, Todd" <Todd.Tatelman@mail.house.gov>, "Columbus, Eric" <Eric.Columbus@mail.house.gov>

Mr. Burnham

I should have added that the documents were downloaded and examined several hours before you filed your stay motion with the court of appeals. Thus, no such motion was pending when the Select Committee acted.

From: Letter, Douglas
Sent: Friday, October 28, 2022 9:27 PM
To: Charles Burnham <charles@burnhamgorokhov.com>
Cc: Tatelman, Todd <Todd.Tatelman@mail.house.gov>; Columbus, Eric <Eric.Columbus@mail.house.gov>
Subject: Eastman v. Thompson

Mr. Burnham

I am hereby formally alerting you that when you provided the relevant documents from Professor Eastman earlier this evening in this case, the Select Committee downloaded and examined all of those documents. The Select Committee did so because the district court had ordered that these documents be disclosed to the Select Committee by 5 pm ET today, and the district court had summarily denied your request for reconsideration or a stay (which had not been filed by you until the very eve of the disclosure deadline). There was thus no court order prohibiting the Select Committee from examining the documents that the district court had ordered your client to produce. Any controversy about those particular documents is thus now moot.

Douglas N. Letter
General Counsel

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CERTIFICATE OF SERVICE

I have served this filing on all counsel through the Court's ECF system.

Respectfully submitted,

/s/Anthony T. Caso

Anthony T. Caso (Cal. Bar #88561)

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