

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

AMERICAN CIVIL LIBERTIES UNION  
OF MICHIGAN,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND  
SECURITY and U.S. CUSTOMS AND  
BORDER PROTECTION,

Defendants.

Case No.: 5:17-cv-11149-JEL-EAS

**DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING  
DECISION ON MOTION TO TRANSFER**

Defendants the United States Department of Homeland Security (“DHS”) and U.S. Customs and Border Protection (“CBP”) respectfully move for a temporary stay of further proceedings pending a decision by the Judicial Panel on Multidistrict Litigation (“JPML”) on Defendants’ motion to transfer this and other related actions for consolidated or coordinated proceedings pursuant to 28 U.S.C. § 1407.

The grounds for this motion are set forth with more specificity in the attached supporting brief.

Pursuant to Local Rule 7.1, counsel for Defendants sought concurrence from counsel for Plaintiff in a telephonic conference on May 10, 2017. Defendants

explained the nature of this Motion and its legal basis. Plaintiff would not concur in the relief sought.

Dated: May 19, 2017

Respectfully submitted,

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/s/ Matthew J. Berns  
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**BRIEF IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING  
DECISION ON MOTION TO TRANSFER**

**ISSUES**

1. Whether a temporary stay of proceedings pending the decision by the Judicial Panel on Multidistrict Litigation on Defendants' motion to transfer this and twelve other related actions brought by ACLU affiliates in thirteen different districts is warranted in light of the need to avoid duplicative proceedings, the substantial burden that would be imposed on Defendants from simultaneous and duplicative proceedings, and the limited burden that would be imposed on Plaintiffs from a temporary stay.

*Defendants answer "Yes."*

**MOST APPROPRIATE AUTHORITIES**

1. *Bearup v. Pfizer, Inc.*, No. 15CV13995, 2015 WL 9266908 (E.D. Mich. Dec. 16, 2015).
2. *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997).
3. *Birchett, Jr. v. Apt. Inv. & Mgmt. Co.*, No. 07-CV-12939-DT, 2007 WL 4569713, at \*1 (E.D. Mich. Dec. 26, 2007).

## **BACKGROUND**

This case is one of thirteen actions pending in thirteen different districts involving parallel Freedom of Information Act (“FOIA”) requests submitted by affiliates of the American Civil Liberties Union (“ACLU”) to CBP, a component of DHS. Each FOIA request at issue asks CBP to search one of its field offices (and corresponding airports and/or ports of entry) for identical or similar categories of records about the implementation of Executive Order 13769, “Protecting the Nation from Terrorist Entry Into the United States,” 82 Fed. Reg. 8977 (Jan. 27, 2017).

The cases are *ACLU of Northern California, et al. v. DHS, et al.*, No. 17-cv-1970 (N.D. Cal. filed Apr. 10, 2017); *ACLU of Virginia, et al. v. DHS, et al.*, No. 17-cv-441 (E.D. Va. filed Apr. 12, 2017); *ACLU of Georgia, Inc., et al. v. DHS, et al.*, No. 17-cv-1309 (N.D. Ga. filed Apr. 12, 2017); *ACLU of Illinois, et al. v. DHS, et al.*, No. 17-cv-2768 (N.D. Ill. filed Apr. 12, 2017); *ACLU of Florida v. DHS, et al.*, No. 17-cv-21382 (S.D. Fla. filed Apr. 12, 2017); *ACLU of Maine, et al. v. CBP, et al.*, No. 17-cv-132 (D. Me. filed Apr. 12, 2017); *ACLU of Washington, et al. v. DHS, et al.*, No. 17-cv-562 (W.D. Wash. filed Apr. 12, 2017); *ACLU of Arizona v. DHS, et al.*, No. 17-cv-1083 (D. Ariz. filed Apr. 12, 2017); *ACLU of Southern California, et al. v. DHS, et al.*, No. 17-cv-2778 (C.D. Cal. filed Apr. 12, 2017); *ACLU of Oregon, et al. v. DHS, et al.*, No. 17-cv-575 (D. Or. filed Apr. 12,

2017); *ACLU of San Diego & Imperial Cnties. v. DHS, et al.*, No. 17-cv-733 (S.D. Cal. filed Apr. 12, 2017); *ACLU Found. of Texas, Inc. v. CBP, et al.*, No. 17-cv-1128 (S.D. Tex. filed Apr. 12, 2017); *ACLU of Michigan v. DHS, et al.*, No. 17-cv-11149 (E.D. Mich. filed Apr. 12, 2017).

On May 8, 2017, Defendants filed a motion with the JPML pursuant to 28 U.S.C. § 1407 to transfer all of the ACLU affiliates' pending FOIA cases relating to Executive Order 13769 to the United States District Court for the District of Columbia. Copies of Defendants' transfer motion, the supporting memorandum, and the schedule of related actions have been served on the Clerk of this Court and are attached as exhibits to the Notice filed with this Court by Defendants on May 8, 2017. As explained more fully in Defendants' memorandum in support of their transfer motion, the JPML previously has centralized multidistrict FOIA litigation in substantially similar circumstances, and transfer is likely here.

Although the JPML has not yet scheduled a hearing on Defendants' transfer motion, Defendants anticipate that the JPML will hear argument on the motion on July 27, 2017, and rule on the motion shortly thereafter.

Defendants respectfully request that the Court temporarily stay proceedings in this action while the JPML considers Defendants' motion to coordinate the handling of these cases. This brief stay would relieve the parties and the judiciary of the burdens associated with duplicative pretrial proceedings in thirteen separate

cases that raise identical or highly related issues, would prevent conflicting pretrial rulings, and would not prejudice Plaintiffs in this action. Courts typically impose stays while motions are pending before the JPML, *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 809 (N.D. Cal. 1998), and for the reasons set forth, it is appropriate for this Court to do so here as well.

### ARGUMENT

It is axiomatic that “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). Courts routinely exercise their power to stay proceedings pending a decision on a motion before the JPML to transfer cases for coordinated or consolidated pretrial proceedings. *See Bearup v. Pfizer, Inc.*, No. 15CV13995, 2015 WL 9266908 (E.D. Mich. Dec. 16, 2015) (Levy, J.) (holding that “the interests of judicial economy and fairness are best served by staying the present matter pending the decision of the Judicial Panel on Multidistrict Litigation”); *Virginia ex rel. Integra Rec LLC v. Countrywide Sec. Corp.*, No. 3:14CV706, 2015 WL 222312, at \*3 (E.D. Va. Jan. 14, 2015) (“Courts frequently grant stays while awaiting a JPML decision about the inclusion of a pending case into an MDL . . . .”); *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 809 (N.D. Cal. 1998) (courts “frequently grant stays pending a decision by

the [JPML]”); *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997) (“[A] majority of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending with the [JPML].”); *see also* David F. Herr, “Multidistrict Litigation Manual: Practicing Before the Judicial Panel on Multidistrict Litigation” § 3:15 at 32 (“District courts . . . readily stay[] proceedings pending a Panel decision.”).

Courts look to several factors when determining whether to issue a stay of proceedings pending the JPML’s decision, including whether judicial economy would be served by avoiding duplicative litigation, the burden on the moving party if the action is not stayed, and any potential prejudice to the non-moving party. *See Douglas v. Bristol-Myers Squibb Co.*, No. 13-cv-2331, 2013 WL 4013901, at \*1 (N.D. Cal. Aug. 5, 2013); *see also Rivers*, 980 F. Supp. at 1360. A stay of proceedings, for the sole purpose and duration necessary for the JPML to decide Defendants’ motion, satisfies each of these factors.

**A. Judicial Economy Requires a Stay Pending the JPML’s Decision**

Staying the proceedings in this action would further judicial economy by avoiding the need for multiple courts to deal with the same or similar pretrial issues. Courts typically grant temporary stays pending motions to transfer to the JPML where, like here, doing so would relieve the parties and the courts from engaging in simultaneous and duplicative pretrial proceedings. *See Freitas v.*



*McKesson Corp.*, No. C 11-05967, 2012 WL 161211, at \*2 (N.D. Cal. Jan. 10, 2012) (“[G]ranted a stay in this case would prevent the Court from needlessly duplicating work that will be done by the MDL transferee court . . . .”); *Naegele v. Albers*, 355 F. Supp. 2d 129, 141 (D.D.C. 2005) (stating that “litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties’ best interests”).

The thirteen related cases involve parallel FOIA requests, each of which seeks disclosure of similar or identical categories of records related to the implementation of Executive Order 13769 from different CBP field offices. To ensure consistency in responding to the ACLU affiliates’ FOIA requests, CBP’s headquarters in Washington, DC is coordinating the agency’s search for records responsive to all of the requests at issue in the related actions, as well as its processing of responsive records for potential release. Absent a stay, Plaintiff may ask the Court to set a schedule for Defendants’ search for, and potential release of, responsive information. Particularly because the ACLU affiliates have been coordinating their handling of these lawsuits, any pretrial proceedings regarding the production schedule would likely duplicate those before other courts in the related actions, and, if the JPML grants Defendants’ motion to transfer, any ruling by the Court could ultimately be vitiated by the transferee court.

Given the early stage of the case and the status of Defendants' processing of the ACLU affiliates' FOIA requests, it is unlikely that any issues regarding the adequacy of CBP's search, the appropriateness of CBP's withholding of responsive information pursuant to the FOIA's statutory exemptions, or the need for discovery will ripen for the Court's consideration before the JMPL rules on Defendants' transfer motion. Nevertheless, were any of these issues to arise, they would substantially overlap in each of the related actions. In a typical FOIA action, the defendant agency establishes its compliance with the requirements of the FOIA through declarations that set forth the procedures the agency followed in conducting its search and the bases for withholding responsive records. *See, e.g., Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) (per curiam). And although discovery is rare in FOIA cases, even when granted, it "is generally limited to the scope of the agency's search and its indexing and classification procedures." *Heily v. Dep't of Commerce*, 69 F. App'x 171, 174 (4th Cir. 2003) (per curiam). Thus, because CBP headquarters is coordinating the responses to the ACLU affiliates' FOIA requests, any pretrial proceedings that could arise in this Court regarding the adequacy of the agency's searches, the application of the FOIA's statutory exemptions, or requests for discovery would be duplicative in each of the related actions. A temporary stay would avoid this needless use of judicial resources.

**B. A Stay Is Necessary to Avoid Hardship to Defendants**

Moving forward with the proceedings in this case would not only frustrate judicial economy, it would also prejudice Defendants. Defendants would be required to engage in simultaneous and duplicative pretrial practice, including responding to thirteen separate complaints that are materially identical. *See Wilbanks v. Merck & Co.*, No. 05-1241, 2005 WL 2234071, at \*2 (W.D. Tenn. Sept. 13, 2005) (granting stay and stating that “in absence of a stay, the risk to [defendant] of duplicative motions and discovery is significant”).

Moreover, moving forward could also result in rulings on pretrial issues that conflict with those of other districts or of the transferee court if the JPML grants the transfer motion. *See C.A. ex rel. Allen v. Pfizer, Inc.*, No. C 13-4087, 2013 WL 6091766, at \*2 (N.D. Cal. Nov. 19, 2013) (recognizing that absent stay, defendants may be required to relitigate issues decided by transferor court before MDL panel); *Namovicz v. Cooper Tire & Rubber Co.*, 225 F. Supp. 2d 582, 585 (D. Md. 2001) (staying proceedings pending decision by JPML to consolidate cases because it is “necessary to ensure that, in the event consolidation of all cases for pre-trial is ordered, there is consistent treatment of the numerous lawsuits”). If proceedings are stayed and the transfer motion is granted, the transferee court would be able to set an efficient pretrial process that establishes a single production schedule (if necessary), avoids duplicative work and competing demands on the same agency

personnel, and “conserves the resources of the parties, their counsel and the judiciary.” *In re Musha Cay Litig.*, 330 F. Supp. 2d 1364, 1365 (J.P.M.L. 2004); *see also In re Air Crash Near Kirksville, Mo.*, 383 F. Supp. 2d 1382, 1383 (J.P.M.L. 2005).

### **C. Plaintiffs Would Not Be Prejudiced by the Stay**

Plaintiffs would not be prejudiced by the limited stay that Defendants have requested. This action is in the early stages of litigation, and Defendants have not yet responded to the Complaint. *See Davis v. Pfizer, Inc.*, No. C 14-1204, 2014 WL 1599005, at \*1 (N.D. Cal. Apr. 21, 2014) (finding no prejudice to plaintiff where the case was in the “very early procedural stage”). Defendants anticipate that the JPML will hold argument on Defendants’ motion on July 27, 2017, and will rule on it shortly thereafter, and therefore the stay would likely be of limited duration. *See* Hearing Information, United States Judicial Panel on Multidistrict Litigation, *available at* <http://www.jpml.uscourts.gov/hearing-information>. *See Birchett, Jr. v. Apt. Inv. & Mgmt. Co.*, No. 07-CV-12939-DT, 2007 WL 4569713, at \*1 (E.D. Mich. Dec. 26, 2007) (granting stay pending JPML decision where “the court has no reason not to anticipate a prompt resolution of the motion following the hearing”); *Am. Seafood, Inc. v. Magnolia Processing, Inc.*, Civ. Nos. 92-1030, 92-1086, 1992 WL 102762, at \*1 (E.D. Pa. May 7, 1992) (holding plaintiffs would

not be prejudiced where the stay “will only be in effect until the JPML issues its decision[, and t]herefore, there will be no extended delay”).

Furthermore, Defendants are still in the process of compiling records responsive to the FOIA requests in the related actions. Defendants will continue to compile and review records during the pendency of any stay. As a result, a temporary stay until the JPML renders its decision should not significantly delay the eventual release of responsive records to the public.

### **CONCLUSION**

For these reasons, this Court should temporarily stay these proceedings.

Dated: May 19, 2017

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on May 19, 2017, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Matthew J. Berns  
MATTHEW J. BERNES