IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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| United States of America, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Zacarias Moussaoui, | ) | |
| | ) | |
| Defendant, | ) | |
| | ) | |
| v. | ) | Criminal No. 01-455-A |
| | ) | |
| All plaintiffs named in 21 MC 97, 21 MC 101, and 03 CV 9849, | ) | |
| | ) | |
| Movants-Intervenors. | ) | |

**REPLY MEMORANDUM IN SUPPORT OF THE GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 7, 2006 ORDER GRANTING INTERVENORS ACCESS TO DISCOVERY PRODUCED TO DEFENSE COUNSEL IN THIS CASE PURSUANT TO PROTECTIVE ORDERS**

**Introduction**

Despite its stridency and rhetorical fireworks, the most remarkable thing about Intervenors' response to our motion for reconsideration of this Court's April 7, 2006 Order is that it does not take issue with the principal points we raised. We argued that the Court should reconsider its April 7 disclosure Order because that order: (1) dissolves the heretofore clear line between civil and criminal discovery obligations and purposes; (2) contravenes various statutes, rules, regulations, and privileges protecting from disclosure sensitive government criminal investigative files; and (3) imposes enormous burdens on

the United States that will create problems in this case and will substantially affect criminal discovery in future major criminal cases. We also showed that courts have recognized and applied the normally clear line between civil litigation and criminal investigations and prosecutions. See, e.g., Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1126-27 (7th Cir. 1997).

Intervenors address virtually none of these points in their response, and instead rather colorfully express at length their own displeasure because this Court properly exempted classified material and SSI from the disclosure obligation. There are many errors in Intervenors' discussion of the points addressed in their response; because Intervenors have ducked nearly all of the points we actually did raise in our motion, though, we will address only a few issues here.

**Discussion**

**1 Intervenors' Response Improperly Seeks Access To Information That The Court's April 7 Order Denied Them**

As noted above, the Government sought reconsideration of the April 7 Order because it directed disclosure of a vast amount of material from an important ongoing criminal investigation to a large group of counsel in private civil tort actions.[1] We pointed out that this material includes matters protected from

[1] Intervenors seem to assume that only their attorneys will have access to material that would be ordered disclosed by the Court. However, attorneys for defendants in the relevant civil actions have sought equal access.

disclosure by statutes, rules, and regulations, such as grand jury material and Suspicious Activity Reports (sent confidentially to the Treasury Department by banks). Further, we explained that a very substantial part of the material at issue constitutes FBI active criminal investigative files, which are protected from civil disclosure by the law enforcement investigative privilege and FOIA Exemption 7. Under such circumstances, we asked this Court to reconsider its unprecedented order, which would cause not only serious problems here, but would also force significant changes in the future in Government responses to discovery in major criminal cases.

Surprisingly, Intervenors address none of these points in their response to our motion. This silence is telling, and apparently evidences Intervenors' recognition of the serious concerns with the April 7 Order.

Intervenors spend nearly all of their response on an argument that can be boiled down to the following: the Victims' Rights Act - which says nothing about any right to documents, privileged or otherwise - trumps every other statute, rule, or regulation that expressly and specifically addresses the disclosure of documents by the Government. Thus, without any explanation or citation to case law, intervenors ask this Court to ignore, among other provisions, the FOIA, the Aviation and Transportation Security Act, the Privacy Act, Federal Rule of Criminal Procedure 6(e), and Executive Orders governing

classified documents - and take on faith their unsupported claim that they are entitled to access to criminal discovery.

Intervenors also continue to complain about their lack of access to classified information and SSI, which is protected from disclosure by statute and regulation, and controlled by TSA. Intervenors' approach is puzzling given that this Court's April 7 Order stated unequivocally that such material is not subject to the disclosure obligation imposed by the Court ("Such access shall be limited to non-classified and non-SSI evidence").

In light of the terms of the Court's Order, we have no intention of disclosing classified or SSI material to Intervenors' counsel. We had raised the subject of SSI in our reconsideration motion solely to demonstrate to the Court that the April 7 Order imposes an enormous practical burden on the Government because it will require, in order to meet the immense public interest in protection of transportation security, examination before disclosure to Intervenors' counsel of numerous pages of material to be certain that it does not contain SSI. This material was not specifically marked when, in the rush to provide criminal discovery as quickly as possible, it was provided confidentially to Moussaoui's counsel pursuant to protective orders. Had there been any indication that this material would later be ordered disclosed to a considerably larger number of counsel in private civil tort litigation, the Government would have had to seriously consider whether to

substantially delay the criminal discovery process in order to mark the SSI to ensure that it would not later be improperly disclosed for civil suit purposes.

Importantly, we also note in response to Intervenors' attack on the conduct of the prosecution team that, at the time the majority of the documents at issue were created, and also at the time they were turned over to Moussaoui's attorneys in the criminal proceeding, TSA's SSI regulations did not require marking. TSA added the regulatory provision cited by Intervenors (49 C.F.R. § 1520.12(a)) in May 2004, in an effort to raise awareness among persons handling SSI of the need to protect this information. See 69 Fed. Reg. 28066, 28071 (May 18, 2004). The lack of markings - especially as to documents created before May 2004 - does not affect the SSI status of a particular document or piece of information.

Thus, the vast majority of Intervenors' response inexplicably addresses an issue not raised in our reconsideration motion. This Court had properly exempted SSI and classified information from its disclosure order, and, although an extraordinary burden will be imposed on the Government, this material will not be turned over to Intervenors' counsel. The bulk of Intervenors' response therefore appears to be an improper attempt to seek their own reconsideration of this aspect of the Court's April 7 Order. The Court should disregard this distraction.

### 2. Intervenors Incorrectly Contend That Classified Information Was Given To Defendant Moussaoui Himself

At the outset, Intervenors' response (at 2) mentions our supposed "speculat[ion]" that the April 7 Order will place an undue burden on the Government because we will have to "undertake the responsibility of properly classifying documents produced to not only Defendant Moussaoui's Standby Counsel but also to Defendant Moussaoui himself."

Intervenors obviously misunderstood our reconsideration motion. The material provided to Moussaoui was indeed screened so that he would not be provided with classified material. However, just as some unmarked documents were determined to contain classified information (as the Court is well aware), these documents might contain SSI or information that is privileged or otherwise protected from disclosure, without being so marked. This situation necessitates a careful review notwithstanding the fact that the documents have been produced in criminal discovery, subject to protective orders, and are unmarked.

### 3. FRCP 60(b) Is Inapplicable To The Present Motion

Intervenors chastise us (at 3-4) for failing to state the authority for our motion for reconsideration, and they then assume that such authority must fall under Fed. R. Civ. P. 60(b) This assumption is wrong.

There is no specific rule governing motions for reconsideration in criminal cases. Nilson Van & Storage Co. v. Marsh, 755 F.2d 362, 364 (4th Cir. 1985). As the Supreme Court has explained, however, reconsideration motions in criminal cases are a recognized part of criminal procedure because "district courts are given the opportunity to correct their own alleged errors, and allowing them to do so prevents unnecessary burdens being placed on the courts of appeals." United States v. Ibarra, 502 U.S. 1, 5 (1991). We demonstrated in our motion that the April 7 Order was erroneous as a matter of law because, in granting civil litigants unprecedented access to criminal discovery, it contradicted statutory and case authority to the contrary. Thus, reconsideration is properly granted.

**4. The Victims' Rights Act Grants No Special Access To Materials Made Available To A Defendant's Attorneys Under Protective Orders In Criminal Discovery**

Intervenors contend (at 9-10) that, in the Crime Victims' Rights Act (18 U.S.C. § 3771), Congress gave them a right of access to confidential law enforcement material from an active criminal investigation, despite the fact that such material is protected from civil litigation disclosure by statutes, rules, regulations, and common law privileges. However, Intervenors point to nothing in the text of that statute providing such an astounding result. Instead, they assert (at 10) that, if the statute is not so interpreted, it "would have no meaning."

This statement is plainly incorrect. Even a cursory reading

of the statute reveals that it provided various rights to crime victims (such as the right to reasonably be heard at public criminal proceedings (see 18 U.S.C. § 3771(a)(4)). But none of these rights includes access to the Government's confidential active criminal investigative file, or to material protected from disclosure by statutes, rules, regulations, or common law privileges.

Finally, the offer by Intervenors' counsel to abide by the terms of the protective orders entered in this case is meaningless. Obviously, civil litigants cannot gain access to privileged information simply by agreeing not to disclose it further.

**CONCLUSION**

For the foregoing reasons and those stated in our reconsideration motion, the Court should grant reconsideration and vacate that portion of its April 7 Order granting Intervenors access to non-classified, non-SSI discovery provided to defense counsel in this case.

Dated: Alexandria, Virginia
May 10, 2006

Respectfully,

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