IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHIQUITA BRANDS INTERNATIONAL, INC.,	)	
Appellant,	)	
v.	)	No. 14-5030
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Appellee,	)	
NATIONAL SECURITY ARCHIVE,	)	
Intervenor-Appellee.	)	

RESPONSE OF NATIONAL SECURITY ARCHIVE IN OPPOSITION TO MOTION FOR AN INJUNCTION PENDING APPEAL, AND NATIONAL SECURITY ARCHIVE'S MOTION TO EXPEDITE CONSIDERATION OF THE APPEAL AND MOTION FOR SUMMARY AFFIRMANCE

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INTRODUCTION

This reverse-Freedom of Information Act (FOIA) case was brought by Chiquita Brands International, Inc. (Chiquita) in an effort to delay the release of documents related to illegal payments Chiquita made to a terrorist organization in Colombia (the Chiquita Payment Documents). The documents are responsive to two now-consolidated FOIA requests submitted by the National Security Archive to the United States Securities and Exchange Commission (SEC) in November 2008. The SEC determined that FOIA requires release of the documents, despite Chiquita's argument, in relevant part, that the documents are exempt from disclosure under FOIA Exemption 7(B).[1] The district court upheld the SEC's determination and denied Chiquita's motion for an injunction pending appeal, and Chiquita has renewed that motion before this Court.

Chiquita's motion should be denied because Chiquita will not prevail on the merits of its appeal and because the balance of interests disfavors delaying release of the records at issue. In the alternative, if the injunction is granted, the Court should expedite consideration of this appeal. Moreover, this case is appropriate for summary

[1]Chiquita also argued for other FOIA exemptions but has abandoned those claims.

affirmance because the SEC's determination is so clearly correct that further briefing would not affect the Court's decision.

BACKGROUND

The National Security Archive (Archive) is a non-profit library and publisher of declassified documents on U.S. national security policy located at George Washington University. Administrative Record (AR) 155. The Archive filed the FOIA request at issue in this case as part of its Colombia Documentation Project, through which it conducts ongoing research related to Colombia and the United States. *Id*.

In its FOIA request, the Archive sought documents relating to SEC investigations of Chiquita's operations in Colombia. After the SEC determined that the Chiquita Payment Documents are responsive to the Archive's FOIA request, Chiquita used the SEC's administrative process to request confidential treatment of the documents. Chiquita argued that the documents should be withheld from disclosure under FOIA Exemption 7(B) because their release "would deprive [Chiquita] of a right to a fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B). Specifically, Chiquita asserted that release of the documents would affect the fairness of pre-trial discovery in a lawsuit to which the Archive is not a party—*In re: Chiquita Brands International, Inc. Alien Tort Statute & Shareholder*

Derivative Litig., No. 0:08-md-01916-KAM (S.D. Fla. filed Feb. 20, 2008) (the MDL), by giving plaintiffs in that case access to information outside of the formal discovery process that has been stayed pending resolution of an issue currently on appeal.[2] The SEC rejected Chiquita's argument, finding that Chiquita had failed to show how disclosure of the documents would interfere with the fairness of the MDL.

Chiquita sued the SEC under the Administrative Procedure Act (APA), alleging that the SEC's decision to disclose the documents was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The Archive intervened. The district court granted summary judgment for the SEC, finding that "[t]here can be no doubt that the SEC rationally determined from the record that disclosure of the Chiquita Payment Documents would not seriously interfere with the fairness of the [MDL]." Chiquita Addendum (Add.) 10. The district court held that Chiquita had failed to articulate how disclosure would confer an unfair advantage on the MDL plaintiffs, noting that Chiquita conceded that it would produce the documents in discovery if the stay is lifted, and holding that the potential availability of a protective order restricting dissemination of discovery documents is not a sufficient basis to

[2]In the proceedings below, Chiquita made other arguments for the application of Exemption 7(B), but has abandoned all but the single issue concerning the fairness of pre-trial discovery in the MDL.

invoke Exemption 7(B) to withhold documents from disclosure under FOIA. *Id.* at 10-11.

Chiquita appealed the district court's decision and moved in the district court for an injunction pending appeal, which the district court denied. Chiquita then moved this Court to enjoin release of the documents pending resolution of its appeal.

ARGUMENT

I. Chiquita's Motion for an Injunction Pending Appeal Should Be Denied.

In determining whether to grant an injunction pending appeal, this Court considers: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). As the movant, Chiquita has the burden of satisfying these stringent requirements. Because Chiquita has failed to do so, its motion should be denied.

A. Chiquita cannot show a likelihood of success on the merits.

Chiquita is unlikely to succeed on the merits of this case. FOIA Exemption 7(B) applies to records compiled for law enforcement purposes whose release "would deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C.

§ 552(b)(7)(B). The standard for finding records exempt under Exemption 7(B) is high. As this Court has explained,"Congress made the threshold of (7)(B) higher than for most of the other exemptions for law enforcement material. . . . requir[ing] that release 'would' deprive a person of fair adjudication." *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988). For records to be withheld under Exemption 7(B), it must be "more probable than not that disclosure of the material sought would seriously interfere with the fairness" of "a trial or adjudication [that] is pending or truly imminent." *Id*. Because this action is a "reverse-FOIA" case, this Court must uphold the agency's decision to release the information unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see, e.g.*, *Jurewicz v. U.S. Dep't of Agric.*, ___ F.3d___, 2014 WL 394107, *2 (D.C. Cir. Feb. 4, 2014).

During the administrative process, the SEC concluded that "Chiquita has not met its burden to show that it is more probable than not that disclosure of the [Chiquita Payment Documents] would seriously interfere with the fairness of the Chiquita Litigation." AR 323. It explained that the only advantage plaintiffs in the MDL might receive was "access to documents earlier than they would otherwise get them" and that such a possibility "does not amount to deprivation of the right to a fair

trial." *Id*. Accordingly, it denied Chiquita's request that the records be withheld under Exemption 7(B). *Id*. at 326. The SEC's decision was correct and should be upheld.

1. By its terms, Exemption 7(B) relates to trials and adjudications, not pre-trial discovery.

Chiquita does not claim that release of the Chiquita Payment Documents would deprive it of a fair trial in the MDL. Rather, Chiquita argues that Exemption 7(B) protects the "fairness" of pre-trial discovery proceedings, and, thus, that the SEC erred in focusing on whether release of the records would lead to an unfair trial. By its terms, however, Exemption 7(B) only applies where disclosure of documents would affect the "right to *a fair trial* or an *impartial adjudication*." 5 U.S.C. § 552(b)(7)(B) (emphasis added). Thus, the SEC and the court below correctly determined that the Exemption does not apply. *See Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1267 (2011) (rejecting interpretation of FOIA exemption that was "disconnected from [the Exemption's] text").

In an attempt to support its atextual reading of the statute, Chiquita points to this Court's statement in *Washington Post Co.* that "[i]t may be that disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties." *Wash. Post Co.*, 863 F.2d at 102, *cited in* Chiquita's Motion at 14. In making that statement,

however, the Court was providing an example of a situation in which disclosure of a record "would deprive [a party] of a fair trial." *Id*. The Court's indication that releasing a record not available through discovery may sometimes cause the trial to be unfair does not support Chiquita's argument that Exemption 7(B) applies to records even when their disclosure would *not* lead to an unfair trial. Likewise, Chiquita points to the 1974 Attorney General's statements that 7(B) "is obviously aimed at more than just inflammation of jurors, . . . since jurors do not sit in administrative proceedings" and that "[i]n some circumstances, the release of damaging and unevaluated information may threaten to distort administrative judgment in pending cases, or release may confer an unfair advantage upon one party to an adversary proceeding." U.S. Dep't of Justice, Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 9 (1975), *reprinted in* House Committee on Government Operations and Senate Committee on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents*, 94th Cong., 1st Sess., 507, 519 (Jt. Comm. Print 1975), cited in Mot. at 14. These statements do not demonstrate that Exemption 7(B) covers records where their release would not affect the trial or adjudication.

In short, Exemption 7(B), which applies to certain records release of which "would deprive a person of a right to a fair trial or an impartial adjudication," 5 U.S.C. § 552(b)(7)(B), does not apply to records that affect the "fairness" of pre-trial proceedings but do not deprive a party of a fair or impartial trial or adjudication. Chiquita's arguments to the contrary are unsupported by the statute, making it impossible for Chiquita to show that it is "likely to succeed" in this case.

2. Chiquita has failed to show that disclosure of the Chiquita Payment Documents would cause unfairness.

Although Exemption 7(B), by its plain language, does not apply where disclosure would cause "unfairness" in a pre-trial proceeding that would not affect the fairness of the trial itself, the SEC considered whether Chiquita had demonstrated that release of the Chiquita Payment Documents earlier than they could be obtained through discovery by the plaintiffs in the MDL litigation would confer an unfair advantage on a party in the MDL. The SEC found that Chiquita had not, and the SEC's determination was well supported and not even arguably arbitrary and capricious.[3]

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[3]Chiquita also asserts that, by determining that release of the documents would not cause unfairness in the MDL sufficient to invoke Exemption 7(B), the district court's decision exceeded the scope of the SEC determination because, according to Chiquita, the SEC decided only that disclosure would not deprive Chiquita of the right to a fair trial and did not determine whether disclosure would cause pretrial unfairness. Mot. at 15. Chiquita is wrong. The SEC determined that "Chiquita has not

Chiquita argues that releasing the records would make the MDL proceedings unfair by allowing the plaintiffs in the MDL "to obtain discovery" before discovery has begun in that case and without any of the restrictions that the district judge in the MDL may put on discovery. Mot. at 15. Chiquita notes, for example, that under the Federal Rules of Civil Procedure, the timing and sequence of discovery is controlled by the court and that the court might enter a protective order limiting the use of the information produced in discovery. But the very premise of Chiquita's argument is wrong, because this case does not involve an effort to "obtain discovery" in the MDL; it involves agency records sought under FOIA by a requester that is not a party to the MDL. The fact that some, or even all, of the Chiquita Payment Documents may eventually be sought in discovery in the MDL does not turn the agency records being sought under FOIA into discovery documents subject to the MDL judge's control. *See Stonehill v. IRS*, 558 F.3d 534, 538 (D.C. Cir. 2009) ("The FOIA disclosure regime . . . is distinct from civil discovery.").

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met its burden to show that it is more probable than not that disclosure of the [Chiquita Payment Documents] would seriously interfere with the fairness of the Chiquita Litigation." AR 323. The district court made clear that it reviewed exactly that determination when it held that "the SEC rationally determined from the record that disclosure of the Chiquita Payment Documents would not seriously interfere with the fairness of the Florida litigation." Add. 10.

In other words, releasing the records here would not, as Chiquita claims, "usurp[] the district court judge's authority to control the sequence, pace, limits, and public uses of discovery." Mot. at 15. The MDL judge continues to have that authority over records that are sought through *discovery* in the MDL. The records here are not being sought in discovery, but through FOIA. Litigants (much less non-parties to a case) are not precluded, however, from using methods other than the discovery rules to collect information that may be relevant in litigation. For example, litigants often consult public records and interview non-party witnesses to gather information outside of formal discovery. Such non-discovery evidence-gathering does not usurp the district court's authority over discovery or otherwise render the discovery proceedings unfair. Likewise, that documents released to the public in response to a FOIA request may be obtained and used by a litigant does not affect the fairness of pre-trial discovery.

3. Chiquita's reading of the statute would vastly expand the scope of Exemption 7(B).

If Chiquita were correct that Exemption 7(B) requires the government to withhold from disclosure under FOIA any law enforcement record that a litigant might eventually seek but is presently unable to obtain through formal discovery, Exemption 7(B) would become a general prohibition on the release of any such

record that might later be pertinent in litigation. Such an interpretation would stretch the coverage of Exemption 7(B) far beyond its intended scope. *See Wash. Post Co.*, 863 F.2d at 102 (recognizing that Exemption 7(B) applies only in a "narrow range of situations").

It is well-established that records may be available through FOIA even when unavailable through discovery. *See, e.g.*, *Stonehill*, 558 F.3d at 538 ("[T]hat a document is exempt from discovery does not necessarily mean it will be exempt from disclosure under FOIA."); *Morgan v. Dep't of Justice*, 923 F.2d 195, 198 (D.C. Cir. 1991) (noting that "[t]here are situations in which FOIA will permit access to information that would not be available through discovery" and explaining that the fact that a document was under seal in separate litigation "is, without more, insufficient to justify nondisclosure under the FOIA" (citations omitted)). Likewise, it has long been settled that a FOIA requester's motivation for making a FOIA request is irrelevant, and a requester's desire to use records in separate litigation does not deprive the requester of its rights to the records under FOIA. *See, e.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n.23 (1978) (explaining that a FOIA requester's rights are neither "enhanced" nor "diminished by its being a private litigant" with a "particular, litigation-generated need" for the requested documents); *North v. Walsh*, 881 F.2d 1088, 1099 (D.C. Cir. 1989) ("FOIA rights are unaffected

by the requester's involvement in other litigation; an individual may therefore obtain under FOIA information that may be useful in non-FOIA litigation, even when the documents sought could not be obtained through discovery.").

Chiquita's theory is contrary to these well-established FOIA principles. Indeed, Chiquita goes even further, asserting that records can be withheld from a FOIA requester based on the existence of separate litigation in which the parties may eventually seek the same records through discovery, even where the FOIA requester is not itself a party to the other litigation and has no ability to participate in discovery in that case. Chiquita is unlikely to succeed on the merits of this expansive argument.

B. Chiquita has failed to show that it will suffer irreparable injury if its motion is denied.

Chiquita's argument that it will suffer irreparable harm rests entirely on the procedural point that denial of a stay would moot its appeal. Mot. at 10-11. Although Chiquita cites a handful of cases where stays were granted to maintain the status quo pending a decision on the merits, the cases are not nearly as uniform as Chiquita suggests.

For example, in *In Re Special Proceedings*, 840 F. Supp. 2d 370, 376 (D.D.C. 2012), the district court refused to stay pending appeal an order unsealing a report regarding possible attorney misconduct even though unsealing would moot the

appeal, because the movant had failed to make a strong showing on the other factors. The movant's request for a stay from this Court was also denied. *See In Re Special Proceedings*, No. 12-5062 (D.C. Cir. Mar. 14, 2012). Thus, the affect of release on the pendency of an appeal is not sufficient to justify an injunction pending appeal, absent a strong showing on the other factors.

Further, Chiquita has not even attempted to show that release of the Chiquita Payment Documents will harm Chiquita in a significant way. Many thousands of pages of documents concerning the matter have already been released in response to FOIA requests by the Archive and are publicly available. *See* The Chiquita Papers, www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB340/. In these circumstances, Chiquita's inability to make a strong showing of harm is telling.

C. Granting Chiquita's motion would harm the Archive and the public.

Chiquita argues that an injunction pending appeal will do nothing more than delay disclosure of the documents and, therefore, any harm to other interested parties "is minimal at best." Mot. at 16. FOIA, however, confers on requesters and the public an important right of access to government records, with specific and fairly prompt deadlines. *See* 5 U.S.C. § 552(a)(6)(A). As the Supreme Court has explained, "the basic purpose of FOIA is to ensure an informed citizenry." *Robbins Tire & Rubber Co.*, 437 U.S. at 242.

This right of access to information is weakened by delays in releasing non-exempt agency records. As Congress recognized in enacting the 1974 FOIA amendments—the same amendments that added the language of Exemption 7(B)—"information is often useful only if it is timely." H.R. Rep. No. 93-876, 93rd Congress, 2nd Sess. 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271. Thus, delay in the release of records "is often tantamount to denial." *Id.* Here, further delaying release of the Chiquita Payment Documents denies the Archive and the public full information about the payments and United States policy concerning Colombia.

II. If Chiquita's Motion for an Injunction Pending Appeal Is Granted, the Appeal Should Be Expedited.

If the Court grants Chiquita's motion, it should expedite consideration of this appeal because the public has an interest in prompt disposition for the reasons explained in Section I.C above. This Court's Handbook of Practice and Internal Procedures provides that "[w]hen the Court disposes of a motion for stay or injunction pending appeal, it may at the same time expedite the case to minimize possible harm to the parties or the public. In moving for a stay or injunction pending appeal, counsel should address the appropriateness of expediting the appeal if a stay is entered." *Id*. at 34.

In its motion, Chiquita argues that expedition is not warranted because "neither the Archive nor the SEC have asserted a need for an expedited appeal." Mot. at 19. Because, however, expedition is necessary only if the injunction is granted, there was no reason for the appellees to request expedition until Chiquita filed its motion.

III. This Court Should Summarily Affirm the District Court's Decision.

Summary affirmance is appropriate where the merits of the appeal are so clear that further briefing would not affect the Court's decision. *See Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Here, the record and the motions papers are adequate to allow the "fullest consideration necessary to a just determination." *Sills v. Bureau of Prisons*, 761 F.2d 792, 794 (D.C. Cir.1985).

For the reasons explained in Section I.A. above, the SEC correctly determined that Chiquita failed to demonstrate that release of the Chiquita Payment Documents would cause unfairness sufficient to invoke Exemption 7(B), and the district court properly upheld the SEC's determination in the face of Chiquita's APA challenge, finding that "[t]here can be no doubt" that the SEC's decision was rational. Add. 10. Additional briefing on these issues is unlikely to aid this Court's determination, and will only further delay release of the documents. This Court should summarily affirm.

CONCLUSION

For the reasons stated above, this Court should deny Chiquita's motion for an injunction pending appeal, and summarily affirm the decision of the district court. In the alternative, the Court should expedite this appeal.

Respectfully submitted,

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February 28, 2014

CERTIFICATE OF SERVICE

I certify that on February 28, 2014, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CORPORATE DISCLOSURE STATEMENT

The National Security Archive is a project of the National Security Archive Fund, Inc. The National Security Archive Fund, Inc. is a not-for-profit corporation established under the laws of the District of Columbia. The National Security Archive Fund, Inc. has no parent corporation and no stock, thus no publicly held corporation owns ten percent or more of its stock. The Archive identifies that its general nature and purpose is to promote research and public education on U.S. governmental and national security decisionmaking and to promote and encourage openness in government and government accountability.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Chiquita Brands International, Inc. was the plaintiff in the district court and is the appellant in this Court.

The United States Security and Exchange Commission was a defendant in the district court and is an appellee in this Court.

The National Security Archive was an intervenor in the district court and is an intervenor-appellee in this Court.

B. Rulings Under Review

The ruling under review is United States District Judge Richard J. Leon's November 18, 2013 Memorandum Opinion and Order granting the Security and Exchange Commission's motion for summary judgment and denying Chiquita Brands International, Inc.'s motion for summary judgment.

C. Related Cases

This case has not previously been before this Court. Counsel for the National Security Archive are not aware of any related cases.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum