

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

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

**NATIONAL SECURITY ARCHIVE’S REPLY TO
APPELLANT’S OPPOSITION TO MOTION TO EXPEDITE
THE APPEAL AND MOTION FOR SUMMARY AFFIRMANCE**

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INTRODUCTION

With its opposition to Chiquita Brands International, Inc.'s (Chiquita) motion for an injunction pending appeal, the National Security Archive (Archive) included motions to expedite consideration of the appeal and for summary affirmance. Chiquita has filed an opposition to the Archive's motions, and the Archive submits this reply.

I. SUMMARY AFFIRMANCE IS APPROPRIATE.

A. Chiquita's Argument on the Merits Is Foreclosed by the Statutory Text.

The primary issue in this case is whether FOIA Exemption 7(B), which protects from disclosure law enforcement records the 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), also protects records that would *not* impact the fairness of a trial or adjudication, but might be of interest to a litigant in a case where discovery has not commenced and to which the FOIA requester is not a party. In its opposition to the motion for an injunction pending appeal and its motion for summary affirmance, the Archive explained that Exemption 7(B), by its plain language, does not extend to records that would not affect trial fairness. Archive's Opp'n & Mots. at 6-8. Moreover, no authority supports Chiquita's effort to expand the scope of Exemption 7(B) beyond the statutory text. Thus, the outcome of this case is so clear that this Court should

summarily affirm the district court's decision upholding the SEC's denial of Chiquita's request for confidential treatment of the Chiquita Payment Documents. *Id.* at 6-8, 15.

In its reply and opposition, Chiquita fails to address the plain-language argument at the heart of this case, tacitly conceding that its position is contrary to the statutory text. Because Chiquita has no response, additional briefing is unlikely to aid this Court's determination of the appeal. Thus, the Court should summarily affirm.

B. Chiquita's Characterization of Its Argument as a Question of First Impression Is Incorrect and Insufficient to Avoid Summary Affirmance.

Chiquita's argument for expanding the scope of Exemption 7(B) beyond the statutory text rests on a statement from *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988), which Chiquita admits "was not the holding of the case." Chiquita's Reply & Opp'n at 3. In *Washington Post*, the Court noted 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." 863 F.2d at 102. In making that statement, however, the Court was providing an example of a situation in which the "unfair advantage" conferred by disclosure of a record "would deprive [a party] of a fair trial." *Id.* Nothing in *Washington Post* suggests that Exemption 7(B) extends to unfairness in pretrial

discovery proceedings absent a showing that such unfairness “would deprive a person of a right to a fair trial or an impartial adjudication,” 5 U.S.C. § 552(b)(7)(B). Nevertheless, Chiquita asserts that whether *Washington Post* “supports Chiquita’s argument that Exemption 7(B) protects the fairness of pre-trial discovery proceedings—independently of whether disclosure will prejudice a fair trial—surely is a serious legal question.” Chiquita’s Reply & Opp’n at 3-4. Chiquita then argues that because no court has ever embraced Chiquita’s atextual and expansive legal theory, summary affirmance is inappropriate because this Court’s *Handbook of Practice and Internal Procedures* discourages requests for summary disposition of issues of first impression. *Id.* at 12 (citing *Handbook* at 36).

Chiquita is wrong. The scope of Exemption 7(b) is not an issue of first impression. And because Chiquita’s theory is contrary to the statutory text and has no supporting precedent, there is a sound basis for summary affirmance. *See Handbook* at 35 (encouraging parties to file dispositive motions “where a sound basis exists for summary disposition”). Further, the parties have briefed the issues with enough detail to allow the “fullest consideration necessary to a just determination,” *Sills v. Bureau of Prisons*, 761 F.2d 792, 794 (D.C. Cir.1985), and further briefing is unlikely to 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). The Court should summarily affirm.

II. IF CHIQUITA’S MOTION FOR AN INJUNCTION PENDING APPEAL IS GRANTED, THE APPEAL SHOULD BE EXPEDITED.

Chiquita opposes the Archive’s request for expedited consideration of this appeal on the grounds that 1) the Archive should have requested expedition as soon as the SEC agreed to stay disclosure of the documents pending a decision on Chiquita’s motion for an injunction pending appeal; and 2) further delay will not harm the public interest. Chiquita’s Reply & Opp’n at 11-12. Chiquita is wrong on both points.

First, the Archive did not “waive” expedition or make a “tardy” request. *See id.* at 11. “Like other procedural motions, motions to expedite must be filed within 30 days of the date the case is docketed.” *Handbook* at 33. This case was docketed on January 31, 2014, and the Archive moved for expedited consideration on February 28, 2014. Thus, the Archive’s motion was timely. Further, as the SEC explained, its decision to withhold the documents pending a decision on Chiquita’s motion “was simply to avoid the inconvenience of requiring the parties to brief, and the Court to decide, the motion for a stay on an emergency basis.” SEC Opp’n at 11 n.7. By extending this courtesy to Chiquita, the SEC did not divest the Archive of its ability

to seek expedition in the event that the Court grants Chiquita's motion. And, because the Archive requests expedition only in the event Chiquita's motion for an injunction pending appeal is granted, it would have made no sense for the Archive to seek expedition before Chiquita filed its motion.

Chiquita cites three cases where a district court granted a stay pending appeal after ordering the release of documents under FOIA but required the party opposing disclosure to seek expedited consideration from the court of appeals. Chiquita's Reply & Opp'n at 11 n.9 (citing *People for the Am. Way Found. v. U.S. Dep't of Educ.*, 518 F. Supp. 2d 174, 178-79 (D.D.C. 2007); *Ctr. for Int'l Env'tl. Law v. Office of the U.S. Trade Rep.*, 240 F. Supp. 2d 21, 24 (D.D.C. 2003); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002)). Chiquita claims that these cases undermine the Archive's request for expedition because, according to Chiquita, the cases demonstrate that "it is standard procedure for parties seeking to expedite to ask that stays to be conditioned on expedition." *Id.* at 11. Chiquita has it backwards. The cases cited by Chiquita show that it is standard procedure to condition stays on expedition; thus, Chiquita should be seeking expedition, not opposing it.

Second, the Archive explained in its motion that the right of access to government records conferred by FOIA is undermined by delay in the release of records and that further delaying release of the Chiquita Payment Documents denies

the public full information about Chiquita's illegal payments to terrorist organizations in Colombia and the government's response to Chiquita's actions. *See* Archive's Opp'n & Mots. at 13-14. Specifically, delay in release of the documents hinders the public's ability to evaluate Chiquita's plea deal, its claims of duress, and its assertions that the Justice Department misunderstood and mischaracterized the documents at issue. In opposing expedition, Chiquita does not address the harm to the public interest other than to make the conclusory assertion that "the public interest will not be harmed if this appeal proceeds on a normal schedule." Chiquita's Reply & Opp'n at 12. Given that Chiquita knows better than anyone what the requested documents will reveal, its failure to address the Archive's arguments is telling.

Chiquita's efforts to block the SEC from releasing the Chiquita Payment Documents have failed again and again. *See* SEC Opp'n at 1-6 (describing decisions in favor of release on Dec. 14, 2012, Jan. 18, 2013, Mar. 8, 2013, Mar. 28, 2013, Nov. 20, 2013, and Feb. 3, 2014). If the Court grants Chiquita's motion for an injunction pending appeal, it should expedite the appeal to put a stop to Chiquita's strategy of winning by losing slowly.

CONCLUSION

As explained above, the outcome of this case is so certain that this Court should summarily affirm. In the alternative, if this Court does not summarily affirm

the decision of the district court, and grants Chiquita's motion for an injunction, the Court should expedite consideration of the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 18, 2014, I filed the foregoing reply with the Clerk of the Court through the Court's CM/ECF system, which will serve notice of the filing on all counsel in this case. I further certify that four paper copies were sent by first-class mail to the Clerk of the Court.

/s/ Michael T. Kirkpatrick

Michael T. Kirkpatrick