COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN DOE, INC.; JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

ERIC HOLDER, JR., in his official capacity as Attorney General of the United States; ROBERT MUELLER, III, in his official capacity as Director of the Federal Bureau of Investigation; and VALERIE E. CAPRONI, in her official capacity as General Counsel of the Federal Bureau of Investigation,

Defendants.

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04 Civ. 2614 (VM)

Under Seal

Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Reconsideration of This Court's October 20, 2009 Order

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Preliminary Statement

Defendants Eric Holder, Jr., Attorney General of the United States of America, Robert Mueller, III, Director of the Federal Bureau of Investigation, and Valerie Caproni, General Counsel of the Federal Bureau of Investigation (collectively, the "Government"), respectfully submit this memorandum of law in opposition to plaintiffs' motion for partial reconsideration of the Court's October 20, 2009 Order. Plaintiffs seek reconsideration of this Court's ruling denying their request to unseal the Attachment to the National Security Letter ("NSL") that was served upon plaintiff Doe. However, contrary to the applicable legal standard, plaintiffs have failed to cite any controlling law or factual matters that the Court overlooked. Regardless, the Court's decision to treat the NSL Attachment as part of the NSL issued to Doe – rather than analyze the NSL Attachment separately – is consistent with the NSL statutes governing challenges to the non-disclosure requirement.

A. Governing Legal Standards

Motions for reconsideration are governed by Local Civil Rule 6.3, which provides that the movant must "set[] forth concisely the matters or controlling decisions which counsel believes the court has overlooked." Local Civ. R. 6.3. The Rule is "narrowly construed and strictly applied in order to avoid repetitive arguments already considered by the Court." Brown v. Barnhart, No. 04 Civ. 2450 (SAS), 2005 WL 1423241, at *1 (S.D.N.Y. June 16, 2005) (internal quotation marks and citation omitted); accord Stephens v. Shuttle Associates, L.L.C., 547 F. Supp. 2d 269, 280 (S.D.N.Y. 2008) ("A court must narrowly construe and strictly apply Local Rule 6.3 so as to avoid duplicative rulings on previously considered issues and to prevent the Rule from being used to advance different theories not previously argued, or as a substitute for appealing a final judgment."). "The purpose of the rule is to ensure the finality of decisions

and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Flaherty v. Filardi, No. 03 Civ. 2167 (LTS) (HBP), 2008 WL 4200577, at *1 (S.D.N.Y. Sept. 12, 2008) (internal quotation marks and citation omitted); accord Finkelstein v. Mardkha, 518 F. Supp. 2d 609, 611 (S.D.N.Y. 2007) ("[A] motion for reconsideration is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved."); In re World Trade Center Disaster Site Litigation, No. 21 MC 100 (AKH), 2008 WL 2704317, at *2 (S.D.N.Y. July 10, 2008) (same). Accordingly, reconsideration "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." In re Health Mgmt. Sys., Inc. Secs. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (internal quotation marks and citation omitted); accord R.F.M.A.S., Inc. v. Mimi So, 640 F. Supp. 2d 506, 509 (S.D.N.Y. 2009).

"A movant for reconsideration bears the heavy burden of demonstrating that there has been an intervening change of controlling law, that new evidence has become available, or that there is a need to correct a clear error or prevent manifest injustice." Flaherty, 2008 WL 4200577, at *2 (internal quotation marks and citation omitted). "Where the movant fails to show that any controlling authority or facts have actually been overlooked, and merely offers substantially the same arguments he offered on the original motion or attempts to advance new facts, the motion for reconsideration must be denied." Mikol v. Barnhart, 554 F. Supp. 2d 498, 500 (S.D.N.Y. 2008); accord Faulkner v. Nat'l Geographic Soc'y, 296 F. Supp. 2d 488, 490 (S.D.N.Y. 2003) ("Reconsideration would be warranted only if the Court had overlooked controlling or persuasive authority or misapprehended the facts"; simple disagreement with the decision "is a basis for appeal but not for reconsideration."); Questrom v. Federated Dep't Stores, Inc., 192 F.R.D. 128, 130-31 (S.D.N.Y. 2000) (same).

B. The Court Should Reject Plaintiffs' Attempt to Relitigate Matters Already Decided by the Court

Plaintiffs' motion for reconsideration should be denied because they have not identified any "matters or controlling decisions . . . the court has overlooked." See Local Civ. R. 6.3. As plaintiffs concede in their brief (Pl. Br. at 4), the Court was well aware of the First Amendment standards bearing on their challenge to section 2709(c)'s non-disclosure provision, including the requirement for narrow tailoring. See October 20, 2009 Decision at 14-15. Moreover, on reconsideration, plaintiffs have not cited any case law that governs this particular situation; rather, they again have cited familiar principles of First Amendment law. Because the Court previously properly considered and rejected plaintiffs' legal arguments, plaintiffs' motion for reconsideration should be denied. See, e.g., R.F.M.A.S., 640 F. Supp. 2d at 512-13.

In any event, the Court's original decision denying plaintiffs' request to unseal the NSL attachment was correct. As the Court properly concluded, for purposes of plaintiffs' challenge to the application of section 2709(c), the NSL Attachment should be treated as part of the NSL issued to Doe. See October 20, 2009 Decision at 13-14. That is because the Court's ruling that the Government was justified in continuing to require non-disclosure of the NSL served upon plaintiff Doe necessarily encompassed the Attachment. Stated simply, given the continuing need for non-disclosure, plaintiff Doe cannot identify himself as the recipient of an NSL, nor can he discuss the contents of the NSL that he received, including the Attachment. See 28 U.S.C. § 2709(c).

Plaintiffs' belated attempt to carve out discrete aspects of the NSL cannot be countenanced. As plaintiffs implicitly recognize (Pl. Br. at 4-5 & n. 2, 4), their effort to remove redactions to the NSL Attachment is not within the scope of their challenge to the continued

application of section 2709(c), but rather is an attempt to revisit the Court's prior rulings concerning what information must be provided on the public docket. As plaintiffs are well aware, at the outset of this case the Court issued a detailed order setting forth procedures by which documents in the case should be filed. See Doe v. Ashcroft, 317 F. Supp. 2d 488 (S.D.N.Y. 2004). Pursuant to those procedures, plaintiffs had the opportunity to (and did in fact) litigate the redactions proposed by the Government for documents filed on the public docket, including with respect to the NSL and its Attachment. Plaintiffs' attempt to contest the redactions that the FBI made to the NSL Attachment in the context of their as-applied challenge to section 2709(c) is not proper.

Finally, plaintiffs' suggestion that the Court erroneously believed that "it lacked authority to lift the gag order to the extent that it prevents plaintiffs from disclosing the contents of the NSL Attachment" (Pl. Br. at 2-3) is mistaken. As discussed above, in deciding that the NSL Attachment should not be considered separately, the Court recognized that its ruling that the Government was justified in continuing to require non-disclosure of the NSL also encompassed the Attachment.[1]

[1] As before, to the extent the Court views plaintiffs' challenge to the redactions to the NSL Attachment as appropriate for consideration, the Government respectfully requests the opportunity to set forth its rationale for the redactions in an appropriate declaration.

Conclusion

For the foregoing reasons, plaintiffs' motion for partial reconsideration should be denied.

Dated: New York, New York
November 18, 2009

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I, Jeffrey Oestericher, am an Assistant United States Attorney in the office of Prett Bharara, United States Attorney for the Southern District of New York.

On November 18, 2009, I served a copy of defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Reconsideration of This Court's October 20, 2009 Order by overnight delivery addressed to:

Melissa Goodman, Esq.
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
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I certify under penalty of perjury that the foregoing is true and correct.

Jeffrey Oestericher

Executed on November 18, 2009