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October 30, 2008

Thomas E. Gibson, AUSA
Bob Wells, AUSA
Administrative Office of the
United States Courts
Washington, DC 20544

Re: Albritton v Cisco

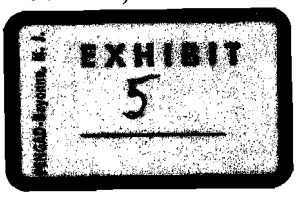
Dear Messrs. Gibson and Wells:

As you know the undersigned represent the defendants in the above referenced case which is a defamation action where the plaintiff alleges that he has been libeled by an internet article the gist of which described Plaintiff of "conspiring" with the district clerks office to change the date on a case file docket sheet and to change the date stamp on a complaint. The discovery cutoff, which has been extended once with permission of the presiding judge, is November 20, 2008.

As the clerks involved in this matter are percipient witnesses they have been subpoenaed to testify at their depositions which called for them to be present and produce documents on October 31, 2008. By letter which was received yesterday at 4:02 PM, Mr. Maland, the U.S. District Clerk for the Eastern District of Texas informed us that he "respectfully declines" to proceed with the depositions and document production on October 31, 2008 as scheduled. He requests that we provide him with written confirmation "of the withdrawal of the subpoenas no later than 12:00PM" today.

We respectfully decline to withdraw the subpoenas and wish to explain in some detail why.

Mr. Maland and his staff have been named by both sides as witnesses in the case. Indeed this week the Plaintiff testified at some length as to the importance of these witnesses. Before issuing a subpoena Mr. McWilliams talked with Mr. Maland to arrange for a convenient place and time for the depositions. Mr. Maland advised that October 31, 2008 was a convenient date for all of the clerks and that he would prefer it to be at the federal courthouse in Tyler. We therefore issued the subpoenas for that date and place. Mr. Maland as recently as October 23, 2008 advised that the depositions would be held in Room 330 at the Tyler Courthouse.



Then on October 27 we received a notice that Mr. Maland and the other clerks would require a "Request for Testimony and Production of Documents" pursuant to so called Touhy regulations. We provided such a request within hours of our receipt of Mr. Maland's letter.

As explained further below we decline to withdraw the subpoena is because, as we explain below, we believe that the regulations are not enforceable and, in the alternative, even if they are, the regulations have been waived by your clients' conduct. On the latter point you may not be aware but through discovery in this case we have learned that Mr. Maland prepared a detailed memo about the incident which forms the basis of the plaintiff's complaint and sent it to both the Plaintiff's lawyer, James Holmes, and two reporters at the Texas Lawyer newspaper. Mr. Maland was quoted extensively in subsequent Texas Lawyer newspaper articles.

Here is why we think the regulations are not enforceable: Exceptions to the demand for "every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Consistent with this principle, individuals must comply with a valid subpoena except in cases where the court quashes the subpoena or in cases where the subpoena calls for privileged information. FED. R. CIV. P. 45. Parties to a lawsuit "may obtain discovery regarding any matter, not privileged, which is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). Non-parties who are served valid subpoenas requiring them to appear for a deposition or produce documents must comply with such a subpoena. FED. R. CIV. P. 45(d). The only way to avoid compliance is to claim a privilege pursuant to Rule 45(d)(2) or file a timely motion for protection pursuant to Rule 45(c).

Individuals must comply with a valid subpoena except in cases where the court quashes the subpoena or in cases where the subpoena calls for privileged information. FED. R. CIV. P. 45. Federal regulations purporting to absolve individuals of this obligation, even where the individuals are government agents, are of no effect unless the federal regulations are enacted pursuant to valid congressional authority. *See U.S. v. Reynolds*, 345 U.S. 1, 9 (1953) (holding that an Air Force regulation preventing the disclosure of information was not dispositive but rather the laws of privilege should apply, stating that "it was the function of the Court and not the Air Force to determine whether the privilege existed"); *see also Nat'l Labor Relations Board v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961); *In re Bankers Trust Co.*, 61 F.3d 465, 470 (6th Cir. 1995); *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 776-78 (9th Cir. 1994). Where federal regulations are based on broad, general grants of congressional authority that don't specifically authorize the power to regulate substantive rules regarding disclosure of information, such regulations will not be enforced. *See In re Bankers Trust Co.*, 61 F.3d at 470; *see also U.S. v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1256-57 (8th Cir. 1997) (holding that no reviewing court could reasonably conclude that 28 U.S.C. §§ 509, 510, 515(a), 516, 519, 533 or 547 authorized the Attorney General the authority to override local ethical rules because the statutes were broad, general grants of authority that could not have contemplated the regulation at issue); *Exxon Shipping*, 34 F.3d at 776-78 (holding that government employees could not refuse to testify pursuant to 28 U.S.C. § 301 because the statute did not grant such broad

authority); *Rosee v. Board of Trade of the City of Chicago*, 35 F.R.D. 512, 515 (N.D. Ill. 1964) (holding that without statutory authority, government agents such as the Secretary of Agriculture "may not erect a privilege which will bar judicial scrutiny.")

In *Bankers*, the Court held that a federal regulation that purported to create rules regarding disclosure of government information was not enforceable because it was based on a general housekeeping statute and therefore exceeded Congressional authority. 61 F.3d 465, 470. In that case, the Federal Reserve promulgated rules regarding disclosure of information, basing its authority on 12 U.S.C. § 301, which at that time provided that "the Federal Reserve may prescribe regulations 'for the government of his [sic] department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records, papers and property.'" *Id.* (citing 12 U.S.C. § 301). The Court held that the language in the Federal Reserve regulation requiring that a person served with a subpoena decline to disclose information or testimony "exceeds the congressional delegation of authority and cannot be recognized by this court. Such a regulation is plainly inconsistent with Rule 34 and cannot be enforced." *Id.* The Court went on to state that the statute could not effectively override the application of the Federal Rules of Civil Procedure without a more specific grant of authority. *Id.* Instead, the Court should disregard the regulations and determine the matter under the Federal Rules of Civil Procedure. *Id.*

The Fifth Circuit applied this reasoning to another housekeeping statute in *Capitol Fish*. 294 F.2d 868. In that case, the Fifth Circuit ruled that 5 U.S.C. § 22 did not provide authority for establishing authority in the N.L.R.B. to determine whether certain papers and records are privileged. *Id.* at 875. Like the housekeeping statute in *Bankers*, the applicable version of 5 U.S.C. § 22 provided authority for the heads of departments to prescribe regulations for the "custody, use, and preservation of the records, papers and property" of the department. *Id.* at 872. The Court further held that the regulation could not require service of process on the N.L.R.B. because it would "open the possibility that some litigants would be deprived of the use of material, unprivileged evidence; it would impose an additional and unnecessary burden on the parties seeking to obtain government records; it would lay a trap for the unwary." *Id.* The Court held that a "housekeeping statute" "cannot bar a judicial determination of the question of privilege or demand for the production of evidence found not privileged." *Id.*

Similar to the regulations in these cases, the Regulations (which counsel for Cisco cannot locate in any codified form) effectively attempts to override Rule 34 of the Federal Rules of Civil Procedure by allowing a "determining officer," to determine whether to allow the depositions. The authority cited by the Regulations and David Maland is based on an even broader and more general statute than the one relied on in *Bankers* and *Capitol Fish*. The Regulations state that they are promulgated pursuant to 28 U.S.C. §§ 604(a)(24), 604(f) and

602(d). (Exhibit E Regulations at Section 2). Only one of these statutes—28 U.S.C. § 604(f)—could even arguably be construed as creating authority for the statute.[1] 28 U.S.C. § 604(f) states:

The Director may make, promulgate, issue, rescind, and amend rules and regulations (including regulations prescribing standards of conduct for Administrative Office employees) as may be necessary to carry out the Director's functions, powers, duties, and authority. The Director may publish in the Federal Register such rules, regulations, and notices for the judicial branch of Government as the Director determines to be of public interest; and the Director of the Federal Register hereby is authorized to accept and shall publish such materials.

This statute is even broader and more general than the 12 U.S.C. § 301 and of 5 U.S.C. § 22, which provided that the agencies could prescribe regulations regarding the use and preservation of its records, papers and property. *See In re Bankers Trust Co.*, 61 F.3d at 470. Therefore, 28 U.S.C. § 604(f) cannot be read as permitting the District Clerk to override the Federal Rules of Civil Procedure and determine whether to allow subpoenas of District Clerks. *See id.*

Mr. Maland alleges that he may refuse to comply with the subpoena on the basis of the Regulation pursuant to the authority of *U.S. v. Touhy,* 340 U.S. 462 (1950). In *Touhy*, the United States Supreme Court held that an FBI agent could not be held in contempt for refusing to obey the Attorney General's orders not to comply with a subpoena based on regulations concerning discovery of government agencies. *Id.* at 469. However, *Touhy* expressly states that "we find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce a court's order the government papers in his possession." *Id.* at 467.

[1] 28 USC § 601 states that "The Administrative Office of the United States Courts shall be maintained at the seat of government. It shall be supervised by a Director and a Deputy Director appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference. The Director and Deputy Director shall be deemed to be officers for purposes of title 5, United States Code." 28 USC § 604 (a)(1) and (24) state that "(a) The Director shall be the administrative officer of the courts, and under the supervision and direction of the Judicial Conference of the United States, shall: (1) Supervise all administrative matters relating to the offices of clerks and other clerical and administrative personnel of the courts; (24) Perform such other duties as may be assigned to him by the Supreme Court or the Judicial Conference of the United States. 28 USC § 602(d) states that "All functions of other officers and employees of the Administrative Office and all functions of organizational units of the Administrative Office are vested in the Director. The Director may delegate any of the Director's functions, powers, duties, and authority (except the authority to promulgate rules and regulations) to such officers and employees of the judicial branch of Government as the Director may designate, and subject to such terms and conditions as the Director may consider appropriate; and may authorize the successive redelegation of such functions, powers, duties, and authority as the Director may deem desirable. All official acts performed by such officers and employees shall have the same force and effect as though performed by the Director in person.

Numerous courts examining *Touhy* have held that it did not reach the issue of authority of agencies or governmental entities to promulgate rules regarding the discovery of documents or testimony of witnesses. *See, e.g., Capitol Fish*, 294 F.2d at 874 (stating that the *Touhy* Court did not reach this issue); *Exxon Shipping*, 34 F.3d at 776 (stating that *Touhy* is not applicable to the governments refusal to comply with requested discovery without complying with the Federal Rules of Civil Procedure because the *Touhy* Court "specifically refused to reach the question of the agency head's power to withhold evidence from a court without a specific claim of privilege"); *see also McElya v. Sterling Medical, Inc.*, 129 F.R.D. 510, 514 (W.D. Tenn. 1990) (holding that *Touhy* did not require enforcement of Navy regulations that conflict with the Federal discovery rules and that the discovery regulations were not enforceable).

We also ask you to consider the fact that Mr. Maland's conduct amounts to waiver. To the extent the Clerks allege any privilege with respect to the subject matter of the filing of the ESN Lawsuit and the alteration of the docket, the disclosure of the Maland Memo to the press and to Albritton's attorney in this lawsuit waived any such privilege. *See Mitchell v. Bass*, 252 F.2d 513, 516-19 (8th Cir. 1958) (holding that the government waived its privilege not to disclose the names of informants since the government had already disclosed them). The essence of privilege is the right to keep things secret; Mr. Maland has already defeated this by revealing information to persons outside the government. Mr. Maland should not be permitted to communicate with the press regarding the subject matter at issue—essential, potentially dispositive issues in this litigation—yet refuse to comply with a Subpoena seeking testimony and documents concerning the same subject matter.

In closing I would ask that you and your clients consider how resistance of the subpoena will look to the public. The Plaintiff and the clerk were accused in the challenged article of "conspiring" to change a docket entry and date stamp on a pleading. After speaking to the press and communicating with Plaintiff's litigation counsel about this matter Mr. Maland has designated himself as the "sole arbiter" of whether testimony will be given after, at first, freely and graciously agreeing to cooperate. He also states that now he will not "allow any exceptions to the 15-day requirement in this case" even though he admits that he has discretion to do so. By applying the 15 business day rule he has made it impossible to obtain the depositions before the court's discovery deadline which will also impact our clients' ability to present their motions for summary judgment in an orderly fashion.

We ask your clients to reconsider their positions and appear for the depositions called for in the subpoenas. Please tell us by 5am today whether your clients will comply.

Very truly yours,

Charles L. Babcock

and

George L. McWilliams w/permission by CLB

George L. McWilliams

cc: Nicholas H. Patton
James A. Holmes
Patricia L. Peden
David Maland
David Provines
Mae Velvin
Peggy Thompson
Rachel Wilson
Rhonda Lafitte
Shelley Moore