REPLY BRIEF FOR APPELLANT/CROSS-APPELLEE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1229

HAROLD WEISBERG,

Appellant/Cross-Appellee

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant

AND CONSOLIDATED NOS. 32-1274,
83-1722 and 83-1764

James H. Lesar
918 F Street, N.W., Suite 509
Washington, D.C. 20004
Phone: (202) 393-1921

Counsel for Weisberg

5

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1229

HAROLD WEISBERG,

Appellant/Cross-Appellee

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant

AND CONSOLIDATED NOS. 82-1274,
83-1722 and 83-1764

REPLY BRIEF FOR APPELLANT/CROSS-APPELLEE

ARGUMENT

Appellee/Cross-Appellant, the U.S. Department of Justice ("the Department"), argues that "if this Court had jurisdiction over [Weisberg's] FOIA claims prior to October 1, 1982 . . . [,] then the Court had jurisdiction to decide the entire case under § 403(e) [of the Federal Courts Improvement Act, 28 U.S.C. § 1295

(a)(2)." (Emphasis in original) Supplemental Brief for the Appellee/Cross-Appellant at 4-5. The Department asserts that this Court "plainly did" have jurisdiction prior to the effective date of the Federal Courts Improvement Act "since plaintiff had taken an appeal under 28 U.S.C. 1292(a)." Id.

The Department's assumption that this Court acquired jurisdiction over Weisberg's FOIA claims as a result of his first cross-appeal (No. 82-1229) is in error for three reasons. First, as Weisberg argued in his opening brief, in the absence of a Rule 54(b) certification, which was not made, the orders appealed from were interlocutory because they adjudicated "fewer than all the claims" which the case presented. Rule 54(b), Federal Rules of Civil Procedure.

Secondly, as the Department itself notes at the end of footnote 2 of its opening brief, Weisberg moved under Rule 59(e) to amend the December 1, 1981 and January 5, 1982 orders which were the subject of this cross-appeal. This motion, timely filed on January 15, 1982, tolled the time for taking an appeal under Federal Rule of Appellate Procedure 4(a)(4), which provides that "[a] notice of appeal filed before the disposition of [such motion] shall have no effect." See Griggs v. Provident Consumer Discount Co., ___ U.S. ___, 103 S. Ct. 400, 74 L. Ed.2d 225, 229 (1982). See also this Court's order of June 29, 1983, dismissing case Nos. 83-1363 and 83-1380 for lack of appellate jurisdiction because the order appealed from was subject to a timely motion for recon-

sideration under Rule 59(e).[1/]

The third flaw in the Department's argument is its erroneous assumption that this Court acquired jurisdiction over Weisberg's FOIA claims as a result of his first cross-appeal (No. 82-1274) because 28 U.S.C. § 1292(a)(1) grants the courts of appeals jurisdiction over appeals from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions. . . ." Weisberg concedes that the District Court's December 1, 1981 order denied him injunctive relief. This does not mean that this Court thereby acquired jurisdiction under § 1292(a)(1). Not all orders that are injunctive in nature are appealable under § 1292(a)(1).

The first Judiciary Act of 1789, 1 Stat. 73, established the general principle that only final decisions of the federal district courts would be reviewable on appeal. Carson v. American Brands, Inc., 450 U.S. 79, 83 (1981). Congress later created exceptions to this general principle, including Section 1292(a)(1) because "rigid application of this principle was found to create undue hardship in some cases. . . ." Id. Stating that § 1292(a)(1) was intended "to carve out only a limited exception to the final-judgment rule," the Supreme Court in Carson noted that:

1/ Although the Department asserts that a Rule 59(e) motion to amend judgment does not affect the validity of Weisberg's March 12, 1982 appeal because it was "taken under 28 U.S.C. § 1292(a)(1)," it cites no authority for this proposition.

> we have constued the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence."

Carson, 450 U.S. at 84, quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955). Thus,

> Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence, and that the order can be "effectually challenged" only by immediate appeal, the general cogressional policy against picemeal review will preclude interlocutory appeal.

Id.

Applying these standards in Center for Nat. Sec. Studies v. C.I.A., 229 U.S.App.D.C. 131, 711 F.2d 409 (1983), this Court rejected the argument that a decision on the merits of one count of a multi-count FOIA case was entitled to immediate appellate review by virtue of § 1292(a)(1). The Court found both that nothing in the FOIA warranted circumvention of traditional adjudicative procedures, and that delay resulting from its refusal to entertain the interlocutory appeal would not cause "serious, perhaps irreparable, harm." Id., 229 U.S.App.D.C. at 136, 711 F.2d at 414.

There are no facts in the record which would sustain a finding that refusal to entertain an immediate appeal would have caused Weisberg "serious, perhaps irreparable, harm." To the contrary, the record shows that (1) on March 23, 1982, the Department moved

to stay proceedings on the appeal and cross-appeal, (2) Weisberg did not oppose the motion to stay, and (3) by order of April 8, 1982, Acting Chief Judge Wright granted the stay. If Weisberg had felt that the lack of immediate appeal threatened him with irreparable injury, he had the option of seeking certification under Rule 54(b). See Center for Nat. Sec. Studies v. C.I.A., 229 U.S.App.D.C. at 135 n.9, 136 n.11. He declined to do so.

Nor was this a case in which the District Court's order could not be "effectually challenged" save by an immediate appeal. Rather, review of the District Court's order was fully available upon conclusion of the entire case.

The fact that all the FOIA claims were decided by the District Court's December 1, 1981 order does not warrant a different result here than obtained in Center for Nat. Sec. Studies v. C.I.A., supra. Because less than all of the claims in the case had been finally adjudicated, this was an interlocutory order. The FOIA has a myriad uses and is susceptible of almost unlimited combination with other legal actions. FOIA claims are frequently included in NLRB, Civil Rights and Privacy Act cases, to give just three examples. To hold that a decision on all FOIA claims in such cases would give rise to a right to immediately appeal them under § 1292(a)(1) before the other claims had been finally adjudicated would flood the courts of appeals and undermine the longstanding policy against piecemeal appeals.

For these reasons this Court should reject the Department's argument that it obtained jurisdiction over Weisberg's FOIA claims as a result of his March 1982 cross-appeal and the operation of § 1292(a)(1). It should hold that because it did not acquire jurisdiction over the FOIA or federal contract and promissory estoppel claims before the effective date of the Federal Courts Improvement Act, jurisdiction over these matters is properly lodged in the Court of Appeals for the Federal Circuit.

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
918 F Street, N.W., Suite 509
Washington, D.C. 20004
Phone: (202) 393-1921

Counsel for Weisberg

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of March, 1985, mailed two copies of the foregoing Reply Brief for Appellant/Cross-Appellee to Mr. John S. Koppel, Attorney, Appellate Staff, Civil Division, Room 3617, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR