UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTHAM NEWS, Plaintiff, v. UNITED STATES IMMIGRATION & NATURALIZATION SERVICE, et al., Defendants.	)	Civil Action No. 85-2721 (HHG)

DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE

Plaintiff, a Canadian news service, brought this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, against the separate defendant agencies,1/ seeking to obtain agency records pertaining to the administration of certain provisions of the Immigration and Naturalization Act of 1952 ("McCarran Act") which authorizes the exclusion of aliens from the United States on specified grounds. In addition, plaintiff has been seeking records pertaining to the Canadian, Farley Mowat, who was excluded from the United Stated pursuant to relevant provisions of the McCarran Act.

1/ The defendant agencies in this case are the Immigration and Naturalization Service (INS), the Department of Justice, the Central Intelligence Agency (CIA), the Department of State and the Federal Bureau of Investigation. The issues addressed in this submission to the Court focus principally on the actions and behavior of the FBI and counsel for defendants.

In a 25-page Memorandum opinion and in an accompanying Order dated September 29, 1987, the Court addressed issues that had been raised by the parties in defendants' motion for summary judgment and in plaintiff's motion for partial summary judgment. Deciding some issues for defendants and other issues for plaintiff, the Court discussed at length the various exemptions under FOIA that had been asserted by each of the defendant agencies in order to protect certain documents from disclosure.2/ The Court also considered issues of whether the document searches conducted by the defendant agencies in response to plaintiff's FOIA request were adequate and whether the FBI had improperly denied plaintiff's request for a waiver of document search fees and copying costs. See 5 U.S.C. § 552(a)(4)(A). In its Order, the Court granted portions of defendants' motion for summary judgment and portions of plaintiff's motion for partial summary judgment.3/

2/ Exemptions (b)(1), (b)(5), (b)(7)(A), (b)(7)(C), and (b)(7)(D) of FOIA were each asserted by one or more of the defendant agencies as grounds for non-disclosure of documents. The Court specifically considered each agency's assertion of the respective exemptions vis-a-vis the documents that had been withheld from disclosure.

3/ The Court ordered, inter alia, the FBI's motion for summary judgment be granted with respect to exemption (b)(7)(C) of FOIA, 5 U.S.C. Section 552 (b)(7)(c) "to the extent that the FBI may withhold the names and identifying data of the FBI Special Agents and the third parties at issue, and denied the FBI's motion on this exemption "in all other respects." Further, the Court stated that with respect to the same exemption "the plaintiff's motion for partial summary judgment be and it is hereby granted in part and denied in part as stated in the accompanying memorandum." However, while the Court granted partial summary judgment, nowhere in its Order or accompanying Memorandum did the Court the documents covered by this ruling were to be produced nor was the production of documents expressly ordered.

The Court denied the INS motion for summary judgment with
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Upon receipt of the September 29, 1987 Memorandum and Order, counsel for defendants, Assistant United States Attorney ("AUSA") Robert E. L. Eaton, Jr., ensured that copies of the Court's papers were mailed to each of the defendant agencies including the FBI. In addition, AUSA Eaton, shortly thereafter, telephonically conferred with staff counsel from each of the agencies faced with obligations under the Court's Order. Among those contacted was counsel for the FBI. AUSA Eaton explained, in particular, the need for the FBI to respond in a timely fashion to the Court's request for a submission on the fee waiver issue. Further, AUSA Eaton advised each of the concerned agencies of their obligations under the Order to conduct additional document searches. Although no time limit had been imposed for the completion of document searches, AUSA Eaton instructed each agency representative--where applicable--that at some point in the future the concerned agency could be called upon to describe those additional searches and to

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respect to documents covered by that agency's assertion of exemption (b)(7)(D) of FOIA, 5 U.S.C. § 552(b)(7)(D), and granted plaintiff's motion for partial summary judgment on the same issue. Again, no time limits were specified by the Court.

With respect to the adequacy of defendants' document searches, the Court stated, "plaintiff's motion for an order compelling further search be and it is hereby granted in part and denied in part as specified in the attached Memorandum." This requires the Department of State, the Department of Justice, INS and the FBI to conduct further document searches, but the FBI's search was to be limited--be order of the Court--only for a specific interagency memorandum dated January 10, 1978. No time limits were set by the Court for the completion of the additional document searches.

Finally, the FBI was ordered by the Court to show cause within twenty days of the Order, why plaintiff's fee waiver request should be denied.

set forth the justification for any withholding of documents retrieved as a result.[4] Declaration of AUSA Eaton at 2-3.

Upon receipt of the Court's Memorandum and Order and following discussions with AUSA Eaton, officials of the FBI initiated a concerted effort to reach a final decision on plaintiff's fee waiver request and to comply immediately with the Court's order to show cause why the fee waiver request should be denied. Declaration John M. Oscadal at 3-4. In addition, a further search of FBI records was conducted for an interagency memorandum of January 10, 1978, as the Court had ordered. The January 10, 1978 memorandum was eventually located and released to plaintiff in redacted form on March 11, 1988 following a security classification review.[5] Declaration of John M. Oscadal at 4.

With respect to the Court's partial denial of defendant's motion for summary judgment on the issue of information and documents withheld under exemption (b)(7)(C) of FOIA, 5 U.S.C. § 522 (b)(7)(C),[6] it was determined by the appropriate FBI

4/ It is clear from the FBI's prompt and timely compliance with that portion of the Court's September 29, 1987 Memorandum and Order dealing with the issue of plaintiff's fee waiver request that defendants -- far from doing nothing -- began to act expeditiously and in conformance with their legal obligations subsequent to their receipt of the Memorandum and Order. In addition, the declarations of AUSA Eaton, and John Oscadal evidence not contumacious behavior, but rather a serious interest in fulfilling their legal duties to the Court as they perceived them at the time. Declarations of AUSA Robert E.L. Eaton, Jr., and John M. Oscadal.

5/ The January 10, 1978 memorandum, when located, was found to be classified as "Secret."

6/ The Court's September 29, 1987 Memorandum and Order denied defendant FBI's motion for summary judgment insofar as it involved the withholding of information which could serve to identify FBI

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officials that reconsideration or appeal of the Court's decision was desirable and should be sought. Declaration of John M. Oscadal at 3. The desire of the FBI to seek reconsideration or appeal on the (b)(7)(C) issue was communicated to AUSA Eaton. Declaration of John M. Oscadal at 3. AUSA Eaton concluded, after conferring with AUSA R. Craig Lawrence, who is the Appellate Counsel, Civil Division that the correct procedural course would be to seek reconsideration of the Court's grant of partial summary judgment inasmuch as the Court's Memorandum and Order were interlocutory in light of the provisions of Rule 54 (b), Fed. R. Civ. P. Declaration of AUSA Eaton at 3-4. Accordingly it was determined by counsel that it would be inappropriate to appeal the Court's September 29, 1987 ruling. Declaration of AUSA Eaton at 3.

On or about November 20, 1987, plaintiff moved for an order for the release of information covered by the September 29, 1987 grant of partial summary judgment and setting a schedule for preparation of Vaughn indices. On January 26, 1988, the Court granted plaintiff's unopposed motion and ordered that within 30 days of the Order defendants would 1) release all materials covered by the Court's September, 1987 grant of partial summary judgment in favor of plaintiff; 2) release all non-exempt materials located as a result of the various defendants' supplemental searches; 3) release all documents subject to the FBI

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clerical employees.

fee waiver 7/ granted by the Court; 4) file affidavits describing the additional searches that were conducted; and 5) file Vaughn indices justifying any exemptions claimed with respect to newly located documents. Once again, AUSA Eaton took steps to ensure that the affected defendant agencies were furnished with copies of the Court's Order and were informed of their legal obligations under the Order. Declaration of AUSA Eaton at 5. At some point after the affected agencies were furnished with copies of the January 26, 1988 Order, AUSA Eaton misplaced and lost his copy of the Order. Declaration of AUSA Eaton at 6. Although AUSA Eaton continued to be aware of the need for the defendant agencies to complete preparation of the required Vaughn indices, he inadvertently failed to recall the requirement imposed upon the FBI to produce the material that had been withheld pursuant to FOIA exemption (b)(7)(C). Declaration of AUSA Eaton at 6-7.

AUSA Eaton coordinated the efforts of the several defendant agencies to complete and timely file the required Vaughn indices, including a Vaughn index filed on behalf of the FBI. Also, AUSA Eaton saw to it that the documents required to be produced by the defendant agencies were produced -- with the exception of the exemption (b)(7)(C) material in the possession of the FBI.

7/ On November 9, 1987, the Court found that the FBI's denial of plaintiff's fee waiver had not been adequately justified. A Notice of Appeal was filed on behalf of defendant FBI in contemplation of an appeal of the November, 1987 Order. However, the appeal was eventually dismissed voluntarily on January 19, 1988. Notwithstanding the Notice of Appeal, at no time did AUSA Eaton's view change as to the interlocutory nature of the September 29, 1987 Order. Declaration of AUSA Eaton.

AUSA Eaton and the FBI failed to reconsider the earlier determination of counsel as to the applicability of Rule 54 (b), Fed. R. Civ. P., to the issue of the exemption (b)(7)(C) material following the Court's January 26, 1988 Order. Thus, defendant FBI and AUSA Eaton continued to act under the assumption -- which is now recognized by defendants to have been in error -- that even after the January 26, 1988 Order, reconsideration before the District Court, rather than an interlocutory appeal, would be available on the issue of the exemption (b)(7)(C) material.[8/] Defendants and counsel failed to realize the impact the January 26, 1988 Order would have on the availability of a request for reconsideration before this Court. This failure was attributable entirely to the fact that AUSA Eaton lost his copy of the January Order; forgot about the requirement to produce the exemption (b)(7)(C) material; and acted on the erroneous assumption that the Court's grant of partial summary judgment on the (b)(7)(C) material remained subject to revision pursuant to Rule 54(b), Fed. R. Civ. P.[9/] Plaintiff opposed the request.[10/] On May 9, 1988, a

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8/ Defendants' timely compliance with a substantial part of the Court's January 26, 1988 Order evidences a genuine interest in meeting fully their lawful obligations. Furthermore, there is absolutely no evidence to suggest that defendant FBI or AUSA Eaton were scornful of the Court's authority or disrespectful towards their opponent. Contempt was not at all evidenced in any of defendant FBI's or AUSA Eaton's conduct. It is only as a consequence of a regrettable -- but excusable -- inadvertence that the FBI failed to comply entirely with the Court's Order of January 26, 1988.

9/ The FBI relied on the judgment of AUSA Eaton with respect to the procedures that would be followed in seeking reconsideration or appeal on its behalf. Declaration of John M. Oscadal at 5-8.

10/ At no point in its opposition did plaintiff make reference to (footnote continued)

status call was held before this Court on the issue of the (b)(7)(C) material where the issue of non-compliance with the September 29, 1987 Order was the subject of colloquy between counsel and the Court.11/ AUSA Eaton, at that time, failed to focus upon or recall the January 26, 1988 Order. Declaration of AUSA Eaton.

Following the May 9, 1988 status conference, during discussion with his supervisors in the Civil Division of the United States Attorney's Office, AUSA Eaton was asked whether any orders had been issued subsequent to September 29, 1987 which imposed a specific obligation on the FBI to release the exemption (b)(7)(C) materials by a date certain. AUSA Eaton could find no such orders in his files. He contacted the FBI agency representative to locate all orders of the Court and was then informed of the complete terms of the January 26, 1988 Order. Based on that information, AUSA Eaton filed a supplemental memorandum with the Court on May 16, 1988, withdrawing the request for reconsideration and apologizing to the Court for the error which had

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the Court's January 26, 1988 Order. Of course, plaintiff cannot be faulted for defendants' failure to recall the January Order or to consider the impact that Order would have on the issue of reconsideration, but it is worth noting that there was nothing in plaintiff's submission to the Court that would have served to remind AUSA Eaton of the Order. Moreover, in a number of telephone conversations between AUSA Eaton and plaintiff's counsel between January 26, 1988 and April 11, 1988, no mention was made of the need to release exemption (b)(7)(C) material. Declaration of AUSA Eaton.

11/ At no time during the May 9, 1988 status conference was the January 26, 1988 Order discussed. While this does not provide an excuse for defendants' neglect, it does explain, in part, AUSA Eaton's failure to recall the terms of the January 26, 1988 Order.

inadvertently resulted in the FBI's non-compliance with the relevant portion of the Court's January, 1988 Order. In the May 16, 1988 supplemental memorandum, defendants stated that they would comply with the Court's January, 1988 Order as soon as possible. Thereafter, in a May 20, 1988 Order the Court ordered defendants' to show cause why they should not be held in contempt.

ARGUMENT

I. DEFENDANT FBI AND AUSA EATON SHOULD NOT BE HELD IN CONTEMPT OF COURT

A. Defendant FBI Has Complied Fully With The Court's January, 1988 Order.

Pursuant to its representation to the Court on May 16, 1988, that it would comply with the January, 1988 Order, defendant FBI released all materials which had previously been withheld under FOIA exemption (b)(7)(C). These materials were a subject of the Court's September, 1987 Order and Memorandum and of the Court's January, 1988 Order. By cover letter dated May 31, 1988 the FBI released all of the material in question to plaintiff's counsel. Declaration of John M. Oscadal, Attachment A. To the extent that the FBI's and AUSA Eaton's actions may be found by the Court to have been contemptuous, the contempt has been purged. Further action by the Court is not warranted.

The purpose of a civil contempt proceeding 12/ is remedial in

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12/ The Court has not specifically denominated its proceedings on the issue of contempt here, as being civil or criminal in nature. Defendants have assumed that the proceedings are civil in nature, due in part to the absence of notice to the contrary. Criminal contempt proceedings in circumstance such as these must be accompanied by requisite elements of due process (e.g., notice to the contemnors that they are subject to a finding of criminal

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nature and intended to coerce the contemnor into doing that which he is supposed to do. Shillitani v. United States, 384 U.S. 361 (1966). In this regard, civil contempt differs from criminal contempt whose purpose is to punish the contemnor or to vindicate the authority of the Court. United States v. United Mine Workers of America, 330 U.S. 258 302 (1947). The party who is found to be in civil contempt carries the "key to his prison"[13/] and may avoid sanctions by complying with the orders of the Court. A contemnor who complies with his lawfully imposed obligations purges himself of contempt. E.g., United States v. Griffin, 816 F.2d 1, 7 n.4 (D.C. Cir. 1987); Oil, Chemical & Atomic Workers International Union, AFL-CIO v. NLRB, 547 F.2d 575, 581 (D.C. Cir. 1976).

In this case, the defendants have fully complied with the terms of the Court's September, 1987 and January, 1988 Orders. Thus, even if it were deemed that they were in contempt of Court, on May 31, 1987 they purged themselves of such contempt by releasing the exemption (b)(7)(C) materials to plaintiff.[14/]

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contempt) that are not present here. Douglass v. First National Realty Corporation, 543 F.2d 894, 898 n.21 (D.C. Cir. 1976); United States v. Armstrong, 781 F.2d 700, 706 (9th Cir. 1986). Moreover, the requisite element of intent or willful disregard of the Court's authority is absent here and a finding of criminal contempt could not be supported by the evidence. Where there is doubt as to the civil or criminal nature of the contempt, the matter should he approached as a civil matter rather than as a crime. United States v. Wendy, 575 F.2d 1025, 1029 (2nd Cir. 1978).

13/ In re Nevitt, 117 F. 448, 461 (8th Cir. 1902).

14/ Although an ancillary purpose of civil contempt proceedings is to compensate a party who has incurred additional expense as a result of the contempt, no such expenses have been alleged or are known to exist in this case. Magwood v. Pearlstein, 785 F.2d
(footnote continued)

B. The FBI and AUSA Eaton Were Not In Contempt Of Court With Respect To The September, 1987 Memorandum and Order

Following the Court's issuance of the September 29, 1987 Order granting partial summary judgment in favor of plaintiff, defendant FBI continued to withhold from plaintiff the exemption (b)(7)(C) material in question. The continued withholding of the (b)(7)(C) material was based upon the FBI's desire to request reconsideration or appeal this Court's ruling of September, 1987. It was counsel's view that in accordance with Rule 54(b), Fed. R. Civ. P., the Court's September, 1987 Order was interlocutory and therefore reconsideration, rather than appeal, would be the only appropriate course of action open to the FBI.

Rule 54(b) provides, in pertinent part, that in lieu of a certification of finality,

> any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. [Emphasis added].

In the instant case, the Court granted only partial summary judgment to the plaintiff on September 29, 1987. Subsequent to this Order, there remained and continues to remain a number of issues yet to be resolved in plaintiff's claims and defendants' responses. Not until the January 26, 1988 Order were the rights

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1077, 1082 (D.C. Cir. 1986).

and liabilities of the FBI adjudicated in a form that could be considered final for purposes of appeal. 28 U.S.C. § 1292.

A prerequisite to petition a Court for reconsideration of an order is to determine whether the order was final. The finality of an order ajudicating one or more, but less than all, multiple claims is controlled, in part, by Rule 54(b). E.g., McGilton v. Mobay Chemical Company, et al., 40 F.R.D. 483, 484 (N.D. W. Va. 1966). Rule 54(b) requires that a Court make "an express determination that there is no just reason for delay and . . . an express direction for the entry of judgment . . . [otherwise] . . . the order . . . is subject to revision at anytime before the entry of judgment adjudicating all the claims". Id.

A partial summary judgment which resolves only one aspect of a case but leaves other issues in dispute is neither final within the meaning of Title 28, United States Code, Section 1291, nor subject to certification under Rule 54(b). See Rudd Construction Equipment Co. v. Home Insurance Co., 711 F.2d 54 (6th Cir. 1983). Indeed:

> Partial summary judgment is interlocutory in nature, it is not final unless certified by the court as such under Fed. R. Civ. P. 54(b), and does not terminate the action as to any of the claim[s] or parties, and the order or other form of decision is subject to revision at any time before entry of judgment adjudicating all the claims and rights and liabilities of the parties.

Kane Gas Light and Heating Co. v. Pennzoil Co., 587 F. Supp. 910, 911 (W.D. Pa. 1984). See also Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978); Update Art, Inc. v. Charnin, 110 F.R.D. 26, 35-36 (S.D.N.Y. 1986).

In the instant case, there are multiple parties and issues. The Court's September 29, 1987, decision and order was not dispositive of all issues as respects all parties. In view of the clear applicability of Rule 54(b), a final judgment had not been rendered prior to January 26, 1988 and the defendant (FBI) had the right to request the Court's reconsideration and revision of the September, 1987 decision regarding the relevant exemption (b)(7)(C) material. Due to what was then correctly perceived to be the absence of a final judgment, counsel for defendants reasonably believed reconsideration could be sought pursuant to Rule 54(b). See also Tolson v. United States, 732 F.2d 998 (D.C. Cir. 1984); Center For National Security Studies v. CIA, 711 F.2d 409 (D.C. Cir. 1983) (regarding availability of interlocutory appeals under 28 U.S.C. § 1292).

In addition to the foregoing, it is clear that with respect to nearly all of the issues that were decided by the Court in the September 29, 1987 Memorandum and Order, no dates were set for the defendants' compliance, nor were specific instructions given to release the covered materials. In circumstances such as these where a date is not established by the Order and no time limit is set, a party cannot be held in contempt for failure to comply with the Order by a date certain. See Aero Corporation v. Department of the Navy, 558 F. Supp. 404, 418 (D.D.C. 1983) (Oberdorfer, J.) (generality of Court's orders precludes proof of contempt with necessary specificity); People's Housing Development Corp. v. City of Paughkeepsie, 425 F. Supp. 482, 495-96 (S.D.N.Y. 1976) (order required compliance "in due course").

Finally, with respect to the September, 1987 Order, it must be noted that defendants -- including the FBI -- substantially complied with every ruling encompassed by the Court's September 1987 Memorandum and Order. Those rulings were wide ranging and involved a substantial effort on the part of defendants and AUSA Eaton. In defendants' substantial compliance can be perceived the genuine desire of all affected agencies and AUSA Eaton to fulfill their lawful obligations to the Court in good faith. That the FBI continued to withhold the exemption (b)(7)(C) material after September, 1987 in the expectation of pursuing a reconsideration of the Court's ruling, is not indicative of contumacious or contemptuous behavior.15/

15/ There is some authority for the proposition that the Court should not act sua sponte in initiating civil contempt proceedings, although counsel has found no cases definitively so holding. While the criminal contempt authority is available without question to vindicate the authority of the Court, civil contempt proceedings may be available as a remedy only to the party adversely affected by the contemmor's behavior. See Washington Metropolitan Area Transit Authority v. Amalgamated Transit Union, National Capital Local Division 689, 531 F.2d 617, 622 (D.C. Cir. 1976) (in civil contempt proceeding court has no independent interest in vindicating its authority); Louisiana Education Association v. Richland Parish School Board, 421 F. Supp. 973, 975-76 (W.D. La. 1976).

Indeed, this Court appears to have acknowledged the possibility that "civil contempt proceedings may probably be initiated only by a party or parties with an interest in the decree, a court may enforce its own judgments by means of criminal contempt even if there has been no request from a party." United States v. American Telephone and Telegraph Co., 552 F. Supp. 131, 217 (D.D.C. 1982) (Greene, J.) (citing MacNeil v. United States, 236 F.2d 149 (1st Cir. 1956)).

C. Defendants Substantially Complied In Good Faith With The Court's January 26, 1988 Order.

Notwithstanding the inadvertent failure of defendant FBI and AUSA Eaton to comply with the part of the January, 1988 Order regarding the release of exemption (b)(7)(C) material, defendants substantially complied with all other terms of the Order. Vaughn indices were prepared by each of the affected agencies and further documents were released as required. There has been no history of contemptuous or disrespectful behavior in this case.

Although it is not necessary to find intent or willful disregard of a court's order for a finding of civil contempt, NLRB v. Blevins Popcorn Co., 659 F.2d 1173 (D.C. Cir. 1981), the elements of inadvertence and substantial compliance should be considered by the Court as mitigating factors. NAACP, Jefferson County Branch v. Brock, 619 F. Supp. 846, 850 (D.D.C. 1985). See Tinsely v. Mitchell, 804 F.2d 1254, 1256 (D.C. Cir. 1986); Securities and Exchange Commission v. Diversified Growth Corp., 595 F. Supp. 1159 (D.D.C. 1984). Cf. DeVaughn v. District of Columbia, 628 F.2d 205, 207 (D.C. Cir. 1980) (evidence established negligence not reckless disregard in criminal contempt proceeding). "The judicial contempt power is a patent weapon." International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967). Therefore, court's impose contempt sanctions with caution. Joshi v. Professional Health Services, Inc., 817 F.2d 877, 879 n.2 (D.C. Cir. 1987). The circumstances surrounding the noncompliance with a portion of the January, 1988

Order are not sufficiently compelling to warrant a contempt citation against defendant FBI or AUSA Eaton.

CONCLUSION

For the foregoing reasons defendants respectfully urge the Court not to find defendants in contempt.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Defendants' Response To Order To Show Cause, has been mailed, postage prepaid, this 2nd day of June, 1988, to counsel for plaintiff, James H. Lesar, Esquire, 918 F Street, N.W., Suite 509, Washington, D.C. 20004.

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