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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC.
PURSUANT TO SECTION 105B OF
THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT. ~~(S)~~

Docket Number: 105B(g) 07-01

DECLARATION OF MATTHEW G. OLSEN (U)

I, Matthew G. Olsen, hereby declare as follows: (U)

1. I am a Deputy Assistant Attorney General in the National Security Division of the United States Department of Justice. I have served in this position since 2006. In this capacity, I supervise all operations for the Office of Intelligence (formerly the Office of Intelligence and Policy Review). The National Security Division, of which the Office of Intelligence is a part, is responsible for, among other things: (1) providing legal advice to the Attorney General, other Department components, and the United States intelligence agencies regarding questions of law and procedure that relate to United States intelligence activities; (2) conducting oversight of intelligence agency compliance with certain national security legal requirements; and (3) obtaining court

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Classified by: Matthew G. Olsen, Deputy Assistant
Attorney General, NSD, DOJ
Reason: 1.4 (c)
Declassify on: 8 May 2033

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authorization for the collection of foreign intelligence pursuant to the Foreign Intelligence Surveillance Act. I hold original classification authority at the TOP SECRET/SCI level by delegation from the Attorney General. (U)

2. The statements herein are made on the basis of personal knowledge and information provided to me in the course of my official duties. (U)

3. In [REDACTED] 2007, the Director of National Intelligence ("DNI") and the Attorney General executed [REDACTED] separate certifications authorizing the acquisition of foreign intelligence information pursuant to the Protect America Act of 2007 (the "Act"). ~~(S)~~

4. Pursuant to section 1805B(e) of the Act, the Attorney General and the DNI subsequently issued directives to communications providers ordering their assistance in the acquisition of foreign intelligence information covered by the authorizations. ~~(S)~~

5. Prior to the issuance of any directives to Yahoo!, Inc. ("Yahoo"), representatives of the Government met with lawyers and other representatives for Yahoo to hold informal discussions about Yahoo's compliance with the Protect America Act. Based on these discussions, the Government understood that Yahoo did not intend to comply with any directives under the Protect America Act absent an order from the Foreign Intelligence Surveillance Court. In addition, the Government understood that when directives were issued to Yahoo, Yahoo would seek review of such directives pursuant to 50 U.S.C. § 1805B(h). As a result, [REDACTED] such directives were issued to Yahoo

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in November 2007. By letter dated November 8, 2007 (attached hereto at Tab 1), Yahoo informed the Government that it refused to comply with the directives "absent a Court Order compelling such assistance." (S)

6. Further informal discussions revealed that Yahoo did not intend to seek review of the Government's directives pursuant to 50 U.S.C. § 1805B(h). As a result, on November 21, 2007, the Government filed a motion pursuant to 50 U.S.C. § 1805B(g) of the Act to compel Yahoo's compliance with the directives. (S)

7. On April 25, 2008, following extensive briefing by the parties, the Court granted the Government's motion to compel and ordered that Yahoo "shall forthwith comply with the directives, and shall continue to comply with each directive until the expiration date specified therein." Id. (emphasis added). The Court simultaneously issued a 98-page Memorandum Opinion explaining the legal basis for its Order. (S)

8. The Government informed counsel for Yahoo of the fact and basic nature of the Court's Order on April 25, 2008, after it learned that counsel had not made arrangements to have the Order formally served until Monday, April 28, 2008. (S)

9. The Court's Order was formally served on counsel for Yahoo on April 28, 2008. To help expedite counsel's review of the Court's Memorandum Opinion, the Government invited both Yahoo's outside counsel, as well as Yahoo's local in-house counsel, to review a redacted copy of the Opinion at the Department of Justice. Yahoo's outside counsel conducted such review on April 29, 2008. Pursuant to the Court's Order

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that the Government formally serve an appropriately redacted copy on Yahoo's counsel by no later than May 14, 2008, the Government provided such a copy to a Court-appointed Alternate Litigation Security Officer on May 2, 2008, for delivery to Counsel at Yahoo's convenience. ~~(S)~~

10. On May 1, 2008, counsel for Yahoo informally indicated that that Yahoo intended to appeal the Court's Order and move for a stay pending appeal. ~~(S)~~

11. On May 2, 2008, the Government formally sought Yahoo's assistance pursuant to the Court's Order of April 25, 2008 compelling Yahoo's compliance with the Government's directives forthwith and made available to Yahoo a number of accounts on which the Government sought to conduct surveillance. I have been informed by the National Security Agency (NSA) that as of May 6, 2008, the Government had provided  accounts to Yahoo for electronic surveillance tasking   ~~(S)~~

12. On the morning of May 5, 2008, the Government delivered a letter (attached hereto at Tab 2) to counsel for Yahoo reiterating that Yahoo's assistance was required pursuant to the Court's Order, issued ten days earlier, compelling compliance with the Government's lawful directives. The letter also requested written notification by the end of that day regarding whether Yahoo intended to comply with the Court's Order, including during any period pending appeal or the consideration of a stay motion. ~~(S)~~

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13. During the afternoon of May 5, 2008, the Government received a letter (attached hereto at Tab 3) from counsel for Yahoo stating that Yahoo was working on getting a final answer regarding whether Yahoo intended to begin compliance while an appeal and stay motion are pending. Counsel for Yahoo stated that he expected to have an answer by close of business on May 6, 2008. Also on May 5, 2008, Yahoo filed a Petition for Review with the Foreign Intelligence Surveillance Court of Review. ~~(S)~~

14. By letter delivered the morning of May 6, 2008 (attached hereto at Tab 4), the Government consented to Yahoo's request for an additional day to determine whether it would begin complying with the Court's Order. ~~(S)~~

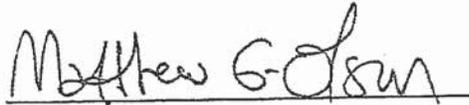
15. On the afternoon of May 6, 2008, the Government received a letter (attached hereto at Tab 5) from counsel for Yahoo stating unambiguously that Yahoo "will not begin producing information or activating surveillance pursuant to the Directives until its Motion to Stay Pending Appeal has been resolved, unless otherwise directed by the Court." Along with the letter, the Government received Yahoo's motion for a stay pending appeal, which was filed on May 6, 2008. ~~(S)~~

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I declare under penalty of perjury that the foregoing is true and correct.

Dated this 8th day of May 2008.



MATTHEW G. OLSEN
Deputy Assistant Attorney General
National Security Division
United States Department of Justice
950 Pennsylvania Ave, NW
Washington, D.C. 20530

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Sonnenschein
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November 8, 2007

VIA HAND-DELIVERY

Matthew Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice
950 Pennsylvania Ave, NW
Washington, D.C. 20530-0001

Re: Protect America Act

Dear Mr. Olsen:

I write as counsel for Yahoo! Inc. ("Yahoo!") regarding the Directives issued by the Director of National Intelligence and the Attorney General and served on Yahoo! on November 8, 2007 pursuant to Section 105B(e) of the Foreign Intelligence Surveillance Act of 1978 ("FISA") as modified by the Protect America Act of 2007 (the "PAA"). Although Yahoo! is committed to working with the government to comply with Yahoo!'s legal obligations, Yahoo! believes that the statute that authorizes the Directives has several legal infirmities.

First, by requiring the surveillance of communications directed at persons "reasonably believed to be located outside the United States," without an order from the Foreign Intelligence Surveillance Court ("FISC"), the PAA and the Directives may implicate the Fourth Amendment rights of United States citizens. This could happen in two ways: (a) where a United States citizen is living or traveling abroad, or (b) where a United States citizen is living in the United States but communicates with someone located outside of the United States (including, potentially even another United States citizen). To the extent the PAA authorizes the United States Department of Justice to command Yahoo! to engage in the warrantless surveillance of United States citizens it may violate the Fourth Amendment to the United States Constitution. *See Katz v. United States*, 389 U.S. 347, 357 (1967) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only a few specifically established and well delineated exceptions").

Second, the Directives are issued pursuant to a certification under Section 105B(a) of FISA, and although Section 105C of FISA does provide some level of judicial review for a portion of that certification, it appears to be a level of review that does not meet Fourth

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November 8, 2007

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Amendment standards. Specifically, there appear to be three ways in which the review mandated by the PAA is constitutionally insufficient: (a) only a portion of the Section 105B(a) certification is subject to review; (b) the review is only for "clear error," rather than for "reasonableness," which is the touchstone of Fourth Amendment analysis; and (c) the review has yet to be completed—and is not required to be completed until 180 days after August 5, 2007—even though the Directives require immediate compliance. *See* 50 U.S.C. § 1805C. Although the statute appears to contemplate that Directives may be issued prior to any judicial review of the procedures that must be filed with the Court, to the extent that the judicial review is required by the Constitution, it must take place before and not after any surveillance begins. Accordingly, because the PAA mandates a constitutionally insufficient level and scope of judicial review, it may violate the constitutionally mandated separation of powers. *See Doe v. Gonzales*, 500 F. Supp. 2d 379, 411 (S.D.N.Y. 2007) ("Congress cannot legislate a constitutional standard of review that contradicts or supersedes what the courts have determined to be the standard applicable . . .").

Third, the PAA allows Directives to be issued upon the government's certification that, among other things, "a significant purpose of the acquisition is to obtain foreign intelligence information." To the extent that the Directives have foreign intelligence information gathering as only a significant purpose — as opposed to their primary purpose — the Directives may violate the Fourth Amendment. *See Mayfield v. United States*, 504 F.Supp. 2d 1023 (D. Or. 2007).

Finally, although the PAA purports to provide Yahoo! with immunity for its compliance with Directives issued thereunder, *see* 50 U.S.C. 1805B(l), the PAA — including the immunity provision — sunsets in February 2008, *see* PAA § 6(c). The Directive, however, can require assistance from Yahoo! for up to year, raising the possibility that the immunity provisions of the PAA may not apply beyond the sunset of the statute. An order from the FISC would carry with it immunity from liability pursuant to 50 U.S.C. § 1805(i) as well as 18 U.S.C. § 2511. Therefore, complying with the Directives absent a FISC Order carries an unacceptable level of liability risk, especially given the lawsuits that have been filed against telecommunications carriers for their alleged participation in other forms of warrantless surveillance.

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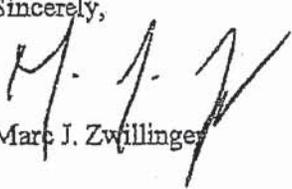
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November 8, 2007

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In light of all these issues, Yahoo! believes that there are significant questions as to the lawfulness of the PAA and/or the Directives issued pursuant to it. Consequently, Yahoo! does not believe it is appropriate for it to provide assistance pursuant to said Directives absent a Court Order compelling such assistance. If the government intends to pursue Yahoo!'s compliance with these Directives via a motion to compel pursuant to Section 105B(g) of FISA, Yahoo! requests that the government work with Yahoo! to agree upon a briefing schedule by which it will have the opportunity to present its arguments to the FISC in response to such a motion.

Sincerely,


Marc J. Zwillinger~~SECRET~~

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U.S. Department of Justice

National Security Division

Washington, D.C. 20530

May 5, 2008

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
1301 K Street, NW
Washington, D.C. 20005

Dear Mr. Zwillinger:

As you know, pursuant to the Protect America Act of 2007, the Attorney General and the Director of National Intelligence have authorized the acquisition of foreign intelligence information targeting persons reasonably believed to be outside the United States. (U)

Pursuant to [redacted] certifications authorizing such acquisition under the Protect America Act, on November 7, 2007, the Attorney General and the Director of National Intelligence executed directives to Yahoo!, Inc. ("Yahoo") requiring Yahoo "to immediately provide the Government with all information, facilities, and assistance necessary to accomplish this acquisition in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference with the services that Yahoo provides." These directives were served on Yahoo on November 8, 2007. (S)

By letter dated November 8, 2007, Yahoo informed the Government that it did not intend to comply with the directives. As a result, on November 21, 2007, the Government filed a motion with the Foreign Intelligence Surveillance Court seeking to compel Yahoo's compliance with the Government's lawful directives. (S)

Following extensive briefing by the parties, on April 25, 2008, the Court issued its Order requiring Yahoo to "forthwith comply with the directives" and to "continue to comply with each directive until the expiration date specified therein." Simultaneous with the issuance of its Order, the Court issued a Memorandum Opinion holding that "the directives issued by the government to Yahoo satisfy the requirements of the [Protect America Act], do not offend the Fourth Amendment, and are otherwise lawful." (S)

We understand that the Court's Order was served on you on April 28, 2008, and that you had an opportunity to review a redacted version of the Court's Memorandum Opinion on April 29, 2008. In addition, on May 2, 2008, we provided a Court-designated alternate Litigation

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Security Officer with a redacted version of the Court's Memorandum Opinion for delivery to you, and we are hand-delivering a copy of the redacted version to you the morning of May 5, 2008. Also on May 2, 2008, we provided specific selectors to Yahoo's technical personnel and requested that Yahoo provide assistance with respect to those selectors pursuant to the directives discussed above. (S)

You have informally advised us that Yahoo may attempt to appeal the Court's Order and seek a stay of the Order pending such appeal. Pursuant to the express language of the Court's Order, however, Yahoo's compliance with the Government's request for assistance must commence "forthwith." Thus, even if Yahoo seeks a stay pending appeal, Yahoo must provide the requested assistance unless and until such a stay is obtained. (S)

The Government stands ready to work with Yahoo to accomplish this acquisition in such a manner that protects the secrecy of the acquisition and produces a minimum of interference with the services that Yahoo provides. We hope that this matter can be resolved in a cooperative manner in the immediate future. (S)

To this end, please notify us in writing by no later than Monday, May 5, 2008, at 6:00 pm, whether Yahoo intends to comply with the Court's Order, including during any period pending an attempted appeal or the consideration of a stay motion. If we have not received a response by the above date and time, the Government will assume that Yahoo does not intend to comply with the Court's Order. In that case, the Government will have to consider taking all appropriate action, including seeking to hold Yahoo in contempt for violating the Court's Order. (S)

Sincerely,



J. Patrick Rowan
Acting Assistant Attorney General

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May 5, 2008

VIA HAND DELIVERY BY CSO

J. Patrick Rowan
Acting Assistant Attorney General
National Security Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Rowan:

Thank you for your letter of today, May 5, 2008. It was provided to me at approximately 11:15 am this morning, the same time the service copy of the Court's Memorandum Opinion was delivered. Thereafter, I immediately provided a copy of your letter, and the court's 98-page Memorandum Opinion ("Opinion") to my client's appropriately cleared representative for review. As you know, this is the first opportunity my client has had to review the Opinion since it was issued.

As you also know, the contents of the Opinion, specifically page 70, bear directly on the types of assistance that Yahoo! is expected to provide. Although I did have the opportunity to review the Opinion on April 29, 2008, I was specifically instructed that I could not take notes on page 70 of the Opinion. Immediately, after reviewing the Opinion, I traveled to Florida due to my father's illness and returned to the office today for the first time since April 29, 2008. Thus, today was my first opportunity to have a detailed discussion of the Opinion with my client.

In your letter, you have demanded a formal response in writing today as to whether Yahoo! intends to comply with the Order. The same-day pressure of this demand seems odd, given that this litigation has been pending since November 21, 2007. It also seems misplaced to the extent that the Order Compelling Compliance with Directives, issued on April 25, 2008, indicates that the determination of lawfulness is based on certain assumptions that the court made about the process used by the government. The government was provided until May 9, 2008 to advise the Court if the assumptions were correct. If the assumptions are not correct, the

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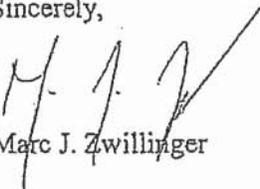
May 5, 2008
Page 2

lawfulness determination might not hold. To this day, it has not been represented to Yahoo!, or to the Court, whether these assumptions are correct.

Assuming that the Court's assumptions are correct, and that Yahoo!'s compliance obligations with your demand are in force, we are working to get a final answer regarding whether Yahoo! intends to begin compliance while a Notice of Appeal and Motion for Stay are pending. We expect to have that answer for you by close of business tomorrow, May 6, 2008. Any assumption made today regarding Yahoo's compliance would be premature.

I look forward to speaking with you tomorrow.

Sincerely,



Marc J. Zwillinger

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U.S. Department of Justice

National Security Division

Washington, D.C. 20530

May 5, 2008

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
1301 K Street, NW
Washington, D.C. 20005

Dear Mr. Zwillinger:

We are in receipt of your letter earlier today, requesting an extra day in which to respond to the Government's request that Yahoo begin complying with the Court's Order of April 25, 2008.

The Court's Order directs Yahoo to comply with the directives that have been issued "forthwith," an obligation that is not contingent on any additional filings by the Government. You were informed of the fact and basic nature of Order by the Government on the day it was issued, received a copy of the Order on April 28, 2008, and reviewed a copy of the Court's Memorandum Opinion on April 29, 2008. Moreover, the Government delivered a redacted copy of the Order to a Court-appointed Alternate Litigation Security Officer for delivery to you at your convenience on May 2, 2008.

Yahoo's obligation to comply with the Order began on the day of its issuance, April 25, 2008, and Yahoo has had ample time to decide whether it would comply with its legal obligations under the Order.

The Government nonetheless accepts Yahoo's request for additional time in which to respond to the Government's request that it comply with its obligations under the Order and the Protect America Act. This is without prejudice to any rights the Government possesses and without consenting in any way to Yahoo's failure to comply with the Order thus far. We trust Yahoo will not take advantage of this additional time by filing additional papers with the Court in this matter prior to responding to the Government letters regarding Yahoo's compliance with the Court's Order.

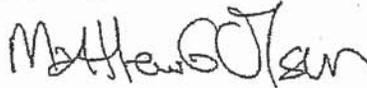
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If the Government has not received a response from Yahoo by 5:00 p.m. tomorrow, it will assume that Yahoo does not intend to comply with the Order and will consider all available options at its disposal, including filing a motion for contempt, to obtain Yahoo's assistance.

Sincerely,

Handwritten signature of Matthew G. Olsen in black ink.

Matthew G. Olsen
Deputy Assistant Attorney General

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May 6, 2008

VIA HAND DELIVERY BY CSO

Matthew G. Olsen
National Security Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Olsen:

On May 6, 2008, I received your letter dated May 5, 2008, purporting to respond to my May 5, 2008 letter to J. Patrick Rowan.

As we discussed by telephone today, I believe your letter somewhat mischaracterizes my prior letter. Your letter suggests that Yahoo! "requested an extra day in which to respond to the Government's request that Yahoo! begin complying with the Court's Order of April 25, 2008." My letter made no such request of the government. My letter informed the government that, notwithstanding its demand for a same-day response, such a response would not be forthcoming from Yahoo! until today. It did not ask the government to delay taking any action.

Further, you indicated in your letter that you "trust Yahoo will not take advantage of this additional time by filing additional papers with the Court in this matter prior to responding to the Government letters regarding Yahoo's compliance with the Court's Order." This sentence contradicts the information in the May 5, 2008 letter of J. Patrick Rowan and my response thereto.

In Mr. Rowan's letter, he acknowledged that "you have informally advised us that Yahoo may attempt to appeal the Court's Order and seek a stay of the Order pending such appeal." The purpose of his letter, as we understood it, was to demand that, notwithstanding such expected filings, Yahoo! begin compliance with the Court's Order. ("Thus even if Yahoo seeks a stay pending appeal, Yahoo must provide the requested assistance unless and until such a stay is obtained.") In my response to him, I reaffirmed that such filings were imminent, indicating "we

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May 6, 2008

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are working to get a final answer regarding whether Yahoo! intends to begin compliance while a Notice of Appeal and Motion for Stay are pending.”

Thus, any expectation that Yahoo! would not file any “additional papers” yesterday or today contradicts our prior conversations and letters. As you know, yesterday Yahoo! filed a Petition for Review with the FISCR. Today, Yahoo! filed a Motion for Stay Pending Appeal with the FISC, and provided a copy of such filing to the FISCR.

Turning to the request in Mr. Rowan’s letter that Yahoo! “please notify us in writing . . . whether Yahoo! intends to comply with the Court’s Order, including during any period pending an attempted appeal or the consideration of stay motion,” Yahoo! has begun making all necessary preparations, including having conversations with the relevant FBI liaisons and its own internal engineers to be in a position to comply with the Order. However, it will not begin producing information or activating surveillance pursuant to the Directives until its Motion to Stay Pending Appeal has been resolved, unless otherwise directed by the Court.

Federal case law makes clear that it is not contemptuous for a party not to comply with a court order after timely filing a motion to stay pending appeal. In *Clemente v. United States*, 766 F.2d 1358, 1367 (9th Cir. 1985), the court held that “to find a defendant guilty of ‘willful and deliberate defiance of the court’s order,’ when a stay has been immediately sought would render meaningless the whole process by which parties invoke the power of the courts to defer the effect of their judgments. The Supreme Court has recognized that ‘willfulness’ may be qualified ‘by a concurrent attempt on defendants’ part to challenge the order by motion to vacate or other appropriate procedures.’ Appellant’s motion to stay was an ‘appropriate procedure.’ Accordingly, we vacate the judgment of contempt.” *Id.*, citing *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947).

This is consistent with Federal Rule of Civil Procedure 62(c), which, while not directly applicable here, expressly provides a mechanism for obtaining a stay pending appeal. This procedure would be meaningless if parties could be held in contempt before such motions were decided. See *General Teamsters Union Local No. 439 v Sunrise Sanitation Services, Inc*, 2006 WL 2091947 (E.D. Cal. 2006) (“Federal Rule of Civil Procedure 62(c) explicitly affords the losing party an opportunity to seek a stay pending appeal. This rule would be meaningless if, as here, parties could be held in contempt before the trial court was given an opportunity to consider such motions.”)

Here, Yahoo!’s Motion for a Stay Pending Appeal was filed within 24 hours after the filing of its Petition for Review, and one day after the service of the Court’s Memorandum Opinion. This is not a case of either willful or deliberate defiance of the Court’s Order. In fact,

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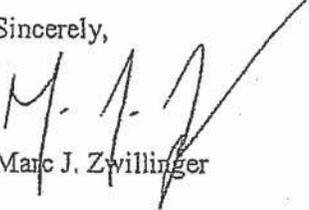
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May 6, 2008
Page 3

Yahoo! has taken, and continues to take appropriate steps to be prepared to comply with the Order should the stay be denied.

While Yahoo! cannot prevent the government from moving ahead with contempt proceedings, we do not believe that the case law supports such a motion at this time. If you are aware of precedent to the contrary, we would appreciate being made aware of it. It is not Yahoo!'s intention to flout the Court's order in any way, only to be sure that its rights, and the rights of its users are preserved while it lawfully and diligently pursues appellate review of a decision that the Court itself recognized to be a "complicated matter of first impression" with "weighty concerns on both sides of the equation."

Sincerely,



Marc J. Zwillinger

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