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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL RETAIL FEDERATION, TECHNET, and INTRAX, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES DEPARTMENT OF STATE; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security; and, MICHAEL R. POMPEO, in his official capacity as Secretary of State,

Defendants.

Case No. 4:20-cv-4887-JSW

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO CLARIFY PRELIMINARY INJUNCTION AND FOR DISCOVERY REGARDING COMPLIANCE

Date: TBD
Judge: Hon. Jeffrey S. White
Ctrm.: 5

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INTRODUCTION

The evidence makes it crystal clear that the Department of State has failed to comply with this Court's injunction. We provided extensive evidence in the opening motion, including an email from the Milan consulate that, in late October, it was told not to process visas for those within the scope of the injunction because the State Department had failed to provide necessary guidance. *See* Mot., Dkt. 99, at 4-5.

Over the last two weeks, Plaintiffs have received overwhelming confirmation that the Department is in blatant violation of the Court's order. On November 12, 2020, a consulate expressly told an Intrax plan participant that she was still subject to Presidential Proclamation 10052. Also on November 12, 2020, the Vancouver consulate told multiple individuals that it still lacked guidance needed to process visas in accordance with the Court's injunction. That is, 42 days after the Court's order—and notwithstanding our pending motion and voluminous communication between counsel for the parties to try to come to an agreement without this Court's intervention—the Department is overtly refusing to adhere to this Court's preliminary-injunction order.

Perhaps most concerning, consulates are explicitly telling Intrax program participants that they are *worse off* than those who are outside the Court's injunction. As we describe below, consulates have informed Intrax program participants that they will *not* be processed, so long as the individual is affiliated with Intrax. *But*, the consulates have instructed, the very same individual *would* be eligible for visa processing if they work with a program sponsor that is *not* covered by the Court's injunction. This position is offensive and absurd. The Department cannot represent that it is acting in good faith when it explicitly takes the position that Intrax is to be treated *worse* than similarly situated J-program sponsors that are outside the injunction's scope. This is a transparent violation of the Court's injunction, and it indicates bad-faith conduct.

Plaintiffs respectfully submit that immediate relief is imperative. The Court should clarify the meaning of its Order, so as to preclude the government's stonewalling tactics. In view of clear evidence that the State Department is simply refusing to comply, the Court should also order prompt discovery into the State Department's implementation of the order. As for sanctions, at-

torney's fees for these enforcement proceedings are warranted. And the Court may wish to consider further sanctions given the conduct that we document.[1]

ARGUMENT

I. THE GOVERNMENT IS NOT COMPLYING WITH THE INJUNCTION.

The government is simply not complying with the Court's injunction. We focus for now on three issues.

1. The State Department has adopted an absurd position: It contends that Plaintiff Intrax and others covered by the injunction are now in a materially *worse* position than parties who are outside the scope of the injunction. This is direct evidence of bad faith.

On October 22, 2020, the consulate at Porto Allegro, Brazil, informed an Intrax program participant that they could receive an appointment *if* the individual "contract[s] with a different au pair agency that is not a party to the NAM v. DHS lawsuit."

> *In addition to the information already provided, you applicant may also apply for your visa from a country that is not subject to P.P. 10041. Another option is contracting with a different au pair agency that is not a party to the NAM v. DHS lawsuit, obtaining a new DS-2019, and making a new appointment request.*

4th Schneider Decl. ¶ 5 & Ex. 2 (emphasis omitted). The program participant followed up, asking: "If I switch to an agency that is not part of this lawsuit can I try again at the Porto Alegre Consulate?" *Id*. ¶ 6. The consulate replied: "Yes, exactly." *Id*.

This is direct, facial evidence of non-compliance: The State Department is telling individuals affiliated with Intrax—a named plaintiff in this lawsuit—that they can receive visa appointments if they contract with a different program sponsor, outside the lawsuit.

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[1] The Court's order of November 5, 2020, urged the parties to attempt further efforts at non-judicial resolution. *See* Dkt. 106. Immediately following that Order, on November 5, 2020, undersigned counsel called defense counsel to discuss the points of difference that remain. Undersigned counsel explained the conditions necessary for resolution, all of which is consistent with the clarifications requested here. Undersigned counsel further stated that we continued to agree with the draft stipulation that Plaintiffs had signed, with the understanding that a deal was complete. Counsel agreed that it was the Department's obligation to provide a revised position. As of this filing, the Department has not responded with any effort to achieve a stipulated resolution of these issues. The assertion now (*see* Dkt. 107-1, Craig. Decl. ¶ 45) that *Plaintiffs* have failed to respond is deeply mistaken. *See* 2d Hughes Decl. ¶¶ 3-4.

We provided this evidence to defense counsel, and the explanation we received is most extraordinary. The government takes the position that, because Presidential Proclamation 10052 has been set aside as to Intrax (and all those within the scope of the injunction), Intrax's participants cannot access the national interest exception (NIE) created by that Proclamation. *But*, the State Department maintains, *only* those who qualify for a NIE can receive visa appointments in Brazil. Thus, Intrax participants, the State Department has informed us, *cannot* obtain visa appointments, while those outside the scope of the injunction can. That is obvious, continued enforcement of the Proclamation, notwithstanding the Injunction.[2] And it is blatant bad faith behavior. The State Department cannot seriously maintain that it is in good faith compliance when it has implemented the Court's injunction to leave named plaintiffs far *worse* than before. *Cf. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 949 (9th Cir. 2014) ("In deciding whether an injunction has been violated it is proper to observe the objects for which the relief was granted and to find a breach of the decree in a violation of the spirit of the injunction, even though its strict letter may not have been disregarded.").

2. The State Department also continues—as recently as November 12, 2020—to baldly apply Presidential Proclamation 10052 to those within the scope of the Injunction. On Tuesday, November 10, 2020, the prospective host of an Intrax-sponsored au pair candidate wrote to a consular official, explaining that the candidate was sponsored by Intrax, and thus not subject to Presidential Proclamation 10052. 4th Schneider Decl. ¶ 7 & Ex. 3. The consulate received a letter dated October 20, 2020, identifying that the particular individual was sponsored by Intrax, and thus within the protection of the Court's injunction. *Id.* Notwithstanding clear evidence that this individual is not subject to Presidential Proclamation 10052, on November 12, 2020, the consulate responded: "We regret to inform you that [the au pair's] application does not meet the standards for a mission critical appointment or an exception under Presidential Proclamation 10052. As a

[2] The government is flatly wrong to assert, accordingly, that we "do not argue that Defendants have directly used or relied on the Proclamation 10052 since the Court's Order." Opp., Dkt. 107, at 2. That is *exactly* what we argue. What is more, it appears that this sentence is artfully written to suggest that the Department may *in*directly use Proclamation 10052 to injure the Plaintiffs. That is plainly incorrect, as it would negate the injunction's very purpose.

result, a National Interest Exception (NIE) and mission critical visa appointment cannot be approved at this time." *Id*. Proclamation 10052, and its exceptions, are still being applied.

3. Defendants have no satisfactory answer to our demonstration that the Milan consulate stated, on October 30, 2020, that it lacked guidance necessary to implement the Court's order. *See* Mot. 4-5. The government merely asserts that there was still ongoing negotiation as to what that guidance would say. But our fundamental point is that it was the *government's* obligation to implement this order in good faith. The Department simply failed to do so.

This is far from an isolated incident. Yesterday, November 12, 2020, the Vancouver consulate informed an Amazon employee that "[y]our case is still under administrative processing review. We are awaiting further guidance from the Department regarding NAM. We cannot predict when a decision will be made, we appreciate your ongoing patience." 2d Hughes Decl. Ex. 1. This employee had requested processing in accordance with the injunction at least as early as October 16, and nearly a month later, the consulate reports that it still lacks guidance necessary to implement this Order. Amazon, moreover, is obviously covered by the Court's injunction. Amazon submitted a declaration in support of our preliminary injunction motion, in which Zane Brown attested that Amazon is a member of the U.S. Chamber. Brown Decl. ¶ 1, Dkt. 31-38. Additionally, Amazon is a member of TechNet, whose membership is public. *See* 2d Hughes Decl. ¶ 1. In sum, as of November 12, 2020, consulates are telling those obviously within the scope of the injunction that they *still* lack guidance necessary to process. This all postdates the actions of the Department discussed in the Sara Craig declaration.

Something is seriously wrong here. The consulates—as of *yesterday*—say that they cannot operationalize the Court's injunction because of a lack of guidance. Instead, the Department has adopted a policy of indefinite delay. This is not good-faith behavior.

II. THE GOVERNMENT'S EFFORT TO BLAME PLAINTIFFS IS MERITLESS.

The government's opposition adopts a most astonishing tactic: It seeks to blame *us* for its delay. Opp. 12-13. This argument is offensively wrong.

First, it is simply not Plaintiffs' obligation to force the State Department to comply with the Court's injunction. It is the *government's* obligation to do so. *See, e.g.*, *Inst. of Cetacean Re-*

search, 774 F.3d at 955 ("The law is clear that those who control an organization may be held liable if they fail to take appropriate action to ensure compliance with an injunction."); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d 1041, 1049 (9th Cir. 2019) ("[I]t is incontrovertible that a person subject to an injunction must ordinarily obey it.") (quotation marks omitted). The Department never informed us that there was any shortcoming in the verification mechanism we established, nor did the State Department approach the Court for clarification of the Injunction's requirements, until we forced the issue.

Second, the government's assertion that we provided verification contact information on October 29, 2020, "for the first time," is false and highly misleading. Opp. 13. As the government elsewhere recognizes (Opp. 7), Plaintiffs early on proposed providing members who wish to obtain the benefit of the injunction letters attesting to membership. *See* Mot. 4. These letters provided contact information for verification at each association. For example, Exhibit 1 of the Cooney declaration is a letter that Plaintiff National Retail Federation (NRF) issued on October 8. *See* Dkt. 99-9. The letter plainly identifies the email address and phone number of Stephanie Martz, NRF's General Counsel, who was identified as available to confirm the letter's contents or provide a corresponding copy from NRF's file. Liane Cooney supplied that letter to the Milan consulate on October 13. *See* Dkt. 99-10. This is just exemplary: The Plaintiff associations have issued dozens, if not hundreds, of such letters—all of which provide names and contact information at the associations for the verification process. This information was all provided to the State Department long before October 29, 2020, and the assertion that contact information was only provided on October 29, 2020, is blatantly false.[3]

III. THE COURT SHOULD ADOPT PLAINTIFFS' CLARIFICATIONS.

At minimum, four clarifications are necessary.

[3] The government's misrepresentation here cannot be accidental. In the email that the government references, undersigned counsel introduced the contact information with the following sentence: "I have confirmed with my clients that these are the relevant contact individuals listed on their letters (which have been provided to State over the past several weeks, and thus State is currently aware of this information)." 2d Hughes Decl. ¶ 2. The government's characterization of this as *new* information on October 29, 2020, is patently erroneous.

A. If consulates are open for non-immigrant visas, those protected by the injunction should stand in the same line; the government baldly misrepresents our position regarding COVID-19 closures.

The government's conduct demonstrates that it is playing games with respect to when consulates are open for processing visas for individuals protected by the Court's injunction.

To start with, Plaintiffs do not—as the government says—assert that those protected by the injunction "must be scheduled ahead of anyone else without regard for each consulate's limited operational capacities." Opp. 2. *See also* Opp. 7. Plaintiffs have never said that. We said exactly the opposite in the motion: "Plaintiffs acknowledge that they and the members of the Plaintiff associations are subject to capacity reductions and restrictions unrelated to Presidential Proclamation 10052." Mot. 9. That is why the relief we seek is "treatment from each consulate at least as favorable as any other category of nonimmigrant visa applicant." *Id*. We further explained our request: "[I]f consulates are open to processing nonimmigrant visas in any capacity, those covered by the injunction must stand in the same line and be treated on terms no less favorable than others." *Id*. Plaintiffs are not saying that they and their members should be treated better than anyone else; but they certainly should not be treated *worse*.[4]

The problem is that—as the Intrax experience in Brazil vividly shows—the government is using COVID-19 closures as pretext to continue applying Proclamation 10052 to plaintiffs. In Brazil, because of COVID-19 related closures, the government takes the position that only those who qualify for the NIE may obtain a visa interview. Those protected by the injunction, because they are exempt from the NIE, *cannot* get an interview, the government asserts. This position is silly. The Department says that the very same individual *can* get a visa interview if she applies

[4] Counsel has repeatedly told the government that we do not take the position that those covered by the injunction must be treated the same as true diplomatic emergencies. For example, if diplomats or military officers require prompt processing, Plaintiffs do not maintain that those within the scope of the injunction must take precedence. But it is absolutely not right for the government to say—the position it has maintained with us—that those affiliated with plaintiffs should be shut out of consulates that are currently engaged in only "emergency" or "mission critical" appointments. Consulates are treating emergency or mission critical appointments as coextensive with the NIE in Proclamation 10052. In fact, the declaration of Sara Craig confirms this: She explains that "an applicant who satisfies the criteria for an exception to relevant Presidential Proclamations may, in some cases, also render a visa application mission critical." Dkt. 107-1, ¶ 3. This conduct continues to apply Proclamation 10052—because those who fit within an NIE are processed, but *not* those affiliated with Plaintiffs.

with a program sponsor *not* within the injunction, but not if she applies through Intrax. This is pure gamesmanship aimed at stonewalling. If the consulate is processing non-immigrant visas, those protected by the Injunction must be able to stand in the relevant line, subject to whatever COVID-19 related reductions in processing or independent Proclamations may be in effect.

The government's position here is especially surprising insofar as we had reached *agreement* with counsel for the government on a stipulation implementing the injunction as we have laid it out. Plaintiffs had signed the stipulation, with the understanding that the deal was done. It was only at the eleventh hour—literally 11 p.m. on Friday, October 30—that the Department rescinded the authority to execute that agreement, arriving at its current position. 2d Hughes Decl. ¶ 3. For all the reasons we have explained, this is a transparent attempt to continue to apply Proclamation 10052. It is what necessitates this motions practice.

B. Verification must occur promptly.

The government cannot deny that, in its conversations with Plaintiffs, it had agreed to stipulated language that verification procedures, absent exceptional circumstances and not counting the time it takes a Plaintiff association to respond, should not take more than approximately 48 hours. That too was included in the stipulation that Plaintiffs had signed. Given the government's conduct to date—and its earlier apparent agreement with this requirement—it is difficult to see the basis of the government's current objection. The government's effort to blame plaintiffs for their delays is, for reasons we explained above, meritless.

Ultimately, placing a time limit on the State Department is essential for relief to be effective. As the Vancouver consulate shows, the State Department is taking a month or longer to putatively "verify" that entities—including entities that are *obviously* members of the Plaintiff associations—are within the scope of the Court's injunction. Indeed, even today, the consulate in Costa Rica placed program participants (that it had agreed to interview) sponsored by Alliance Abroad into administrative holding, explaining that the delay "may take several months." 2d Hughes Decl. Ex. 2. As we previously documented, Alliance Abroad has long proven that it is within the scope of the Court's injunction. *See* Mot. 7. This policy of interminable delay is not good faith compliance, and a time limitation is now necessary.

C. The Court's order did not contain a temporal limitation on membership.

The government asks the Court to rewrite its injunction by imposing a temporal limitation on membership in a Plaintiff association, but no such limitation appears in the injunction the Court issued. The Court should decline the government's attempts to impose such a limitation now. Rather, the Court should confirm that the relevant inquiry is just what appears on the face of the Order: The issue is whether an entity is a "member[] of the Plaintiff associations" at the time that Proclamation 10052 would otherwise be applied to it. The government's argument otherwise lacks all merit.

First, another court recently rejected the same argument that the government makes here. In *Casa de Maryland v. Wolf*, No. 20-cv-2118 (D. Md.), the court issued a preliminary injunction regarding a regulation ending employment authorization for asylum seekers; it provided relief to "all members of the Plaintiff organizations." Dkt. 70, at 2. The parties disputed whether it covered members who joined after the preliminary injunction issued. As the government indicated in a letter following a court conference, "the parties understand that the Court clarified during the October 19, 2020 conference, that to obtain the benefit of the preliminary injunction, a CASA or ASAP member must be a member at the time the relevant application is filed." Dkt. 83, at 2. That is just the position we urge here.

Second, the government's contention is irrational because there is no doubt that, if the Court were to issue a final injunction, that relief *would* apply to members that joined the Plaintiff associations after October 1, 2020. Assume for a moment that litigation were to continue, and the Court were to issue a *permanent* injunction at some time in the future. That permanent injunction would, at bare minimum, provide relief to all members of the Plaintiff associations at that time. Because the purpose of the *preliminary* injunction is to provide "complete relief to the plaintiffs" pending litigation (*Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), that relief is only "complete" if it extends to the scope of relief that would be achieved upon a permanent injunction. The government's contrary understanding would render the preliminary injunction insufficient to achieve the necessary scope of relief. That is, if the government continues to apply the unlawful

Proclamation 10052 against a subset of the Plaintiff associations' members, the relief awarded is far from "complete."

Third, the government's proposed relief runs contrary to the very purpose of associational standing—"to permit the association or corporation in a single case to vindicate the interests of *all*" of the members. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 290 (1986) (emphasis added). In the normal course of business, entities become members of—or withdraw from—the Plaintiff associations for a host of complex reasons, many of which have nothing to do with this case.[5] There is no basis to freeze membership in time at October 1, 2020, as that would fail to fully preserve the status quo ante for the Plaintiffs and the members of the Plaintiff associations. If it were otherwise, the Plaintiffs would have to continuously amend the lawsuit or seek new judgments simply to ensure that their membership is sufficiently protected. Associational standing obviates placing such a burden on the Court and the parties.

Fourth, the government's proposal would lead to a most bizarre rule, where an entity could *cease* being a member of the Plaintiff association, but still maintain protection under the injunction. That makes no sense. While it is true that, as the government points out, Article III standing must be established at the outset of a lawsuit, the jurisdictional inquiry does not somehow stop at that moment. *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) ("Th[e] case-or-controversy requirement subsists through all stages of federal judicial proceedings," and "[t]he parties must continue to have a personal stake in the outcome of the lawsuit."). The result is that the injunction applies to those entities that are currently members of a Plaintiff association. The Court did not impose a temporal limitation when it issued the order, and it should decline the government's request to graft one on now.

D. Plaintiff Intrax must be treated fairly.

Intrax appears to be the subject of remarkable retaliatory behavior by the Department. The overt government communication to Intrax plan participants, asserting that they may be processed

[5] Notably, Defendants do not—and certainly cannot—suggest that any entities are not bona fide members of the Plaintiff associations.

if they change to a plan sponsor who did not sue, is conduct that immediately damages Intrax's business. Indeed, it is now being reported on social media that Intrax is being treated materially worse than other au pair sponsors by the Department, which is enormously injurious to Intrax's market standing. This egregious conduct must cease.

IV. DISCOVERY REGARDING COMPLIANCE IS WARRANTED.

Contrary to the government's assertion, this is not merely a "good-faith disagreement over the Court's order." Opp. 15. For reasons described, Plaintiffs are deeply concerned that the Department is acting in bad faith, with the purpose of erecting barriers to the implementation of this Court's injunction. Indeed, the Department's express direction to Intrax program participants that they can be processed now, but only if they switch to program sponsors not within the lawsuit, is shocking behavior. There is no way to understand this conduct as anything other than naked disobedience of the Court's order.

If the Department needed further guidance to implement the Court's order, it should have approached Plaintiffs or the Court. The Department did neither. It did nothing until Plaintiffs threatened action in this Court, and even now, Defendants refuse to meaningfully comply with the Court's order. For this reason, the discovery that we request is warranted.

Notably, Defendants do not contest the Court's authority to grant such discovery. For good reason, as it is obvious that the Court may order this material produced in service of its broader contempt powers. *See* Mot. 11-12. Defendants instead urge against discovery by noting "separation of powers concerns." The true separation-of-powers issue here, however, is the Department's contumacy with respect to this Court's Article III powers. Discovery is necessary to determine whether the Department has engaged in willful violations of the injunction.

V. THE COURT SHOULD AWARD REASONABLE ATTORNEY'S FEES.

This motion would have been unnecessary if State Department had undertaken good faith efforts to comply with the terms of the injunction. In the face of doubt, the Department could have approached us or the Court for resolution. It did neither, forcing us to litigate for compliance instead. Even now, notwithstanding clear evidence of non-compliance, the Department refuses to negotiate meaningful terms for the operationalization of the injunction. At minimum, a sanction

of Plaintiffs' reasonable attorney's fees associated with enforcement activities is warranted. The Court may wish to consider additional sanctions, especially once discovery provides a complete picture of Defendants' conduct.

CONCLUSION

The Court should clarify the preliminary injunction, order specified discovery, award reasonable attorney's fees, and enter any additional relief it deems just and proper.

Respectfully submitted,

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DATED: November 13, 2020

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