**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,<br><br>Plaintiff,<br><br>v.<br><br>EXECUTIVE OFFICE OF THE PRESIDENT, et al.,<br><br>Defendants. | ) | Civil Action No: 1:07-cv-01707 (HHK/JMF) |
| NATIONAL SECURITY ARCHIVE,<br><br>Plaintiff,<br><br>v.<br><br>EXECUTIVE OFFICE OF THE PRESIDENT, et al.,<br><br>Defendants. | ) | Civil Action No: 1:07-cv-01577 (HHK/JMF) |

**DEFENDANTS' OPPOSITION TO PLAINTIFF CREW'S**
**EMERGENCY MOTION FOR AN IMMEDIATE STATUS CONFERENCE**

## INTRODUCTION

It is without question that defendants have been complying—and will continue to comply—with the injunctive orders of this Court. See Order [18] of November 12, 2007; Order [68] of April 24, 2008. Nor can there be any doubt that presidential records transferred pursuant to the Presidential Records Act ("PRA") into the legal custody of the Archivist will be preserved and made accessible by the Archivist, if necessary, beyond January 20, 2009. 44 U.S.C. §§

2203, 2205. Nonetheless, based on unsupported challenges to these truths, plaintiff CREW unnecessarily seeks judicial intervention to confirm what is already known and established. Because defendants will comply with Court orders beyond January 20, 2009 and any presidential records relevant to the dispute will be accessible after the transition, CREW's emergency motion for an immediate status conference should be denied.

CREW identifies concerns about three categories of records or media in its motion: (1) media subject to the injunctive orders; (2) media that are the subject of a pending motion for an expanded injunctive order; and (3) records potentially relevant to possible discovery sought in CREW's pending motion for leave to conduct expedited discovery. None poses any preservation or accessibility concern that supports CREW's request.

First, a transfer of media subject to the Court's November 12, 2007 and April 24, 2008 orders to the Archivist pursuant to the Presidential Records Act will not "raise[] questions about the future accessibility of these materials" as CREW contends. CREW's Emerg. Mot. for an Immed. Status Conf. [98] at 3 ("CREW's Mot. [98]"). Putting aside the PRA's command that the Archivist "shall assume responsibility for the custody, control and ***preservation of***" presidential materials, 44 U.S.C. § 2203(f)(1) (emphasis added), the Archivist and the National Archives and Records Administration ("NARA") are defendants in this action bound by the Court's orders to "preserve media, no matter how described, presently in their posses[ion] or under their custody or control, that were created with the intention of preserving data in the event of its inadvertent destruction" and to "preserve the media under conditions that will permit their eventual use, if necessary[.]" Order [18] at 2. Accordingly, the measures implemented in Alexander v. FBI to bind a non-party in that suit (NARA and the Archivist) to preservation

commitments are entirely unnecessary and superfluous here. The Archivist and NARA are parties and will faithfully fulfill their obligations to follow the Court orders, and CREW presents no evidence that either will change course after January 20, 2009 when records transfer into their legal custody under the PRA. The disaster recovery back-up tapes will continue to be preserved, and made accessible if necessary at the conclusion of the case.

Second, CREW inaccurately presumes that the media at issue in the pending motion for an expanded injunctive order will be transferred to NARA pursuant to the Presidential Records Act. Because the request for expanded injunctive relief is cabined by the ***Federal Records Act*** allegations in plaintiffs' complaints, any requirement that defendants collect .pst files of emails sent or received between March 2003 and October 2005 from workstations or other media would be limited to the EOP FRA components, which are not obligated to transfer all their records to the Archivist on January 20, 2009. Thus CREW's concern about NARA's ability to "receiv[e], catalog[] and retriev[e] the presidential records of the Bush administration" is wholly immaterial to the request for expanded injunctive relief from the EOP FRA components. But even if the request for .pst files encompassed the Office of Administration's own media possibly containing PRA emails, all media transferred to the Archivist will be preserved by the Archivist and made accessible for any further action that might be initiated by the Attorney General, if plaintiffs prevail on their first four claims. And of course, as defendants explained in their Renewed Local Civil Rule 72.3(b) Objections to the Magistrate Judge's First Report and Recommendation [89], to which plaintiffs did not respond, the recommendations are unwarranted, rendering CREW's concerns here moot.

Similarly, CREW's discovery demands should not be granted. See Defs.' Opp'n to Pl. CREW's Renewed Mot. to Conduct Expedited Discovery [94]. But even if discovery were permitted after January 20, 2009, records potentially relevant to this litigation will be preserved and made accessible through the Archivist. See id. at 12-15. Moreover, CREW has been provided additional, extensive assurances that all of the Office of Administration's hard-copy records (except for a small subset of travel records that will be stored at NARA's Texas facility) will be segregated and maintained by NARA in Washington, D.C. during the pendency of this case. If this Court orders discovery in connection with plaintiffs' claims, the labelled boxes transferred from the Office of Administration to the Archivist will be readily accessible for use in this litigation.

At bottom, the orderly transfer of OA's records to the Archivist does not pose a "risk that documents at the heart of this litigation will not be accessible" as CREW contends. CREW's latest "emergency" motion should be denied. CREW's Mot. [98] at 2.

## ARGUMENT

### I. THE ARCHIVIST AND NARA WILL FAITHFULLY COMPLY WITH THE COURT'S INJUNCTIVE ORDERS

No basis exists for CREW's asserted concern about the "future accessibility of" the materials subject to the Court's injunctive orders. CREW's Mot. [98] at 3. As defendants have repeatedly confirmed, defendants have been complying with the Court's order to "preserve media, no matter how described, presently in their possess[ion] or under their custody or control, that were created with the intention of preserving data in the event of its inadvertent destruction" and to "preserve the media under such conditions that will permit their eventual use, if

necessary, and . . . not transfer said media out of their custody or control without leave of this court." Order [18] of November 12, 2007; Order [68] of April 24, 2008. The Archivist and NARA, both defendants, are not excluded from the commitment: each has complied with and will continue to abide by the Court's orders, even after the Archivist assumes custody of disaster recovery back-up tapes from the Office of Administration pursuant to the PRA on January 20, 2009.[1] See also 44 U.S.C. § 2203(f)(1) ("[T]he Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President."); CREW's Mot. [98] at 3 ("CREW recognizes that because both NARA and the archivist are parties to this litigation a transfer of this media to NARA would not result in technically removing the media from defendants' custody or control.").

Defendants subject to court order are not required to "provide through sworn declarations, appropriate assurances" about their commitment to follow that court's order. CREW's Mot. [98] at 4. CREW's request for "adequate assurances from the defendants about the continued maintenance of these materials, including where they will be kept, the conditions under which the media will be preserved, and measures the defendants will take to ensure their continued accessibility," id. at 3, is therefore entirely superfluous to the terms of the Court's orders themselves, which require all defendants to preserve the media, and "under such conditions that will permit their eventual use, if necessary." Order [18] of November 12, 2007. Putting aside the ordinary "presum[ption] that executive officials will act in good faith," Armstrong v. EOP, 1 F.3d 1274, 1293 (D.C. Cir. 1993), CREW cannot provide evidence that the

[1] In fact, the disaster recovery back-up tapes will be preserved by NARA in the same secure facility that they currently in.

Archivist or NARA will violate the Court's orders or that any preservation or accessibility concern about the media justifies an "emergency" and "immediate" status conference.

The measures adopted in Alexander v. FBI are therefore distinguishable and unnecessary here. See CREW's Mot. [98] at 3-4. First, neither NARA nor the Archivist were parties to the litigation in Alexander v. FBI, nor were they subject to the court's preservation orders when the back-up tapes transferred from the Office of Administration to the Archivist under the PRA there. Moreover, the terms of the Memorandum of Understanding articulating "NARA's newly assumed responsibilities for the transferred records" were not drafted pursuant to court order, but were drafted for independent purposes and then provided to the court simply to assure it that the tapes would not be destroyed when transferred out of the custody of defendants under the court's jurisdiction to a third party. Id. at 3. Here, of course, NARA and the Archivist are defendants, not third parties, and bound by the Court's injunctive orders.

Moreover, the back-up tapes in Alexander v. FBI were under continuing use to restore emails for production in ongoing, and then-pending discovery. Thus, the parties were obligated to restore emails from the back-up tapes before, during and after the transition to produce the restored emails in then-pending discovery. The Office of Administration therefore required ***continued*** access to presidential records that transferred into the Archivist's custody, and the court sought to assure itself that a third party, NARA, could not hinder access after the transition. See CREW Mot. [98] at 3 (explaining that memorandum of understanding in Alexander "spell[ed] out OA's continuing responsibilities"). In contrast, the disaster recovery back-up tapes here are not under use for any court-ordered processes now. Rather, the media has been ordered preserved to "permit their ***eventual*** use, if necessary," in the event the Court rules in

plaintiffs' favor on the first four claims. Order [18] at 2; see also, CREW's Mot. for Temporary Restraining Order [4-2] at 20 ("CREW seeks preservation to ensure this Court's ability to award full and effective relief should CREW prevail."). And even then, a judgment here could obligate defendants to initiate action through the Attorney General, who in turn would determine how any further restoration would occur. The concerns animating the court in Alexander v. FBI—to ensure continued restoration of emails during and after the transition when the tapes were transferred to a third-party, and to facilitate immediate production of documents in discovery—are entirely absent here, and the court's orders in Alexander v. FBI do not support CREW's request for an immediate status hearing.

## II. CREW'S STATED CONCERN ABOUT THE MEDIA AT ISSUE IN THE PENDING MOTION TO EXPAND THE SCOPE OF THE INJUNCTIVE ORDER DOES NOT SUPPORT CREW'S REQUEST

In defendants' renewed objections to the report and recommendation on NSA's motion for expanded injunctive relief, defendants explained that, because "EOP defendants have been preserving under court order—and will continue to preserve—an ever-growing cache of disaster recovery back-up tapes that should contain substantially all emails for the period of time alleged to be deficient, any request for expanded injunctive relief must be denied." EOP Defs.' Renewed Local Civil Rule 72.3 Objections [89] at 2. In addition, defendants explained the flaws in the Magistrate Judge's recommendation that EOP defendants "(1) search the workstations, and any .pst files located therein, of any individuals who were employed between March 2003 and October 2005, and to collect and preserve all e-mails sent or received between March 2003 and October 2005; and (2) issue a preservation notice to its employees directing them to surrender any media in their possession—irrespective of the intent with which it was created—

that may contain any emails sent or received between March 2003 and October 2005, and for EOP to collect and preserve all such media." Id. Namely, defendants established that the Magistrate Judge's reliance on a purported absence of disaster recovery back-up tapes with email information from March 1, 2003 to May 22, 2003 could not justify expanded injunctive relief because NSA's representation about the .pst files did not allege a single email to be missing on any day in March, April or May 2003. Id. at 3-5. Plaintiffs did not respond to defendants renewed objection, and expanded injunctive relief is not warranted.

This is particularly true given the conclusions that have been reached by the EOP defendants in analyses on the .pst file stores conducted through 2008. As defendants have explained to plaintiffs in recent correspondence, defendants have evidence that the first four causes of action are now moot and that the Court lacks subject matter jurisdiction to entertain them.[2] As the D.C. Circuit has made clear "[e]ven where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990) (quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990)). "Where intervening events preclude the Court from granting plaintiffs any effective relief, even if they were to prevail on their underlying claim, the Court must dismiss a suit as moot for want of subject matter jurisdiction." Citizens Alert Regarding the Environ. v. Leavitt,

[2] It is therefore perplexing that CREW would claim that "to date the White House has made no recovery efforts," when defendants have put CREW on notice that defendants have initiated

355 F. Supp. 2d 366, 369 (D.D.C. 2005) (citing Church of Scientology v. United States, 506 U.S. 9, 11 (1992)). Such intervening events preclude relief on the first four claims here.

In the first four causes of action, plaintiffs allege failure to initiate action to recover allegedly missing emails, and claim a right to declaratory or mandamus relief that the defendants "request that the Attorney General initiate action, or seek other legal redress, to recover the deleted e-mails." NSA Compl. ¶¶ 49, 54, 61, 68. Since plaintiffs filed their complaints, significant intervening events have transpired that clearly establish that plaintiffs' claims are moot: defendants have initiated action within the meaning of the FRA. Specifically, defendants will provide documentation in their forthcoming motion to dismiss based on analyses conducted through 2008 establishing that the 2005 analysis referenced in plaintiffs' complaints was flawed, and will provide information on the actions defendants have taken through their e-mail inventory rebaseline efforts that moot plaintiffs' claims. Accordingly, defendants will establish that further injunctive relief is unnecessary and that the first four claims should be dismissed as moot.

But even if the Court were to expand the preservation order as the Magistrate Judge had recommended, the media at issue in his recommendations is not affected by the transition and provides no basis for CREW's requested emergency status hearing. Because the lawsuits are about allegedly missing FRA emails, any repository to restore those emails must be directed at repositories of FRA emails. Workstations and "media that may contain" FRA emails "sent or received between March 2003 and October 2005" and allegedly missing from the .pst file stores are not, however, subject to transfer to the Archivist under the PRA. EOP FRA components are

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action and conducted analyses through 2008. CREW's Mot. [98] at 4.

not transferring workstations or media to the Archivist on January 20, 2009, obviating CREW's claim that "NARA will face a Herculean task in locating, segregating, and preserving these additional sources for the missing emails, a task that may prove impossible to accomplish and will certainly not be completed for a considerable length of time given the total volume of materials NARA will be receiving." CREW's Mot. [98] at 4-5. If the Court were to expand the preservation order, relief would thus still be available.

Even if the Magistrate Judge's recommendation were read more broadly to encompass the Office of Administration's media possibly containing its own PRA emails, transfer of such media to the National Archives will not threaten access to it, if plaintiffs prevail on their claims and the media is required by the Attorney General for any restore process.[3] The media will remain preserved by NARA and remain available if ultimately necessary. As defendants explained in their opposition to CREW's Renewed Motion for Expedited Discovery, CREW's allegations about NARA's ability to handle the transition are overblown. NARA itself has expressed confidence about ingesting electronic records transferred pursuant to the transition into NARA systems. Indeed, past practice reveals that through many presidential transitions and after, litigation against government officials, components and entities has proceeded, with records made available to litigants by NARA after records have been transferred pursuant to the

[3] CREW suggests that it is "CREW's timely access" to the media that is critical. See CREW's Mot. at 6. That is not so. Any expanded injunctive order, like the injunctions in place, is meant to preserve the disaster recovery back-up tapes and other media in the event plaintiffs prevail and defendants are ordered to initiate action through the Attorney General to recover any missing emails. Thus, it is the Attorney General's access to the tapes and media that is contemplated, not CREW's. See, e.g., Armstrong v. Bush, 924 F.2d 282, 294 (D.C. Cir. 1991) (explaining limited relief available under the FRA). Any concern about ***plaintiffs'*** immediate access to such media, rather than the Attorney General's eventual access at the conclusion of litigation if plaintiffs prevail, does not justify any immediate or emergency need for a status conference.

Presidential Records Act. See, e.g., 44 U.S.C. § 2205 (contemplating discovery of materials transferred to NARA at the conclusion of an administration through "special access" provisions of the PRA); United States v. Philip Morris, Inc., et al., Civ. No. 99-2496 (D.D.C.) (GKK) (discovery continuing after presidential transition and transfer of presidential records to NARA). And as explained in further detail below, significant, additional assurances have been provided that hard-copy records transferred from OA will be preserved and maintained in Washington, D.C. during the pendency of this litigation, permitting ready access to OA's records if necessary.

## III. CREW's RENEWED MOTION FOR EXPEDITED DISCOVERY DOES NOT SUPPORT CREW'S REQUEST

Finally, CREW claims a need for an immediate, emergency status hearing for "assurances that all records potentially relevant to this litigation will be appropriately preserved and readily accessible to the plaintiffs for use in this litigation." CREW's Mot. [98] at 6. As defendants explained in their opposition to the motion to conduct expedited discovery [94], discovery is wholly unwarranted in this litigation, particularly in light of defendants' forthcoming motion to dismiss establishing that the first four claims are moot.

But even if plaintiffs were entitled to discovery, the transition poses no concerns about preservation and access to records after January 20, 2009. See Defs.' Opp'n to Pl. CREW's Renewed Mot. to Conduct Expedited Discovery [94] at 12-16. As an initial matter, the Archivist is tasked under the PRA to "assume responsibility for the custody, control and ***preservation of***" presidential materials. 44 U.S.C. § 2203(f)(1) (emphasis added); § 2109 ("The Archivist ***shall provide for the preservation***, arrangement, repair and rehabilitation, duplication and reproduction . . . of records or other documentary material transferred to him as needful or

appropriate[.]") (emphasis added). That obligation alone ensures that all records transferred from OA to the Archivist will be preserved.

Moreover, plaintiffs here have been provided with significant, additional assurances that the Archivist, through NARA, will maintain all but a small subset of hard-copy records from the Office of Administration in Washington, D.C., until the case is finally resolved, under appropriate security and in a manner that will enable ready access to them, if necessary.[4] Similarly, defendants explained that the Archivist, through NARA, will maintain all electronic records and emails transferred from the Office of Administration, subject to all necessary processes for transferring electronic records into the National Archives.[5] See Ex. 1 (proposed stipulation and order proposed by defendants). Accordingly, plaintiffs have been provided with "adequate assurances that that all records potentially relevant to this litigation will be appropriately preserved and readily accessible to plaintiffs for use in this litigation."[6] CREW's Mot. at 6.

These assurances are buttressed by the commitments OA and NARA have made to CREW in connection with CREW v. Office of Administration, Civ. No. 07-964 (D.D.C.) (CKK).

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[4] Defendants explained to plaintiffs that a small subset of travel service records from OA will be preserved in a NARA facility in Texas. No OA boxes identified as likely to have discoverable information relating to plaintiffs' claims will be preserved outside of Washington, D.C.

[5] The process for transferring electronic records into the National Archives refers to the process required to ingest records into NARA's Electronic Records Archive system.

[6] In the unlikely event that defendants' motion to dismiss is denied; that the administrative record is held to be deficient; and that discovery is found to be appropriate through searches of electronic holdings at NARA to supplement the record, defendant NARA will make best efforts to perform such searches, provided that a reasonable period of time is allowed to conduct them. Given the speculative nature of the need to perform such searches, however, it remains true that the transition will not impede plaintiffs' ready access to material evidence for purposes of their

There, the universe of records that OA believes is potentially responsive to FOIA requests at issue in that litigation has already been segregated by OA and will remain to be segregated by NARA once transferred. Those records would constitute the significant majority of records demanded by CREW in its motion for expedited discovery:

- Any and all copies of the analyses prepared between the fall of October 2005 and the fall of October 2006, that include, among other things, estimates as to how many emails were missing from the Executive Office of the President's ("EOP") system for preserving email;
- Any and all copies of any and all spreadsheets or similar documents and any accompanying documents prepared between September 2005 and September 2006, outlining the dates of all missing email from the EOP email records system;
- Any and all copies of any documents prepared in 2002 or 2003 discussing the risks associated with the EOP's email records management system, including an assessment of the risk to public perception from disclosure of problems with the email system;
- Any and all requests for proposals prepared by the Office of Administration between 2002 and 2004, to address any aspect of the EOP's email records management;
- Copies of all analyses prepared by the OA and its offices, directorates, branches between January 21, 2001 and April 13, 2007, that identify potential technical, procedural and process problems related to the potential loss of email records of the Executive Office of the President ("EOP") associated with any and all EOP-managed email systems and environments;
- Copies of all documents, databases, spreadsheets and inventories prepared between January 21, 2001 and April 13, 2007, that provide a detailed accounting (daily, weekly and/or monthly) of actual email messages retained or that identify potential missing email messages within the scope of all EOP-managed email records management environments;
- Copies of all system requirements specifications, risk assessments, project implementation documents, project concepts and other documents related to all planned, incomplete or completed implementation of any EOP email records management systems since January 21, 2001; and
- Copies of all statements of work ("SOW"), requests for proposal ("RFP") and requests for quote ("RFQ") issued by the OA or other government offices or agencies on behalf of the OA related to the analysis, design, implementation, and support of EOP email systems implementation and migration and email records management system analysis, implementation, support and services.

See Ex. 2 (April 17, 2007 and April 18, 2007 FOIA requests at issue in litigation). Among the approximately 39 boxes of documents that OA believes is the universe of potentially responsive

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proceeding with the present suit.

documents in that suit, are the documents that OA provided to a December 20, 2007 request for documents by the House Committee on Oversight and Government Reform. See NSA Mot. to Compel Production of the Administrative Record [97] at 3 ("The Archive's letter included examples of documents and emails that Defendants had already produced to Congress in early 2008 ***regarding the same agency actions and decisions at issue here***."). That document request sought, among other things:

- Any documents relating to potential failures to archive or maintain Executive Office of President e-mails during the Bush Administration, including documents discussing options for restoring or recovering lost e-mails;
- Information about e-mail back-up tapes maintained by the White House, including the number of back-up tapes holding White House data, the contents of those tapes, and a description of how these tapes are labeled, organized, and stored; and
- Any documents relating to the maintenance or development of existing or proposed electronic records management, e-mail archiving, or e-mail retrieval systems for the Executive Office of the President during the Bush Administration, including internal White House communications, requests for proposals, statements of work, task orders, and other contract documents.

As indicated in correspondence between OA's then acting General Counsel and the General Counsel of NARA, OA has properly labeled and segregated those 39 boxes for transfer to NARA, and NARA has agreed to keep those boxes segregated once they are transferred to NARA. NARA has further committed to store the OA boxes in the Washington, D.C. area under appropriate security, in a manner that will enable NARA and OA to readily retrieve them if necessary. See Ex. 3 (letters between NARA and OA regarding documents responsive to FOIA request).

CREW suggests these assurances are inadequate because "the governing principle should be Fed. R. Civ. P. 26(b) (defining relevance for discovery purposes)." CREW's Mot. at 6; see id. at 6 (suggesting also that White House Counsel "had a critical role in the missing email

discovery" and that its records should be preserved for discovery). But even if (1) defendants had not mooted plaintiffs' claims by initiating action on the first four claims; (2) an administrative record on the first four claims was required; and (3) some discovery were permitted, not all "relevant" records are at issue here. As this Court has made clear, deliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the administrative record to justify APA claims. See, e.g., Blue Ocean Institute v. Gutierrez, 503 F. Supp. 2d 366, 371-72 (D.D.C. 2007) (declining to compel production of "notes of telephone conversations, informal notes of meetings and discussions and emails" for APA record review). Many "relevant" records within the meaning of Rule 26 would not therefore be available to CREW in any discovery in connection with its APA and mandamus claims. CREW's asserted basis for a hearing is built on layer upon layer of contingencies, none of which is likely.

Regardless, the assurances that have been provided to plaintiffs, as well as the Archivist's duty to preserve all records that are transferred to her, undercut CREW's assertion of harm. No status hearing is required to confirm that defendants will comply with Court orders beyond January 20, 2009 and that any presidential records relevant to the dispute will be accessible after the transition. CREW's motion should be denied.

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Although CREW does not make it express, CREW's "emergency motion" amounts to a request for injunctive relief. "The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985). "'[T]he key word in this consideration is ***irreparable***." Id. To

meet the "high standard for irreparable injury," the D.C. Circuit has required a movant to show that the injury is "both certain and great; it must be actual and not theoretical," and that "[t]he injury complained of is of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006) (emphasis in original) (quoting Wisc. Gas Co., 758 F.2d at 674).

Importantly, the movant must "substantiate the claim that irreparable injury is 'likely' to occur." Id. "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will ***in fact*** occur." Id. Rather, "[t]he movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." Id. Thus, where the movant has premised its motion "upon unsubstantiated and speculative allegations of [redressable] injury," the court must deny the motion. Id.

CREW has utterly failed to meet the "high standard for irreparable injury" set by the D.C. Circuit. Chaplaincy of Full Gospel Churches, 454 F.3d at 297. Its alleged irreparable harm is based on no more than the unsubstantiated allegations and cannot support its request for emergency relief at an immediate status hearing.

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## CONCLUSION

For the foregoing reasons, plaintiff's emergency motion for an immediate status conference should be denied.

Respectfully submitted this 12th day of January, 2009.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2009, a true and correct copy of the foregoing Defendants' Opposition to Plaintiff CREW's Emergency Motion for an Immediate Status Conference was served electronically by the U.S. District Court for the District of Columbia Electronic Document Filing System (ECF) and that the document is available on the ECF system.

/s/ Helen H. Hong
HELEN H. HONG