Private Sector Subpoenas

Backpage.com Case
Key Excerpts from 2016 District Court Opinions on Backpage Requests to Delay Document Production

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On Aug. 12, Sept. 16, and Sept. 30, 2016, the D.C. District Court issued three rulings denying requests by Backpage CEO Carl Ferrer to delay production of documents covered by a subpoena issued by the Senate Permanent Subcommittee on Investigations. Here are key excerpts from those three district court rulings, each excerpt of which consists of a direct quotation taken from the text of the court orders, with no changes in punctuation but with footnotes omitted.

August 12 District Court Order Denying Stay

Granting stay is extraordinary remedy
"[G]ranting a stay pending appeal is 'always an *extraordinary remedy*,' and . . . the moving party carries a *heavy burden* to demonstrate that the stay is warranted." *United States v. Phillip Morris USA, Inc.,* 449 F. Supp. 2d 988, 990 (D.D.C. 2006) (internal citations omitted) (emphasis added).

No First Amendment right to refuse to search for documents
The Court readily recognizes that First Amendment rights might be strongly implicated in a congressional investigation and the use of documentary subpoenas. The Court is not insensitive to Mr. Ferrer's First Amendment rights. However, the Court cannot accept Mr. Ferrer's position that he has a First Amendment right to withhold — much less to refuse to search for — documents that are relevant to the Subcommittee's investigation on Backpage's practices to prevent advertisements for illegal sex trafficking.

No assumption that subpoena violates First Amendment
In the absence of specific evidence or a privilege log, Mr. Ferrer cannot expect the Court to simply assume that the subpoena violates the First Amendment.

Failure to balance First Amendment interests is fatal to motion to stay
Mr. Ferrer's First Amendment objection requires a balancing of "the nature of the intrusion against the asserted governmental interest — an exercise that Mr. Ferrer simply does not acknowledge, let alone discuss, in his briefs or letters." *Id*. at *10 (citing *Konigsberg v. State Bar of California*, 366 U.S. 36, 51 (1961). Mr. Ferrer's failure to recognize and undertake the First Amendment's balancing of competing interests is fatal to his claim and to his motion to stay.

Intransigence and blanket objections do not support motion to stay
Mr. Ferrer is long on First Amendment law and short on dealing with the only facts in the record, that is, his refusals to negotiate more favorable terms, to search for and produce responsive documents, or to provide a privilege log asserting applicable objections. To be frank, in the face of such intransigence and the blanket nature of his objections, the Court cannot find that Mr. Ferrer has made a strong showing on likelihood of success.

Failure to search for documents does not help establish required harm for stay
[S]ince Mr. Ferrer has not conducted a full search for responsive documents, any showing of harm would be "theoretical" and comprised of "unsubstantiated and speculative allegations." *Id*. In the absence of a privilege log or concrete evidence of prejudice by Mr. Ferrer, the Court cannot find that actual harm would flow from a search for responsive materials and production of non-privileged documents once identified.

Subpoena noncompliance undermines Senate inquiry and public interest
Mr. Ferrer's refusal to comply with the subpoena has stymied the Subcommittee's investigation. To grant a stay would further delay the Subcommittee's efforts, interfere with the investigation, and reward Mr. Ferrer's dilatory conduct. See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 511 & n.17 (1975) (recognizing that "protracted delay has frustrated a valid congressional inquiry"); see also *Judicial Watch, Inc*., 241 F. Supp. 2d at 18. In addition, given the seriousness of the inquiry's subject (illegal sex trafficking), a stay would undermine the public interest in ensuring that the Subcommittee is able to complete its investigation promptly and make informed recommendations to the Senate on potential legislation addressing the use of the Internet for illegal sex trafficking.

September 16 District Court Order on Request for Extension of Time

Failure to file privilege log can be fatal to privilege claims
The October 1, 2015 subpoena required Mr. Ferrer to file a privilege log. … This was not a suggestion or a recommendation. The filing of a privilege log in response to a documentary subpoena is required by courts and the Federal Rules of Civil Procedure. Failure to do so constituted a waiver of the claimed privileges. *See In re Grand Jury Subpoena*, 274 F.3d 563, 575-76 (1st Cir. 2001) ("The operative language [of Federal

Rule of Civil Procedure 45] is mandatory . . . . A party that fails to submit a privilege log is deemed to waive the underlying privilege claim."). … A privilege log "is a necessary condition to preservation of any privilege" and the failure to comply with this requirement "could be fatal to any assertion of a privilege."

Failure to file privilege log waived privileges
Aside from the unsupported argument that he had a First Amendment right not to search for responsive documents, there is no good reason for the Court to find that Mr. Ferrer was justified in waiting over a year to identify and log privileged documents. … Mr. Ferrer "had numerous opportunities to assert [his] claims of privileges and produce an adequate privilege log before the Court entered its order compelling production, and [he] failed to do so. Thus, [he has] waived [his] claims to privilege."

September 30 District Court Order Denying Second Stay

Motion to stay is not platform to relitigate issues
A motion to stay a court order pending appeal is not a platform to relitigate an issue or to preserve arguments that were not properly raised.

Allowing new privilege claims raises separation of powers concerns
Mr. Ferrer (or his attorneys) failed to invoke the underlying attorney-client and work product privileges properly prior to the subpoena's production deadline (i.e., October 23, 2015), the filing of this enforcement action, or the Court's enforcement ruling. Mr. Ferrer cannot now ask the Court to excuse his non-compliance and permit him to assert new privileges or objections that the Subcommittee was unable to consider and rule upon. To hold otherwise would raise serious separation of powers concerns and potentially undermine Congress's constitutional power of inquiry.

Unlike normal civil discovery, the Court's jurisdiction in this context is narrowly circumscribed. In the context of congressional subpoenas, Congress "strip[ped] this Court of its customary authority to modify or quash a subpoena" and limited the "court's jurisdiction . . . to the matter Congress brings before it" for enforcement. The "matter Congress brings before" the Court in this case includes the Subcommittee's October 1, 2015 subpoena, as well as the legal objections Mr. Ferrer raised to justify his noncompliance. … Congress contemplated that the Senate would have before it all asserted privileges and objections to the subpoena before the Senate applied to a court for its enforcement. 2 U.S.C. § 288d. To go beyond those objections raised by Mr. Ferrer before the Subcommittee would undermine the very purpose of the statute conferring limited jurisdiction on this Court, namely "to avoid judicial interference with Congress's exercise of its constitutional powers."

Subpoena noncompliance can trigger criminal contempt of Congress
[F]ailure to comply with the subpoena by the return date, even without judicial intervention, may have triggered criminal contempt proceedings against Mr. Ferrer. *See* 2 U.S.C. §§ 192, 194; *see also Shelton*, 404 F.2d 1292. In *McPhaul v. United States*, the Supreme Court stated:

> [I]f petitioner had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that he state his reasons for noncompliance upon the return of the writ . . . . *To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes. His failure to make any such statement was a patent evasion of the duty of one summoned to produce papers before a congressional committee, and cannot be condoned.*

McPhaul v. United States, 364 U.S. 372, 379 (1960) (internal quotation marks, citations, and alterations omitted) (emphasis added).

Untimely privilege claims precluded Senate rulings and undermined its constitutional authority

Mr. Ferrer's actions precluded the Subcommittee from considering the applicability of his common law privileges to the congressional subpoena. Because Mr. Ferrer willfully chose this path, it is highly questionable whether the Court has jurisdiction under the statute to acknowledge Mr. Ferrer's untimely assertion of privilege.

The "response to this subpoena" was due on October 23, 2015. The Subpoena "directed Mr. Ferrer to 'assert any claim of privilege or other right to withhold documents from the Subcommittee by October 23, 2015, the return date of the subpoena, along with a complete explanation of the basis of the privilege or other right to withhold documents' in a privilege log." *Ferrer*, 2016 WL 4179289, at *3 (quoting Oct. 1, 2015 Subpoena at 3). Compliance with the deadline was not a formality; rather, the purpose was to allow the Subcommittee to consider Mr. Ferrer's timely objections and rule on them, as it did. By failing to do so, Mr. Ferrer "den[ied] the [Subc]ommittee the opportunity to consider the objection" and undermined its constitutional authority. *McPhaul*, 364 U.S. at 379.

No delay of subpoena response until First Amendment claim resolved

To hold that Mr. Ferrer did not have to respond to a congressional subpoena until the Court ruled on his First Amendment objection would not only undermine Congress's constitutional power of inquiry, but also, would incentivize subpoena recipients to refuse to search for documents and raise objections in staggered batches, thereby treating a congressional subpoena "as an invitation to a game of hare and hounds" — a game that could delay congressional proceedings indefinitely. *United States v. Bryan*, 339 U.S. 323, 331 (1950); *see also In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998) (addressing the obligations of subpoena recipients under Federal Rule of Civil Procedure 45).

Self-inflicted harms do not satisfy irreparable harm criterion required for stay

It is well-settled that a party requesting the extraordinary equitable relief of a stay pending appeal "does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." … Mr. Ferrer's failure to assert any non-First Amendment privilege or produce a privilege log prior to this enforcement action is the real source of the alleged irreparable harm. Precisely because Mr. Ferrer could have avoided any harm that could

result from the disclosure of responsive documents, the Court finds that Mr. Ferrer's own litigation choices do not warrant a stay of this Court's Order.

Waiver of privilege particularly compelling when congressional subpoena
[T]he Court's holding stands for the unremarkable proposition that failure to assert a common privilege in a timely and detailed manner results in waiver of the underlying privilege. This result is particularly forceful and compelling in the context of congressional subpoenas, where the Court's authority and jurisdiction is limited by statute and by due respect for separation of powers.