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11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA

13 AMERICAN FEDERATION OF LABOR AND )  
 14 CONGRESS OF INDUSTRIAL )  
 15 ORGANIZATIONS, et al., )

16 Plaintiffs, )

17 SAN FRANCISCO CHAMBER )  
 18 OF COMMERCE, et al., )

19 Plaintiffs-Intervenors, )

20 and )

21 UNITED FOOD AND COMMERCIAL )  
 22 WORKERS INTERNATIONAL UNION, et al., )

23 Plaintiffs-Intervenors, )

24 v. )

25 MICHAEL CHERTOFF, Secretary of Homeland )  
 26 Security, et al., )

27 Defendants. )  
 28 )

Case No. 07-4472 CRB

**MOTION TO STAY  
 PROCEEDINGS PENDING  
 NEW RULEMAKING**

Date: December 28, 2007

Time: 10:00 a.m.

Place: Courtroom 8, 19<sup>th</sup> Floor  
 Hon. Charles Breyer

1                                   **MOTION TO STAY PROCEEDINGS PENDING NEW RULEMAKING**

2                   Defendants respectfully move the Court to stay proceedings in this action while the  
3 Department of Homeland Security (DHS) conducts additional rulemaking proceedings on the Safe  
4 Harbor rule, 72 Fed. Reg. 45611 (August 15, 2007). Counsel for Plaintiffs have been contacted and  
5 state that Plaintiffs do not consent to this motion, however the parties continue to discuss this matter.  
6  
7 A proposed order has also been filed.

8                   1. On October 10, 2007, this Court entered a preliminary injunction barring Defendants from  
9 implementing or enforcing the Safe Harbor rule. The Court found that Plaintiffs had raised “serious  
10 questions on the merits” as to several aspects of the rule.  
11

12                   2. DHS intends to conduct additional rulemaking proceedings to address the issues raised by  
13 the Court. This will include preparing a Regulatory Flexibility Act analysis. Defendants hope and  
14 anticipate that the amended rule will fully address the Court’s concerns. When an amended final rule  
15 is issued, Defendants intend to move this Court to vacate the preliminary injunction.  
16

17                   3. DHS expects it will be able to complete the contemplated rulemaking proceedings by  
18 March of 2008. Accordingly, Defendants request that this Court stay proceedings until March 24,  
19 2008 or until an amended final rule is issued, whichever occurs first. Defendants will provide  
20 Plaintiffs and the Court with monthly status reports.

21                   4. A stay will prevent the waste of judicial resources in litigating over a rule that is in the  
22 process of being revised. “The District Court has broad discretion to stay proceedings as an incident  
23 to its power to control its own docket.” Clinton v. Jones, 520 U.S. 680, 706 (1997). In particular,  
24 district courts have authority under Federal Rule of Civil Procedure 16(a)(3) to schedule proceedings  
25 in a case to “discourag[e] wasteful pretrial activities.” As the Ninth Circuit has noted, “[a] trial court  
26 may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter  
27  
28

1 a stay of an action before it, pending resolution of independent proceedings which bear upon the  
2 case,” including proceedings in an administrative forum. Lockyer v. Mirant Corp., 398 F.3d 1098,  
3 1111 (9<sup>th</sup> Cir. 2005), quoting Leyva v. Certified Grocers of Calif., 593 F.2d 857, 863-64 (9<sup>th</sup> Cir.  
4 1997). See also Ethicon, Inc. v. Quigg, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988) (reasonable to stay  
5 proceedings pending a Patent and Trademark Office reexamination of a patent).  
6

7 5. Plaintiffs will not be harmed by a stay, as the preliminary injunction barring implementation  
8 or enforcement of the Safe Harbor rule will remain in effect.  
9

10  
11  
12 DATED: November 23, 2007

Respectfully submitted,

13  
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Certificate of Service

I hereby certify that on November 23, 2007, I electronically filed the forgoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted below:

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