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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
2004 NOV -5 P 3:33

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IN RE: Request from Requesting State §
Pursuant to the Treaty §
Between the United States of §
America and the Requesting § No. SA-04CA0676-OG
State on Mutual Assistance §
in Criminal Matters §

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GOVERNMENT'S RESPONSE TO MOTION TO UNSEAL

Movants Electronic Frontier Foundation ("BFF"), Urbana-Champaign Independent Media Center Foundation ("UCIMC"), and Jeffery Moe ("Moe") have petitioned this Court to unseal the documents previously filed in the above entitled and numbered cause. The United States responds herein and ask that said request be denied and for grounds would show as follows:

1. None of the Movants have standing to file the Motion to Unseal. As acknowledged by the Movants, the subpoena at issue was served on Rackspace in San Antonio, Texas. The parties to the instant action are the requesting foreign country, hereinafter "requesting state", the United States government and the party on whom the subpoena was served, Rackspace. The entities and one individual requesting the illegal unsealing are not parties and lack standing to complain of the alleged seizure. BFF and UCIMC contend they have standing as a consequence of the ruling in *U.S. v. Chagra, 701 F.2d 354 (5th Cir. 1983)*. *Chagra*, as the Court is aware, was unique situation and the Fifth

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Circuit has limited its' applicability. *Walker v. City of Mesquite*, 858 F.2d 1071, (5th Cir.(Tex.) Oct 31, 1988), holding *Chagra* was a "unique situation" and thus not precedent for expanding standing to unnamed party members in a class action suit. at 1075, footnote 1. Similarly, Movant Moe is not a party to the MLAT request. Movants state Moe received no justification nor any avenue for redress. Neither are true. Moe was told by Rackspace they received an order and were bound to comply with it. Movant Moe was offered his servers back but refused. Subsequently he demanded and was given new servers by Rackspace. As Movants have no standing their request to unseal should be denied.

2. As further grounds for denial of the Motion to Unseal, without waiving the forgoing, the United States would show that pursuant to Article 8 of the treaty between the United States and the requesting country, entitled "Protecting Confidentiality and Restricting Use of Evidence and Information" states in part;

"2. If deemed necessary, the Requesting State may request that the application for assistance, the contents of the request and its supporting documents, and the granting of such assistance be kept confidential".

Such a request has been made to the United States by the Requesting State. The unsealing and release of the documents therein would violate the treaty between the United States and the Requesting State. Article VI of the United States Constitution states in part:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the

judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

As such, this honorable Court is required to uphold the confidentiality of the Requesting state and the documents must remain sealed.

3. As further grounds for denial of the Motion to Unseal, without waiving the forgoing, the United States would show that the sealed documents pertain to an ongoing criminal terrorism investigation. The unsealing of the documents on file in this matter would seriously jeopardize the investigation. The non-disclosure is necessitated by a compelling government interest.

Wherefor, premises considered the United States respectfully requests that this honorable Court deny the Motion to Unseal.

Respectfully submitted,
JOHNNY SUTTON
UNITED STATES ATTORNEY

By: _____
Don J. Calvert
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was sent by certified mail, return receipt requested*, to

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*neither listed fax or phone numbers on this pleading and as such the Governments response was sent via certified mail.