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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, *et al.*,

Plaintiffs,

v.

GEORGE W. BUSH, *et al.*,

Defendants.

CV. 06-274- KI

DEFENDANTS' REPLY IN SUPPORT OF STAY PENDING INTERLOCUTORY APPEAL

INTRODUCTION

Plaintiffs' Response to Defendants' Motion for a Stay Pending Appeal Under 28 U.S.C. § 1292(b) (hereafter "Pls. Resp." and "Defs. Mem." respectively) presents no persuasive reason why this case should proceed in district court pending an appeal of the Court's Opinion and Order of September 7, 2006 (hereafter "Op."). Indeed, if the Court of Appeals grants

Defendants' 1292(b) petition, this Court would be divested of jurisdiction to proceed further on the subject of its September 7 Order—whether the state secrets privilege requires dismissal of this case—and that alone would halt further proceedings.

Plaintiffs rely on the wrong standards governing a stay under the circumstances present here, and then misapply those standards. Plaintiffs wrongly contend that Defendants must demonstrate likely success on an appeal and irreparable harm in order to obtain a stay—standards that apply to injunctive relief (or a stay of such relief), which is not at issue here. But even if those standards were applicable here, Defendants would satisfy them, since serious issues are presented on appeal and further disclosures of the very privileged information at issue on appeal would plainly constitute irreparable harm. Plaintiffs offer no meaningful alternative to a stay; indeed, their contention that the burden has somehow shifted to Defendants to disclose information that would be privileged is specious. In addition, Plaintiffs fail to address the futility of proceeding, since no viable claims remain to be adjudicated in this case.

Since Defendants' motion for a stay was filed, the Court of Appeals, by Order dated November 8, 2006, has granted the Government's 1292(b) petition in *Hepting v. AT&T*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), and thus has already decided to consider similar state secrets privilege issues that will have an impact on this case. If this case is not transferred to the multi-district litigation proceedings in the Northern District of California, the Court should await a determination by the Court of Appeals on whether to grant the Government's 1292(b) petition in this case and, if that petition is granted, stay further proceedings.

ARGUMENT

I. DEFENDANTS NEED NOT SATISFY THE STANDARDS FOR OBTAINING INJUNCTIVE RELIEF IN ORDER TO OBTAIN A STAY UNDER THE PRESENT CIRCUMSTANCES, BUT NONETHELESS SATISFY THOSE STANDARDS.

A. Plaintiffs Rely on the Wrong Standards for a Stay Pending Appeal Under the Present Circumstances.

Plaintiffs spend much of their response brief addressing the wrong question. They contend incorrectly that Defendants must satisfy the standards for obtaining a stay of injunctive relief pending appeal by showing a likelihood of success on the merits and irreparable harm. *See* Pls. Resp. at 3-4. The traditional standards for staying injunctive relief pending appeal apply because such a stay would in essence constitute the entry of an injunction (by halting the operation of injunctive relief obtained by the prevailing party pending appeal). These circumstances are not present here. Defendants' motion obviously does not seek to stay any injunctive relief, since none was entered by the Court. The Court simply denied Defendants' motion to dismiss and ordered that the case proceed.

Defendants' motion seeks to stay further *proceedings* pending appellate review of the Court's decision, because such proceedings would make little sense where a controlling question of law—whether the state secrets privilege requires dismissal—is pending on appeal, and where further district court proceedings would pose serious harm to Defendants' interests in protecting privileged information. *See* Defs. Mem. at 6-11. Defendants' motion is based on the existence of an independent proceeding that will bear directly on this case. *See id*. at 6 (citing *Levya v. Certified Growers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir.), *cert. denied*, 444 U.S. 827 (1979)). This request does not implicate the standards for injunctive relief.

Indeed, if the Court of Appeals grants the Government's 1292(b) petition, this Court

would be divested of jurisdiction as to the subject of the Order on appeal. *See City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001) (holding that the "issuance of an order by a court of appeals permitting an appellant to bring an interlocutory appeal" "divests the district court of jurisdiction over the particular issues involved in that appeal"); *accord Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) ("[A]n appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal."). Since the Court's September 7 Order concerns whether the state secrets privilege precludes further proceedings, the Court would be without jurisdiction to proceed if the pending 1292(b) petition is granted. This only makes sense since the Court's ruling on the state secrets privilege assertion would form the basis of further proceedings in district court while that ruling would be on appeal.

B. Defendants Need Not Show that the Court Ruled in Error to Obtain a Stay Pending Appeal.

Even if the standards for staying an injunction pending appeal were applicable, Defendants satisfy them as well.[1/]

The appropriate standard is whether serious issues are presented on the merits, and whether the balance of hardships tips sharply in favor of the moving party. *See* Defs. Mem. at 5, n.5; *Artukovic v. Rison*, 784 F.2d 1354, 1355 (9th Cir. 1986); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds*, 463 U.S. 1328 (1983); *see also Population Institute v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) ("'[I]t will ordinarily be enough that the plaintiff has raised serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation and thus for more deliberative

[1] By addressing these standards in response to Plaintiffs' arguments, Defendants do not concede they apply to the pending motion.

investigation.’”) (quoting *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Defendants need not demonstrate that this Court ruled in error in order to obtain a stay since the Court "has already made a judgment on the merits and is unlikely to reverse itself." *Evans v. Buchanan*, 455 F. Supp. 715, 721 (D. Del. 1978). "To give substance to the standard . . . the relevant inquiry on the merits is whether 'the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear.'" *Id.* (quoting *Evans v. Buchanan*, 435 F. Supp. 832, 844 (D. Del. 1977) (district court need not “confess error in original ruling before issuing stay")); *see also Washington Metro*, 559 F.2d at 843 (court "may exercise its discretion to grant a stay if the movant has made a substantial case on the merits" even if [the court's] own approach may be contrary to movant's view of the merits").

The Court has already found, in certifying its order for interlocutory review, that there are substantial grounds for a difference of opinion on controlling questions of law at issue in its decision. *See* Op. at 32. That alone indicates there are serious questions presented by Defendants’ interlocutory appeal. Indeed, it can hardly be doubted that whether a lawsuit challenging alleged foreign intelligence surveillance activities may proceed under the state secrets privilege doctrine is a serious question for appellate review.

C. The Risk of Irreparable Harm Clearly Exists Where Further Proceedings in District Court Would be Based on the Very Privilege Determination at Issue on Appeal.

Plaintiffs’ contention that Defendants do not face a serious risk of irreparable harm if the case proceeds while an appeal is pending is based on a series of flawed contentions.

Plaintiffs first contend that the interlocutory appeal “poses a single, narrow question” of whether the Plaintiffs may make an *in camera* reference to the sealed document. *See* Pls. Resp.

at 5. But the issues on appeal would be much broader than that. The Court ruled on a threshold issue of privilege from which all further proceedings would derive. The issue on appeal is whether the very subject of the case is a state secret and, thus, whether the case can proceed at all. Where a privilege determination is on appeal, further proceedings based on that determination inherently risk disclosures that would cause the harm that the Government's assertion of privilege seeks to avoid. *See* Defs. Mem. at 8-10; *see also United States v. Griffin*, 440 F.3d 1138, 1142 (9th Cir.) (where specific privilege claims are raised on appeal, disclosure would constitute irreparable harm), *cert. denied*, 127 S. Ct. 259 (2006). The Court's September 7 Order specifically contemplates a range of discovery and *in camera* proceedings, including redaction of the Sealed Document and disclosure of some portions under a protective order, as well as interrogatories, and depositions. *See* Defs. Mem. at 4-5 and Op. at 21; 25-26; 30; and 32. Individually or collectively, these proceedings risk the disclosure of privileged information for the reasons Defendants have already set forth. *See* Defs. Mem. at 7-11.

Plaintiffs' continued assertion that there could be no risk of disclosing privileged information in further proceedings because they "already know" what is at stake, *see* Pls. Resp. at 6, is not only wrong, but beside the point. Even if Plaintiffs think they know what the Sealed Document reflects, they do not know what is at stake in the Government's state secrets privilege assertion, nor all of the facts implicated by any adjudication of their claims, nor the potential harms that further proceedings would pose. Moreover, Plaintiffs once again concede that they do *not* know whether they were subject to warrantless surveillance. They argue instead that is they must have been subject to warrantless surveillance because, otherwise, the Government would have "told this Court long ago" in order to avoid needless litigation and, further, that the Government "evidently [has] not done so in any of their secret filings." *See* Pls. Resp. at 11. Whatever information the Government provided to the Court, *ex parte, in camera,* cannot be

revealed and cannot form the basis of undisputed facts for further proceedings. Plaintiffs' repeated assertion that they "already know" the facts needed to proceed, followed by admissions that they do not, underscores that further proceedings should be stayed.

Plaintiffs' next contention that the burden of proof shifts and requires the Defendants to prove whether any surveillance was lawful because certain information is "peculiarly within the knowledge" of the Government, *see* Pls. Resp. at 10-11, is specious in the context of the state secrets privilege. Indeed, long-standing authority holds the opposite. Where facts are protected by the state secrets privilege (for example, whether or not Plaintiffs were subject to the alleged warrantless or FISA surveillance), such evidence must be excluded from the case, not disclosed. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998). And if state secrets not available to Plaintiffs are essential to litigate the case, the result is not that the burden shifts to the Government to prove facts that cannot be revealed, but that the case must be dismissed. *See id.* at 1167. Plaintiffs' notion that, because state secrets are peculiarly within the Government's knowledge their disclosure is required to meet a burden of proof, would turn the privilege on its head and is clearly not the law.

Plaintiffs' other suggestions as to how the case may proceed without harm to national security are unavailing. They contend, for example, that the Government may pursue "alternative strategies" to protect national security information by litigating the merits on summary judgment without state secrets. *See* Pls. Resp. at 7-8. But the state secrets privilege goes to the heart of whether the case can be litigated—whether Plaintiffs have standing and whether the facts needed to resolve the merits of their legal claims can be disclosed. The Government is not required to adjudicate the legal merits of Plaintiffs' claims in a vacuum, without the necessary underlying facts, since that would lead to no more than an advisory opinion, *see Halkin v. Helms* (*Halkin II*), 690 F.2d 977, 990, 1001 (D.C. Cir. 1982), and would

risk resolution of the significant legal claims where evidence critical to the Government's defense could not be considered.[2/]

Likewise, Plaintiffs' assurances of cooperation in protecting sensitive information, *see* Pls. Resp. at 7, and exhortations that Defendants "have some faith in this Court" to protect information, *see id.* at 8, do nothing to allay the risks at issue. As Defendants have set forth, even where efforts are made to protect information, inadvertent disclosures may occur, even of seemingly innocuous facts, that may cause serious harm when seen in their full context. *See* Defs. Mem. at 10-11. While an appeal is pending on the very privilege determination at issue, neither the Court nor the Government should tolerate "playing with fire" by attempting to work with some of the privileged information at issue even in a secure fashion. *See Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052 (2006). Moreover, based on past events in this case, where Defendants have repeatedly warned that information related to the Sealed Document must be stored in a secured facility and treated with special care,[3/] we have

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[2] Indeed, Plaintiffs appear to suggest in their recent summary judgment motion that the merits of their statutory and constitutional claims be considered *regardless* of whether facts concerning Plaintiffs' alleged surveillance are available and, hence, whether their standing can be addressed. *See* Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment or, Alternatively, for Partial Summary Adjudication of Specific Issues within Claims at 32-33 (proposing "summary adjudication" of legal claims without regard to facts concerning whether *Plaintiffs* were subject to surveillance). As should be apparent, if the proof needed to establish a current case or controversy with respect to these Plaintiffs is unavailable, adjudication of any legal claim cannot proceed.

[3] *See* Declaration of Francis T. Hourihan ¶ 7 (attachment B to docket no. 24) (specifically advising Plaintiffs Ghafoor and Belew not to disclose, discuss, retain, or disseminate the information contained in that document); *see* Transcripts of March 20 and 21, 2006 teleconferences and Order of April 10, 2006 (docket no. 23) (Sealed Document must be treated in accordance with strict procedures governing Top Secret and Sensitive Compartmented Information (SCI)); *see* Declaration of David Hackett ¶ 9 (Attachment 3 to docket no. 32) (noting that additional safeguards apply to SCI material); *see* Transcript of June 19, 2006 teleconference (Court indicating that a sealed declaration submitted by Plaintiffs was inadvertently opened and copied by unauthorized court personnel; subsequently ordered to be

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continuing serious concerns about information security in any further proceedings.

Finally, Plaintiffs' further suggestion that the "Defendants can seek appellate review of any rulings they think threaten national security, if and when such rulings occur," *see* Pls. Resp. at 8, is also meritless. The Court has certified an appeal *now*, and Defendants have no assurance that any further rulings that we believe raise national security concerns can be appealed before a final judgment. Where an appeal has been certified to address the threshold issue of whether this case should proceed at all, Defendants should not be required to wait for the damage to be done by further proceedings to seek appellate review.

D. The Public Interest Does Not Warrant Proceeding with Plaintiffs' Motion for Summary Judgment.

Plaintiffs' contention that the public interest lies in litigating their summary judgment motion is baseless. At issue here is nothing less than the disclosure of information that might cause exceptionally grave harm to the national security, and "no governmental interest is more compelling than the security of the nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981). Where courts have found that, upon an assertion of the state secrets privilege, the "greater public good" may lie in dismissal of the case, *see Kasza*, 133 F.3d at 1167, the public interest is best served by staying further proceedings until the Court of Appeals decides that very question. Proceeding to Plaintiffs' motion for summary judgment or discovery proceedings, where the very issue on

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[3](...continued)
stored in a SCIF); *see* Transcript of Aug. 29, 2006 hearing, at 93-94 (counsel for the United States reiterated that the use of any information in the Sealed Document must be undertaken in accordance with secure procedures, noting specifically that any documents purporting to describe classified information, even from memory, must be created with secure equipment); *see* Court's Opinion of September 7, 2006 (finding that Sealed Document "contains highly classified information that must not be disclosed to the public"); *see also id.* at 6, 31 (noting the Government's determination that the Sealed Document is classified as Top Secret and SCI). Indeed, the Court ordered Plaintiffs to deliver to chambers all copies of the document in their possession or control. *See id.* at 26.

appeal is whether the state secrets privilege precludes further proceedings and a determination on the merits, makes little sense. And it does not serve the public interest to adjudicate significant allegations concerning foreign intelligence activities where the full record of the facts needed to decide the case is not available in order to protect national security concerns.

III. PLAINTIFFS FAIL TO ADDRESS WHETHER THEY HAVE A VIABLE CLAIM FOR FURTHER PROCEEDINGS.

Lastly, Plaintiffs do not respond in any meaningful fashion to whether they have any viable claims that may proceed. *See* Defs. Mem. at 12-15. In particular, Plaintiffs do not address how they could now obtain prospective relief for any claim in light of the Court's decision to uphold the state secrets privilege as to any alleged current surveillance. *See id.* Plaintiffs also fail to address the fact that sovereign immunity limits their ability to obtain damages from the United States. *See id*. Plaintiffs' contention that sovereign immunity is an affirmative defense that Defendants have raised "prematurely" because an Answer to the Complaint has not yet been filed, *see* Pls. Resp. at 13, is meritless. The issue of sovereign immunity goes to the Court's subject matter jurisdiction and whether the Court has subject matter jurisdiction over a claim can be raised at any time. *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc*., 185 F.3d 978, 981 n.3 (9th Cir. 1999); *Quarty v. United States*, 170 F.3d 961, 973 n. 7 (9th Cir.1999). Defendants raised this issue in their stay motion to demonstrate, in light of the Court's ruling, an additional reason why discovery proceedings should be stayed, *i.e.*, because there appear to be no viable claims to litigate any further. Defendants have not asked that the sovereign immunity issue be adjudicated through this motion to stay proceedings, but only for an opportunity to brief this issue (and whether any other claim exists for further proceedings) in the event the Court decides not to stay this case. Nothing in Plaintiffs' response demonstrates that they have any viable claims remaining, nor explains why these issues should

not be addressed first if this case is not stayed.

Dated: November 15, 2006

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