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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

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A PROTECTIVE ORDER BARRING THE DEPOSITION OF BARBARA C. HAMMERLE

ORAL ARGUMENT REQUESTED

INTRODUCTION

Plaintiffs Al-Haramain Islamic Foundation, *et al.*, have noticed the deposition of Barbara C. Hammerle, Acting Director, Office of Foreign Assets Control ("OFAC"), U.S. Department of Treasury, for June 12, 2006, and additionally seek "[a]ll documents supporting the allegation made by defendants . . . [that] 'Al-Haramain in Oregon was subsequently designated as a "Specially Designated Global Terrorist" because of support provided to, inter alia, Usama bin Laden and the terrorist organization Al-Qa'ida.'" *See* Attach. 1, Notice of Deposition. This deposition should not go forward for several reasons, including its lack of apparent relevance to Plaintiffs' claims. In any event, it should not take place in light of Defendants' forthcoming assertion of the state secrets privilege in this case.

Under even ordinary circumstances, the practice of compelling testimony from high-ranking officials such as the Acting Director of OFAC is sharply limited to a confined extraordinary set of circumstances, none of which is present here. Courts have repeatedly made clear that senior agency heads should not be distracted from their official duties and compelled to testify in civil actions to discuss their agency's deliberations on matters of policy. The particular circumstances of this case demonstrate that a deposition of Ms. Hammerle would be wholly unnecessary, burdensome, and cumulative, thereby meriting entry of a protective order.

Ms. Hammerle provided a declaration in this case solely in connection with the pending motion of the Oregonian to unseal a classified document, which was filed by Plaintiffs under seal. This declaration made one point: that the document at issue was inadvertently disclosed by OFAC. *See* Attach. 2, Decl. of Barbara C. Hammerle ¶ 9 (Apr. 11, 2006) [hereinafter, "Hammerle Decl."].[1/] As briefing on the Oregonian's motion is now complete, this issue is not an appropriate basis for

[1] This declaration of Acting Director Hammerle was originally submitted in opposition to the Oregonian's Motion to Unseal Records. *See* Defs.' Resp. in Opp'n to the Oregonian's Mot. to Unseal Records (Apr. 14, 2006) [Docket No. 24].

discovery.

As background to that declaration, however, Ms. Hammerle noted that OFAC had previously designated the Plaintiff Al-Haramain Islamic Foundation–Oregon ("AHF") as a "Specially Designated Global Terrorist" ("SDGT") pursuant to Exec. Order No. 13,224 and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706. As noted, Plaintiffs have also requested "[a]ll documents supporting the allegation made by defendants . . . [that] 'Al-Haramain in Oregon was subsequently designated as a "Specially Designated Global Terrorist" because of support provided to, inter alia, Usama bin Laden and the terrorist organization Al-Qa'ida.'" *See* Attach. 1, Notice of Deposition. Thus, it appears that Plaintiffs now seek to depose Ms. Hammerle about the basis for the OFAC designation. If so, a protective order barring this deposition is therefore warranted for that reason, as well.

This lawsuit does not challenge the merits of the OFAC designation itself but concerns the lawfulness of the National Security Agency's alleged surveillance of Plaintiffs pursuant to an intelligence-gathering program described by the President in December 2005 as essential to detecting the threat of foreign terrorist attacks on the United States (the "Terrorist Surveillance Program"). *See* Compl. (Feb. 28, 2006) [Docket No. 1]. The Complaint concerns OFAC only insofar as Plaintiffs seek to purge from OFAC's records any information related to this alleged surveillance. *See* Compl. (Prayer for Relief). This claim for relief plainly does not justify probing the merits of the AHF designation itself. Moreover, even if the AHF designation were in issue, the law is clear that the substance of that determination must be reviewed solely on the basis of the administrative record in support of the designation, *not* through the depositions of OFAC officials. OFAC has already provided Plaintiff AHF with a copy of the unclassified and non-privileged information contained in the administrative record in support of its designation as an SDGT. *See* Hammerle Decl. ¶ 8. The

requested deposition of Ms. Hammerle, therefore, appears to be a back-door attempt to use this unrelated litigation to obtain information for it to use in later litigation challenging the designation of AHF, by questioning its Acting Director as to the basis for the designation. The Court should not countenance such an abuse of the discovery tools in this case. Particularly in light of the fact that OFAC has already provided to Plaintiff AHF the unclassified and non-privileged information in the administrative record in support of the designation, any deposition of Ms. Hammerle would be wholly unnecessary, burdensome, and cumulative under Rule 26.

Finally, to the extent that the requested deposition is for other purposes, Defendants are preparing a dispositive motion, based on an assertion of the state secrets privilege, that will demonstrate that this case should not proceed. That privilege claim will specifically address facts concerning Plaintiff AHF in the context of the Plaintiffs' allegations in this case. Until that motion is resolved, discovery of any kind — let alone the deposition of any agency head — should not be permitted.

For the foregoing reasons, Defendants motion for a protective order pursuant to Fed. R. Civ. P. 26(c) to bar Plaintiffs' deposition of Acting Director Hammerle should be granted.

ARGUMENT

I. THERE ARE NO EXTRAORDINARY CIRCUMSTANCES JUSTIFYING THE DEPOSITION OF THE ACTING DIRECTOR OF OFAC.

It is well settled that the practice of compelling testimony from high-ranking officials, such as the Acting Director of OFAC,[2/] is sharply limited to a confined set of extraordinary circumstances. *See*

[2] Acting Director Hammerle is a high-level official for purposes of this doctrine. The Acting Director is the head of OFAC, a component of the U.S. Department of Treasury that is "principally responsible for the implementation, administration, and enforcement of multiple U.S. economic sanctions programs." *See* Hammerle Decl. ¶ 4. Officials at similar (or even relatively lower) levels than the Acting Director of OFAC have not been compelled to give testimony. *See, e.g., Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (finding that "top executive department officials [such as the Solicitor of Labor, the Secretary of (continued...)

Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition."); *see also In re United States*, 197 F.3d 310, 314 (8th Cir. 1999); *Oliveri v. Rodriguez*, 122 F.3d 406, 409-10 (7th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998); *In re Federal Deposit Ins. Corp.*, 58 F.3d 1055, 1060 (5th Cir. 1995); *In re United States*, 985 F.2d 510, 512 (11th Cir.) (per curiam), *cert. denied*, 510 U.S. 989 (1993); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). The Supreme Court has recognized that the practice of calling high-ranking officials as witnesses should be discouraged. *See United States v. Morgan*, 313 U.S. 409, 422 (1941). Thus, circumstances warranting depositions of high level officials have been found only occasionally — when, for example, the deponent had personal and sole knowledge of the information sought. *See, e.g., American Broadcasting Cos. v. U.S. Information Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) (finding unique circumstances of case justified deposition of the director of the U.S. Information Agency, where he was the sole person responsible for the creation of documents in question, and where plaintiffs were *not* seeking to depose him "regarding why his or his agency's statutory discretion was exercised in a particular manner"); *Alliance to End Repression v. Rochford*, 75 F.R.D. 428, 429 (N.D. Ill. 1976).[3/]

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[2](...continued)
Labor's Chief of Staff, the Regional Administrator, and the Administration's Area Director] should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions"); *Church of Scientology v. IRS*, 138 F.R.D. 9, 11 (D. Mass. 1990) ("In general, heads of agencies and other top government executives [such as the Director of Exempt Organizations Technical Division, National Office of the Internal Revenue Service] are normally not subject to depositions.").

[3] Requiring "extraordinary circumstances" before the deposition of a high-ranking government official is necessary for at least two reasons. First, insulating the mental processes of top executive officials from judicial scrutiny is an essential element in preserving constitutional separation of powers. *See Village of Arlington Heights v. Metropolitan Hous. Dev.*, 429 U.S. 252, 268 n.18 (1977) ("[J]udicial inquiries into legislative or executive motivation represents a substantial intrusion into the working of other branches of government. Placing a decisionmaker on the stand is therefore 'usually to be avoided.'"); *Morgan*, 313 U.S. at
(continued...)

Thus, only a showing of "extraordinary circumstances" could justify allowing the deposition of the Acting Director of OFAC to go forward. As explained below, any testimony sought from the Acting Director would be burdensome, cumulative, and irrelevant to the issues in this case. As a result, there are no "extraordinary circumstances" present here, and Ms. Hammerle should not be deposed in this case.

II. THE ACTING DIRECTOR OF OFAC HAS NO NON-PRIVILEGED, FIRSTHAND KNOWLEDGE RELEVANT TO THIS CASE THAT IS UNAVAILABLE FROM ANY OTHER SOURCE.

To establish that exceptional circumstances require depositions of a high-level agency officials, the party seeking the official's testimony must establish first that the official in question has *relevant*, *non-privileged*, *firsthand* knowledge of an issue in the lawsuit. *See In re United States*, 985 F.2d at 512. Indeed, absent some preliminary showing that the non-privileged information already furnished to the party seeking the official's deposition testimony is incorrect or incomplete, a court should grant the government's motion for a protective order. *See Sykes v. Brown*, 90 F.R.D. 77, 78 (E.D. Pa. 1981).

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[3](...continued)
422 ("Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." (internal citations omitted)). Courts protect the mental processes of high level officials because "subjecting them to interrogation about how they reached particular decisions would impair that decision-making process by making officials less willing to explore and discuss all available options, no matter how controversial." *See Walker v. NCNB Nat'l Bank*, 810 F. Supp. 11, 12 (D.D.C. 1993).

Second, "[h]igh ranking government officials have greater duties and time constraints than other witnesses." *In re United States*, 985 F.2d at 512. Thus, as a practical matter, requiring the deposition of such officials would be burdensome both to the officials themselves and to the efficient running of the agency. If required to give testimony in a myriad of civil actions involving their agencies, high-level officials would be paralyzed from carrying out their duties. *See Community Federal Savings and Loan Ass'n v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983). Heads of government agencies have generalized knowledge about matters that may be implicated in thousands of lawsuits. If extraordinary circumstances were not required in order to compel agency heads to testify, high-ranking officials would be deposed or otherwise required to testify continuously, to the detriment of the efficiency of the running of the agency. *In re Equal Employment Opportunity Comm'n*, 709 F.2d 392, 398 (5th Cir. 1983); *accord Sykes v. Brown*, 90 F.R.D. 77, 78 (E.D. Pa. 1981).

It is not at all apparent that Ms. Hammerle has any relevant, firsthand, or non-privileged knowledge essential to Plaintiffs' case which cannot be obtained from any other source. Thus, the Court should enter a protective order barring this deposition.

A. Such Testimony Is Irrelevant and Prohibited by Applicable Precedent.

To the extent that Plaintiffs seek to depose Ms. Hammerle about the OFAC designation of AHF, Plaintiffs cannot probe the Acting Director's mental processes or inquire into any knowledge she might have of privileged information supporting the designation of Plaintiff AHF as an SDGT, which would be protected by the deliberative process privilege. *See Village of Arlington Heights v. Metropolitan Hous. Dev.*, 429 U.S. 252, 268 n.18 (1977); *Morgan*, 313 U.S. at 422.

Moreover, any knowledge that Ms. Hammerle might have about this designation is not relevant to this action. Any attempt to gather information about the basis for the OFAC designation would constitute an abuse of the discovery tools in this case. Plaintiff AHF has not challenged its designation as an SDGT in this lawsuit: rather, it has challenged the President's Terrorist Surveillance Program as a violation of the Constitution and certain statutes. *See* Compl. Accordingly, Plaintiff AHF should not be permitted to obtain, through discovery in this action, information beyond the unclassified and non-privileged information in the administrative record in support of the designation. As the Supreme Court has stated:

> In deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information. Thus, *when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied*.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 353 n.17 (1978) (emphasis added); *see also Shepherd v. Wellman*, 313 F.3d 963, 969 (6th Cir. 2002) (affirming sanctions imposed on lawyer who persisted in lodging discovery requests that "had no bearing on the instant case").

Nor would Plaintiff AHF be entitled to depose Acting Director Hammerle if it *had* challenged

its designation as an SDGT as a violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. For APA challenges, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Florida Power & Light v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."); *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004). For these reasons, district courts eschew testimony except in "very unusual circumstances." *See American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)).

These principles apply fully to challenges to actions taken by OFAC pursuant to IEEPA and to IEEPA's predecessor statute, the Trading with the Enemy Act ("TWEA"), 50 U.S.C. §§ 1-44. Courts reviewing challenges to agency decisions made pursuant to IEEPA and TWEA have traditionally examined those challenges through the lens of the APA and thus strictly limited their review to the administrative record. In *Holy Land Found.*, for example, the D.C. Circuit noted that Judge Kessler had "correctly reviewed the actions of the Treasury Department under the highly deferential 'arbitrary and capricious' standard":

> The district court noted that this standard does not allow the courts to undertake their own factfinding, but to review the agency record to determine whether the agency's decision was supported by a rational basis.

Holy Land Found., 333 F.3d at 162; *see also Milena Ship Mgmt. Co. v. Newcomb*, 995 F.2d 620, 623 (5th Cir. 1993) (in reviewing challenge to OFAC's refusal to unblock certain vessels owned by Yugoslav entities under IEEPA, review was on "the full administrative record that was before the administrative officer at the time he made his decision") (internal quotation marks omitted), *cert.*

denied, 510 U.S. 1071 (1994); *Tran Qui Than v. Regan*, 658 F.2d 1296, 1301 (9th Cir. 1981) (holding the district court correctly applied APA to review OFAC's refusal to unblock funds pursuant to TWEA), *cert. denied*, 459 U.S. 1069 (1982).[4/] Accordingly, should Plaintiff AHF directly challenge its designation as an SDGT, the Court should confine its review of the appropriateness of OFAC's decisions under IEEPA to the administrative record.

Further, to the extent that Plaintiffs seek to compel the testimony of Ms. Hammerle so that she may discuss this agency decision which was based, in part, on classified evidence, such testimony would be wholly improper and absolutely barred. Congress authorized that classified information in support of a designation made pursuant to IEEPA be produced to the Court *in camera* and *ex parte*. *See* IEEPA, 50 U.S.C. § 1702(c), *as amended by* USA PATRIOT Act, Pub. L. No. 107-56, § 106, 115 Stat. 272, 278; *see also Holy Land Found.*, 333 F.3d at 162 (stating that "it is clear that the government may decide to designate an entity based on a broad range of evidence, including intelligence data"); *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779, 791, 205 ("When, as here, Congress and the President have determined a need for the secrecy of government information, courts have rejected challenges to the *ex parte* use of a classified record.") (N.D. Ill.), *aff'd*, 315 F.3d 748, 754 (7th Cir. 2002), *cert. denied*, 540 U.S. 1003 (2003). As Defendants have noted throughout this litigation, classified materials are not subject to discovery under well-settled case law. *See United States v. Reynolds*, 345 U.S. 1, 6 (1953); *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir.) (refusing to require

[4] It is standard practice in economic sanctions lawsuits for the Government to submit a declaration of the Director of OFAC to provide background information. Courts have not accepted arguments that the provision of such background information opens the administrative record to discovery. *See, e.g.*, *Camp*, 411 U.S. at 143 (noting that an agency's decision can be supplemented through the agency's affidavits); *see also Clifford v. Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996); *IPT Co. v. U.S. Dep't of Treasury*, No. 92 Civ. 5542(JFK), 1992 WL 373480, at *2 (S.D.N.Y. Dec. 3, 1992) (granting a protective order barring the deposition of the Director of OFAC as "[p]laintiff has failed to establish that this is one of the 'rare circumstances' in which discovery is necessary").

production of classified materials where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged"), *cert. denied*, 525 U.S. 967 (1998).

Plaintiffs also cannot show that the information they might seek through the deposition of Ms. Hammerle is unavailable from any other source, which is a condition precedent to deposing a high-level official. *See, e.g.*, *Kyle Engineering*, 600 F.2d at 232; *In re FDIC*, 58 F.3d at 1062; *In re United States*, 985 F.2d at 512; *Simplex Time Recorder Co.*, 766 F.2d at 597 (deposition of high-level official improper where information sought was available from published reports and available agency documents). Here, OFAC has already provided to Plaintiff AHF the unclassified and non-privileged information that formed the basis for Treasury's decision to designate AHF as an SDGT. *See* Hammerle Decl. ¶ 8. Because OFAC previously provided these materials to Plaintiff AHF — with the exception of classified and privileged information to which they are not entitled — Plaintiffs already have within their possession "[a]ll documents supporting the allegation . . . [that] 'Al-Haramain in Oregon was subsequently designated as a "Specially Designated Global Terrorist" because of support provided to, inter alia, Usama bin Laden and the terrorist organization Al-Qa'ida,'" which Plaintiffs also seek incident to the deposition of the Acting Director of OFAC. *See* Attach. 1, Deposition Notice. Thus, Plaintiffs can obtain no relevant, firsthand, or non-privileged information from the deposition of this high-level official beyond the information already in their possession.

B. To the Extent That Plaintiffs Seek to Depose the Acting Director of OFAC on Any Other Topic, Such Testimony Would Be Unduly Burdensome and Similarly Barred by Applicable Precedent.

Finally, Plaintiffs cannot demonstrate the extraordinary circumstances necessary to depose Ms. Hammerle on any other topic that may actually be relevant to this litigation. To the extent Plaintiffs wish to depose the Acting Director of OFAC on the subject of her declaration — *i.e.*, the fact that the sealed classified document was inadvertently disclosed to counsel for AHF by OFAC — there is no

genuine issue of material fact as to this point. It is now the subject of a motion that has been fully briefed and presented to the Court. *See* Oregonian's Mot. to Unseal Records and related filings, Docket Nos. 7, 8, 24, 25, 30, 32, 33, 34, 37 & 38.

Nor can Plaintiffs meet their burden of demonstrating that Ms. Hammerle has relevant, firsthand knowledge of the Terrorism Surveillance Program, which is the subject of this lawsuit — an intelligence program undertaken by another agency. *See* Compl. ¶ 2. In any event, Defendants' forthcoming assertion of the state secrets privilege should, at the very least, be considered as a threshold issue before Defendants can be required to respond to any discovery requests lodged in this case, including producing a witness in response to the deposition notice of the Acting Director of OFAC since the state secrets privilege may result in dismissal and obviate the need for any discovery. *See Reynolds*, 345 U.S. at 8*; Kasza*, 133 F.3d at 1166.

Thus, under Fed. R. Civ. P. 26(c), the Court should enter a protective order here "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Because the deposition of a high-level official such as Acting Director Hammerle is barred by applicable precedent; cumulative, in that Plaintiff AHF already has in its possession the unclassified and non-privileged portions of the administrative record in support of the designation; and additionally would subject Defendants to undue burden and expense prior to the assertion of the state secrets privilege, Plaintiffs should not be permitted to take the deposition of the Acting Director of OFAC.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter a protective order barring the deposition of Barbara C. Hammerle, Acting Director of OFAC.

Dated: June 9, 2006

Respectfully submitted,

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