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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

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

Case No. CV 06-274-KI

Plaintiffs,

v.

GEORGE W. BUSH, *et al.*,

Defendants.

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' NOTICE OF DECISION BY
THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

I. **Opposition to Stay of Proceedings**

In defendants' notice to this Court of the decision by the Judicial Panel on Multidistrict Litigation to transfer a group of lawsuits against telecommunications companies to the Northern District of California, defendants "suggest" that this Court "stay proceedings in this case" and "continue the hearing presently scheduled for August 29, 2006" pending resolution of this case's status as a potential "tag-along" action with the transferred telecommunications lawsuits. Defendants explain that they "expect" the Panel to issue a "conditional transfer order" in this case. *See* Defendants' Notice of Decision by the Judicial Panel on Multidistrict Litigation (Aug. 14, 2006) [Docket No. 59] at 3.

Plaintiffs oppose this "suggestion" because it is contrary to Rule 1.5 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, which contemplates that the litigation before this Court shall continue to go forward. Rule 1.5 states: "The pendency of . . . [an] order to show cause [or] conditional transfer order . . . does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court." *See McCovey v. Astrazeneca Pharmaceuticals, L.P.*, 2006 WL 2329465, at *1 (N.D. Cal. 2006) (conditional transfer order "is just that, conditional, and thus this Court retains jurisdiction over the instant action, including any related pretrial motions, under Rule 1.5 of the Rules for Multidistrict Litigation"); *State of Missouri ex rel. Nixon v. Mylan Laboratories, Inc.*, 2006 WL 1459772, at *2 (E.D. Mo. 2006).

Thus, defendants' "suggestion" that this Court stay the proceedings in this case and continue the August 29 hearing date is contrary to Rule 1.5 and for that reason alone should be rejected.

We also note that there are sound reasons for the Panel to decline to transfer this case to the Northern District of California as a “tag along” to the telecommunications cases. Transfer is properly denied if the “future course of the litigation” will be steered predominantly by issues unique to a particular case rather than by common issues shared with other cases. *In re Eli Lilly & Company “Oraflex” Products Liability Litigation*, 478 F.Supp. 422, 423 (Jud.Pan.Mult.Lit. 1984). That is the situation here. Defendants seek transfer of this case based on their common assertion of the state secrets privilege here and in the telecommunications cases. Unique to this case, however, is the pivotal issue whether plaintiffs should be given access to the sealed document, which proves they were actual targets of warrantless surveillance, establishes their standing, and rebuts defendants’ assertion of the state secrets privilege, thus paving the way for an adjudication of this lawsuit on the merits. That pivotal issue does not arise in the telecommunications cases. *See In re National Security Litigation*, MDL-1791, Interested Parties Al-Haramain Islamic Foundation, Inc., Wendell Belew, and Asim Ghafoor’s Response to the United States’ Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 to Add Actions to MDL 1791 (June 27, 2006) (attached hereto).

II. Status of Proceedings in Panel on Multidistrict Litigation

For the Court’s information, the current status of the present case before the Panel is that, in its transfer order, the Panel stated that this case would be treated as a “potential tag-along” action in accordance with Rules 7.4 and 7.5 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. *In re National Security Litigation*, MDL-1791, Transfer Order (Aug. 9, 2006) at 1, n. 1. That means the Panel may issue either a conditional transfer order under Rule 7.4 or an order to show cause under Rule 7.5, or may choose to do neither.

The Panel has not yet issued a conditional transfer order or an order to show cause for this case. If the Panel issues a conditional transfer order, plaintiffs will then have 15 days to file opposition, the Clerk of the Panel will set the matter for oral argument, and the conditional transfer order will not become effective until further order of the Panel. *See* Rule 7.4(b), (c) & (d), Rules of Procedure of the Judicial Panel on Multidistrict Litigation. If the Panel issues an order to show cause, plaintiffs' time to file a response will be 20 days instead of 15 days. *See* Rule 7.3(b), Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

Conclusion

For the foregoing reasons, we respectfully request that this Court go forward with the hearing scheduled for August 29, 2006.

Dated: August 15, 2006

Respectfully submitted,

/s/ Steven Goldberg
STEVEN GOLDBERG
JON EISENBERG
LISA JASKOL

Of Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF DECISION upon the following:

Anthony J. Coppolino / Andrew Tannenbaum / Andrea Gacki
U.S. Dept. of Justice
P.O. Box 883, Rm. 6102
Washington D.C. 20044

Attorney for Defendant

— by **MAILING** a full, true and correct copy in a sealed envelope, with postage paid, addressed to the above-named party at last known address, and deposited with U.S. Postal Service in Portland, Oregon on this date.

X by **ELECTRONIC DELIVERY VIA E-MAIL** a full, true and correct copy to the above-named party(ies) to the last known e-mail address on this date via the Court CM/ECF electronic filing system.

— by **FAXING** a full, true and correct copy to the above-named party to the fax listed above on this date. Said attorney's facsimile was operating at the time of service. The transmission was recorded and confirmed.

— by **HAND DELIVERING** a full, true and correct copy to the above-named party by messenger service to the last known office address of said party.

— by **OVERNIGHT COURIER** a full, true and correct copy to the above-named party in a sealed envelope, with courier fees paid to the last know office street address of said party.

DATED: August 15, 2006

/s/ Steven Goldberg
Steven Goldberg, OSB No. 75134