BEFORE THE JUDICIAL PANEL

ON MULTIDISTRICT LITIGATION

IN RE: NATIONAL SECURITY AGENCY LITIGATION	**MDL Docket No. 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

INTRODUCTION

The United States government has filed a document which (1) concurs with a pending motion by the three Verizon corporations for transfer and coordination of 20 actions alleging that various telecommunications companies have unlawfully given the National Security Agency (NSA) information regarding electronic communications, and

(2) also seeks transfer and coordination of five additional actions alleging that various government entities have unlawfully conducted warrantless electronic surveillance. The filed document is styled a "motion" for transfer and coordination, but in a subsequent letter to the Clerk of the Panel the government asks that its purported motion be treated as a response to the Verizon motion and a request that the five warrantless surveillance cases be treated as "tag-along actions." *See* Rules 1.1 & 7.4, Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

This preliminary Interested Party Response is filed by the plaintiffs in one of the five warrantless surveillance actions that the government asks to be treated as tag-along actions – *Al-Haramain Islamic Foundation v. Bush*. If the Panel issues a conditional transfer order that includes *Al-Haramain*, the *Al-Haramain* plaintiffs will file a full formal response via notice of opposition and motion to vacate the conditional transfer order pursuant to Rule 7.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. This preliminary response is filed *only* on behalf of the *Al-Haramain* plaintiffs, and does not purport to assert any points on behalf of any plaintiffs in the other four warrantless surveillance actions that the government asks to be treated as tag-along actions.

In this preliminary response, we demonstrate that *Al-Haramain* should not be included with the other four warrantless surveillance cases in any conditional transfer order because the pretrial issues in *Al-Haramain* – primarily issues of standing – turn on

questions that do not arise in any of the other cases but are unique to and predominant in *Al-Haramain*.

The basis for the government's tag-along request is an assertion of the state secrets privilege in each of the five warrantless surveillance cases. The government contends it cannot confirm or deny any alleged surveillance without disclosing state secrets, and without such confirmation none of the plaintiffs can establish their standing to sue. That argument may or may not be tenable in the other four warrantless surveillance cases, where there is currently no proof that the plaintiffs were actual targets of warrantless surveillance, but it is untenable in *Al-Haramain*, where there *is* such proof. *Al-Haramain* is unique among all these cases in that a document filed under seal with the district court – which the government previously disclosed to the *Al-Haramain* plaintiffs by accident – *proves* that these plaintiffs were actual targets of warrantless surveillance and thus indisputably have standing to sue, making it unnecessary, for purposes of standing, for the government to disclose state secrets by confirming the surveillance. In *Al-Haramain*, the fact of the plaintiffs' surveillance is not a secret anymore.

The pivotal pretrial issue in *Al-Haramain* is not whether state secrets are imperiled, but whether plaintiffs' counsel should be allowed to use the sealed document to prove their clients' standing. That issue is unique to *Al-Haramain*. It is fully briefed in the district court, and it not only predominates over, but entirely eclipses, any state secrets privilege issues, making *Al-Haramain* inappropriate for transfer and coordination.

BACKGROUND

A. Three actual victims of warrantless surveillance have sued the government in *Al-Haramain Islamic Foundation v. Bush*.

On February 28, 2006, plaintiffs Al-Haramain Islamic Foundation, Inc. (AHIF) and its attorneys Wendell Belew and Asim Ghafoor filed a complaint in the United States District Court for the District of Oregon alleging a private cause of action under 50 U.S.C. § 1810 for violating the Foreign Intelligence Surveillance Act (FISA). The complaint also alleges violations of the constitutional separation of powers, the First, Fourth and Sixth Amendments, and the International Covenant on Civil and Political Rights. *See* Al-Haramain Islamic Foundation, *et al.* v. Bush, *et al.*, Complaint CV 06-274-KI (Feb. 28, 2006) [hereinafter, "Compl.].

The complaint alleges that defendants George W. Bush, the National Security Agency (NSA), the Federal Bureau of Investigation (FBI), and the Office of Foreign Assets Control (OFAC) "have engaged in electronic surveillance of plaintiffs without court orders" in violation of FISA and the United States Constitution. Compl. ¶ 2. Specifically, the complaint alleges that in March and April 2004, the NSA targeted and engaged in electronic surveillance of attorney-client communications between a director or officer of AFIH and its attorneys Belew and Ghafoor without obtaining a warrant or otherwise complying with FISA, and that in May 2004 the NSA gave OFAC logs of those surveilled communications. *Id.* ¶¶ 19-20. The complaint seeks compensatory and punitive damages for violating FISA as well as other forms of relief. *Id.* at 7-8.

B. A document filed with the district court under seal establishes the fact of the plaintiffs' warrantless surveillance and thus their standing to sue.

Plaintiffs also filed under seal with the district court a document, classified "top secret," which establishes the fact of their warrantless surveillance as alleged in the complaint and thus their standing as "aggrieved" persons to assert a private cause of action under FISA, 50 U.S.C. § 1810. The sealed document, referred to herein as Exhibit 1, and a declaration describing the document, also filed under seal and referred to herein as Exhibit 2, are being held in Oregon in a highly secure repository called a "sensitive compartmented information facility" (SCIF), and plaintiffs' counsel have no copies of the document or the declaration. Plaintiffs' counsel have filed with the Panel a notice of intention to file these materials with the Panel under seal. In a teleconference on June 27, 2006, the district court and the parties arranged for expeditious transfer of copies of the document and declaration to the Panel for storage in a SCIF in Washington D.C.

In May 2004, OFAC accidently gave the document to AHIF's counsel Lynne Bernabei as part of OFAC's production of unclassified documents relating to AHIF's designation as a "Specially Designated Global Terrorist." *See* Plaintiffs' Response to Defendants' Motion to Deny Access to Sealed Document (June 16, 2006) at 14 (Exhibit 3). Two months later, after Bernabei had innocently given copies of the document to Belew and Ghafoor and to AHIF directors Soliman Al-Buthi and Pirouz Sedaghaty, the FBI retrieved copies from Bernabei, Belew and Ghafoor (who were not the source of the

copy filed under seal) but not from Al-Buthi and Sedaghati. *See* Memorandum in Support of Defendants' Motion to Prevent Plaintiffs' Access to the Sealed Classified Document (May 26, 2006) at 4-6 (Exhibit 4).

OFAC's inadvertent disclosure of the document makes the *Al-Haramain* case unique among the five warrantless surveillance cases that the government asks to be treated as tag-along actions, because the document establishes that the *Al-Haramain* plaintiffs were *actual targets* of warrantless surveillance and thus indisputably have standing to sue under 50 U.S.C. § 1810 for violation of FISA.

C. The pivotal issue in *Al-Haramain* is whether the plaintiffs may use the sealed document to demonstrate their standing.

On May 26, 2006, the *Al-Haramain* defendants filed a "Motion to Prevent Plaintiffs' Access to the Sealed Classified Document," by which defendants are attempting to bar plaintiffs from referring to the sealed document to establish the standing that the document plainly shows. *See* Exhibit 4. Defendants have *not* asserted the state secrets privilege as a basis for the motion. They rely instead on the constitutional separation of powers and argue that because the document is classified, the Executive Branch has absolute, unfettered, and exclusive control over it, with which the Judicial Branch is powerless to interfere.

As more fully set forth in section I.B. below, defendants' motion to deny access, and plaintiffs' response to it, raise four sub-issues: whether the constitutional separation

of powers vests the district court with exclusive control over the document as part of the court's files; whether any control defendants might retain over the document is subject to judicial review; whether due process requires that plaintiffs' counsel be given access to the document; and whether FISA authorizes the district court to grant plaintiffs' counsel access to the document.

The access question, which is fully briefed and is scheduled for oral argument before the district court along with other pretrial issues on August 29, 2006, is pivotal, and it makes *Al-Haramain* unique among the five warrantless surveillance cases because the access issues eclipse the state secrets privilege on the matter of standing. If access is denied and plaintiffs cannot refer to or rely on the sealed document, then plaintiffs cannot show standing and their case is over. If access is granted, then standing will be established and the case can proceed to trial on the merits.

ARGUMENT

I. *AL-HARAMAIN* SHOULD NOT BE TRANSFERRED AND COORDINATED WITH THE OTHER FOUR WARRANTLESS SURVEILLANCE CASES.

A. The predominant pretrial issue in *Al-Haramain* is not the state secrets privilege but whether plaintiffs' counsel should be given access to the document that proves plaintiffs' standing.

"The existence of one or more common questions of fact is the statutory predicate to transfers under [28 U.S.C.] Section 1407." *In re Admission Tickets*, 302 F.Supp. 1339, 1340 (Jud.Pan.Mult.Lit. 1969). The government's transfer request claims that "common

questions relating to . . . the state secrets privilege" are shared by the five warrantless surveillance cases. *See* The United States' Combined Memorandum In Support of Verizon Communications, Inc.'s, Verizon Global Networks, Inc.'s, and Verizon Northwest, Inc.'s Motion for Transfer and Coordination Pursuant to 28 U.S.C. §1407 and Memorandum In Support of the United States' Motion for Transfer and Coordination Pursuant to 28 U.S.C. §1407 (June 29, 2006) [hereinafter, "Transfer Motion"] at 18. The question of fact raised by an assertion of the state secrets privilege is whether there is a "reasonable danger" that national security would be harmed by the disclosure of state secrets in the course of litigation. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

Transfer is not appropriate, however, where unique questions of law or fact predominate over any common questions of fact. *In re Pharmacy Benefit Plan Administrators Pricing Litigation*, 206 F.Supp.2d 1362, 1363 (Jud.Pan.Mult.Lit. 2002); *In re Asbestos School Products Liability Litigation*, 606 F.Supp. 713, 714 (Jud.Pan.Mult.Lit. 1985); *In re Eli Lilly & Company "Oraflex" Products Liability Litigation*, 578 F.Supp. 422, 423 (Jud.Pan.Mult.Lit. 1984). Transfer should be denied if the "future course of the litigation" will be steered predominantly by factual issues unique to a particular case, rather than by common factual issues shared with other cases. *In re Eli Lilly & Company "Oraflex" Products Liability Litigation*, 478 F.Supp. at 423. That is the situation here, because in *Al-Haramain* the state secrets privilege becomes irrelevant if plaintiffs' counsel are given access to the sealed document that is the subject of defendants' motion

to deny access.

The assertion of the state secrets privilege in all these cases hinges on the government's insistence that it cannot confirm or deny any alleged surveillance without disclosing state secrets. That argument may or may not be plausible in the other four warrantless surveillance cases, where the plaintiffs presently lack evidence that they have been actual targets of warrantless surveillance. But it is wholly meritless in *Al-Haramain*, where the sealed document independently *proves*, without requiring any confirmation by the government, that the plaintiffs were targets of warrantless surveillance.

The key difference in *Al-Haramain* is in OFAC's accidental disclosure of the document, which caused it to be given to the very people whose surveillance it revealed, thus compromising its secrecy. The victims of this warrantless surveillance now *know* they were targeted. Thus, it is nonsense for the government to claim that national security would be harmed if these victims were told what they already know. Because of the accidental disclosure, the warrantless surveillance of the *Al-Haramain* plaintiffs is no longer clandestine. *Cf. Doe v. Tenet*, 329 F.3d 1135, 1154 (9th Cir. 2003), *overruled on another point* in *Tenet v. Doe*, 544 U.S. 1 (2005) (in action by foreign spies against CIA for reneging on obligation to pay for espionage, any jeopardy to state secrets was "not self-evident" because "[i]t is widely known that the CIA contracts for spy services" and a letter from the CIA to plaintiffs admitting the relationship "could be evidence" that the relationship "is not now clandestine").

Thus, upon denial of defendants' motion to deny access, plaintiffs will not need the government's confirmation that they were surveilled without a warrant. That fact will be established by the document itself, which requires only a simple glance to demonstrate that plaintiffs are "aggrieved" within the meaning of 50 U.S.C. § 1810 and thus have standing to sue.

The access question is pivotal in *Al-Haramain*. It not only predominates over, but entirely eclipses, any state secrets privilege issues – a point demonstrated by the government's failure to assert the state secrets privilege in its motion to deny access. The predominance of the access question in *Al-Haramain* makes that case inappropriate for transfer and coordination with the other four warrantless surveillance cases.

B. The access issue, and its various sub-issues, are unique to *Al-Haramain*.

The *Al-Haramain* defendants' motion to deny access, and plaintiffs' response to it, present four sub-issues:

The first sub-issue is *whether the constitutional separation of powers vests the district court with exclusive control over the sealed document as part of the court's files.* The answer is yes. "[T]he separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996). Defendants seek to impair the district court's performance of its constitutional duties by wielding control over a document that is now in *the court's custody* by virtue of its having been filed with the court. "Every court has supervisory

power over its own records and files." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). "So long as they remain under the aegis of the court, they are superintended by the judges who have dominion over the court." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004). This supervisory power of the courts over their files is "an incident of their constitutional function." *In re Sealed Affidavit(s) To Search Warrants Executed on February 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979). Thus, control over things like this document in Judicial custody is a *Judicial* power which the Executive cannot impair. *See* Exhibit 3 at 3-5.

The second sub-issue is *whether any control defendants might retain over the document is subject to judicial review.* The answer is yes. The district court has power to determine whether the sealed document's classification was improper because intended to conceal defendants' unlawful conduct in violating FISA. *See* Executive Order 12958, § 1.8(a) ("[i]n no case shall information be classified in order to . . . conceal violations of law"); *Snepp v. United States*, 444 U.S. 507, 513 n. 8 (1980) (approving pre-publication classification procedure that was "subject to judicial review"); *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983) ("courts must assure themselves that the reasons for classification are rational and plausible ones"); *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) (*de novo* judicial review of propriety of classification in FOIA litigation). Any control defendants might retain over the document is also subject to judicial review for denial of plaintiffs' constitutional rights. *Webster v. Doe*, 486 U.S.

592, 604 (1988); *Doe v. Tenet*, 329 F.3d at 1153; s*ee* Exhibit 3 at 6-9.

The third sub-issue is *whether due process requires that plaintiffs' counsel be given access to the document.* The answer is yes. The Fifth Amendment requires "[n]otice and an opportunity to be heard," which are the "hallmarks of procedural due process." *Guenther v. Comm'r of Internal Revenue*, 889 F.2d 882, 884 (9th Cir. 1989), *appeal after remand*, 939 F.2d 758 (9th Cir. 1991). A plaintiff's opportunity to be heard is unconstitutionally impaired when only defense counsel are given access to evidence before the court. Because "[t]he openness of judicial proceedings serves to preserve both the appearance and the reality of fairness," the "main rule" is that "a court may not dispose of the merits of a case" based on secret filings available to one litigant but not the other. *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986). The *Al-Haramain* defense counsel have admitted that they have access to the sealed document. *See* Exhibit 4 at 14-15, n. 10. If plaintiffs' counsel are not also given access, they will be unconstitutionally prevented from showing their clients' standing to obtain a civil remedy that Congress has expressly prescribed in FISA, 50 U.S.C. § 1810. *See* Exhibit 3 at 10-11.

The fourth sub-issue is *whether FISA authorizes the district court to grant plaintiffs' counsel access to the document.* The answer is yes. FISA applies, in pertinent part, "[w]henever any motion or request is made by an aggrieved person . . . to . . . obtain . . . materials relating to electronic surveillance or to . . . obtain . . . information obtained

or derived from electronic surveillance under this chapter . . . ." 50 U.S.C. § 1806(f). If the Attorney General files an affidavit asserting that access to such materials would harm national security, FISA allows the court to review the materials *in camera* and *ex parte*. FISA also gives the court discretion to afford opposing counsel access to the materials: "[T]he court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the . . . materials" as "is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f). Thus, in *Al-Haramain*, the district court has discretion to grant plaintiffs' counsel access to the document as is necessary to determine the legality of the government's warrantless electronic surveillance program. *See* Exhibit 3 at 11-13.

These pivotal sub-issues are unique to *Al-Haramain*. They are not presented in any of the other four warrantless surveillance cases or in the telecommunications disclosure cases. They make transfer and coordination inappropriate for *Al-Haramain*.

C. Because the government has insisted that the document be accessible only in a secure facility, *Al-Haramain* should be litigated in Oregon, where plaintiffs' counsel can access the document without burdensome travel.

One of the factors for the Panel to consider is "the convenience of parties and witnesses." 28 U.S.C. § 1407(a). For *Al-Haramain*, that factor disfavors transfer out of the Oregon district court, because of something else that is unique to *Al-Haramain*: At the government's insistence, the sealed document (Exhibit 1) and the declaration describing it (Exhibit 2) are being held in Oregon under high security, and plaintiffs' counsel have no

copies of them. Thus, if *Al-Haramain* is transferred to the District of Columbia district court, as the government asks, and the transferee court denies the defendants' motion to deny access, then plaintiffs' counsel will have to travel across the country every time they need to view the document and declaration, e.g., in preparing subsequent court filings and in getting ready for trial. That would be an onerous burden.

If this case *were* to be transferred and coordinated with other cases, the cases should all be transferred to the Oregon district court, where plaintiffs' counsel in *Al-Haramain* can readily access the document that proves their clients' standing. It is well-settled that coordinated cases are appropriately transferred to a district where relevant documents are located. *See In re Xybernaut Corp. Securities Litigation*, 403 F.Supp.2d 1354, 1355 (Jud.Pan.Mult.Lit. 2005) (transfer to district that is "a likely source of relevant documents"); *In re 1980 Decennial Census Adjustment Litigation*, 506 F.Supp. 648, 651 (Jud.Pan.Mult.Lit. 1981) (transfer to district where "relevant records and documents will be found"); *In re Resource Exploration, Inc., Securities Litigation*, 483 F.Supp. 817, 823 (Jud.Pan.Mult.Lit. 1980) (transfer to district where "document repository" for litigation materials was located).

D. Transfer of *Al-Haramain* would be inefficient because its major pretrial issues will be fully briefed by the time of the Panel's hearing on July 27 and are scheduled for oral argument on August 29.

Another factor for the Panel to consider is whether transfer would promote the "efficient conduct" of the actions. 28 U.S.C. § 1407(a). That factor, too, disfavors a

transfer of *Al-Haramain* out of the Oregon district court, because of the extensive pretrial litigation that has already transpired.

In the four months since the *Al-Haramain* complaint was filed, the following issues have been fully or partially briefed in some 50 filings with the district court, and some have been addressed by the court during multiple teleconferences: (1) whether the action should be dismissed or summary judgment granted pursuant to the state secrets privilege; (2) whether plaintiffs' counsel should be granted access to the sealed document; (3) whether defendants should be compelled to answer a set of interrogatories; (4) whether the sealed document should be disclosed to the public pursuant to a motion by a Portland newspaper; and (5) whether defendants should be permitted to file a secret declaration opposing the newspaper's motion. By the time of the Panel's hearing on July 27, 2006, all of these issues will be fully briefed. The district court has scheduled oral argument on these issues for August 29, 2006.

It would hardly serve the efficient conduct of the *Al-Haramain* litigation to transfer it out of the Oregon district court after the judge has devoted so much time to it and so many pretrial issues are ready for decision. That reason alone is an appropriate basis for denying transfer of *Al-Haramain*. *See In re Nortel Networks Corp. Securities & "Erisa" Litigation*, 269 F.Supp.2d 1367, 1369 (Jud.Pan.Mult.Lit. 2003) (three actions transferred, but other actions would not also be transferred because judge "has already devoted significant time and effort in the conduct of the matters before him").

Alternatively, the Panel may wish to defer its decision on transfer of *Al-Haramain* until the district court decides the pending motions – which, given the scheduled August 29 hearing date, is likely to occur sometime in September and before the end of the 30-day period for plaintiffs to file a motion to vacate any conditional transfer order that the Panel might issue. *See In re Resource Exploration, Inc., Securities Litigation*, 485 F.Supp. at 822 (eight actions transferred, but decision on transfer of ninth action was deferred pending district court's decision on fully-submitted motion for summary judgment).

The government's transfer motion seems more a matter of forum-shopping than efficiency-promotion.

E. Alternatively, the Panel may separate the *Al-Haramain* FISA claim and remand it forthwith to the Oregon district court.

If the Panel decides that any part of *Al-Haramain* other than its FISA claim is appropriate for transfer and coordination, the Panel should separate the FISA claim and remand it forthwith to the Oregon district court before the remainder of the case is remanded. *See* 28 U.S.C. § 1407(a) ("the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded"). The FISA claim in *Al-Haramain* is severable from the other four warrantless surveillance cases because it is the only one seeking damages under 50 U.S.C. § 1810 for proven targets of warrantless surveillance.

Separation and remand is appropriate where inclusion of the separated claim in the

transfer of actions "would not accomplish the goals of Section 1407." *In re Sinking of the Motor Vessel Ukola*, 462 F.Supp. 385, 387 (Jud.Pan.Mult.Lit. 1978); *see, e.g., In re Vioxx Marketing, Sales Practices and Products Liability Litigation*, 416 F.Supp.2d 1354, 1355 (Jud.Pan.Mult.Lit. 2006) (separation and remand of claims involving medications Bextra and Celebrex from transfer of actions involving medication Vioxx); *In re Antibiotic Drugs*, 309 F.Supp. 155, 157 (Jud.Pan.Mult.Lit. 1970) (separation and remand of claim for cancellation of patent from transfer of actions seeking trebled antitrust damages). For each of the reasons set forth above regarding the matter of FISA standing, inclusion of the *Al-Haramain* FISA claim in a transfer and coordination would not accomplish section 1407's goals of efficiency, convenience, and justice.

II. *AL-HARAMAIN* SHOULD NOT BE TREATED AS A TAG-ALONG ACTION WITH THE TELECOMMUNICATIONS DISCLOSURE CASES.

For the same reasons why *Al-Haramain* should not be transferred and coordinated with the other four warrantless surveillance cases, it should not be treated as a tag-along action with the telecommunications disclosure cases. The predominance of the access issue, the need for document access in Oregon, and the district court's substantial progress in litigating the pretrial FISA issues in *Al-Haramain* all make it inefficient, inconvenient, and unjust to treat *Al-Haramain* as a tag-along action.

Additionally, the statutory issues in *Al-Haramain* are fundamentally different from those in the telecommunications disclosure cases. The government's transfer request argues vaguely that the warrantless surveillance cases and the telecommunications

disclosure cases share common questions of fact because they all allege the "violation of federal statutes." Transfer Motion at 18. In this manner, the government glosses over the highly significant point that the "federal statutes" implicated in the five warrantless surveillance cases and in the telecommunications disclosure cases are *completely different*. The telecommunications disclosure cases arise primarily under the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2701 *et seq*. The five warrantless surveillance cases arise primarily under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801 *et seq*.

The factual issues in these two sets of actions for violating ECPA and for violating FISA are *completely different*. In the ECPA actions, the issue is whether the telecommunications companies unlawfully gave the NSA information regarding electronic communications that, according to the government, did not include the content of the communications. *See* 18 U.S.C. § 2702. According to Verizon, the ECPA actions "allege participation by [telecommunications companies] in a Government program to intercept and analyze domestic telephone and Internet communications as reported in a U.S.A. Today article published on May 11, 2006" and "are premised on identical factual allegations, contending that Verizon [unlawfully] disclosed records pertaining to plaintiffs' use of Verizon's telecommunications services to the National Security Agency . . . ." Verizon Communications Inc. Motion for Transfer and Coordination (May 30, 2006) ¶¶1-2. In the FISA actions, in contrast, the issue is whether the government failed

to obtain warrants required for electronic surveillance of the content of communications. *See* 50 U.S.C. § 1804.

The two sets of actions thus involve completely different types of conduct by completely different classes of actors. There is no factual commonality of either deed or doer.

CONCLUSION

For the foregoing reasons, the Panel should either (1) exclude *Al-Haramain* from any conditional transfer order in this proceeding, (2) defer a decision on transfer and coordination of *Al-Haramain* until the motions currently pending before the district court in that case are decided, (3) separate the FISA claim in *Al-Haramain* and remand it forthwith to the Oregon district court before the remainder of the case is remanded, or (4) transfer all cases to the Oregon district court.

Dated _____ day of June, 2006.

Respectfully submitted,

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