

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: MDL Docket No 06-1791 VRW
NATIONAL SECURITY AGENCY Case No C 07-0109 VRW
TELECOMMUNICATIONS RECORDS
LITIGATION ORDER

This order pertains to:
AL-HARAMAIN ISLAMIC FOUNDATION,
INC, an Oregon Nonprofit
Corporation; WENDELL BELEW, a
United States Citizen and
Attorney at Law; ASIM GHAFOOR, a
United States Citizen and
Attorney at Law,

Plaintiffs,

v

BARACK H OBAMA, President of the
United States; NATIONAL SECURITY
AGENCY and KEITH B ALEXANDER, its
Director; OFFICE OF FOREIGN
ASSETS CONTROL, an office of the
United States Treasury, and ADAM
J SZUBIN, its Director; FEDERAL
BUREAU OF INVESTIGATION and
ROBERT S MUELLER III, its
Director,

Defendants.

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1 Al-Haramain Islamic Foundation, Inc ("Al-Haramain"), an
2 Oregon nonprofit corporation, and two of its attorneys filed an
3 action for damages and equitable relief against the President of
4 the United States; the National Security Agency ("NSA") and its
5 Director; the Treasury Department's Office of Foreign Assets
6 Control ("OFAC") and its Director; and the Federal Bureau of
7 Investigation ("FBI") and its Director, Robert S Mueller III, in
8 both his official and personal capacities. Plaintiffs allege that
9 defendants conducted an illegal and unconstitutional program of
10 electronic surveillance of United States citizens and entities. On
11 March 31, 2010, the court granted plaintiffs' motion for summary
12 judgment of liability on their claim that defendants violated the
13 Foreign Intelligence Surveillance Act ("FISA"), 50 USC §§ 1801 et
14 seq. The court dismissed the claims against FBI Director Mueller
15 in his personal capacity. This order concerns plaintiffs' claims
16 for recovery of damages, equitable relief and attorney fees.

17 After plaintiffs prevailed on their FISA claim, they
18 requested recovery of damages. Specifically, each plaintiff seeks
19 \$20,400 in liquidated damages and \$183,600 in punitive damages.
20 Doc ##723/117¹ at 2; 729/122. For the reasons set forth below, the
21 court GRANTS the motion for liquidated damages as to plaintiffs
22 Ghafoor and Belew and awards liquidated damages to those plaintiffs
23 in the amount of \$20,400 per plaintiff. The court DENIES the
24 motion for liquidated damages as to plaintiff Al-Haramain. The
25 court DENIES plaintiffs' motion for punitive damages.

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28 ¹ Documents will be cited both to the MDL docket number (No M
06-1791) and to the individual docket number (No C 07-0109) in the
following format: Doc #(MDL)/(individual).

1 The only one of these activities that has been publicly disclosed,
2 and the one that forms the basis for the plaintiffs' claims, is
3 known as the "Terrorist Surveillance Program" ("TSP"). Id at 11.
4 This program involved interception, without court order, of
5 international communications where there was "a reasonable basis to
6 conclude that one party to the communication is a member of al-
7 Qa'ida, affiliated with al-Qa'ida, or a member of an organization
8 affiliated with al-Qa'ida." Id (citation omitted). After its
9 inception in late September 2001, the president reauthorized the
10 PSP approximately every 45 days. Id.

11 On September 18, 2001, "Congress authorized the President
12 to 'use all necessary and appropriate force against those nations,
13 organizations, or persons he determines planned, authorized,
14 committed, or aided the terrorist attacks' of September 11 in order
15 to prevent 'any future acts of international terrorism against the
16 United States.'" Doc #657-5/99-5 at 3. Between this date and
17 December 16, 2005 (when the existence of the TSP was publicly
18 revealed in media reports), NSA director Michael Hayden briefed
19 various members of Congress on the PSP. Doc #657-2/99-2 at 3; Doc
20 #671-2/104-2 at 21. According to Hayden, no member of Congress
21 ever suggested that the NSA should discontinue the program. Doc
22 #671-2/104-2 at 21.

23 Between October 2001 and May 2003, Deputy Assistant
24 Attorney General John Yoo in the Department of Justice ("DOJ")
25 Office of Legal Counsel ("OLC") was the only OLC official who was
26 informed of the existence of the PSP. Doc #671-2/104-2 at 15. Yoo
27 drafted a November 2, 2001 memo supporting the legality of the PSP
28 and in particular focusing on the TSP and its legality in light of

1 FISA. Id at 16. Yoo reasoned that FISA should not be construed to
2 restrict the president's authority in the national security area in
3 the absence of a clear statement in the statute and that such a
4 construction would unconstitutionally infringe upon the president's
5 Article II authority. Id at 17.

6 After Yoo resigned in May 2003, his successor, Patrick
7 Philbin, was briefed on the PSP and became the new advisor to the
8 Attorney General concerning the PSP. Doc #671-2/104-2 at 24.
9 Philbin's supervisor, Assistant Attorney General Jack Goldsmith,
10 was also briefed on the PSP. Id at 24-25. Philbin and Goldsmith
11 found flaws in Yoo's legal analysis supporting the legality of the
12 PSP. Id at 25. They noted that Yoo had failed to address a
13 provision of FISA demonstrating that the statute was intended to
14 apply to the president's wartime actions. Id. Philbin and
15 Goldsmith began to develop a new analysis to support the legality
16 of parts of the PSP (including the TSP) based on the 2001
17 Congressional Authorization for Use of Military Force ("AUMF").
18 Specifically, Philbin and Goldsmith noted that FISA prohibits
19 electronic surveillance "except as authorized by statute," and
20 posited that the AUMF statute implicitly authorized some PSP
21 activities. Id. But Philbin and Goldsmith believed that even this
22 analysis would not justify some of the activities conducted under
23 the PSP. Id. They first shared their concerns with Attorney
24 General Ashcroft in August 2003; Ashcroft gave Philbin permission
25 to prepare a new memorandum analyzing the legality of the PSP. Id.

26 In December 2003, Philbin and Goldsmith began to discuss
27 their concerns about the legality of the PSP with White House
28 officials, including White House Counsel Alberto Gonzales and

1 Counsel to the Vice President David Addington. Doc #671-2/104-2 at
2 25. That same month, James Comey was confirmed as Deputy Attorney
3 General and was briefed on the PSP shortly thereafter. Id at 26.
4 Comey also found Yoo's analysis of the program's legality to be
5 questionable. Id.

6 By early March 2004, Ashcroft and FBI Director Robert
7 Mueller agreed that there were significant problems with the legal
8 justification for some parts of the PSP. Doc #671-2/104-2 at 26-
9 27. Ashcroft was hospitalized on March 4, 2004. Id at 26. On
10 March 5, 2004, Gonzales spoke to Goldsmith and requested that the
11 OLC produce a letter stating that Yoo's earlier memoranda had found
12 the PSP to be legal, but Goldsmith, Philbin and Comey concluded
13 that they could not certify this because Yoo's memoranda had not
14 accurately described some of the PSP activities in discussing their
15 legality. Id at 27-27. Between March 6 and March 9, Goldsmith,
16 Philbin and Comey continued to discuss the PSP with White House
17 officials including Gonzales and Addington and requested that
18 certain activities be discontinued; White House officials disagreed
19 with this request and pressed them for a reauthorization of the
20 PSP, which was soon to expire. Id at 27-28.

21 On the evening of March 10, 2004, Gonzales and White
22 House Chief of Staff Andrew Card went to the hospital to persuade
23 Ashcroft to reauthorize the PSP. Doc #671-2/104-2 at 30. Ashcroft
24 stated his legal concerns with the PSP "in very strong terms" and
25 told Gonzales that Ashcroft's deputy, Comey, was the acting
26 Attorney General at the time. Id. Comey did not authorize the
27 program.

28 On March 11, 2004, President Bush signed a new

1 authorization for the PSP; instead of being certified by the
2 Attorney General, as in every previous instance, it was certified
3 by White House Counsel Gonzales. Doc #671-2/104-2 at 31. The
4 authorization asserted that the president's commander-in-chief
5 authority under Article II displaced any contradictory provisions
6 of law, including FISA. Id. Various DOJ and FBI officials,
7 including Ashcroft, Comey, Goldsmith and Mueller, considered
8 resigning if the president continued to operate the PSP without
9 approval of the Attorney General. Id at 32. President Bush met
10 with Comey and Mueller on March 12, 2004 and expressed his wish to
11 "fix" the legality of the PSP through legislative or other means
12 before May 6, 2004 (the day on which the current authorization was
13 set to expire). Id at 33.

14 On March 12, 2004, Comey did not direct the FBI to stop
15 cooperating with the NSA on PSP activities. Doc #671-2/104-2 at
16 33. Instead, Goldsmith wrote a memorandum to Comey explaining that
17 the president had the constitutional duty to "take care that the
18 laws are faithfully executed" and that his determination of the
19 PSP's lawfulness was binding on the entire executive branch. Id.
20 In the days following, Comey, Goldsmith and others continued to
21 express doubts that some of the PSP activities (not including the
22 TSP) could be legally supported. Id at 33-34. On March 17, 2004,
23 President Bush decided to modify or discontinue certain PSP
24 activities that DOJ officials had declared legally unsupportable.
25 Id at 34.

26 On May 6, 2004, Goldsmith and Philbin issued a new
27 memorandum supporting the legality of the PSP as revised by
28 President Bush. Doc #671-2/104-2 at 34. The memorandum explained

1 that the 2001 AUMF authorizing "all necessary and appropriate
2 force" to prevent future terrorist attacks also necessarily
3 authorized targeted electronic surveillance against al-Qa'ida and
4 affiliated groups and thereby justified the PSP. Id at 34-35.

5 In the midst of these activities, the Department of the
6 Treasury's OFAC blocked Al-Haramain's assets on February 19, 2004,
7 pending an investigation for violations of tax and currency
8 reporting laws. Doc #458/35 at 7. On September 9, 2004, OFAC
9 declared Al-Haramain a "Specially Designated Global Terrorist"
10 ("SDGT") organization. Id at 8-9.

11 For almost seventeen months after Al-Haramain's
12 designation as a SDGT organization, the DOJ continued to rely on
13 the argument that surveillance under the PSP did not violate FISA
14 because it was authorized by the AUMF statute. Doc #657-5/99-5 at
15 3-4. This was summarized in a DOJ white paper issued on January
16 19, 2006. Id. On February 1, 2007, President Bush allowed the
17 final authorization for the PSP to expire. Doc #671-2/104-2 at 35.

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Plaintiffs filed their action in the United States
District Court for the District of Oregon on February 28, 2006,
alleging, among other things, that the NSA conducted electronic
surveillance of telephonic attorney-client communications without
obtaining a warrant or otherwise complying with FISA, and that the
FBI used this surveillance in connection with OFAC's investigation
of Al-Haramain.

On January 9, 2007, plaintiffs' action was transferred to
this district. On July 9, 2009, plaintiffs moved for partial

1 summary judgment on the issue of defendants' liability under
2 section 1810 of FISA. Doc #657/99. Defendants subsequently moved
3 to dismiss the amended complaint and cross-moved for summary
4 judgment. Doc #668/103. On March 31, 2010 the court issued a
5 memorandum of decision and order granting plaintiffs' motion and
6 denying defendants' motion (the "March 31 order"). Doc #721/115.
7 As more fully described in the March 31 order, the court found that
8 plaintiffs established standing on their FISA claim and established
9 a prima facie case of electronic surveillance. Doc #721/115 at 2-
10 3. Defendants failed to meet their burden to come forward with any
11 evidence, in response to plaintiffs' prima facie case of electronic
12 surveillance, that a FISA warrant was obtained or that the
13 surveillance was otherwise lawful. Doc #721/115 at 3. Because
14 there was no genuine issue of material fact whether a warrant was
15 obtained for the electronic surveillance of plaintiffs or that such
16 surveillance was otherwise lawful, this court granted plaintiffs'
17 motion for summary judgment on the issue of defendants' liability
18 under FISA, denied defendants' motion to dismiss the amended
19 complaint and denied defendants' cross-motion for summary judgment.
20 Doc #721/115 at 3. The court dismissed plaintiffs' claims against
21 FBI Director Mueller in his personal capacity. Id.

22 After prevailing on their motion for partial summary
23 judgment, plaintiffs submitted a proposed judgment on April 16,
24 2010. Doc #723/117. Plaintiffs' proposed judgment seeks \$20,400
25 in liquidated damages per plaintiff (computed at a rate of \$100 per
26 day, pursuant to 50 USC § 1801(a), for violations spanning a period
27 of 204 days) and \$183,600 in punitive damages per plaintiff, for a
28 total award of \$204,000 per plaintiff and a grand total of \$612,000

1 for all three plaintiffs. Doc #723/117. Plaintiffs' proposed
2 judgment also seeks equitable relief in two forms: (1) a
3 declaration that defendants' warrantless electronic surveillance of
4 plaintiffs was unlawful as a violation of FISA; and (2) an order
5 that any information obtained by means of defendants' unlawful
6 surveillance shall not be used by the United States government in
7 any proceeding and shall be expunged from defendants' files and
8 records. Doc #723/117. Plaintiffs' proposed judgment also
9 specified that plaintiffs would dismiss their remaining claims
10 against defendants. Doc #723/117. Finally, plaintiffs' proposed
11 judgment seeks reasonable attorney fees and other investigation and
12 litigation costs (although the issue is not briefed in plaintiffs'
13 proposed judgment). Doc #723/117.

14 Defendants responded to plaintiffs' proposed judgment and
15 submitted an alternative form of judgment on April 30, 2010. Doc
16 ##727/119; 727-1/119-1. Defendants' response argues that only
17 plaintiffs Belew and Ghafoor are entitled to liquidated damages, in
18 the amount of \$1,000 per plaintiff. Doc #727-1/119-1 at 3.
19 Defendants further contend that plaintiffs are not entitled to
20 recover any punitive damages and are not entitled to any equitable
21 relief. Doc #727-1/119-1 at 3.

22 On July 7, 2010, plaintiffs moved for an award of
23 attorney fees. Doc #738/128. Plaintiffs' motion seeks
24 \$2,630,122.80 in attorney fees and \$22,012.36 in expenses. Doc
25 #738/128 at 11. Defendants opposed this motion, arguing that
26 plaintiffs' requested fees are "excessive and unreasonable." Doc
27 #746/131 at 4. Defendants argue that even if plaintiffs obtain all
28 relief sought, no more than \$606,116 could reasonably be awarded in

1 attorney fees, and that this amount would have to be reduced if
2 punitive damages are not awarded. Doc #746/131 at 6. Defendants
3 also argue that plaintiffs are not entitled to recover any of the
4 claimed costs they seek. Doc #746/131 at 26-27.

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6 II

7 A

8 Each of the three plaintiffs seeks \$20,400 in liquidated
9 damages. Doc #723/117. In the event of a FISA violation, 50 USC §
10 1810(a) provides for recovery of "actual damages, but not less than
11 liquidated damages of \$1,000 or \$100 per day for each day of
12 violation, whichever is greater." 50 USC § 1810(a). Plaintiffs do
13 not request actual damages and instead seek liquidated damages
14 based on the number of days that defendants violated FISA. Doc
15 #723/117. Plaintiffs base the requested amount of \$20,400 for each
16 plaintiff on the inference that they were unlawfully surveilled for
17 204 days beginning February 19, 2004 (the date on which the
18 Department of the Treasury blocked the assets of Al-Haramain and
19 defendants announced the investigation of Al-Haramain) and ending
20 September 9, 2004 (the date on which Al-Haramain was first
21 designated as a Specially Designated Global Terrorist with ties to
22 Osama bin Laden). Doc ##721/115 at 38-39; 729/121 at 6-7; see Doc
23 #727/119.

24 Defendants claim that plaintiffs lack evidentiary support
25 for their conclusion that the surveillance lasted 204 days and
26 should only recover the statutory minimum liquidated damages of
27 \$1,000 provided by 50 USC § 1801(a). Doc #727/119 at 9-11.
28 Defendants point to plaintiff Belew's identification of ten

1 specific dates over three months in 2004 on which he spoke over the
2 telephone with Al-Haramain director Soliman al-Buthi (also spelled
3 "al-Buthe") in Saudi Arabia and plaintiff Ghafoor's statement that
4 he spoke with al-Buthi "approximately daily from February 19 to
5 February 29, 2004 and approximately weekly thereafter." Doc ##657-
6 7/99-7 at 2; 657-6/99-6 at 2. Defendants claim that this is "the
7 extent of the communications that plaintiffs' [sic] claim were
8 unlawfully surveilled, and * * * the extent of the evidence
9 submitted by plaintiffs as to the duration of any alleged
10 surveillance." Doc #727/119 at 10.

11 The evidence in the record undermines defendants'
12 argument. Plaintiffs have produced a wide range of evidence from
13 unclassified sources that establishes a prima facie case showing
14 that they were electronically surveilled. See March 31 order, Doc
15 #721/115, for extended discussion. It is apparent that defendants
16 continued to monitor plaintiffs over a prolonged period. Although
17 the evidence does not disclose a precise start and end date of the
18 surveillance, it is evident that it continued for at least the 204
19 days plaintiffs claim, if not longer. Plaintiffs' estimate of the
20 duration of unlawful surveillance appears conservative. See Doc
21 #729/121 at 7.

22 It is true that neither plaintiffs nor the court have
23 been informed of the precise dates on which plaintiffs were
24 surveilled. Defendants, the only parties who have access to this
25 information, have not admitted or disclosed whether "plaintiffs
26 were in fact subject to electronic surveillance" (Doc #727/119 at
27 12), although the fact of such surveillance is not in doubt.
28 Defendants have had ample opportunity in this litigation to produce

1 evidence in their exclusive possession concerning the details of
2 the surveillance; they have simply chosen not to do so.
3 Accordingly, the court must draw a reasonable inference regarding
4 the length of the surveillance based on the evidence offered by
5 plaintiffs to establish their prima facie case.

6 The evidence shows that an inferred surveillance period
7 lasting from February 19, 2004 to September 9, 2004 is reasonable.
8 Based on statements by the Office of Intelligence and Analysis, at
9 least four of al-Buthi's telephone calls were intercepted as early
10 as February 2003. Doc #657-4/99-4 at 32-38. Between this time and
11 September 9, 2004, when the OFAC declared Al-Haramain a SDGT
12 organization, governmental interest in Al-Haramain's activities
13 appears to have increased. Various officials involved acknowledged
14 using surveillance and other classified information in this
15 investigation. See Doc #721/115 at 37-41.

16 Accordingly, the most reasonable inference is that
17 defendants had already begun electronic surveillance of Al-Haramain
18 before its assets were blocked on February 19, 2004 and continued
19 the surveillance at least through September 9, 2004. Plaintiffs
20 Belew and Ghafoor were associated and in frequent contact with Al-
21 Haramain and its officials during this time and were similarly
22 subjected to electronic surveillance. See Doc ##657-6/99-6; 657-
23 7/99-7. Although plaintiffs have not had access to classified
24 information that could prove the precise details of defendants'
25 surveillance, plaintiffs have nevertheless put forth sufficient
26 evidence to raise a strong inference that the period of
27 surveillance lasted at least 204 days. Defendants have proffered
28 nothing in response. Accordingly, the motion of plaintiffs Ghafoor

1 and Belew for statutory damages is GRANTED. The court ORDERS that
2 plaintiffs Ghafoor and Belew shall each recover liquidated damages
3 in the amount of \$20,400.

4 The distribution of any funds to plaintiff Al-Haramain is
5 impossible because Al-Haramain's assets are blocked as a result of
6 its designation as a SDGT organization. Executive Order No 13,224
7 (66 CFR 49,079), issued pursuant to the International Emergency
8 Economic Powers Act (50 USC §§ 1701 et seq), authorizes the
9 Secretary of Treasury to designate any foreign person or group
10 engaging in or supporting terrorist activities as a SDGT and block
11 all assets of such person or group. "[A]ny attachment, judgment,
12 decree, lien, execution, garnishment, or other judicial process is
13 null and void with respect to any property in which on or since the
14 effective date there existed an interest of a person whose property
15 or interests in property are blocked." 31 CFR 594.202.

16 Al-Haramain challenged its 2004 SDGT designation in an
17 action filed in the United States District Court for the District
18 of Oregon. Al-Haramain Islamic Foundation, Inc v United States
19 Dept of the Treasury, 585 F Supp 2d 1233, 1239 (D Or 2008). The
20 court found that the OFAC's designation was proper and dismissed
21 the complaint. Id at 1273; Al-Haramain Islamic Foundation, Inc v
22 United States Dept of the Treasury ("Al-Haramain II"), 2009 US Dist
23 LEXIS 103373 at *52-53 (D Or). Al-Haramain has appealed to the
24 Ninth Circuit. Doc #727/119 at 13 n11. As explained more fully
25 below in the discussion of punitive damages, there is ample
26 evidence supporting Al-Haramain's designation as a SDGT.

27 FISA specifies that a "foreign power or an agent of a
28 foreign power" is not eligible to recover damages under the

1 statute. 50 USC § 1810. The statute broadly defines "foreign
2 power" and specifically includes "a group engaged in international
3 terrorism or activities in preparation therefor." 50 USC §
4 1801(a)(4). As described in section IIC2, the OFAC has determined
5 that Al-Haramain provided aid and support to terrorist
6 organizations. These activities, coupled with the fact that Al-
7 Haramain was designated a SDGT organization, demonstrate that Al-
8 Haramain is a "foreign power" that has engaged in "international
9 terrorism or activities in preparation therefor" as defined in the
10 FISA statute. 50 USC §§ 1801(a)(4), 1810. Al-Haramain is
11 therefore not entitled to recover any damages in this action.

12 Plaintiffs propose that, in lieu of a transfer of
13 compensatory damages to Al-Haramain's blocked account, the court
14 order a cy pres distribution "to one or more other charitable
15 organizations whose missions are 'consistent with the nature of the
16 underlying action.'" Doc #122 at 21 (quoting In re Agent Orange
17 Product Liab Litig, 818 F2d 179, 186 (2d Cir 1987)). Plaintiffs'
18 cy pres argument fails at the threshold because, as described
19 above, Al-Haramain is a "foreign power" under FISA and is therefore
20 not entitled to any award of damages. Moreover, even if Al-
21 Haramain were entitled to recover damages, because Al-Haramain is a
22 SDGT "any damages awarded to [Al-Haramain] would constitute assets
23 in which it has a property interest, and any transfer of that
24 interest by court order to any party would still be subject to the
25 blocking and licensing requirement under CFR §§ 594.201(a),
26 202(b)." Doc #730 at 26 n22.

27 The cy pres doctrine is "a rule of construction used to
28 preserve testamentary charitable gifts that otherwise would fail."

1 Democratic Cent Comm of Dist of Columbia v Washington Metro Area
2 Transit Comm'n, 84 F3d 451, 455 n1 (DC Cir 1996). The doctrine has
3 been extended by some courts to class actions, where undistributed
4 damage or settlement funds may be distributed to the "next best"
5 use when plaintiffs cannot be compensated individually. Id at 455.
6 "The object of applying funds to the 'next best' class is to
7 parallel the intended use of the funds as nearly as possible by
8 maximizing the number of plaintiffs compensated." Id (citation
9 omitted).

10 Plaintiffs have provided no precedent applying the cy
11 pres doctrine to the distribution of a damages award in
12 circumstances analogous to those at bar. To do so here would
13 require the court to speculate as to the "intended use of the
14 funds" and the degree to which the missions of charitable
15 organizations are "consistent with the nature of the underlying
16 action." Democratic Cent Comm of DC, 84 F3d at 455 n1; In re Agent
17 Orange, 818 F2d at 186. In the absence of any legal authority and
18 any compelling reason, the court declines to apply the cy pres
19 doctrine in this case.

20 Accordingly, the court DENIES plaintiff Al-Haramain's
21 motion for recovery of statutory damages.

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23 B

24 Plaintiffs seek two types of equitable relief. First,
25 plaintiffs seek a declaration that defendants' warrantless
26 electronic surveillance of plaintiffs was unlawful as a violation
27 of FISA. Doc #723/117. Second, plaintiffs seek an order directing
28 that:

1 [I]nformation obtained by means of plaintiffs' unlawful
2 electronic surveillance shall not be used by the United
3 States government, either directly or derivatively, in
4 any administrative, civil or criminal proceeding in which
5 the United States is a party. Upon the final resolution
6 of all such proceedings potentially involving such
7 information, all files and records containing such
8 information shall be purged and destroyed, except to the
9 extent that defendants may have an existing legal
10 obligation to preserve exculpatory evidence.

7 Doc #723/117 at 3. Defendants argue that plaintiffs are not
8 entitled to either form of equitable relief. Doc #727/119.

9 The court first turns to plaintiffs' request for a
10 declaration that the warrantless electronic surveillance of
11 plaintiffs was unlawful as a violation of FISA. Defendants argue
12 that FISA does not authorize the entry of any declaratory relief.
13 Doc #727/119. Defendants further argue that a declaratory judgment
14 cannot issue if the "program or activity" no longer exists. Doc
15 #727/119.

16 It is unnecessary to decide whether and under what
17 circumstances FISA authorizes the entry of a declaratory judgment
18 because the equitable relief sought by plaintiffs is neither
19 necessary nor appropriate. This court already determined in its
20 March 31 order that plaintiffs established a prima facie case of
21 unlawful electronic surveillance in violation of FISA. Doc
22 #721/115 at 3. In the present order, the court awards compensatory
23 damages and attorney fees based on defendants' actions. A
24 declaration that defendants' actions were illegal would not provide
25 plaintiffs with any additional relief or remedy.

26 Furthermore, because the TSP under which plaintiffs were
27 monitored in violation of FISA ended in January 2007, Doc #668/103
28 at 18, there is no reason to believe that plaintiffs will be

1 subjected to the same injury in the future. Under 28 USC § 2201, a
2 declaratory judgment is available only when there is "a substantial
3 controversy, between parties having adverse legal interests, of
4 sufficient immediacy and reality." Golden v Zwickler, 394 US 103,
5 108 (1969). "[P]ast wrongs do not in themselves amount to that
6 real and immediate threat of injury necessary to make out a case or
7 controversy." City of Los Angeles v Lyons, 461 US 95, 103 (1983).
8 Accordingly, plaintiffs' request that the court declare defendants'
9 actions unlawful is DENIED.

10 Plaintiffs' second request for equitable relief seeks an
11 order prohibiting the United States government from using any
12 information obtained during the surveillance at issue and ordering
13 the destruction of such information. Again, to enter declaratory
14 relief, there must be an "actual controversy" before the court. 28
15 USC § 2201. No such controversy exists here.

16 As authority for their request, plaintiffs cite a section
17 of FISA authorizing the suppression of certain "unlawfully
18 acquired" evidence. Doc #723/117 at 2. The suppression remedy
19 authorized by FISA is limited to situations in which evidence
20 obtained or derived from unlawful surveillance is used against an
21 "aggrieved person" in "any trial, hearing, or other proceeding in
22 or before any court, department, officer, agency, regulatory body,
23 or other authority of the United States [or] a State." 50 USC §
24 1806(e). Upon the motion of the "aggrieved person" to the
25 authority in that proceeding, evidence determined to be acquired
26 unlawfully will be suppressed. 50 USC § 1806(g). No party here
27 has brought a motion to suppress evidence in an ongoing "trial,
28 hearing, or other proceeding." 50 USC § 1806(e). Plaintiffs'

1 request to have evidence "suppressed" for purposes of other,
2 unnamed proceedings is not authorized by section 1806(e) or (g).
3 Furthermore, the suppression remedy provided by section 1806 does
4 not authorize the court to order expungement of records in the
5 government's possession, and no other provisions of FISA authorize
6 such a remedy. For these reasons, plaintiffs' request that the
7 information be suppressed and expunged is DENIED.

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Plaintiffs seek punitive damages in the amount of
11 \$183,600 per plaintiff. Doc #723/117. The FISA statute provides
12 that an "aggrieved person, other than a foreign power or an agent
13 of a foreign power * * * who has been subjected to an electronic
14 surveillance * * * in violation of Section 1809 of this title * * *
15 shall be entitled to recover * * * punitive damages." 50 USC §
16 1810. Plaintiffs claim that defendants conducted unauthorized
17 electronic surveillance and are therefore liable for punitive
18 damages.

19

As a threshold matter, plaintiff Al-Haramain is not
20 eligible to recover punitive damages. As explained in section IIA,
21 Al-Haramain is a "foreign power" as defined in FISA and is
22 therefore exempted from recovery of punitive damages. 50 USC §
23 1810. Al-Haramain's motion for punitive damages is therefore
24 DENIED. The court will thus turn to the claims for punitive
25 damages brought by plaintiffs Belew and Ghafoor.

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It is settled law that municipalities are not liable for

1 punitive damages. In the context of cities and counties,
2 municipalities are not liable for punitive damages "unless
3 expressly authorized by statute." Cook County v United States ex
4 rel Chandler, 539 US 119, 129 (2003) (quoting Newport v Fact
5 Concerns, Inc, 453 US 247, 260 n21 (1981)). This rule is supported
6 both by a long history in the common law and by logic. Punitive
7 damages serve the purpose "of punishing the defendant, of teaching
8 him not to do it again, and of deterring others from following his
9 example." Protectus Alpha Navigation Co v North Pacific Grain
10 Growers, Inc, 767 F2d 1379, 1385 (9th Cir 1985) (quoting Prosser,
11 The Law of Torts § 2, at 9 (1971)). None of these purposes is well
12 served by imposing penalties upon the taxpayers of a city or county
13 rather than the officials who are directly responsible for
14 wrongdoing. The same reasoning applies to punitive damage awards
15 against the United States and its agencies, and the Supreme Court
16 has expressed its concern with "imposing punitive damages on
17 taxpayers under any circumstances." Vermont Agency of Natural
18 Resources v United States ex rel Stevens, 529 US 765, 785 n15
19 (2000).

20 The primary retributive purpose of punitive damages is
21 not advanced by laying the burden of punishment "upon the shoulders
22 of blameless or unknowing taxpayers." Newport, 453 US at 267.
23 Punitive damages are not intended to compensate the injured
24 plaintiff, and in such a situation they "are in effect a windfall
25 to a fully compensated plaintiff, and are likely accompanied by an
26 increase in taxes or a reduction of public services for the
27 citizens footing the bill." Id. "Under ordinary principles of
28 retribution, it is the wrongdoer himself who is made to suffer for

1 his unlawful conduct," and "neither reason nor justice" suggests
2 that taxpayers should suffer for the malicious acts of their
3 officials. Id.

4 The deterrent purpose of punitive damages is also ill
5 served by imposing punitive damages upon the government. It is far
6 from clear that government officials will be meaningfully deterred
7 from future acts of official conduct by the fear that punitive
8 damages may be imposed upon the government. It is possible that
9 awards of punitive damages against municipalities or other
10 governments may "induce voters to condemn official misconduct
11 through the electoral process," but there is "no reason to suppose
12 that corrective action, such as the discharge of offending
13 officials who were appointed and the public excoriation of those
14 who were elected, will not occur unless punitive damages are
15 awarded against the municipality." Newport, 453 US at 268.

16 Plaintiffs have requested punitive damages against four
17 officials in their official capacities - President Barack Obama,
18 NSA Director Keith Alexander, OFAC Director Adam Szubin and FBI
19 Director Robert Mueller - as well as the NSA, the OFAC and the FBI
20 as entities. Doc #723/117 at 2. A suit against an officer in his
21 official capacity "is not a suit against the official but rather is
22 a suit against the official's office," and is therefore a suit
23 against the government. Will v Michigan Dept of State Police, 491
24 US 58, 71 (1989) (quoting Brandon v Holt, 469 US 464, 471 (1985)).
25 Notably, none of the named defendants except Mueller held his
26 office during the time of the illegal conduct at issue in this
27 case. This helps to illustrate the illogic of punitive damages
28 here. An award of punitive damages against the current president

1 based on the actions of his predecessor serves no coherent
2 retributive or deterrent purpose.

3 Plaintiffs argue that FISA expressly authorizes punitive
4 damages against the United States. Doc #729/122 at 12. This court
5 has previously ruled that the United States is included in the FISA
6 definition of "person" and that sovereign immunity has therefore
7 been waived. In re National Security Telecom Records Litig, 564 F
8 Supp 2d 1109, 1124-25 (ND Cal 2008). Plaintiffs argue that the
9 same reasoning exposes the government to punitive damages. Doc
10 #729/122 at 12. The plain text of 50 USC § 1810 states that an
11 aggrieved person "shall be entitled to recover" actual or
12 liquidated damages, punitive damages and attorney fees from "any
13 person who committed such violation," and does not explicitly
14 exempt the United States from punitive damages. But this language
15 is by no means an express authorization of punitive damages. The
16 court must assume that Congress is aware of existing law –
17 including the presumption against awarding punitive damages against
18 the government – when it passes legislation. Miles v Apex Marine
19 Corp, 498 US 19, 32 (1990). The legislature will not be presumed
20 to overturn long-established legal principles unless such intention
21 plainly appears in the statute. See 73 American Jurisprudence 2d,
22 Statutes § 97. Congress must surely have been aware of the long-
23 standing presumption against awarding punitive damages against the
24 government. Nothing in the text of FISA can be read to explicitly
25 overturn the general presumption that it is not appropriate to
26 award punitive damages against the government.

27 //

28 //

1
2 Even if this court were to determine that Congress had
3 authorized punitive damages against the United States under FISA,
4 punitive damages would not be appropriate here. As plaintiffs
5 admit, FISA does not explicitly provide for mandatory recovery of
6 punitive damages. Both parties concede that section 1810(b) is
7 silent as to how a court should decide whether to award punitive
8 damages in a given case. Doc ##729/122 at 13 (explaining that "the
9 statute offers no guidance as to the specific standard a court is
10 to apply when deciding whether to award such damages in a
11 particular case"); 730/123 at 15 ("Section 1810 does not provide
12 any standard governing the determination of whether punitive
13 damages should be awarded"). Moreover, no judicial precedent
14 elucidates the standard that applies to an award of punitive
15 damages under FISA. Doc #730/123 at 15.

16 Plaintiffs instead look to a statutory analogue, 42 USC §
17 1983 ("section 1983"), which concerns damages actions against
18 government officials for depriving persons of federally secured
19 rights. Doc #729/122 at 13-14. Defendants assume, for the sake of
20 argument, that section 1983 provides a proper analogy. Doc
21 #730/123 at 15. Under section 1983, punitive damages may be
22 awarded for conduct found to be malicious, oppressive or in
23 reckless disregard of a plaintiff's rights. See Smith v Wade, 461
24 US 30, 56 (1983). Stated somewhat differently, punitive damages
25 may be appropriate "when the defendant's conduct is shown to be
26 motivated by evil motive or intent, or when it involves reckless or
27 callous indifference to the federally protected rights of others."
28 *Id.* Further, any award of punitive damages must be based on harm

1 caused by the defendants to the plaintiffs specifically, as opposed
2 to nonparties to the action. Philip Morris USA v Williams, 549 US
3 346, 353-55 (2007).

4 The punitive damages standard articulated in Wade was
5 drawn from the common law of torts "with such modification or
6 adaptation as might be necessary to carry out the purpose and
7 policy of [section 1983]." Wade, 461 US at 34. The Court, finding
8 "no reason why a person whose federally guaranteed rights have been
9 violated should be granted a more restrictive remedy than a person
10 asserting an ordinary tort cause of action," held that no such
11 modification or adaptation was necessary. *Id* at 48-49.

12 This reasoning applies equally to FISA, which was enacted
13 primarily to safeguard the constitutional rights of United States
14 citizens. See Senate Select Committee to Study Governmental
15 Operations with Respect to Intelligence Activities ("Church
16 Committee Report") Book II: Intelligence Activities and the Rights
17 of Americans, S Rep No 94-755, 289 (1976); Doc #453/33 at 10-14.
18 Accordingly, this court will consider plaintiffs' request for
19 punitive damages under FISA using the common law standard for
20 awarding punitive damages as restated in Wade. This court has
21 found defendants liable for violating FISA for a period of 204 days
22 between February 19, 2004 and September 9, 2004. Punitive damages
23 must be based on this particular conduct and not on any larger
24 pattern of misconduct.

25 Plaintiffs argue that "defendants conducted plaintiffs'
26 unlawful surveillance in reckless disregard of their rights, having
27 acted 'in the face of a perceived risk' that the surveillance would
28 'violate the plaintiff's rights under federal law.'" Doc #729/122

1 at 16 (quoting Model Civ Jury Instr 9th Cir 5.5 (2008)). Further,
2 plaintiffs argue that the "unlawful surveillance was oppressive in
3 that it occurred 'by misuse or abuse of authority or power.'" Doc
4 #729/122 at 17 (quoting Dang v Cross, 422 F3d 800, 809-10 (9th Cir
5 2005)).

6 The court cannot find that the surveillance of plaintiffs
7 in 2004 pursuant to the TSP involved "reckless or callous
8 indifference to [their] federally protected rights." Smith, 461 US
9 at 56. The record shows that the government had reason to believe
10 that Al-Haramain supported acts of terrorism and that critical
11 intelligence could be obtained by monitoring Al-Haramain. Al-
12 Haramain, 585 F Supp 2d at 1251-53. The parent organization of
13 plaintiff Al-Haramain is Al-Haramain Islamic Foundation ("AHIF").²
14 AHIF is headquartered in Saudi Arabia and has had operations in as
15 many as fifty countries "providing support for the [al-Qa'ida]
16 network and promoting militant Islamic doctrine worldwide." Id at
17 1241. Among other activities, AHIF was involved in planning and
18 financing terrorist attacks against United States embassies in
19 Kenya and Tanzania and attempted attacks against United States
20 consulates in India. Id. Beginning in 2002, the United States
21 Secretary of Treasury designated numerous AHIF divisions around the
22 world as SDGTs. Id. AHIF was designated as a SDGT on September 9,
23 2004. Id at 1245-46.

24 Al-Haramain was founded in Oregon between 1997 and 1999.
25 Id at 1243. In March 2000, Al-Haramain transferred \$150,000 to
26

27 ² The Oregon branch of Al-Haramain, a plaintiff in this case,
28 is consistently referred to as "Al-Haramain" in this order. Its
parent organization is consistently referred to as "AHIF."

1 AHIF, which the OFAC believed was used to support terrorist
2 activities by the Chechen mujahideen. Id at 1243-45; Doc #657-
3 4/99-4 at 34-36. The OFAC began investigating Al-Haramain in
4 February 2004 and first designated Al-Haramain as a SDGT on
5 September 9, 2004. Al-Haramain, 585 F Supp 2d at 1245-46; Doc
6 #721/115 at 38-39. Soliman al-Buthi, a founding member, was also
7 designated a SDGT in September 2004. Al-Haramain, 585 F Supp 2d at
8 1242. Given the connections between Al-Haramain and AHIF,
9 including the provision of funds that the OFAC believed were used
10 to support terrorist activities, the court does not find that
11 defendants' surveillance of Al-Haramain was conducted in reckless
12 disregard for plaintiffs' rights.

13 While the facts show a clear dispute among DOJ and White
14 House officials over the legality of some PSP activities, the
15 evidence does not demonstrate that defendants knowingly acted in
16 the face of a significant risk that their actions violated
17 plaintiffs' rights. Importantly, for the entire period at issue in
18 this case, defendants relied upon legal analyses by the OLC
19 supporting the legality of the TSP. Between late 2001 and March
20 11, 2004, the TSP was operating under the authorization of the
21 president and the certification of the attorney general. Doc #671-
22 2/104-2 at 16-18, 25, 31-32. Yoo in the Office of Legal Counsel
23 had provided an analysis supporting the legality of the TSP and
24 other PSP activities. Id. After Yoo resigned in 2003, Philbin and
25 Goldsmith began to share their concerns about the legality of some
26 PSP activities with Ashcroft and White House officials. But these
27 concerns remained a matter of internal discussion and debate within
28 the Office of Legal Counsel and in no way altered its prior

1 official analysis stating that the PSP was legal.

2 In early 2004, various officials, including Ashcroft,
3 Comey and Mueller, continued to voice concern regarding Yoo's
4 analysis of the PSP. These concerns focused primarily on still-
5 undisclosed "other activities" authorized under the PSP, not the
6 TSP (the program at issue here). Doc #671-2/104-2 at 26-31. Then-
7 White House Counsel Gonzales expressed disagreement with such
8 criticisms, and the President reauthorized the PSP without the
9 certification of the Attorney General on March 11, 2004. Id. On
10 March 17, 2004, however, President Bush discontinued certain PSP
11 activities that the DOJ believed were not legally supported. Id at
12 34. On May 6, 2004, Goldsmith and Philbin completed an analysis of
13 the newly-modified PSP (including the TSP) and found it to be
14 legally supported by the 2001 AUMF. Id. The DOJ has never
15 repudiated this analysis or conclusion. Therefore, despite the
16 high-level disagreement over the legality of certain aspects of the
17 PSP, there is no basis to find that defendants acted in the face of
18 a significant risk that their actions violated plaintiffs' legal
19 rights or that defendants engaged in "misuse or abuse of authority
20 or power."

21 Plaintiffs repeatedly emphasize the weakness of the legal
22 rationales advanced for the TSP and have apparently inferred that
23 defendants acted in bad faith. This court has, of course, held
24 that plaintiffs established a prima facie case that defendants'
25 actions were in violation of FISA and that defendants did not rebut
26 this showing. Questions of defendants' intent, however, are more
27 difficult than plaintiffs allow.

28 For the reasons made clear momentarily, the court has

1 little difficulty concluding that the government's conduct here
2 does not merit imposition of punitive damages. In doing so,
3 however, the undersigned must acknowledge that the facts of this
4 case, at a minimum, do not cast a flattering light on certain
5 executive branch officials. Wholly apart from the apparent
6 weakness of Yoo's legal analysis, it is disquieting that for more
7 than a year and a half, sole responsibility for determining the
8 legality of the TSP was reposed in a single official.

9 This aside, it is essential to remember that the precise
10 limits of the president's power to act in defense of the nation are
11 not specifically delineated, and due to the nature of our
12 Constitution will never be spelled out in every detail.
13 Intelligent and sincere officials disagree about the scope of these
14 powers, and the existence of such disagreement should not in every
15 case prevent action from being taken. The president and other
16 senior executive branch officials responsible for national security
17 necessarily bear some risk that their actions may one day be held
18 to be unlawful; they must balance this risk against the harm that
19 may come to the nation if they fail to act. While the court has
20 the constitutional duty to apply the law in cases before it and
21 hold violators accountable, it need not mete out punitive measures
22 on officials for perceived "recklessness" in dealing with a
23 serious, proven threat to the national security.

24 For these and the foregoing reasons, the motion of
25 plaintiffs Ghafoor and Belew for punitive damages is DENIED.

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As the prevailing parties on their claims under FISA,

1 plaintiffs Ghafoor and Belew may recover their reasonable attorney
2 fees and costs of suit. 50 USC § 1810. Defendants do not dispute
3 that FISA provides for fee-shifting to a prevailing plaintiff.
4 Defendants contend, however, that an award of attorney fees and
5 costs is premature and, in any event, dispute plaintiffs'
6 calculation of attorney fees and costs.

7 As discussed in section IIA, Al-Haramain is a "foreign
8 power" as defined by FISA. FISA specifically exempts foreign
9 powers from recovery of attorney fees and expenses. 50 USC §§ 1810
10 (b) and (c). The motion of Al-Haramain for attorney fees and
11 litigation expenses is therefore DENIED.

12 The court thus turns to the claims for attorney fees and
13 expenses brought by plaintiffs Belew and Ghafoor. Despite
14 defendants' protestations, it is not premature to address this
15 issue. The Federal Rules of Civil Procedure establish that
16 "[u]nless * * * a court order provides otherwise," a motion for
17 attorney fees must be filed "no later than 14 days after the entry
18 of judgment." FRCP 54(d)(2)(B)(i). The notes of the advisory
19 committee specifically state that the rule "permits the court to
20 require submissions of fee claims in advance of entry of judgment."
21 FRCP 54, Notes of Advisory Committee on 1993 amendments. Although
22 the court has granted a motion for summary judgment on the issue of
23 liability, defendants claim that they cannot fully address the
24 reasonableness of a fee award without knowing the specific amount
25 of damages awarded. Doc #746/131 at 8-9. But defendants have
26 argued at length that the amount requested by plaintiffs is
27 excessive and unreasonable even if the full amount of damages
28 sought is obtained and have specifically addressed the

1 proportionality of the requested fee in relation to various
2 hypothetical damages awards. Doc #746/131 at 7-9, 16-17. Having
3 effectively disputed plaintiffs' attorney fee motion, defendants'
4 argument that it is premature to address the issue fails.

5 Plaintiffs propose that the fee award be calculated by a
6 straightforward application of the lodestar approach. Doc #738/128
7 at 3. This approach starts by multiplying "the number of hours
8 reasonably expended on the litigation" by "a reasonable hourly
9 rate." Hensley v Eckerhart, 461 US 424, 433 (1983). This method
10 has "achieved dominance in the federal courts" and has "become the
11 guiding light of [the Supreme Court's] fee-shifting jurisprudence."
12 Perdue v Kenny A, 130 S Ct 1662, 1672 (2010) (quoting Gisbrecht v
13 Barnhart, 535 US 789, 801 (2002)).

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16 To determine reasonable hourly rates in a case involving
17 attorneys with widely varying experience and billing rates, this
18 court uses the well-established Laffey matrix. See Laffey v
19 Northwest Airlines, Inc, 572 F Supp 354 (DDC 1983), aff'd in part,
20 rev'd in part on other grounds, 746 F2d 4 (DC Cir 1984). This
21 matrix compiles average billing rates for attorneys in the District
22 of Columbia area, divided into categories based on years of
23 experience. See [http://www.justice.gov/usao/dc/Divisions/Civil_Div](http://www.justice.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html)
24 [ision/Laffey_Matrix_8.html](http://www.justice.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html). Because the cost of living in the
25 District of Columbia differs from that of other cities, the court
26 will adjust the rates to the appropriate locality using the federal
27 locality pay differentials based on federally compiled cost of
28 living data. See, for example, In re HPL Technologies, Inc

1 Securities Litigation, 366 F Supp 2d 912, 921 (ND Cal 2005).

2 Defendants argue that the Laffey rates should be adjusted
3 for the locality in which each of plaintiffs' attorneys operates
4 rather than for the locality where the district court sits. Doc
5 #746/131 at 26. Although the undersigned declined to adjust for
6 the locality of the district court in one unusual case involving
7 two actions pending simultaneously in two district courts, see
8 Martin v FedEx Ground Package System, 2008 WL 5478576, *1-2, 7 (ND
9 Cal 2008), the Ninth Circuit has held that "[g]enerally, when
10 determining a reasonable hourly rate, the relevant community is the
11 forum in which the district court sits." Prison Legal News v
12 Schwarzenegger, 608 F3d 446, 454-55 (9th Cir 2010) (quoting Camacho
13 v Bridgeport Fin, Inc, 523 F3d 973, 979 (9th Cir 2008)).
14 Accordingly, the court will use the San Francisco Bay area as the
15 locality in computing all rates.

16 Plaintiffs propose that the court use the current hourly
17 rates from the Laffey matrix for all the hours worked going back to
18 2005. Doc #748/132 at 19. As a general matter, a trial court has
19 the discretion to apply current rates to all hours billed over the
20 course of the litigation as a means of compensating a plaintiff's
21 attorney for the delay in payment. Welch v Metropolitan Life Ins
22 Co, 480 F3d 942, 947 (9th Cir 2007) (citing In re Wash Pub Power
23 Sys Sec Litig, 19 F3d 1291, 1305 (9th Cir 1994)). Alternately, a
24 court may use the attorney's historical rates and add an
25 enhancement in the form of interest based on the prime rate. *Id.*
26 But this principle of compensating for delay does not apply in
27 suits against the United States. Rather, the longstanding "no-
28 interest rule" holds that "[i]n the absence of express

1 congressional consent to the award of interest separate from a
2 general waiver of immunity to suit, the United States is immune
3 from an interest award." Library of Congress v Shaw, 478 US 310,
4 314 (1986). In the Ninth Circuit's view, an award of attorney fees
5 at current rates is tantamount to an award of interest. See
6 Sorenson v Mink, 239 F3d 1140, 1148 (9th Cir 2001).³ Because
7 Congress has not consented to an award of interest in cases such as
8 this, the court is constrained to use historical rates. Moreover,
9 there is a relatively modest difference between the use of current
10 rates (\$2,724,355.79) compared to historical rates (\$2,515,387.09).
11 Because the weight of authority supports the use of historical
12 rates and because the difference between the two awards is not
13 great, the attorney fees here will be calculated based on
14 historical rates.

15 To calculate the amount of compensation for each attorney
16 for each year the court must first determine each attorney's years
17 of experience and then find the rate for the appropriate year in
18 the Laffey matrix. This rate must then be adjusted based on the
19 federal locality pay differential for that year. See
20 <http://www.opm.gov/oca/10tables/index.asp> and linked pages for
21 historical data. Finally, this rate is multiplied by the number of
22 hours the attorney worked in that year. The Laffey matrix provides

23
24 ³ The Ninth Circuit appears to conflate compensation for the
25 delay in payment with compensation for the erosion in the value of
26 money (inflation). But the concepts are distinct; the former
27 typically takes the form of interest while the latter typically
28 entails a price or cost of living adjustment. Where litigation spans
a lengthy period or interest rates are high, or both, using current
billing rates instead of historical billing rates with interest can
significantly under-compensate prevailing parties or their counsel.
See Theme Promotions, Inc v News America Marketing FSI, Inc, __ F Supp
2d __, 2010 WL 2464961 (ND Cal 2010).

1 billing data for each year starting with June 1 and running to the
 2 following May 31. Accordingly, the number of hours worked per year
 3 is calculated based on the same dates. The federal locality pay
 4 differential and the attorney's years of experience are calculated
 5 based on the later date; for example, for the Laffey year June 1,
 6 2009 - May 31, 2010, both the locality pay and years of experience
 7 are calculated using 2010 data. The only exception is the final
 8 Laffey year, June 1, 2010 - May, 31, 2011; because 2011 locality
 9 pay information is not yet available, data from 2010 are used.

10 **Table 1: Years of Experience of Plaintiffs' Counsel**

11 Name	2006	2007	2008	2009	2010
12 Eisenberg	27	28	29	30	31
13 Hancock	24	25	26	27	28
14 Goldberg	31	32	33	34	35
15 Nelson	33	34	35	36	37
16 Jaskol	18	19	20	21	22
17 Hassan	10	11	12	13	14
18 Albies	1	2	3	4	5
19 Kreuzscher	0	1	2	3	4

20 **Table 2: Laffey Rates for Plaintiffs' Counsel**

21 Name	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
22 Eisenberg	\$405	\$425	\$440	\$465	\$465	\$475
23 Hancock	\$405	\$425	\$440	\$465	\$465	\$475
24 Goldberg	\$405	\$425	\$440	\$465	\$465	\$475
25 Nelson	\$405	\$425	\$440	\$465	\$465	\$475
26 Jaskol	\$360	\$375	\$440	\$465	\$465	\$475
27 Hassan	\$290	\$375	\$390	\$410	\$410	\$420
28 Albies	\$195	\$205	\$215	\$270	\$270	\$275
Kreuscher	\$195	\$205	\$215	\$225	\$270	\$275

1 fell into more than one year, the hours were counted toward the
 2 year in which the task ended. The total number of hours worked by
 3 each lawyer for each Laffey year is given in the first table below;
 4 the combined number of hours is 5518.8. The second table below
 5 contains the total fee award for each attorney and combined.

6 **Table 5: Hours Worked by Plaintiffs' Counsel by Laffey Years**

Name	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
Eisenberg	129.1	582.9	630.8	688.9	409.4	97.9
Hancock	0	30.1	72.2	55.9	64.7	18.9
Goldberg	89	137.2	176.5	123.2	123.8	41.3
Nelson	273.8	287.2	200.8	34	113	7.1
Jaskol	38	124	39.4	62.2	15.4	13.1
Hassan	78.2	94.4	73	51	33.4	17.7
Albies	139.3	174.9	55.5	21.7	66.6	12.9
Kreuscher	0	18.5	0	0	0	1.9

15 **Table 6: Attorney Fee Award by Individual and Total**

Name	Attorney fee award
Jon B Eisenberg	\$1,241,127.74
William N Hancock	\$119,754.88
Steven Goldberg	\$335,196.23
Thomas H Nelson	\$430,541.17
Lisa Jaskol	\$131,217.98
Zaha S Hassan	\$140,760.61
J Ashlee Albies	\$112,052.13
Kenneth A Kreuscher	\$4,736.35
TOTAL	\$2,515,387.09

26 Defendants argue that the number of hours for which
 27 plaintiffs seek compensation is unreasonable for a variety of
 28 reasons. Defendants first claim that "the documentation provided

1 by plaintiffs is plainly inadequate" because plaintiffs have
2 provided declarations summarizing their work rather than
3 contemporaneous billing records. Doc #746/131 at 5. Plaintiffs
4 have complied with Local Rule 54-5, which requires that a motion
5 for attorney fees be supported by "declarations or affidavits"
6 containing a "statement of the services rendered by each person for
7 whose services fees are claimed together with a summary of the time
8 spent by each person." Defendants imply that Hensley, which holds
9 that a prevailing party "should maintain billing time records in a
10 manner that will enable a reviewing court to identify distinct
11 claims," effectively nullifies the rule by requiring a district
12 court in every case to examine such detailed billing records.
13 Hensley, 461 US at 437. Plaintiffs have maintained contemporaneous
14 time records, see Doc #748/132 at 7, and Local Rule 54-5 allows a
15 court to require production of these for in camera inspection.
16 Such a production is not necessary here. The court has no
17 difficulty in determining from plaintiffs' detailed billing
18 summaries that their legal work was related to the successful FISA
19 claims of Ghafoor and Belew. As discussed in more detail below,
20 even though only these two plaintiffs ultimately have succeeded on
21 only one of their original six claims, all of the claims "involve a
22 common core of facts or [are] based on related legal theories" and
23 therefore "cannot be viewed as a series of discrete claims."
24 Hensley, 461 US at 435.

25 Defendants similarly object to plaintiffs' summaries as a
26 form of "block billing." Doc #746/131 at 5. But again, according
27 to plaintiffs' sworn declarations, detailed contemporaneous time
28 records have in fact been kept throughout the litigation and may be

1 reviewed by the court. Using these records to create the summaries
2 required by the local rules does not amount to an objectionable
3 form of "block billing."

4 Defendants maintain that plaintiffs' fee award should be
5 reduced due to "overstaffing and duplicative work by multiple
6 counsel on the same task." Doc #746/131 at 14. Defendants argue
7 that "[a]t most, a reasonable fee would compensate two attorneys"
8 for attending various hearings in this case. Id at 15. As the
9 lengthy procedural history makes clear, this case has been
10 vigorously litigated. Defendants frequently sent three or four
11 government attorneys to attend hearings. Doc ##746/131 at 17;
12 748/132 at 11-12. Indeed, defendants utilized at least twenty-two
13 different government attorneys to write briefs and to attend
14 hearings. Doc #748/132 at 11. Even if defendants proved that two
15 attorneys at a hearing is "reasonable" in the abstract, their own
16 litigation practices confirm that plaintiffs' use of resources was
17 reasonable in this particular case. "The government cannot
18 litigate tenaciously and then be heard to complain about the time
19 necessarily spent by the plaintiff in response." Copeland v
20 Marshall, 641 F2d 880, 904 (DC Cir 1980).

21 The fact that seven attorneys seek compensation for
22 working on each of several important motions also does not
23 demonstrate the "excess" and "needless duplication" alleged by
24 defendants. Doc #746/131 at 14. The declarations of plaintiffs'
25 attorneys demonstrate that different attorneys worked on different
26 elements of the larger project. See, for example, Doc #748/132 at
27 12. This appears to be an efficient division of labor among a team
28 whose members each specialize in particular tasks.

1 Defendants argue that plaintiffs have not attempted to
2 exercise billing judgment because they have "simply summarized all
3 of the hours and activities they undertook since 2006." Doc
4 #746/131 at 4-5. It is true that a fee applicant should "exercise
5 'billing judgment' with respect to hours worked." Hensley, 461 US
6 at 437. However, defendants' argument "misreads the mandate of
7 Hensley" by suggesting that an attorney "should necessarily be
8 compensated for less than the actual number of hours spent
9 litigating the case." City of Riverside v Rivera, 477 US 561, 570
10 n4 (1986) (plurality). Rather, the law requires that the number of
11 hours for which an attorney seeks compensation be "reasonable."
12 Id.

13 As Judge Kozinski has explained, "lawyers are not likely
14 to spend unnecessary time on contingency fee cases in the hope of
15 inflating their fees" because "[t]he payoff is too uncertain, as to
16 both the result and the amount of the fee." Moreno v City of
17 Sacramento, 534 F3d 1106, 1112 (9th Cir 2008). "By and large, the
18 court should defer to the winning lawyer's professional judgment as
19 to how much time he was required to spend on the case; after all,
20 he won, and might not have, had he been more of a slacker." Id.
21 This reasoning is especially apt here. Plaintiffs are the only
22 parties to have obtained a liability finding on a FISA claim in
23 this multi-district litigation concerning warrantless electronic
24 surveillance. Plaintiffs had little reason to believe that they
25 would recover anything at all when this case began. It is
26 therefore unlikely that plaintiffs' attorneys, believing that they
27 were probably working pro bono and trying to fit the case into a
28 schedule that also included work for paying clients, spent more

1 time than they felt was absolutely necessary to win the case.

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4 Defendants also argue that plaintiffs' fee award should
5 not include "unproductive" or "unnecessary" hours. Doc #746/131 at
6 3. By this, defendants mean "hours that had no direct bearing on
7 the grant of partial summary judgment on plaintiffs' FISA claim."
8 Doc #746/131 at 3. Defendants point to various issues throughout
9 the litigation that have been resolved in their favor – such as the
10 government's successful assertion of the state secrets privilege,
11 plaintiffs' failed attempts to obtain access to classified
12 information, plaintiffs' failure in July 2008 to present enough
13 evidence to establish standing, and a handful of other motions –
14 and suggest that the hours spent on these issues should not be
15 compensated because they had no bearing on the grant of summary
16 judgment. Doc #746/131 at 19-23. What defendants propose is close
17 to the "mathematical approach comparing the total number of issues
18 in the case with those actually prevailed upon" that was rejected
19 in Hensley. 461 US at 435 n11.

20 To take one particular example, defendants argue that it
21 would be unreasonable for plaintiffs to be compensated for the time
22 spent between July 2008 and June 2009 fighting to gain access to
23 classified information because this dispute "ended in no access
24 being granted." Doc #746/131 at 22-23. Of course, the reason that
25 plaintiffs never gained access to the information is that
26 defendants disobeyed direct court orders to negotiate an
27 appropriate protective order and to give plaintiffs' counsel access
28 to some of the information once they had obtained security

1 clearances. See Doc #721/115 at 16-18. Defendants claim that
2 because "the Court declined to enter any sanctions or issue a
3 protective order granting the disclosure of classified information
4 to plaintiffs' counsel," they essentially won the issue. Doc
5 #746/131 at 23. A defendant "cannot prolong the litigation through
6 its own obdurate behavior and then protest that [plaintiffs'
7 counsel] has spent too much time prosecuting the action." O'Neill,
8 Lysaght & Sun v Drug Enforcement Admin, 951 F Supp 1413, 1426 (CD
9 Cal 1996). The time spent by plaintiffs' counsel seeking access to
10 classified information was made necessary by defendants' litigation
11 tactics and is therefore compensable.

12 Defendants correctly point out that "the most critical
13 factor" in determining whether a fee award is reasonable is "the
14 degree of success obtained." Hensley, 461 US at 436. In
15 particular, when a plaintiff succeeds on only some claims for
16 relief, two questions must be addressed: "First, did the plaintiff
17 fail to prevail on claims that were unrelated to the claims on
18 which he succeeded? Second, did the plaintiff achieve a level of
19 success that makes the hours reasonably expended a satisfactory
20 basis for making a fee award?" Id at 434. "A plaintiff is not
21 eligible to receive attorney's fees for time spent on unsuccessful
22 claims that are unrelated to a plaintiff's successful * * * claim,"
23 and is not entitled to a fee award not "commensurate with the
24 extent of the plaintiff's success." McCown v Fontana, 550 F3d 918,
25 923-24 (9th Cir 2008) (quotation omitted). "A reduced fee award is
26 appropriate if the relief, however significant, is limited in
27 comparison to the scope of the litigation as a whole." Hensley,
28 461 US at 439. But "[w]here a plaintiff has obtained excellent

1 results, his attorney should recover a fully compensatory fee,"
2 which normally "will encompass all hours reasonably expended on the
3 litigation," and may justify an enhanced award "in some cases of
4 exceptional success." Hensley, 461 US at 435.

5 Although plaintiffs Belew and Ghafoor have prevailed on
6 only one of their six original claims for relief, it is clear that
7 the remaining five claims – rising from violations of the First,
8 Fourth and Sixth Amendments, as well as the principle of separation
9 of powers and the International Covenant on Civil and Political
10 Rights – "involve a common core of facts" and are "based on related
11 legal theories." Doc #458/35 at 14-16; Hensley, 461 US at 435.

12 Each of these claims was based on the same instances of the
13 government's illegal wiretapping of plaintiffs, and each sought to
14 vindicate plaintiffs' legal and constitutional rights against
15 claims of expanded executive power. Plaintiffs "in good faith
16 * * * raise[d] alternative legal grounds for a desired outcome, and
17 the court's rejection of or failure to reach certain grounds is not
18 a sufficient reason for reducing a fee." Hensley, 461 US at 435.

19 Nor should the overall award of attorney fees be reduced because
20 Al-Haramain is not entitled to recover damages or attorney fees.
21 The surveillance of plaintiffs Al-Haramain, Ghafoor and Belew
22 involved the same set of facts. As a result, the litigation
23 involving the surveillance of Al-Haramain cannot be separated from
24 the litigation involving the surveillance of Belew and Ghafoor.

25 This court must also consider whether the level of
26 success achieved is commensurate with the fee award requested by
27 plaintiffs' counsel. Although plaintiffs Belew and Ghafoor have
28 fully obtained the \$100 per day of liquidated damages sought for a

1 total of \$40,800, they have obtained none of the \$1,000,000 of
2 punitive damages requested in the first amended complaint or the
3 \$550,800 of punitive damages requested in the proposed judgment.
4 Doc ##458/35 at 16; 723/117 at 2. Similarly, Al-Haramain is barred
5 from recovering any relief and none of the plaintiffs have obtained
6 the equitable relief sought. Doc ##458/35 at 16; 723/117 at 3.

7 The Supreme Court has previously rejected a rule of
8 proportionality between damages recovered in a civil rights case
9 and attorney fees awarded under a fee-shifting statute. See City
10 of Riverside v Rivera, 477 US 561, 574 (1986) (plurality); Id at
11 585 (Powell concurring). "Where recovery of private damages is the
12 purpose of a civil rights litigation, a district court, in fixing
13 fees, is obligated to give primary consideration to the amount of
14 damages awarded as compared to the amount sought." Id at 585
15 (Powell concurring). But "[i]n some civil rights cases, * * * the
16 court may consider the vindication of constitutional rights in
17 addition to the amount of damages recovered." Id. Because damages
18 recovered in such cases "contribute[] significantly to the
19 deterrence of civil rights violations in the future" and otherwise
20 "serve[] the public interest," the "damages award[ed] do not
21 reflect fully the public benefit advanced" by the litigation. Id
22 at 574-75.

23 FISA was enacted primarily to address Congress's concern
24 that the constitutional rights of American citizens were being
25 undermined by various intelligence activities. See Church
26 Committee Report, S Rep No 94-755, 289 (1976); Doc #453/33 at 10-
27 14. Plaintiffs' success in obtaining damages under FISA must
28 therefore be viewed as a vindication of constitutional rights that

1 serves the greater public interest. This court's judgment under
2 FISA awarding damages against defendants for unlawful surveillance,
3 as well as its previous order holding that the state secrets
4 privilege is preempted by FISA, contributes to the deterrence of
5 future violations of constitutional rights by warrantless
6 wiretapping. For these reasons, strict proportionality here is a
7 particularly unsuitable measure of the reasonableness of
8 plaintiffs' requested attorney fees.

9 "Where the relief sought and obtained is limited to
10 money, the terms 'extent of success' and 'level of success' are
11 euphemistic ways of referring to money." McGinnis v Kentucky Fried
12 Chicken, 51 F3d 805, 810 (9th Cir 1995). But this case, from the
13 start, has been about more than money. Plaintiffs began this
14 litigation five years ago because they believed that they had been
15 illegally wiretapped by executive branch officials and wanted both
16 to vindicate their own constitutional rights and enforce the laws
17 that they believed were being violated. With the award of
18 liquidated damages under FISA, plaintiffs have essentially obtained
19 what they sought.

20 The difficulties faced and overcome by plaintiffs in this
21 case add significantly to their "level of success." Plaintiffs
22 here stand alone among the dozens of plaintiffs in this
23 consolidated litigation that have had any success in pursuing
24 claims against the government. The government has fiercely
25 litigated this case from the beginning and has used every available
26 tactic in defense. Plaintiffs have gone to extraordinary lengths
27 in their attempts to obtain classified evidence from in the
28 government's possession and have ultimately managed to win their

1 case despite the government's refusal to provide them with this
2 evidence. Plaintiffs' counsel have clearly obtained "excellent"
3 results for their clients and accordingly are entitled to a "fully
4 compensatory fee" that includes "all hours reasonably expended on
5 the litigation." Hensley, 461 US at 435. Accordingly, the court
6 GRANTS the motion for attorney fees brought by Belew and Ghafoor
7 and awards \$2,515,387.09. The court DENIES the motion for attorney
8 fees brought by Al-Haramain.

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10 4

11 Plaintiffs also request to be compensated for a total of
12 \$22,012.36 in expenses. Doc #738/128 at 11. FISA provides that,
13 in addition to "reasonable attorney's fees," a prevailing party may
14 recover "other litigation and investigation costs reasonably
15 incurred." 50 USC § 1810(c). Even absent express statutory
16 authority, judges are authorized to award certain specific
17 litigation-related expenses, known as "taxable costs," to a
18 prevailing party. 28 USC § 1920. The specific authorization of
19 FISA goes further than this, though, and clearly contemplates
20 recovery of additional "non-taxable" costs. In any case, federal
21 fee-shifting statutes awarding "reasonable attorney's fees" may
22 include various non-taxable costs at the court's discretion. Grove
23 v Wells Fargo Financial California, Inc, 606 F3d 577, 579-81 (9th
24 Cir 2010). This award may include such expenses as travel and
25 computerized legal research if it is standard practice in the local
26 legal community to bill these expenses separately from hourly
27 rates. *Id.*

28 Attorneys Albies, Eisenberg, Jaskol, Goldberg and Hassan

1 describe in their declarations the expenses for which they seek
2 compensation; the total amount is \$8,808.18. Doc #738-2/128-2 at
3 5-6; 738-3/128-3 at 13; 738-5/128-5 at 8; 738-6/128-6 at 9-10; 738-
4 8/128-8 at 7. These expenses relate to travel, computerized legal
5 research and courier services, and all of the attorneys state that
6 they believe that such expenses are normally billed separately from
7 hourly rates in their communities. Id. This is a small figure in
8 the context of litigation that has lasted nearly five years, and an
9 inspection of the declarations reveals that the attorneys have
10 omitted a large percentage of the expenses that they must have
11 incurred in this litigation. The court finds that the request for
12 expenses is reasonable.

13 Attorney Thomas Nelson seeks reimbursement for \$6,715.00
14 that he paid to an ethics consultant and \$6,489.18 that he spent on
15 travel. Doc #738-7/128-7 at 4-6. Mr. Nelson retained the ethics
16 consultant, Mark Fucile, to help him decide an ethical matter that
17 he felt was "unprecedented" - that is, what he should do to protect
18 the confidential communications of his client when he had reason to
19 believe that the government was monitoring his client. Id at 5-6;
20 Doc #748-1/132-1 at 3-4. Based on the same concerns, Mr. Nelson
21 felt compelled to discuss confidential matters in person rather
22 than through electronic communications, which required him to
23 travel. Doc #748-1/132-1 at 3. He seeks reimbursement for two
24 trips to Saudi Arabia, two trips to Washington, D C, and three
25 trips to San Francisco, although he claims to have "made
26 approximately 40 trips to the Middle East" to provide legal counsel
27 to the director of Al-Haramain. Doc #738-7/128-7 at 6.

28 The court acknowledges that the ethical questions arising

1 from this case are in fact novel and difficult. The duty to
2 safeguard confidential client information is one of the most
3 critical ethical obligations of a lawyer, and Mr Nelson's actions
4 to protect this information were not unreasonable by any measure.
5 Mr Nelson's request for expenses is, accordingly, approved. In
6 sum, the court GRANTS the request for \$22,012.36 in costs and
7 expenses brought by plaintiffs Belew and Ghafoor.

8
9 III

10 For the reasons stated herein, the court GRANTS the
11 motion of plaintiffs Ghafoor and Belew for liquidated damages and
12 awards liquidated damages to those plaintiffs in the amount of
13 \$20,400 to each plaintiff. The court DENIES the motion of
14 plaintiff Al-Haramain for liquidated damages and all other relief,
15 DENIES the motion of all plaintiffs for punitive damages and DENIES
16 the motion of all plaintiffs for equitable relief (a declaration
17 that defendants' warrantless electronic surveillance was unlawful
18 as a violation of FISA and an order that any information obtained
19 by means of the defendants' unlawful surveillance shall not be used
20 by the United States government in any proceeding and shall be
21 expunged from defendants' files and records). Doc #723/117.

22 The court GRANTS the motion of plaintiffs Ghafoor and
23 Belew for the entry of an award of attorney fees and expenses, Doc
24 #738/128; 746/131; 748/132, and awards plaintiffs Ghafoor and Belew
25 attorney fees in the amount of \$2,515,387.09 and expenses in the
26 amount of \$22,012.36. The court DENIES the motion of plaintiff Al-
27 Haramain for attorney fees and expenses.

28 Plaintiffs request that the court dismiss the Second,

1 Third, Fourth, Fifth and Sixth claims for relief pleaded in the
2 First Amended Complaint pursuant to Federal Rule of Civil Procedure
3 41(a)(2). Doc #722/116 at 1. Defendants' opposition to
4 plaintiffs' proposed judgment states that defendants do not oppose
5 the dismissal of these claims. Doc #727/119 at 15. Accordingly,
6 the court GRANTS plaintiffs' request to dismiss without prejudice
7 the Second, Third, Fourth, Fifth, and Sixth claims for relief. Doc
8 #722/116.

9 The clerk is directed to enter judgment, terminate any
10 remaining motions and close the file for Case Number 07-0109.

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12 IT IS SO ORDERED.



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14 VAUGHN R WALKER
15 United States District Chief Judge
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