

1 JEFFREY S. BUCHOLTZ
 Acting Assistant Attorney General
 2 CARL J. NICHOLS
 Deputy Assistant Attorney General
 DOUGLAS N. LETTER
 3 Terrorism Litigation Counsel
 JOSEPH H. HUNT
 4 Branch Director
 ANTHONY J. COPPOLINO
 5 Special Litigation Counsel
 ALEXANDER K. HAAS
 6 Trial Attorney
 U.S. Department of Justice
 7 Civil Division
 Federal Programs Branch
 8 20 Massachusetts Avenue, NW
 Washington, D.C. 20001
 9 Phone: (202) 514-4782
 Fax: (202) 616-8460

10 *Attorneys for the Defendants*

11
 12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**

14 IN RE NATIONAL SECURITY AGENCY)
 15 TELECOMMUNICATIONS RECORDS)
 LITIGATION)
 16 This Document Solely Relates To:)
 17 *Al-Haramain Islamic Foundation et al.*)
 18 *v. Bush, et al.* (07-CV-109-VRW))

No. M:06-CV-01791-VRW
**DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' MOTION TO EXTEND
 TIME FOR PERSONAL SERVICE IN
*Al-Haramain Islamic Foundation et al.
 v. Bush et al.***
 Date: April 23, 2008
 Time: 10:00 a.m.
 Courtroom: 6, 17th Floor
 Honorable Vaughn R. Walker

1 On April 17, 2008, after over two years of litigation and just a few days before a hearing
2 on the Government's renewed motion to dismiss or for summary judgment, Plaintiffs filed a
3 motion to extend the 120 day time limit (long since elapsed) to serve each Defendant in this case
4 in his *personal* capacity. See Pls. Service Mot. at 1. But Plaintiffs cannot possibly satisfy their
5 burden of proving that they missed the service deadline for good cause, and offer no credible
6 reason why the Court should exercise its discretion to extend the service deadline. As even they
7 concede, Plaintiffs have had actual knowledge of the personal service issue for at least the last
8 nine months (and should have been aware of the issue for nearly two years) and did *nothing* to
9 address the matter. Plaintiffs' excuse—essentially that they were busy—hardly provides a
10 reason, let alone good cause to extend the service deadline. The Court should summarily reject
11 Plaintiffs' motion to extend the service deadline in light of their willful disregard of the matter.^{1/}

12 ARGUMENT

13 **I. Plaintiffs Fail to Establish Good Cause**

14 Under Rule 4(m), a litigant has 120 days after the filing of a complaint to accomplish
15 service. By placing time limits on service, "Congress balanced the possible loss of a litigant's
16 federal cause of action against the need to encourage diligent prosecution of lawsuits." *Townsel*
17 *v. County of Contra Costa*, 820 F.2d 319, 321 (9th Cir. 1987). "The rule is intended to force
18 parties and their attorneys to be diligent in prosecuting their causes of action." *Wei v. Hawaii*,

19 ¹ If necessary, the Court could place this on the motion calendar, where it should have been
20 raised, to allow for full consideration of the issue. See L.R. 6-3(d). The motion certainly should
21 not be granted without doing so. Plaintiffs have sought to use Local Rule 6, on a three-day fast
22 track, to address an issue of obvious substantive significance—service of a lawsuit on the
23 President of the United States and three agency heads in their personal capacity. But Local Rule
24 6 concerns motions to extend time and appears intended to address non-controversial *scheduling*
25 issues akin to non-substantive matters governed by administrative motion practice. Courts in this
26 district have held that analogous Local Rule 7-11(a)—concerning administrative motions—
27 should not be used for substantive matters. See *Dister v. Apple-Bay East*, 2007 WL 4045429, *3
28 (N.D. Cal. 2007); *Hess v. Astrazeneca Pharmaceuticals*, 2006 WL 2092068, *1 (N.D. Cal. 2006)
(noting that "an administrative motion is not the appropriate vehicle for resolution of the
substantive arguments"). To file the instant motion on an expedited track and give the
Defendants just a few days to review and respond, while we are simultaneously preparing for oral
argument on the pending motions, should not be condoned. This is especially so where
Defendants again indicated prior to the February 7 case management conference that they would
raise sovereign immunity in their pending dispositive motion, and Plaintiffs failed to present their
motion to extend the service date during the briefing on Defendants' motion.

1 763 F.2d 370, 372 (9th Cir. 1985). “Good cause generally means plaintiff attempted service but
2 did not complete it,” *Television Signal v. City & County of San Francisco*, 193 F.R.D. 645, 646
3 (N.D. Cal. 2000) (Walker, J.), while ignorance or misunderstanding of Rule 4 does not constitute
4 good cause. *Townsel*, 820 F.2d at 319 (“To hold that complete ignorance of Rule 4(j) [now
5 4(m)] constitutes good cause for untimely service would allow the good cause exception to
6 swallow the rule.”). Likewise, counsel’s own inadvertence does not constitute good cause to
7 extend the service date. *Wei*, 763 F.2d at 372 (“Counsel always could aver that he or she
8 inadvertently forgot about the 120 day limit”).

9 Here, there is no dispute that Plaintiffs never attempted to effectuate personal service on
10 the federal official Defendants, as required by Rule 4(i)(3) to initiate suit against a government
11 employee in his individual capacity. Instead, Plaintiffs’ only argument is that the press of other
12 issues at the outset of this case distracted their attention away from obtaining proper service on
13 each of the Defendants in their individual capacity. This contention is simply not credible:
14 service of process is the most basic act of filing a lawsuit, as experienced counsel well know.
15 And even if this claim were credible, the failure to make any attempt at service for over two years
16 cannot constitute good cause.

17 Plaintiffs’ claimed belief that service on the Attorney General was sufficient is expressly
18 contradicted by the clear text of the relevant rules governing service of a complaint on a
19 government employee. Plaintiffs followed the rule for service of a complaint “on the United
20 States” its agencies or officers for official capacity claims under Rule 4(i)(2). But Rule 4(i)(3)
21 clearly sets forth different requirements for suing a government employee personally in his
22 “individual capacity” and it is uncontested that Plaintiffs have never attempted to comply with
23 Rule 4(i)(3).^{2/}

24 More fundamentally, a review of the complaint demonstrates that Plaintiffs’ arguments
25 are nothing more than post-hoc attempts to avoid a strategic decision Plaintiffs made long ago.

26 ² The section was clarified in the 2000 Amendments, and the Advisory Committee Notes to
27 those amendments state: “It has been understood that the individual defendant must be served as
28 an individual defendant, a requirement that is made explicit.” Advisory Comm. Note to 2000
Amend. to Rule 4.

1 Plaintiffs' complaint reflects no intent at all to sue any of the Defendants in their *individual*
2 capacity. The law is clear that such claims are quite distinct from official capacity claims, *see*
3 *Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales*, 474 F. Supp. 2d
4 1133, 1140 (N.D. Cal. 2007), and yet the complaint fails to raise such claims on its face as
5 required by Rule 8.^{3/} *See* Compl. ¶¶ 7-13; *see also Multi-Denominational Ministry*, 474 F. Supp.
6 2d at 1140-41; *Kaufmann v. United States*, 840 F. Supp. 641, 652-55 (E.D. Wis. 1993) (rejecting
7 claimed personal capacity suits against named federal officials because of absence of facts of
8 personal involvement). And while Plaintiffs assert that Defendants have had 'actual notice' of
9 the complaint, such notice was not of potential *personal* liability of any individual defendant.^{4/} In
10 addition, of course, Plaintiffs never *acted* as if they had sued any individuals in their personal
11 capacity.^{5/}

12 Moreover, Plaintiffs have been on notice of the issue of sovereign immunity for well over
13 a year and, in particular, of their failure to serve individual defendants for at least nine months.
14 (Even if they had not bee so alerted, Plaintiffs' obligation to serve the Defendants in their
15 individual capacity is Plaintiffs' alone, not the Government's, the Court's, or the clerk's office.)
16 The Government first raised the sovereign immunity issue in October 2006, in seeking a stay
17 pending appeal after Judge King had ruled on the Government's first dispositive motion. *See*
18 Exh. A at 12-14 (Gov't stay motion). Judge King upheld the state secrets privilege as to any
19 alleged *current* surveillance, and thus left only a question of retrospective damages. The
20 Government then pointed out that further proceedings pending appeal would be futile because
21 Plaintiffs' claim for damages against the United States was barred by sovereign immunity. In
22 opposing that motion, Plaintiffs never mentioned that they had sued *any* Defendant in his

23 ³ *See Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1968 (2007) (a
24 complaint must state "enough facts to state a claim to relief that is plausible on its face" and
"give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.").

25 ⁴ Indeed, the individual defendants would likely be represented by different counsel from a
26 separate component of the Department of Justice in an individual capacity suit.

27 ⁵ In any event, the mere service of an official capacity suit on the Defendants does not serve
28 to convert that suit into personal capacity action. To allow such a result would effectively read
Rule 4(i)(3) out of the Federal Rules of Civil Procedure.

1 individual capacity, but argued simply that the sovereign immunity issue was prematurely raised.
2 *See* Exh. B at 12-13 (Pls. Opp. to stay). Thereafter, in their Ninth Circuit brief, Plaintiffs claimed
3 for the first time that their complaint raised personal capacity claims against the individual
4 Defendants. *See* Exh. C (pages from Pls. 9th Cir. Brief). When the Government, in reply, noted
5 that the complaint had never been served on these individuals, *see* Exh. D (pages from Gov't
6 Reply), Plaintiffs still did *nothing* to cure this service defect—six months *before* the statute of
7 limitations expired.

8 To be sure, requiring a party to follow the rules for service may, in some cases, bar a
9 plaintiff's claim. But it is well-established in this Circuit that such a result does not relieve a
10 litigant of the obligation to timely serve a complaint. *See Wei*, 763 F.2d at 372 (dismissing
11 plaintiff's claim pursuant to Rule 4 prior to 1993 amendment although it would be time-barred,
12 reasoning "Wei may be harmed by his attorney's neglect, but litigants are bound by the conduct
13 of their attorneys, absent egregious circumstances which are not present here."); *see also Tuke v.*
14 *United States*, 76 F.3d 155, 156 (7th Cir. 1996) (actual notice to a defendant is insufficient).

15 **II. Plaintiffs Point to No Basis for the Court to Exercise its Discretion**

16 Recognizing that they cannot demonstrate good cause, Plaintiffs appeal to the Court's
17 discretion. *See In re Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001). But even assuming the Court
18 has discretion to grant Plaintiffs' request absent good cause, the circumstances here do not
19 warrant allowing the case to proceed in light of the strategic decisions Plaintiffs have made in
20 this case. After all, Plaintiffs are not pro se litigants who missed a service deadline. Instead,
21 Plaintiffs and their counsel have had numerous opportunities to amend their complaint or
22 otherwise make clear that they were bringing personal capacity claims against the Defendants
23 individually, as well as to effect proper service. Because Plaintiffs chose to dawdle with the
24 statute of limitations running—even when on notice months before it expired—it cannot possibly
25 be a sound act of discretion to allow them to serve now. "Willful failure in serving a complaint
26 is a particularly serious failure to prosecute." *See Television Signal*, 193 F.R.D. at 647. To
27
28

1 permit these claims to proceed would sanction an intentional disregard of the rules for over two
2 years.^{6/}

3 The notion that there would be “no prejudice” to the Government by allowing Plaintiffs
4 to serve the individual Defendants now is also wrong. The Government has been litigating this
5 case for over two years, has prevailed in its central state secrets privilege claim, and has briefed
6 additional jurisdictional and legal issues. The central issue in this case is whether national
7 security would be harmed by further litigation, and allowing that harm to continue in the face of
8 dilatory tactics would put the Government’s interests in harms way despite a clear holding by the
9 Ninth Circuit that risk to national security is at stake. Also, any individual defendant subject to
10 suit in their personal capacity would obviously be prejudiced by the existence of a lawsuit
11 seeking damages against them personally—particularly after having received no notice of the
12 specific allegations against them, no service of the suit, and no ability, therefore, to defend
13 themselves over the past two years.

14 In sum, no basis exists to grant this motion. At bottom, the “good cause” and
15 “discretion” embodied in Rule 4(m) cannot be stretched so far as to gut the rule, as Plaintiffs
16 request. Two years after the suit was filed, eighteen months after the sovereign immunity issue
17 was first raised, and nine months after again being alerted to the deficiency in their position on
18 appeal, Plaintiffs offer nothing that would justify relief at this late stage from the inadvertence
19 and tactical choices they have made. If the Court were to grant the requested relief, it would be
20 difficult to imagine any circumstance where such a motion could possibly be denied.

21 **CONCLUSION**

22 For the foregoing reasons, Plaintiffs’ motion should be denied.

23 Dated: April 22, 2008

Respectfully Submitted,

24 JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

25 CARL J. NICHOLS
Deputy Assistant Attorney General

26
27 ⁶ The fact that the statute of limitations would otherwise expire is not an independent
28 ground to let the case proceed. It is at most a factor. Indeed, rigid reliance on the statute of
limitations would have the perverse effect of rewarding those who most ignore the service rules.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DOUGLAS N. LETTER
Terrorism Litigation Counsel

JOSEPH H. HUNT
Branch Director

s/ Anthony J. Coppolino
ANTHONY J. COPPOLINO
Special Litigation Counsel
tony.coppolino@usdoj.gov

s/ Alexander K. Haas
ALEXANDER K. HAAS
Trial Attorney
U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20001
Phone: (202) 514-4782
Fax: (202) 616-8460
Attorneys for the Defendants