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9
 10 **UNITED STATES DISTRICT COURT**
 11 **NORTHERN DISTRICT OF CALIFORNIA**

12)	No. M:06-CV-01791-VRW
13	IN RE NATIONAL SECURITY AGENCY)	
14	TELECOMMUNICATIONS RECORDS)	[CORRECTED VERSION]
15	LITIGATION)	GOVERNMENT DEFENDANTS'
16	<u>This Document Solely Relates To:</u>)	CASE MANAGEMENT STATEMENT
17	<i>Al-Haramain Islamic Foundation et al.</i>)	Date: January 23, 2009
18	<i>v. Obama, et al.</i> (07-CV-109-VRW))	Time: 10:30 a.m.
19)	Courtroom: 6, 17th Floor
20)	
21)	Honorable Vaughn R. Walker
22)	
23)	

19 Pursuant to Local Rule 16-10(d) and the Court's Order of January 5, 2009, the
 20 Government submits this case management statement in connection with the Case Management
 21 Conference set for Friday, January 23, 2009. This report will: (1) set forth the Government's
 22 position as to further proceedings; and (2) respond to issues raised in Plaintiffs' Case
 23 Management Report ("Pls. Rep.").^{1/}

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 27 ¹ Pursuant to Fed. R. Civ. P. 25(d), President Obama is substituted in his official capacity
 as a defendant in this case.

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I. The Government’s Position as to Further Proceedings

On January 5, 2009, the Court issued an Order denying the Government Defendants’ Third Motion to Dismiss or for Summary Judgment. *See* Dkt. 57 (07-cv-109-VRW). On January 16, 2009, the Government noticed an appeal of the Court’s Order. *See* Dkt. 59. On January 19, 2009, the Government filed a motion for a stay pending appeal and for certification of the Court’s Order pursuant to 28 U.S.C. § 1292(b). *See* Dkt. 60 (hereafter “Stay Mem.”). For the reasons set forth in detail in that motion, the Government requests that further proceedings in this action be stayed pending appeal.

The Government also requests that the Court shorten the time for plaintiffs to respond to the Government’s motion because the January 5 Order provides for immediate proceedings and deadlines that, in the Government’s view, present issues of irreparable harm and thus necessitate consideration of the stay motion as soon as possible. *See* Stay Mem. (Dkt. 60). We propose that the plaintiffs’ respond to the motion by Tuesday, January 27, 2009, that the Government reply by Friday, January 30, 2009, and that if the Court deems a hearing is necessary, it be set for Thursday, February 5, 2009.

II. The Government’s Response to Plaintiffs’ Case Management Statement

Plaintiffs’ Case Management Report addresses three topics that the Government will briefly address in turn.

A. Timing of Conferral and Submission of Separate Statements

Plaintiffs spend two pages discussing the parties conferral process since the January 5 Order, addressing why a joint report was not submitted and the timing of these reports. *See* Pls. Rep. at 2-3. The substance and tone of plaintiffs’ discussion appears to cast blame on the Government for either inadequately conferring or for delaying the process of setting forth the parties views for the Court. We see little point to an extended discussion of the matter. The bottom line is that the Government could not state its position as to further proceedings until that position had been determined after internal deliberations. The Government apprised plaintiffs of the its position on further proceedings as soon as possible. Moreover, the Court’s Order itself

1 permits the parties to file separate statements of their “respective plans” after conferring in any
2 event. *See* Dkt. 57 at 25.

3 After the Court issued its Order, the Government immediately undertook deliberations on
4 whether to undertake an appeal of the Court’s Order and, on January 16, 2009, the Solicitor
5 General authorized the Government to appeal that Order, to seek a stay pending appeal, and to
6 seek certification of an interlocutory appeal under 28 U.S.C. § 1292(b). Prior to that time, the
7 Government could not indicate to the plaintiffs how it proposed to proceed in this case. We
8 recognize that the decisions to appeal and to seek a stay were made within a week of the
9 scheduled January 23, 2009 conference. But the Court’s Order raised significant issues for the
10 Government to examine, and the Government moved expeditiously (within 10 days) and has set
11 forth its position at length. The Government also sought to continue the conference to January
12 30, 2009 to allow plaintiffs more time to respond. Indeed, plaintiffs’ statement indicates that
13 they would like additional time to respond to the motion, as the Government had proposed.

14 In sum, the compressed conferral process resulted from the need for the Government to
15 determine its position on future proceedings in a significant case; we did so expeditiously,
16 advised the plaintiffs of our position, and set forth that position at length before the conference.
17 There was no intent to delay conferring and advising the Court of our views but, on the contrary,
18 to make those views clear and detailed.

19 **B. Plaintiffs’ Objections to Appellate Jurisdiction**

20 Plaintiffs next spend over three pages arguing that the Court’s Order is not appealable
21 under 28 U.S.C. § 1291 and, thus, that this Court has not been divested of jurisdiction. *See* Pls.
22 Rep. at 4-7 (citing *Nascimento v. Dummer*, 508 F.3d 905, 908 (9th Cir. 2007) and *Estate of*
23 *Connors v. O’Connor*, 6 F.3d 656, 658 (9th Cir. 1993)). But this has nothing to do with the
24 question at hand. The Government is not here addressing the argument that the Court has been
25 divested of jurisdiction by the filing of a notice of appeal. We seek a stay pending the disposition
26 of that appeal to preserve the status quo and the Ninth Circuit’s ability to consider the matter
27 without the imposition of irreparable harm on the Government. If plaintiffs wish to challenge the

1 Court of Appeal's jurisdiction, they should do so in that court.

2 To the extent any briefing on this topic is necessary in this Court, the appropriate course
3 would be for parties to do so in connection with the pending stay motion. For now, we note
4 simply our disagreement with plaintiffs' specific contention that the collateral order doctrine
5 would not provide grounds for an appeal under 28 U.S.C. § 1291. *See* Pls. Rep. at 4-5.^{2/} The
6 Court's Order conclusively determined that Section 1806(f) of the FISA has preempted the state
7 secrets privilege and that those procedures now will be applied in this case, first to determine
8 whether the plaintiffs have been subject to the alleged surveillance and thus whether they in fact
9 have Article III standing. That issue is separate from the merits question of whether any
10 surveillance violated the law. Also, for the reasons set forth in the Government's stay motion,
11 any decision on the issue of standing under Section 1806(f), in the unique context here, would be
12 effectively unreviewable because the proceedings ordered by the Court would not only inherently
13 risk disclosure of the privileged information, they provide for its disclosure to plaintiffs' counsel
14 based on due process considerations. *See* USG Stay Mem. at 9-14. Plaintiffs' plan for
15 proceeding does not contend otherwise, but confirms their agreement that further proceedings
16 under the Order would involve the disclosure of classified information to plaintiffs' counsel,
17 including possibly of the Government's prior classified filings. Under these circumstances, the
18 Government need not wait until the last minute for an actual physical disclosure of classified
19 information to the plaintiffs' counsel before appealing. *See id.* at 14, n.9.^{3/}

20 Finally, in arguing that the Order is not appealable, plaintiffs refer to some statements of
21 two individuals who have been nominated to offices in the Department of Justice regarding the
22 lawfulness of some particular forms of surveillance. *See* Pls. Rep. at 5-6. These observations are

23 ² The order is appealable under Sections 1291 and 1292(a)(1). The government has also
24 sought certification under 28 U.S.C. § 1292(b). But this has nothing to do with the present
25 question regarding a stay of this Court's order pending appellate proceedings.

26 ³ The fact that the Order provides for declassification review of information implicates an
27 issue of timing, not the legal effect of the Order, which provides that due process requires the
28 disclosure of classified information to the plaintiffs under Section 1806(f) after the 45 day review
period.

1 also irrelevant to whether the Court should grant a stay pending appeal. The concern raised by
2 the Government's stay motion is that the privilege assertion not be irreparably harmed pending
3 appeal. The Government's position remains that this case should be stayed.

4 **C. Plaintiffs' Plan for Further Proceedings**

5 For the foregoing reasons as well as those set forth in our stay motion, the Government
6 opposes the plaintiffs' plan for further proceedings.

7 Dated: January 22, 2009

Respectfully Submitted,

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Acting Assistant Attorney General

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