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4   **IN THE UNITED STATES DISTRICT COURT**

5   **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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8   **IN RE:**   **MDL Docket No 06-1791 VRW**

9   **NATIONAL SECURITY AGENCY   ORDER**
    TELECOMMUNICATIONS RECORDS
10 **LITIGATION**

11 _____

    This order pertains to:
12
    Al-Haramain Islamic Foundation et
13 **al v Bush et al (C-07-0109 VRW),**

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16   On January 5, 2009, the court ruled on cross-motions in

17 this action, denying the United States government defendants' third

18 motion to dismiss (Doc #475/49[1]) and granting plaintiffs' motion

19 for discovery pursuant to 50 USC § 1806(f)(Doc #472/46). Doc

20 #537/57 at 22.

21   The January 5 order also set forth orders designed to

22 make it possible for the court to determine whether plaintiffs had

23 been subject to unlawful electronic surveillance and to enter an

24 order under seal regarding the outcome of that determination. The

25 order provided for plaintiffs' counsel to obtain top

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

1 secret/sensitive compartmented information (TS/SCI) security

2 clearances and ordered the government to review its classified

3 submissions in this case and determine whether any could be

4 declassified. Id at 22-25. At the January 23 case management

5 conference herein, the court stated:

6   I have no intention of reviewing the sealed
         document [containing classified information] until
7   we get all of these pieces in place so that we can
         proceed in a judicial fashion; and by that I mean a
8   fashion in which both parties have access to the
         material upon which the court makes a decision.

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10 RT (Doc #532) at 34.

11   The January 5 order noted in detail the manner in which

12 defendants had declined "fully [to] engage with plaintiffs' [§

13 1806(f)] motion, but rather seem[ed] to hold themselves aloof from

14 it" while continuing to assert legal positions already specifically

15 rejected by the court in previous orders. Doc #537/57 at 20-22.

16   Defendants next filed a notice of appeal and moved the

17 court for an order certifying the January 5 order for an

18 interlocutory appeal. The court denied the motion and ordered

19 defendants to inform the court by February 27, 2009 how they

20 intended to comply with the January 5 order. Doc #562/71. The

21 court of appeals dismissed defendants' appeal and agreed with this

22 court that an interlocutory appeal was not appropriate. <u>Al-</u>

23 <u>Haramain Islamic Foundation, Inc v Obama</u>, No 09-15266 (9th Cir

24 February 27, 2009). Defendants, in response, presented to the

25 court "three similar-sounding alternatives all of which appear[ed]

26 geared toward obtaining a stay of this court's proceedings and

27 review by the court of appeals." Doc #600/84 at 1-2.

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1   The court next ordered the parties to meet and confer

2 regarding the entry of an appropriate protective order and to

3 submit such an order to the court. Id at 2. The parties filed

4 their joint submission on May 15, 2009. Doc #626/89.

5   As the court understands the situation:

6   1. The United States has completed suitability

7 determinations for two of plaintiffs' attorneys and found them

8 suitable for TS/SCI clearances, but government officials in one or

9 more defendant agencies, including the NSA Director (Doc #626/89 at

10 16), are refusing to cooperate with the court's orders because,

11 they assert, plaintiffs' attorneys do not "need to know" the

12 information that the court has determined they do need to know.

13   2. Defendants have refused to agree to any terms of the

14 protective order proposed by plaintiffs and have refused to propose

15 one of their own. Doc #626/89 at 35.

16   Defendants are now ordered to show cause why, as a

17 sanction for failing to obey the court's orders:

18   (1) defendants should not be prohibited, under FRCP

19 37(b)(2)(ii), from opposing the liability component of plaintiffs'

20 claim under 50 USC § 1810 —— that is, from denying that plaintiffs

21 are "aggrieved persons" who were subjected to electronic

22 surveillance; and

23   (2) the court should not deem liability under 50 USC §

24 1810 established and proceed to determine the amount of damages to

25 be awarded to plaintiffs.

26   Defendants shall submit written response to this order no

27 later than May 29, 2009.

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1   Plaintiffs shall, no later than May 29, 2009, submit a

2 memorandum addressing whether it would now be appropriate and/or

3 feasible for plaintiffs to file a motion for summary judgment on

4 their claim under 50 USC § 1810. Plaintiffs should address the

5 merits of filing such a motion under two scenarios: (1) with a

6 protective order in place allowing plaintiffs' counsel access to

7 the Sealed Document; and (2) with no such protective order and no

8 such access.

9   Counsel for the parties shall appear for a hearing on

10 these questions June 3, 2009 at 2:00 pm in Courtroom 6.

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12   IT IS SO ORDERED.

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VAUGHN R WALKER

15   **United States District Chief Judge**

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