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

17 **IN RE NATIONAL SECURITY AGENCY)**
TELECOMMUNICATIONS RECORDS)
18 **LITIGATION)**

MDL Docket No. 06-1791 VRW

19 This Document Relates Solely To:)

PLAINTIFFS’ MOTION TO EXTEND
TIME FOR SERVICE PURSUANT TO
F. R. CIV. P. 4(m)

20 *Al-Haramain Islamic Foundation, Inc., et al. v.*)
21 *Bush, et al. (C07-CV-0109-VRW)*)

Al-Haramain Islamic Foundation, Inc.,
et al., v. Bush, et al.

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INTRODUCTION

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2 Plaintiffs hereby move this Court under F. R. Civ. P. 4(m) for an Order extending the time for
3 service of the Complaint and Summons on Defendants George W. Bush, Keith B. Alexander, Robert
4 W. Werner, and Robert S. Mueller III, individually. This Motion is based upon F. R. Civ. P. 4(m),
5 N.D. Cal. Civil L.R. 6-3, and the Declaration of Steven Goldberg attached hereto.

6 Rule 4(m) requires a two-step analysis in deciding whether to extend the time for serving a
7 Complaint. First, upon a showing of good cause, the Court must extend the time period. Second, even
8 absent good cause, the Court still has discretion to extend the time period. *In re Sheehan*, 253 F.3d
9 507, 512 (9th Cir. 2001). Plaintiffs request an extension on both grounds.

I. GOOD CAUSE

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11 To put the issue in context here: Plaintiffs properly served the U.S. government through the
12 U.S. Attorney General. Within weeks, however, this case became focused on the classified document
13 that Plaintiffs filed under seal with the Complaint. (Docket Nos. 6, 9). There were numerous
14 telephone conferences with Judge Garr King, to whom the case was initially assigned, regarding the
15 nature of the document, where the document should be kept, and whether Plaintiffs should have access
16 to the document or be able to rely on it in this litigation. (Declaration of Steven Goldberg, p. 1).
17 These issues, along with Defendants' assertion of the state secrets privilege, have driven this litigation
18 to date in the trial and appellate courts and have overshadowed all other aspects of this case.

19 We believe this context explains plaintiffs' oversight in omitting to serve Defendants
20 individually and demonstrates good cause for the requested extension. If, however, this Court
21 concludes otherwise, we respectfully ask the Court to exercise its discretion to extend the time period
22 for serving the named Defendants individually.

II. EXERCISE OF DISCRETION

23
24 District courts have broad discretion to extend the time for service under Rule 4(m). In actions
25 that arise under federal law and have been commenced in compliance with the governing statute of
26 limitations, "the manner and timing of serving process are generally nonjurisdictional matters of
27 'procedure' controlled by the Federal Rules." *Henderson v. United States*, 517 U.S. 654, 656 (1966).
28 In particular, 1993 amendments to Rule 4(m) gave courts greater leeway to preserve meritorious

1 lawsuits despite untimely service of process. Thus, the Ninth Circuit has made clear that district courts
2 have broad discretion under Rule 4(m) to extend the time for service even without a showing of good
3 cause. *Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2006). Further, a district court may extend
4 the time for service retroactively after the 120-day service period has expired. *Mann v. American*
5 *Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003); *United States v. 2164 Watches*, 366 F.3d 767, 772 (9th
6 Cir. 2004).

7 In making extension decisions under Rule 4(m), the district court may consider such factors
8 as “a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and eventual
9 service.” *Efaw v. Williams*, 473 F.3d at 1041. Here, these factors favor extending the time for service
10 against the individual Defendants:

11 **A. Actual Notice to Defendants**

12 This lawsuit has engendered much publicity since its initial filing – in Oregon, San Francisco
13 and nationally. Throughout this case, Defendants have been represented by the Department of Justice,
14 which filed its appearance “on behalf of all defendants.” (Docket Nos. 13-15). At least one individual
15 Defendant, Keith Alexander, has filed declarations in his capacity as Director of the National Security
16 Agency. [Dockets Nos. 55, 59]. Plaintiffs do not know whether the declarations of other individual
17 Defendants are among the many ex parte, in camera filings in this case to which Plaintiffs and their
18 counsel have been denied access.

19 In any event, there can be no doubt that the individual Defendants have known of this lawsuit.
20 And it is well settled – and surely known by the Department of Justice – that a nonspecific complaint
21 may be characterized as alleging both official and personal capacity liability. *See Brandon v. Holt*, 469
22 U.S. 464, 469 (1985); *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985). The individual Defendants
23 surely have had actual notice of this lawsuit, and their counsel certainly must have known the
24 applicable law under which the Complaint may be characterized as naming the Defendants
25 individually.

26 **B. Absence of Prejudice to Defendants**

27 Defendants cannot have suffered any conceivable prejudice because of Plaintiffs’ omission to
28 serve them individually. Defendants might have obtained independent counsel, but certainly they

1 would not have pursued a different trial strategy. To date, there has been no discovery in this case.
2 No documents have been exchanged; no depositions have been taken. The entirety of this litigation
3 has been halted in its tracks while the courts have focused on the classified document, the state secrets
4 privilege, and FISA preemption. Defendants have been ably represented by the Department of Justice,
5 and that representation would have been no different had they been served individually.

6 **C. Statute of Limitations Bar**

7 If, as seems likely, the applicable limitations period in this case is two years, the statute of
8 limitations may bar the filing of an Amended Complaint for service on Defendants individually, since
9 Plaintiffs first realized in December 2005 that they were unlawfully surveilled. The Ninth Circuit has
10 made clear that a statute of limitations bar is a factor supporting the exercise of discretion to extend
11 the time for service. *United States v. 2164 Watches*, 366 F.3d at 773; *Mann v. American Airlines*,
12 324 F.3d at 1090-1091 (“The district court’s discretion is not diminished when the statute of
13 limitations would bar re-filing of the suit if the district court decided to dismiss the case instead of
14 grant an extension. To the contrary, the advisory committee notes explicitly contemplate that a district
15 court might use its discretion to grant an extension in that very situation: ‘Relief may be justified, for
16 example, if the applicable statute of limitations would bar the re-filed action.’ Fed R CivP 4, Advisory
17 Committee Note to 1993 Amendments, Subdivision (m).”).

18 **D. The Importance of This Case**

19 Finally, if this lawsuit dies because of the omission to serve Defendants individually, there
20 might never be any resolution of the critical issues the action raises – whether FISA preempts the state
21 secrets privilege and whether the President may disregard an act of Congress in the name of national
22 security. Similar litigation elsewhere has failed for lack of standing, and the actions against the
23 telecommunications carriers are under threat of retroactive immunity. The present case might well be
24 the only hope for a judicial determination of these critical issues. Public policy favors disposition of
25 cases on their merits rather than dismissal on procedural grounds. “This policy favoring resolution on
26 the merits ‘is particularly important in civil rights cases.’” *Hernandez v. City of El Monte*, 138 F.3d
27 393, 399 (9th Cir. 1998) (citation omitted).

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CONCLUSION

In light of these various factors, we respectfully ask this Court to grant a 30-day extension of the time period for serving the Defendants individually.

DATED this 17th day of April, 2008.

/s/ Steven Goldberg
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