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10
 11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **SAN FRANCISCO DIVISION**

14)	No. 3:06-md-1791-VRW
15	IN RE NATIONAL SECURITY AGENCY)	
16	TELECOMMUNICATIONS RECORDS)	DEFENDANTS' OPPOSITION TO
17	LITIGATION)	PLAINTIFFS' MOTION FOR
18	<u>This Document Solely Relates To:</u>)	ATTORNEY FEES
19	<i>Al-Haramain Islamic Foundation of Oregon</i>)	Date: (No Hearing Set)
20	<i>et al. v. Barack Obama, et al.</i>)	Time:
21	(07-cv-109-VRW))	Courtroom: 6, 17 th Floor
22)	Chief Judge Vaughn R. Walker
23)	
24)	
25)	
26)	
27)	
28)	

Defendants' Opposition to Plaintiffs' Motion for Attorney Fees
Al-Haramain Islamic Found. Oregon et al. v. Obama et al. (07-cv-109-VRW) (3:06-md-1791-VRW)

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INTRODUCTION

1 On March 31, 2010, the Court granted plaintiffs' motion for partial summary judgment
2 and held that the Government Defendants were liable for damages based on the Court's finding
3 that plaintiffs were subject to warrantless surveillance in violation of Section 110 of the Foreign
4 Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1810 (hereafter "Section 1810") (Dkts.
5 721/115).¹ The Court directed plaintiffs to submit a proposed judgment setting forth the specific
6 damages and relief they seek, and plaintiffs did so on April 16, 2010. *See* Dkts. 723/117.

7 In their proposed judgment, plaintiffs requested statutory damages of \$20,400 per
8 plaintiff and punitive damages of \$183,600 per plaintiff, for a combined total of \$612,000 in
9 damages. *See id.* Plaintiffs also requested various declaratory and injunctive relief. *See id.* The
10 Government submitted a written response opposing the entry of judgment and the particular
11 relief plaintiffs seek. *See* Dkts. 727/119. In addition, the Court separately ordered plaintiffs to
12 support their claim for punitive damages. *See* Dkts. 724/118. Plaintiffs submitted a brief in
13 support of such damages on May 7, 2010, *see* Dkts. 729/122, and the Government filed a brief in
14 opposition on May 21, 2010, *see* Dkts. 730/123. The Court has not yet entered judgment in this
15 case nor awarded any relief to the plaintiffs.

16 By Order dated June 4, 2010 (Dkts. 732/124), the Court directed plaintiffs to file an
17 application for attorney fees and, on July 7, 2010, plaintiffs filed a Motion for Attorney Fees
18 (and costs), accompanied by eight declarations. *See* Dkts. 738/128. Plaintiffs seek over \$2.6
19 million to compensate their attorneys for 5,442.6 hours dating back to the inception of this
20 litigation in February 2006. Plaintiffs also seek over \$22,000 in costs. Defendants hereby
21 oppose plaintiffs' request for attorney fees and costs.

SUMMARY OF ARGUMENT

22 As a threshold matter, consideration of plaintiffs' motion is premature. Only a
23 "prevailing party"—that is, a party that has obtained a judgment or consent decree providing
24
25

26
27 ¹ These two docket citations are to the MDL docket (3:06-md-01791-VRW) and the
28 docket in this case (3:07-cv-00109-VRW).

1 some actual relief against a defendant—is eligible for attorney fees and, as noted, no judgment
2 affording any relief to plaintiffs has been entered by the Court. Indeed, Rule 54(d)(2)(B)(ii) of
3 the Federal Rules of Civil Procedure requires that a motion for attorney fees and expenses “must
4 specify the judgment” entitling the movant to the award. This is not a mere formality. The
5 “most critical factor” in determining a reasonable fee is the results obtained in the litigation.
6 *Hensley v. Eckerhart*, 461 U.S. 424, 434, 436 (1983). In particular, a key factor in determining a
7 reasonable fee is how much damages are awarded in relation to the damages sought, including
8 whether any punitive damages sought are granted. *See McCown v. Fontana*, 565 F.3d 1097,
9 1104 (9th Cir. 2009); *McGinnis v. Kentucky Fried Chicken*, 51 F.3d 805, 808, 810 (9th Cir.
10 1994). Until judgment is entered granting or denying the relief plaintiffs seek, the
11 reasonableness of a fee award cannot be addressed or decided. However the parties may now
12 attempt to analyze the “lodestar” reasonable fee, that analysis will be hypothetical, speculative,
13 and incomplete until relief is actually awarded.

14 Recognizing that plaintiffs may obtain some relief when judgment is entered, the lodestar
15 fee they seek (\$2.6 million) is excessive and unreasonable, even assuming plaintiffs obtain the
16 entire \$612,000 damage award requested. To begin with, in submitting a fee application, a
17 prevailing party is required to exercise “billing judgment” by making a good faith effort to
18 exclude from the request hours that are excessive, redundant, or otherwise unnecessary.
19 *Hensley*, 461 U.S. at 434. “Hours that are not properly billed to one’s client also are not properly
20 billed to one’s adversary” *Id.* Plaintiffs’ counsel have not attempted to exercise such
21 judgment. Instead, it appears they simply summarized all of the hours and activities they
22 undertook since 2006 and left it for the Defendants and Court to sort out. That is not the proper
23 approach to submitting a fee application.

24 The initial considerations in reducing a fee award are whether the hours requested have
25 been adequately documented; whether the request reflects overstaffing and duplication of effort
26 by counsel; and whether hours have been expended on activities that were unproductive,
27 unnecessary, or otherwise unreasonable. *See Hensley*, 461 U.S. at 433-34; *Sorenson v. Mink*,

1 239 F.3d 1140, 1146-47 (9th Cir. 2001). Plaintiffs' fee request should be reduced for all of
2 these reasons.

3 First, the documentation provided by plaintiffs is plainly inadequate. Plaintiffs' counsel
4 have submitted eight declarations summarizing their work on this case and have not produced
5 contemporaneous billing records. These declarations repeatedly lump together multiple
6 activities into blocks of hours for various ranges of dates. Some entries summarize activities by
7 plaintiffs counsel for a few days, weeks, months, in some instances nearly one year's worth of
8 activities. Courts have repeatedly criticized this practice of "block billing" because it renders the
9 task of determining how much time plaintiffs' counsel reasonably spent on particular activities
10 extraordinarily difficult. By itself, plaintiffs' broad use of block billing warrants up to a 30%
11 across-the-board reduction in the total hours plaintiffs seek.

12 In addition, plaintiffs' request should be reduced to account for excessive duplication. In
13 numerous instances, multiple attorneys seek fees for working on the same submissions and
14 issues, attending the same hearings, and for repeatedly "consulting" one another. All the major
15 activities in the case were staffed by five to seven plaintiffs' counsel (often several billing at
16 senior "partner" rates). Plaintiffs' counsel made no effort to reduce such redundancies in
17 submitting their fee application. Defendants have attempted to identify the hours where
18 excessive consultation and duplicative staffing occurred, and we submit that significant
19 reductions to those hours are warranted.

20 The Court should also exclude as unproductive, unnecessary, and unreasonable numerous
21 hours that had no direct bearing on the grant of partial summary judgment on plaintiffs' FISA
22 claim. For example, nearly two years of this case was devoted to litigating the Government's
23 state secrets privilege assertion, which was upheld on appeal, subject to a remand on whether it
24 was preempted by FISA Section 1806(f). And, initially on remand, plaintiffs' original complaint
25 was dismissed for lack of standing in July 2008. Similarly, plaintiffs seek all their fees for
26 extensive hours devoted to obtaining access to classified information. That issue was intensely
27 disputed from the outset of the case, but the Court ultimately directed plaintiffs to seek summary

1 judgment based solely on publicly available information. Even if some of the time expended by
 2 plaintiffs' counsel during previous phases of the case is reasonably attributable to whatever
 3 results plaintiffs obtain, they would be far fewer than the hours plaintiffs seek to have
 4 compensated.

5 To complete the initial lodestar calculation, plaintiffs' contention that they are entitled to
 6 the current 2010 hourly rate under the *Laffey* matrix (adjusted for the San Francisco Bay Area) is
 7 wrong. Accepting the Court's practice of applying the *Laffey* rates, plaintiffs would be entitled
 8 to no more than the historical *Laffey* rate for the years in which services were rendered (2006-
 9 2010). In addition, this Court has previously adjusted the hourly rate further for the locality
 10 where counsel operate, and here only two counsel operate in the Bay Area.

11 Based on the applicable rates, Defendants have attempted to set forth an initial
 12 determination of what the maximum reasonable fee could be assuming that plaintiffs obtain all
 13 the relief they seek—including punitive damages. On that basis, Defendants submit that no more
 14 than approximately \$606,116 for 1,325 combined hours could reasonably be awarded in attorney
 15 fees upon the grant of that full relief, and these figures would have to be reduced if punitive
 16 damages are not awarded. *See* Appendix 1 (Initial Lodestar Summary Charts).

17 ARGUMENT

18 **I. ATTORNEY FEES MAY BE AWARDED ONLY TO A "PREVAILING PARTY" AND MUST BE REASONABLE IN RELATION TO THE RESULTS OBTAINED.**

19 A plaintiff must be a "prevailing party" to recover attorney fees, and to qualify as a
 20 prevailing party, a plaintiff "must obtain an enforceable judgment against the [government] . . .
 21 or comparable relief through a consent decree or settlement." *Farrar v. Hobby*, 506 U.S. 103,
 22 111 (1992); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *see also Buckhannon Bd. and Care*
 23 *Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 603-04
 24 (2001). The determination that a plaintiff is the "prevailing party" merely brings him across the
 25 "threshold" of eligibility, and it remains for the district court to determine what fee is
 26 "reasonable." *Hensley*, 461 U.S. at 433.

27 "The most useful starting point for determining the amount of a reasonable fee is the

number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”
 1 *Hensley*, 461 U.S. at 433. “This calculation provides an objective basis on which to make an
 2 initial estimate of the value of a lawyer’s services.” *Id*; see also *Perdue v. Kenny A.*, 130 S.Ct.
 3 1662, 1671-1673 (2010); *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002); *Schwarz v. Secretary*
 4 *of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995); *Albion Pacific Property Resources*
 5 *LLC v. Seligman*, 329 F. Supp. 2d 1163 (N.D. Cal. 2004) (Walker, J.).

6 In making this determination, “[t]he district court . . . should exclude from this initial fee
 7 calculation hours that were not ‘reasonably expended.’” *Hensley*, 461 U.S. at 434. The
 8 assessment of reasonableness is made by reference to standards established in dealings between
 9 paying clients and the private bar, *id.* at 434, and the burden is on the party seeking fees to
 10 demonstrate, with sufficient evidence, that the hours worked and rates claimed are reasonable,
 11 *id.* at 433-34; accord *Schwarz*, 73 F.3d at 906 (burden of showing that hours and fees are
 12 reasonable falls squarely upon the plaintiffs).

13 Cases may be overstaffed, and the skill and experience of lawyers
 14 vary widely. Counsel for the prevailing party should make a good
 15 faith effort to exclude from a fee request hours that are excessive,
 16 redundant, or otherwise unnecessary, just as a lawyer in private
 practice ethically is obligated to exclude such hours from his fee
 submission.

17 *Hensley* at 434; accord *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir.
 18 2000) (citation omitted). The Supreme Court in *Hensley* noted in particular:

19 In the private sector, “billing judgment” is an important component
 20 in fee setting. It is no less important here. Hours that are not
 21 properly billed to one’s client also are not properly billed to one’s
 adversary pursuant to statutory authority.

22 *Id.* (citation omitted); accord *Albion Pacific Property*, 329 F. Supp. 2d at 1168; see also *Perdue*,
 23 130 S.Ct. at 1672 (the lodestar method “produces an award that *roughly* approximates the fee
 24 that the prevailing attorney would have received if he or she had been representing a paying
 25 client who was billed by the hour in a comparable case.”)^{2/}

26 _____
 27 ² As this Court has explained, before the lodestar method was developed, the Ninth
 Circuit applied the twelve-factor test set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67,
 70 (9th Cir.1975), to determine attorney fee awards in fee-shifting cases. See *Albion Pacific*,

1 The determination of the lodestar—reasonable hours multiplied by a reasonable hourly
 2 rate— “does not end the inquiry;” rather, the “crucial” and “most critical” factor in deciding a
 3 reasonable fee is the “results obtained.” *Hensley*, 461 U.S. at 434, 436. The key inquiry on
 4 which the district court “should focus” is the significance of the overall relief obtained by the
 5 plaintiff in relation to the hours reasonably expended on the litigation.” *Id.* A prevailing party
 6 may recover a fee award based on all hours reasonably expended only “if the relief obtained
 7 justified that expenditure of attorney time.” *Id.* n.11. Hence, “if a plaintiff has achieved only
 8 partial or limited success, the product of hours reasonably expended on the litigation as a whole
 9 times a reasonable hourly rate may be an excessive amount.” *Id.* at 436.

10 Accordingly, in setting a “reasonable” fee, the district court must “consider the
 11 relationship between the amount of the fee awarded and the results obtained.” *Hensley*, 461 U.S.
 12 at 437. Even a finding that plaintiff has obtained “significant” relief “does not answer the
 13 question of what is ‘reasonable’ in light of that level of success.” *Hensely* at 439. “A reduced
 14 fee award is appropriate if the relief, however significant, is limited in comparison to the scope
 15 of the litigation as a whole.” *Hensley* at 439-40; *accord Schwarz*, 73 F.3d at 901.

16 **II. PLAINTIFFS’ FEE APPLICATION IS PREMATURE.**

17 Based on the foregoing principles, plaintiffs’ fee application is premature. At this point,
 18 the Court has entered solely an interlocutory ruling on partial summary judgment in plaintiffs’
 19 favor, limited to the issue of liability, but has not entered judgment affording any specific relief.
 20 That does not suffice to render plaintiff a prevailing party eligible for attorney fees. *See Hewitt*,
 21 482 U.S. at 760 (where a party receives only a favorable interlocutory ruling but no relief such as
 22 damages, an injunction, declaratory judgment, or relief through a consent decree, it is not a

23 _____
 24 329 F. Supp. 2d at 1166-67. “The lodestar method greatly simplified this analysis by limiting
 25 the court’s consideration to two factors: the reasonableness of the number of hours and the
 26 reasonableness of the hourly rate.” *Id.* at 1167. At least five of the *Kerr* factors have been
 27 deemed “subsumed in the initial lodestar calculation.” *See Perdue*, 130 S.Ct. at 1673; *Morales v.*
 28 *City of San Rafael*, 96 F.3d 359, 363-64 & n. 9 (9th Cir. 1996). The remaining *Kerr* factors are
 not at issue here. *See Jackson v. Sturkie*, 255 F. Supp. 2d 1096, 1104 (N.D. Cal. 2003) (Walker,
 J.) (listing non-subsumed *Kerr* factors).

1 prevailing party eligible for attorney fees). Again, this is not a mere technicality that can be
2 cured by the entry of judgment before fees are actually awarded. The issue now before the Court
3 —the reasonableness of a fee award—cannot be fully addressed until specific relief is afforded.
4 This is especially so where damages are being sought.

5 In *Farrar v. Hobby*, *supra*, the Supreme Court made clear that the amount of damages
6 “does bear on the propriety of fees awarded.” 506 U.S. at 574.

7 “Where recovery of private damages is the purpose of ... civil
8 rights litigation, a district court, in fixing fees, is obligated to give
primary consideration to the amount of damages awarded as
compared to the amount sought.”

9 *Id.* at 575 (quoting *Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in
10 judgment)). Such a comparison promotes the court's “central” responsibility to “make the
11 assessment of what is a reasonable fee under the circumstances of the case.” *Blanchard v.*
12 *Bergeron*, 489 U.S. 87, 96 (1989). In some cases (as in *Farrar* itself), an award of damages may
13 be so “nominal” as to justify no fee at all. *Farrar*, 506 U.S. at 575. But in any case, “in judging
14 the plaintiff’s level of success and the reasonableness of hours spent achieving that success, a
15 district court should ‘give primary consideration to the amount of damages awarded as compared
16 to the amount sought.’” *McCown v. Fontana*, 565 F.3d at 1104.

17 In *McCown*, the plaintiff received \$20,000 in damages as part of a settlement agreement
18 and no other relief—one-fourth of the damages sought in the complaint and one tenth of what
19 was demanded in settlement. On this basis, the Ninth Circuit held that “it is unreasonable to
20 grant his attorneys more than a comparable portion of the fees and costs they requested,” and
21 directed the district court on remand to “take into account [plaintiff’s] limited success when
22 determining a reasonable fee award.” *McCown*, 565 F.3d at 1104-05.^{3/} In particular, whether or
23

24 ³ See also *Corder v. Brown*, 25 F.3d 833, 836-37 (9th Cir. 1994) (case remanded to
25 reconsider fee amount in light of *Farrar* where plaintiff received \$24,006 in damages out of \$1
26 million requested); *Toussaint v. McCarthy*, 826 F.2d 901 (9th Cir. 1987) (reducing lodestar by
27 37.5% where plaintiff did not obtain all injunctive relief sought). Cf. *Caudle v. Bristow Optical*
28 *Co.*, 224 F.3d 1014,1029 n.11 (9th Cir. 2000) (not be proper to reduce a fee award without
explanation merely because an amount of recovery is modest, but permissible to do so based on
the degree of success obtained) (citing *Hensley*, 461 U.S. at 436).

1 not punitive damages are awarded factors into a determination of a reasonable fee. In *McGinnis*
 2 *v. Kentucky Fried Chicken, supra*, the court held that it was an abuse of discretion to award the
 3 same amount of fees regardless of whether punitive damages were awarded. *See McGinnis*, 51
 4 F.3d at 810. In that case, the plaintiff’s “extent of success” dropped from \$234,000 to \$34,000
 5 when punitive damages were excluded. *See id.* The court remanded with instructions that the
 6 fee award be reduced so that “it is commensurate with the extent of plaintiff’s success.” *Id.* The
 7 court noted that “[l]awyers might reasonably spend \$148,000 worth of time to win \$234,000 . . .
 8 [b]ut no reasonable person would pay lawyers \$148,000 to win \$34, 000.” *Id.*^{4/}

9 In this case, the plaintiffs are seeking a combined total of \$612,000 in damages for three
 10 plaintiffs: the Al-Haramain Islamic Foundation of Oregon; Wendell Belew; and Asim Ghafoor.
 11 Of that total, \$550,800 is sought in total punitive damages (\$183,600 per plaintiff) and \$61,200
 12 in statutory damages (\$20,400 for each plaintiff). The Government has argued that plaintiffs
 13 have not met their burden of proof to support the actual damages sought and that, at most, \$2,000
 14 in minimum statutory damages could be awarded to plaintiffs Belew and Ghafoor and no
 15 punitive damages may be awarded. *See* Dkts. 727/119 (Defendants’ Opposition to Proposed
 16 Judgment) and Dks. 730/123 (Defendants’ Opposition to Request for Punitive Damages).
 17 Whether any damages are awarded and how much—in particular whether punitive damages are
 18 awarded—are critical factors in determining a reasonable fee. This is not a question of whether
 19 a fee award must be “proportionately” reduced by the same percentage as a reduction in damages
 20 sought. The law is clear that, even where the test is not “strict proportionality,” the amount of
 21 damages awarded must be *compared* to the amount sought in assessing fees. *McCown*, 565 F.3d
 22 at 1104; *see also McGinnis*, 51 F.3d at 809-10.^{5/} Because the most basic information needed to

23
 24 ⁴ *Cf. Mendez v. County of San Bernardino*, 540 F. 3d 1109, 1126 (9th Cir. 2008)(award
 25 of punitive damages takes the award out of the “nominal” category under *Farrar*); *Thomas v.*
City of Tacoma, 410 F.3d 644, 648 (9th Cir. 2005) (same).

26 ⁵ Even where damages awarded are nominal, or non-monetary relief is granted, an award
 27 of fees may be reasonable depending on the significance of the legal issue on which plaintiff
 28 claims to have prevailed or whether the litigation accomplished some public goal. *See Mahach-*
Watkins v. Depee, 593 F.3d 1054, 1059-63 (9th Cir. 2010); *McCown*, 565 F.3d at 1105 (citing

1 evaluate the reasonableness of any fee award is presently unknown—whether damages will be
 2 awarded, including punitive damages, or some other relief will be granted—plaintiffs’ fee
 3 application is premature.⁶

4 **III. THE NUMBER OF HOURS FOR WHICH PLAINTIFFS SEEK
 5 COMPENSATION ARE UNREASONABLE.**

6 Plaintiffs’ demand for over \$2.6 million in fees to compensate them for 5,442.6 hours
 7 dating back to the first day of the case is excessive and unreasonable—even assuming plaintiffs
 8 obtain some “significant” relief or all the relief they seek. Courts reduce fee awards based on a
 9 variety of factors, including specifically for: (i) inadequate documentation; (ii) overstaffing and
 10 duplication of effort by plaintiffs’ counsel; and (iii) hours that were unproductive or otherwise
 11 unreasonable. *See Hensley*, 461 U.S. at 433-34; *Sorenson*, 239 F.3d at 1146-47; *Chalmers v.*
 12 *City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986); *Role Models America, Inc. v.*
 13 *Brownlee*, 353 F.3d 962, 971-73 (D.C. Cir. 2004) (50% reduction in hours for inadequate
 14 documentation and duplication). Reductions based on all of these factors should be made here).

15 **A. Plaintiffs’ Documentation of Their Fee Request Is Improper.**

16 A substantial reduction in the number of hours plaintiffs seek is warranted based on the
 17 inadequate documentation of their fee request. Plaintiffs have failed to produce
 18 contemporaneous billing records, and the declarations they have substituted are rife with “serial”

19 _____
 20 *Riverside v Rivera*, 477 U.S. at 572; *Morales*, 96 F.3d at 364-5. However, this ground for
 21 recovery cannot turn on a mere liability determination that a plaintiff’s rights were violated, but
 22 must be based on some additional way in which the judgment effected a change in civil rights
 23 policy. *See Benton v. Oregon Student Assistance Commission*, 421 F.3d 901, 904-908 (9th Cir.
 2005) (no public goal served where challenged policy changed prior to judgment); *cf. Macach-*
Watkins, 593 F.3d at 1062 (judgment against officer for using deadly force favored fee award as
 future deterrent).

24 ⁶ Courts have also recognized that the resolution of attorney fees may be appropriately
 25 deferred “until the litigation is final . . . [so as to] avoid deciding an issue that may become moot
 26 if the government prevails on appeal.” *Harmon v. United States*, 101 F.3d 574, 587 (8th Cir.
 1996); *see Poland v. Chertoff*, 494 F.3d 1174, 1187 (9th Cir. 2007) (after damage award was
 27 vacated on appeal, plaintiff was not a prevailing party entitled to attorneys’ fees); *U.S. ex rel.*
Walton Tech., Inc. v. Weststar Eng'g, Inc., 290 F.3d 1199, 1202 (9th Cir. 2002) (where judgment
 was reversed and remanded, district court’s award of attorneys’ fees was premature).

or “block billed” entries that impermissibly intermix the time spent on multiple activities.

The Supreme Court stated in *Hensley* that the prevailing party “should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.” *Hensley*, 461 U.S. at 437; *see id.* at n.12 (counsel’s records must provide a proper basis for determining how much time was spent on particular claims); *see also Schwarz*, 73 F.3d at 906 (“[A]n attorney should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.”); *Chalmers*, 796 F.2d at 1210 (“[i]n determining reasonable hours, counsel bears the burden of submitting detailed time records justifying the hours claimed to have been expended.”). “Where the documentation of hours is inadequate, the district court may reduce the award accordingly.” *Hensley* at 433; *accord Trustees of Directors Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 433 (9th Cir. 2000). And both the Supreme Court and Ninth Circuit have emphasized that they will not “view with sympathy” claims that a district court abused its discretion in awarding unreasonably low attorneys’ fees where the record does not provide a proper basis for determining time spent on specific claims. *Hensley*, 461 U.S. at 437 n.12.

Plaintiffs state that they have kept contemporaneous billing records, but they have not produced them with their fee application and will only make them available for *in camera* inspection.^{7/} In their place, plaintiffs seek an award based on summaries of those records in declarations. Defendants object to this practice. While Local Rule 54-5(b) permits the use of declarations in a *motion* for attorney fees, *Hensley* indicates that a fee award should be based on data contained in billing records, and there is no justification for not producing these records to the Defendants to assist in verifying the activities for which plaintiffs seek to be compensated and the time spent on those activities.^{8/} Moreover, this is a circumstance where the Court should

⁷ *See* Declaration of Jon Eisenberg ¶ 12; Declaration of Steve Goldberg ¶ 14; Declaration of Thomas Nelson ¶ 12; Declaration of William Hancock ¶ 10; Declaration of Zaha Hassan ¶ 10; Declaration of Lisa Jaskol ¶ 9; Declaration of Ashlee Albies ¶ 7.

⁸ This is not a circumstance where a fee applicant seeks to reconstruct billing information where contemporaneous records were not kept. *See Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115,

1 require production pursuant to Local Rule 54-5(b)(2). The Ninth Circuit has held that a district
 2 court may abuse its discretion by relying on summaries of billing records in declarations that are
 3 not sufficient to distinguish time spent on different claims. *See Entertainment Research Group,*
 4 *Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1230-31 (9th Cir. 1997). That is what
 5 plaintiffs have submitted.

6 The declarations submitted by plaintiffs' counsel utilize the practice of "serial" or "block
 7 billing" whereby counsel include multiple distinct activities in a block of time without
 8 identifying and segregating the time devoted to a particular task. Plaintiffs' counsel use this
 9 practice to describe their work over various periods—ranging from a few days, weeks, or
 10 months. Some of plaintiffs' counsel use this practice more than others by including more items
 11 in the block and using blocks for longer periods of time. *See Nelson Declaration; Goldberg*
 12 *Declaration.* But declarations submitted by all of plaintiffs' counsel contain "block billed"
 13 hours—in some cases encompassing nearly every hour in the declaration. *See Hassan*
 14 *Declaration; Hancock Declaration; Jaskol Declaration; Albies Declaration; see also Appendix 3*
 15 *(Block Billing Calculation).*

16 Time records that are "submitted in a form not reasonably capable of evaluation do not
 17 satisfy the 'burden of submitting detailed time records justifying the hours claimed.'" *Gates v.*
 18 *Stewart*, 987 F.2d 1450, 1452-53 (9th Cir. 1993) (quoting *Chalmers*, 776 F.2d at 1210). In
 19 particular, the practice of serial or block billing is disfavored by courts reviewing fee
 20 applications "because it makes it much more difficult to determine how much time was spent on
 21 particular activities." *Welch v. Metropolitan Life Insurance Co.*, 480 F.3d 942, 948 (9th Cir.
 22 2007) (citing *Role Models America*, 353 F.3d at 971 (reducing requested hours because
 23 counsel's practice of block billing "lump[ed] together multiple tasks, making it impossible to

24 _____
 25 1121 (9th Cir. 2000) ("lack of 'contemporaneous records' is not a basis for denying . . . fee
 26 request in its entirety"); *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1542 (9th
 27 Cir. 1992) (failure to keep adequate contemporaneous records not a basis to deny fee award
 28 where the records can be reconstructed from agendas, summary of meetings, notes, and time
 sheets of co-counsel). Here, plaintiffs concede they have contemporaneous records, but have not
 produced them.

1 evaluate their reasonableness’’). The use of declarations with block summaries is especially
 2 inappropriate where plaintiffs’ counsel assert they kept contemporaneous records in *tenths* of an
 3 hour.⁹

4 The Ninth Circuit in *Welch* concluded that block billing “may increase time by 10% to
 5 30%.” *See Welch*, 480 F.3d at 948 (citing The State Bar of California Committee on Mandatory
 6 Fee Arbitration, Arbitration Advisory 03-01 (2003). Accordingly, courts have identified block
 7 billing as an independent ground for an overall reduction in the hours claimed. *Mendez*, 540 F.
 8 3d at 1128; *see also Gadberry v. Astrue*, 2009 WL 2983086, at *1 (D. Or. Sept. 15, 2009);
 9 *Gaines v. Douglas County School Dist.*, 2009 WL 2710063, at *3 (D. Nev. Aug. 25, 2009);
 10 *Settlegoode v. Portland Public Schools*, 2005 WL 1899376, at *7 (D. Or. Aug. 9, 2005); *see also*
 11 *Keith v. Volpe*, 644 F. Supp. 1317, 1322 (C.D. Cal. 1986) (explaining that “serial billing”
 12 seriously hampers the court.) Such percentage cuts “are acceptable, and perhaps necessary tools
 13 for district courts fashioning reasonable fee awards.” *Gates v. Deukmejian*, 987 F.2d 1392, 1399
 14 (9th Cir. 1992).

15 Defendants have attempted to calculate the number of hours per counsel that are block
 16 billed, as required by *Welch*, 480 F.3d at 948. *See* Appendix 3 (describing methodology and
 17 summarizing data). Given the widespread use of this practice in so large a fee request (seeking
 18 \$2.6 million and over 5400 hours), and involving so many counsel, a 30% reduction of these
 19 block billed hours is warranted and would be consistent with the findings of the California Bar
 20 Report. *See id.*

21 **B. Plaintiffs’ Request Should be Reduced for Excessive Overstaffing.**

22 The number of hours for which plaintiffs’ counsel seeks compensation should also be
 23 reduced to account for overstaffing and duplicative work by multiple counsel on the same task.
 24 *Tahara v. Matson Terminals*, 511 F.3d 950, 955 (9th Cir. 2007) (in calculating number of hours
 25 reasonably expended, a district court is to exclude hours that are redundant). “A party is

26 _____
 27 ⁹ *See* Eisenberg Decl. ¶ 11; Goldberg Decl. ¶ 15; Nelson Decl. ¶ 11; Hancock Decl. ¶ 8;
 28 Hassan Decl. ¶ 6.

1 certainly free to hire and pay as many lawyers as it wishes, but cannot expect to shift the cost of
 2 any redundancies to its opponent.” *Settlegoode*, 2005 WL 1899376, *7. The exercise of “billing
 3 judgment” is especially necessary to eliminate redundant hours for overstaffing.

4 When attorneys hold a telephone or personal conference, good “billing
 5 judgment” mandates that only one attorney should bill that conference
 6 to the client, not both attorneys. The same good “billing judgment”
 7 requires attorneys not to bill for more than two attorneys to review
 8 pleadings or to attend oral argument or trial.

9 *Id.* Plaintiffs have made no effort to reduce their time for work by several counsel on particular
 10 activities. Two aspects of overstaffing and redundancy are reflected in plaintiffs’ declarations:
 11 (1) excessive “consultations” between co-counsel; and (2) multiple attorneys working on the
 12 same project or attending the same hearing.

13 (1) Excessive Conferencing

14 The declarations of plaintiffs’ counsel refer to “consultations” with co-counsel
 15 approximately 162 times. *See* Appendix 4. Courts have specifically cut back hours for
 16 excessive conferencing. *See Welch*, 480 F.3d at 949 (absent persuasive justification reducing
 17 time for intra- office conference by experienced attorneys); *Keith*, 644 F. Supp. at 1324
 18 (reduction for excessive non-serial conference time). “Although . . . co-counsel and staff must
 19 communicate with each other to insure effective representation, billing at a full rate for each
 20 attorney or staff member for such essentially duplicative or instructional effort requires
 21 adjustment.” *See Zhang v. GS Services, LP*, 537 F. Supp. 2d 805, 812-813 (E.D. Va. 2008) (66%
 22 reduction where two experienced co-counsel conferred repeatedly on case). A reduction for
 23 excessive conferencing would likewise be warranted here.

24 Plaintiffs’ data does not reveal how many lawyers participated in each consultation,
 25 when, or how long the consultations occurred. But their documentation does reveal that seven
 26 attorneys^{10/} (five at partner rates) would each bill their clients for a given co-counsel
 27 consultation. That reflects no billing judgment and is unreasonable. Defendants calculate that

28 ¹⁰ No compensation should be awarded for the 19.7 hours expended by Kenneth
 Kreuscher, who is not a counsel of record in this case. Also, the hours for which he seeks
 compensation are described in wholly vague terms and are therefore unsupported.

1 the number of hours in the blocks containing these “co-counsel consultation” references totals
 2 4,177.4 out of 5,442 hours sought. *See* Appendix 4. The Court should reduce the total block
 3 hours referring to consultations by 25% or 1,056 hours. *See id.* Such a reduction is supported by
 4 the fact that the data contains 162 separate billing entries for consultations, seven (7) different
 5 lawyers identified this activity, the case lasted for five years, and the total block hours at issue
 6 are voluminous. Those hours are excessive and should be excluded from the fee award.^{11/}

7 (2) Overstaffing

8 Aside from excessive conferencing, plaintiffs’ documentation reveals that multiple
 9 lawyers worked on the same activity and attended the same hearings, and, thus, would have
 10 billed their client for the same work. Once again, plaintiffs made no effort to eliminate this
 11 redundancy. “Courts ought to examine with skepticism claims that several lawyers were needed
 12 to perform a task, and should deny compensation for such needless duplication as when three
 13 lawyers appear for a hearing when one would do.” *Democratic Party of Wash. State v. Reed*,
 14 388 F.3d 1281, 1286 (9th Cir. 2004). While some degree of duplication might be reasonable in
 15 some circumstances, plaintiffs’ declarations indicate that four to five attorneys would have billed
 16 time for nearly all the major activities in this case. *See* Appendix 5. Examples of the excesses
 17 revealed in the data include:

- 18 * Five attorneys (three at “partner” levels) seek compensation for time working on
 19 plaintiffs’ opposition to the Government’s first motion to dismiss in June 2006 based on
 the state secrets privilege. *See* Appendix 5 at 6.
- 20 * Seven attorneys (four at “partner” levels) seek compensation for time working on
 plaintiffs’ opposition to interlocutory appeal in 2006-07. *See id* at 8.
- 21 * Seven attorneys (five at “partner” levels) seek compensation for time working on
 22 plaintiffs’ opposition to the Government’s second motion to dismiss in 2008.
See id at 11-12.
- 23 * Seven attorneys (five at the “partner” level) worked on plaintiffs’ partial motion for
 24 summary judgment in 2009. *See id* at 19.

25 ¹¹ Defendants submit there should be a separate reductions for block billing and
 26 excessive consultations. Block billing results in “padding” of time in the overall block by failing
 27 to distinguish time for multiple different activities, not simply consultations. Also, the sheer
 28 number of instances in which consultations are mentioned indicates that this is an especially
 significant component of time within the block.

1 It also appears that all counsel seek compensation for their attendance at various hearings
2 in this case. Five to six plaintiffs' counsel were identified on the record for a telephone
3 conference with Judge King on April 25, June 19, and June 27, 2006. *See* Appendix 5
4 (Attaching Transcript Cover Pages). Five plaintiffs' counsel (four at partner level) attended the
5 hearing on the Government's first motion to dismiss in August 2006. *See id.* Five plaintiffs'
6 counsel (four at partner level) attend the hearing on June 3, 2009, on the Courts Order to Show
7 Case regarding the entry of a protective order. *See id.* Four plaintiffs' counsel (all at partner
8 level) attend the hearing on September 23, 2009, on plaintiffs' motion for partial summary
9 judgment. *See id.* So far as we can tell from the confusing block data, plaintiffs appear to seek
10 compensation for the time of all counsel attending these hearings. At most, a reasonable fee
11 award would compensate two attorneys who attended these hearings. *See Democratic Party*, 388
12 F.3d at 1286 (courts should deny compensation for such needless duplication as when three
13 lawyers appear for a hearing when one would do.); *Role Models of America*, 353 F.3d at 972 (no
14 basis presented to support three senior attorneys billing at least \$400 for participating in the
15 case); *Keith v. Volpe*, 644 F. Supp. at 1323 (reduction of time where more than two attorneys
16 attended hearing); *Cruz v. Alhambra School District*, 601 F. Supp. 2d 1183, 1191-92 (C.D. Cal.
17 2009) (reductions where four to five attorneys worked on activities and attended events).

18 Because no semblance of billing judgment is reflected in plaintiffs' application to reduce
19 for excessive staffing, a further reduction should be made in the total number of hours for which
20 plaintiffs' seek compensation. Appendix 5 sets forth a calculation of the number of duplicative
21 hours incurred by multiple counsel on particular activities. Estimates of the time devoted to
22 particular projects were made by taking the number of hours in a block entry that identifies the
23 subject area of the project (*e.g.*, complaint) and dividing by the number of subject areas
24 identified in block. Given the repeated use of multiple counsel on all major activities in the case,
25 including attendance at hearings, a separate 25% reduction in the particular time devoted to these
26
27

activities is warranted.^{12/}

C. Plaintiffs' Fee Request Should Also Be Reduced for Unproductive or Unnecessary Hours.

In addition to reductions for inadequate documentation and duplication, a third independent ground exists to reduce the hours sought by plaintiffs. Even where a plaintiff has obtained “excellent results” to warrant a “fully compensatory fee,” this does not mean it should be awarded fees for all hours expended, as plaintiffs here seek, but only for hours “*reasonably* expended.” *Hensley*, 461 U.S. at 435. Even where only a single claim is litigated to success, as here, a party is not entitled to 100% of their fees. *See California State Foster Parents Assn v. Wagner*, 2009 WL 4823193 *9 (N.D. Cal. 2009) (Alsup, J.).

If the test is plaintiffs’ “degree of success,” then the question is not whether a complaint is styled to include one or many causes-of-action. Rather, the question is how the relief *sought* compares to the overall result *obtained*.

Id. (original emphasis); *see also Sealy Incorporated v. Easy Living, Inc.*, 743 F.2d 1378, 1384 (9th Cir. 1984) (court should examine whether the hours expended were “reasonably necessary to the effective prosecution of” the claim).

Here, plaintiffs seek compensation for all hours incurred by their counsel from the beginning of the case. Again assuming plaintiffs obtain “significant” relief or all the relief they seek, that would not be a reasonable award. For example, if plaintiffs were to obtain the full \$612,000 in statutory and punitive damages they seek, an award of \$2.6 million in fees—four times the amount of damages—would still be unreasonable. If plaintiffs were to obtain solely the amount requested in statutory damages—\$61,200—the fee award requested would be forty times that amount. And if plaintiffs were to obtain just \$2,000 in minimum statutory damages (which Defendants contend is the most that could be supported under the Court’s liability determination, *see* Dkts. 727/119), the fee award would be 1300 times the damage award. In any

¹² In calculating a reduction for duplicative activities, Defendants attempted to account for the separate reductions for excessive consultations set forth in Appendix 4 by attempting to exclude hours for those “consultations” from the time estimated to have otherwise been spent on a particular project on which multiple counsel worked. *See* Appendix 5.

1 event, a major lodestar reduction is warranted here. *See, e.g., Stewart v. County of Sonoma*, 634
2 F. Supp. 773, 777-780 (N.D. Cal. 1986) (Schwarzer, J.) (reducing lodestar request of \$800,000
3 and 5400 hours to 820 hours and \$100,000, holding that “billing judgement rules out the
4 submission of a bill for services and disbursements of \$925,000 for a case with a probable
5 verdict value of less than \$100,000”). An overview of the various issues litigated during phases
6 of this case that preceded plaintiffs’ summary judgment motion on liability further demonstrates
7 that the amount plaintiffs seek is unreasonable.

8 *February 2006-2007: Litigation on the Government’s State Secrets Privilege:* The first
9 two years of this case—from February 2006 through the Ninth Circuit’s Decision on the first
10 appeal in November 2007—were primarily devoted to litigation over the Government’s
11 successful state secrets privilege assertion. Plaintiffs filed with their original complaint the
12 classified “Sealed Document” inadvertently disclosed to them during administrative proceedings
13 on the designation of the Al-Haramain Islamic Foundation of Oregon as a specially designated
14 global terrorist. From that point through November 2007, proceedings in this case were focused
15 on whether plaintiffs could use any information in that document to litigate the case in the face
16 of the Government’s privilege assertion. That dispute was never resolved in plaintiffs’ favor;
17 indeed, in 2009, the Court ordered that their partial summary judgment not rely on classified
18 information unless the Government used it in defense. *See* Dkts. 643/96.

19 In sum, after the initial complaint was filed, the Government moved to dismiss or for
20 summary judgment based on an assertion of the state secrets privilege by the Director of
21 National Intelligence that sought to protect from disclosure, *inter alia*, whether the plaintiffs
22 were subject to the alleged surveillance as well as information contained in the Sealed
23 Document. In September 2006, Judge King upheld the Government’s state secrets privilege
24 assertion with respect to any information confirming or denying whether plaintiffs’
25 communications have been or continue to be intercepted—except with respect to
26 communications allegedly reflected in the Sealed Document. *See Al-Haramain v. Bush*, 451 F.
27 Supp. 2d 1215, 1224 (D. Or. 2006), *rev’d*, 507 F.3d 1190 (9th Cir. 2007). The Court considered

1 whether Section 106(f) of the FISA, 50 U.S.C. § 1806(f), preempted the state secrets privilege
2 but declined to resolve the issue at that stage. *See id.* at 1230-32. The court declined to dismiss
3 the case, but certified its decision for interlocutory review pursuant to 28 U.S.C. § 1292(b), *see*
4 *id.* at 1233.

5 On November 16, 2007, the Court of Appeals reversed the district court's decision and
6 upheld the Government's state secrets privilege assertion to protect from disclosure information
7 concerning whether or not the plaintiffs had been subject to the alleged surveillance, as well as
8 information contained in the Sealed Document. *See Al-Haramain*, 507 F.3d at 1202-04. The
9 Ninth Circuit went on to hold that, without the privileged information, plaintiffs could not
10 establish their standing and their claims would be dismissed. *See id.* at 1205. The Court of
11 Appeals remanded without deciding whether FISA Section 1806(f) preempts the privilege.

12 Plaintiffs devoted 109.59 combined hours opposing the Government's first motion to
13 dismiss and 513.75 combined hours in briefing the merits of the appeal. *See* Appendix 5 at 6, 9
14 and 10. But by November 2007—nearly two years into the case, they had not prevailed on any
15 issue and, indeed, lost the key issue on appeal and faced dismissal of their complaint unless the
16 state secrets privilege was preempted. *Cf. Atkins v. Apfel*, 154 F.3d 986, 988, 989-90 (9th Cir.
17 1998) (where plaintiff prevails generally in the case but loses on appeal, district court abused
18 discretion in awarding fees without taking into account the results obtained on appeal). The time
19 spent in 2006-07 during this phase of the litigation had little bearing on plaintiffs' partial
20 summary judgment victory in 2009, particularly where, on remand, the Court's first substantive
21 ruling resulted in the dismissal of plaintiffs' first complaint.^{13/}

22 Plaintiffs' counsel also recorded numerous other hours during 2006 that were
23 unproductive. For example:

24 * Plaintiffs' counsel devoted a combined total of 62.65 hours in support of a motion
25 by the Oregonian newspaper in 2006 to unseal the Sealed Document—a motion
26 that was denied. *See* Appendix 5 at 5.

27 ¹³ This situation is thus not akin to denying a party fees for an unsuccessful motion in
28 connection with a claim in which the party prevailed in the case. *See Allen v. Bay Area Rapid
Transit*, 2003 WL 23333580 (N.D. Cal. 2003) (Walker, J.).

1 * Plaintiffs' counsel devoted a combined total of 127.3 hours in 2006 devoted to
2 drafting discovery and in support of a motion to compel discovery, which the
Government opposed through its privilege assertion. Discovery was never
allowed in the five years the case has been pending. *See id.* at 2-3.

3 * Also in 2006, plaintiffs' counsel devoted 96 combined hours opposing a motion by the
4 Government to deny them continued access to the Sealed Document and plaintiffs have
not prevailed on their demand for access in five years. *See id.* at 5.

5 * Plaintiffs' counsel also devoted 118.5 combined hours opposing the
6 Government's petition for interlocutory appeal, which was granted, and in
opposing a stay pending appeal, which again was granted. *See id.* at 9.

7 * Plaintiffs' counsel also devoted 116.9 combined hours opposing transfer of this case
8 to this Court by the Judicial Panel on Multi-District Litigation. *See id.* at 6-7.

9 It would not be reasonable to grant compensation for unproductive hours during this initial phase
10 of the case that had no bearing on the Court's grant of partial summary judgment in 2009.

11 *Dismissal of First Complaint in July 2008:* After remand, the Government filed a second
12 motion to dismiss or for summary judgment and argued, *inter alia*, that Section 1806(f) does not
13 preempt the state secrets privilege. *See* Dkts. 432/17. On July 2, 2008, the Court denied the
14 Government's motion and concluded, *inter alia*, that FISA Section 1806 preempts the state
15 secrets privilege. *See In re: Nat'l Security Agency Telecomm. Records Litig., Al-Haramain*
16 *Islamic Found. v. Bush*, 564 F. Supp. 2d 1109, 1115-25 (N.D. Cal. July 2, 2008). However,
17 before proceeding under Section 1806(f), the Court held that plaintiffs must first establish their
18 standing by presenting "enough specifics based on non-classified evidence to establish their
19 'aggrieved person' status under FISA." *Id.* The Court concluded at that point that "it is certain
20 that plaintiffs' showing thus far with the Sealed Document excluded falls short of the mark" for
21 establishing their standing, and dismissed the first complaint without prejudice. *Id.* at 1135.

22 At that point in the litigation, the case had been dismissed, and there was no certainty that
23 plaintiffs would muster sufficient evidence to establish their standing, let alone ultimately
24 become a prevailing party on a claim not yet actually before the Court. Plaintiffs' request to be
25 compensated for all the hours leading up to the Court's July 2008 dismissal of their lawsuit is
26 unreasonable. The Court's ruling on FISA preemption does not warrant compensation for these
27 pre-July 2008 hours. "[A] judicial statement that does not effect the relationship between the

1 plaintiff and the defendant is *not*” equivalent to a judgment rendering plaintiff a prevailing party.
2 *Hewitt*, 482 U.S. at 761; *see also id.* at 763. Whatever role the Court’s FISA preemption ruling
3 came to play in subsequent proceedings, plaintiffs were found to lack standing in July 2008 and
4 it would be unreasonable to compensate plaintiffs’ counsel fully for the hours incurred prior to
5 that period. Accordingly, Defendants set forth in Appendix 6 the hours for which we believe
6 further reductions should be made, and we identify those reductions separately in our lodestar
7 calculation at Appendix 1.

8 *Litigation to June 2009 Over Access to Classified Information:* The immediate next
9 phase of the case entailed a year’s worth of litigation (July 2008 to June 2009) focused on
10 whether plaintiffs may obtain access to the Sealed Document and other classified information in
11 order to litigate the case, pursuant to security clearances and protective order procedures
12 established under the rubric of FISA Section 1806(f). Plaintiffs filed an amended complaint on
13 July 29, 2008, *see* Dkts. 458/35, and relied on various public statements and reports in an attempt
14 to establish that they were “aggrieved persons” subject to alleged surveillance. The Government
15 filed a third motion to dismiss or for summary judgment and argued principally that the
16 information cited by plaintiffs did not established their standing. *See* Dkts. at 475/49. Plaintiffs
17 cross-moved to obtain discovery under FISA Section 1806(f). *See* Dkts. 472/46.

18 On January 5, 2009, the Court denied the Government’s third dispositive motion and
19 ordered further proceedings in response to plaintiffs’ motion for discovery under Section
20 1806(f). *Al-Haramain Islamic Found. v. Bush*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. Jan. 5,
21 2009). The Court held, *inter alia*, that plaintiffs’ amended complaint sufficiently alleged
22 plaintiffs’ status as aggrieved persons to survive a motion to dismiss and proceed under Section
23 1806(f). *See id.* at 1082-86. The Court also held that due process considerations required that
24 some of plaintiffs’ counsel obtain the security clearances necessary to be able to litigate the case,
25 including, but not limited to, reading and responding to the court’s future orders. *Id.*

26 This ruling triggered a six month dispute over whether plaintiffs would obtain access to
27 classified information—a dispute that ended in no access being granted. Notably, the Court

1 issued an order dated April 17, 2009, which directed the parties “to meet and confer regarding
2 the entry of an appropriate protective order which shall be entered herein before the court rules
3 on the merits.” *See* Dkts. 600/84 at 2. In response, the Government set forth its opposition to
4 plaintiffs’ proposed order which granted counsel access to classified information. Dkts. 626/89.
5 On May 22, 2009, the Court issued an Order to show cause as to why the Defendants should not
6 be sanctioned pursuant to Rule 37(b)(2)(A)(ii) of the Federal Rules of Civil Procedure for
7 declining to consent to a protective order. *See* Dkts. 620/90 at 3. The Government filed a
8 detailed opposition (Dkts. 636/93) and, after a hearing on June 3, 2009, the Court declined to
9 enter any sanctions or issue a protective order granting the disclosure of classified information to
10 plaintiffs’ counsel. Instead, the Court directed plaintiffs to seek summary judgment based solely
11 on publicly available information unless, as noted, the Government sought to use classified
12 information in response to plaintiffs’ motion. *See* Dkts. 643/96. In these circumstances,
13 Defendants submit it would be unreasonable for plaintiffs’ counsel to obtain all of the time
14 expended during this period (July 2008 to June 2009), and we set forth specific reductions for
15 particular hours during this period that plaintiffs devoted to seeking access to classified
16 information (in general 25% of the hours related to this goal).

17 *Plaintiffs’ Motion for Partial Summary Judgment:* The final phase in this case began in
18 June 2009, when plaintiffs filed a motion for partial summary judgment based solely on public
19 information and obtained a liability determination on their claim brought under FISA Section
20 1810, 50 U.S.C. § 1810. Defendants recognize that some of the hours incurred in the prior
21 phases of the case described above contributed to the grant of partial summary judgment. But,
22 for the reasons outlined herein, a substantial number of the hours plaintiffs seek should be
23 reduced, and the Court should focus on a number of hours that would have been reasonably
24 expended in connection with plaintiffs’ partial summary judgment motion.

25 Plaintiffs’ 2009 motion was not complicated and should not have required substantial
26 time to prepare. Plaintiffs culled various statements from the public record, asserted they
27 established a *prima facie* case that they had standing as aggrieved persons subject to alleged

1 warrantless surveillance, and argued that the burden be shifted to the Government to disclose
2 information it deemed privileged to create a genuine issue of fact or face the entry of summary
3 judgment. There was no discovery in the case or any evidentiary proceedings as might be
4 typical of a case commanding over 5,000 hours of counsel's time. As noted, the litigation was
5 otherwise devoted to whether the Government could protect the Sealed Document and
6 information pertaining to intelligence sources and methods or whether plaintiffs would get
7 access to that information under Section 1806(f) of the FISA.

8 As a "cross-check" on the reductions Defendants believe should be made in the overall
9 hours sought by plaintiff, the Court could attempt to estimate a number of hours devoted to the
10 development of plaintiffs' partial summary judgment motion that did not concern disputes
11 related to access to classified information or the Sealed Document. Defendants estimate that
12 plaintiffs' counsel devoted 151 combined hours to their 2009 partial summary judgment motion.
13 *See* Appendix 5 at 19. Even if all the hours associated with amending the complaint (104 hours),
14 *see id.* at 12-13 are counted, and the time devoted to responding to the Government's third
15 motion to dismiss where prima facie standing was found (87 hours), *see id.* at 14, that would
16 remain a fraction of the time sought for compensation (342 hours). And if some non-duplicative
17 hours from prior period of the case are considered as well, the total number of hours still would
18 not approach 5,444.6—indeed, it would be far less than 1000 hours.^{14/}

19
20
21 ¹⁴ Starting from the 342 hours identified above, if the Court included all the hours
22 plaintiffs' counsel devoted preparing to the first (dismissed) complaint (117) which contained the
23 FISA claim, along with all hours associated with plaintiffs' first attempt at seeking partial
24 summary judgment motion in 2006 (69.5 hours), all hours devoted to plaintiffs work on that
25 motion in 2007 while the case was on appeal (52.65 hours), *see* Appendix 5 at 1, 7, 8, 11, the
26 total would be approximately 581 hours. If the hours plaintiffs devoted in response to the
27 Government's Second Motion to Dismiss (addressing the FISA preemption issue) are added (200
28 hours), *see id.* at 11-12, the total rises to 781 hours—still far below the amount sought by
plaintiffs. This illustrates that a relatively discrete number of hours can be identified as related
to the grant of partial summary judgment, and even these hours are overstated for the reasons
identified above. It also illustrates the initial lodestar hours identified by the Defendants (1,325)
is more than reasonable.

D. The Court Should Also Exclude Other Unproductive Hours and Time Related to Vague Entries.

The should also reduce other miscellaneous unproductive hours identified by the Defendants at Appendix 6, including for billing entries that are unreasonably vague. Notably, plaintiffs' counsel devoted 19 combined hours to pursuit of an individual capacity claim against FBI Director Mueller that was dismissed. *See* Appendix 6 at 4, 9, 16, 19. Plaintiffs' counsel also devoted 28 hours in 2009 acting as an *amicus* seeking unsuccessfully to forestall vacatur of decision by the district court in the *Horn v. Huddle* litigation in the District of Columbia upon settlement of that case. *See id.* at 6. These and other unproductive hours listed in Appendix 6 are not reasonably compensable and are reflected in the calculation of unproductive and unreasonable hours set forth in the data at Appendix 1 (Initial Lodestar Summary Charts).

E. Hours Related to Researching Punitive Damages Should Be Eliminated.

Defendants have also reduced from an initial lodestar calculation hours devoted by plaintiffs' counsel to researching the question of punitive damages (103 hours combined), because the Court has not yet decided upon that relief and we submit such an award would be unfounded. *See* Appendix 1 (summary charts by counsel listing research on punitive damages as separate reduction).

F. Hours Related to "Fees-on-Fees" Should Be Reduced Accordingly.

In addition, the combined 56.6 hours devoted by plaintiffs' counsel to preparing their attorney fees application should be reduced by the same percentage as the rest of their fee award may be reduced. *Thompson v. Gomez*, 43 F.3d 1365, 1367-68 (9th Cir. 1995). Defendants initial lodestar calculation would reduce the possible award from \$2.6 million to no more than \$606,000 if the full relief sought is granted—approximately a 73% reduction, warranting a 41 hour reduction in fee preparation time.

IV. PLAINTIFFS RELY ON THE WRONG HOURLY RATES.

Once it sets the number of reasonable hours, the district court must determine a reasonable hourly rate "according to the prevailing market rates in the relevant community." *Schwarz*, 73 F.3d at 907. This Court's consistent practice has been to rely on the so-called

1 *Laffey* matrix rates prepared and updated by the Department of Justice. *See In re HPL*
 2 *Technologies, Inc. Securities Litigation*, 366 F. Supp. 2d 912, 921-22 (N.D. Cal. 2005); *see also*
 3 *Garnes v. Barnhardt*, 2006 WL 249522, at *7 (N.D. Cal. 2006). Plaintiff contends that the
 4 current 2010 *Laffey* matrix hourly rate for the San Francisco Bay Area should apply for the five
 5 respective years of the litigation (2006-2010) and for all counsel. The Government disagrees.
 6 Only the historical *Laffey* matrix rate for those years could be applied here.^{15/} The Court has also
 7 previously applied the *Laffey* rate adjusted for the locality in which plaintiffs' counsel operates.
 8 *See Martin v. FEDEX Ground Package System*, 2008 WL 548576 * 7 (N.D. Cal. 2008) (applying
 9 *Laffey* matrix rate for San Francisco, Sacramento, and Los Angeles (Santa Ana) where counsel
 10 operated); *see also In re Chiron Corporation Securities Litigation*, 2007 WL 4249902 *6 (N.D.
 11 Cal. 2007) (applying New York and Los Angeles rates). Defendants set forth the applicable
 12 adjusted *Laffey* rates in Appendix 7.

13 Again as summarized in Appendix 1, Defendants estimate that no more than 1325 hours
 14 of the time incurred by plaintiffs' counsel could reasonably be awarded in this case. When
 15 multiplied by the applicable hourly rates for each counsel, an initial lodestar fee award could be
 16 no more than approximately \$606,000. *See* Appendix 1. The final lodestar fee can be
 17 determined only after the results in the case are known.

18 **V. PLAINTIFFS ARE NOT ENTITLED TO THE EXPENSES THEY SEEK.**

19 Plaintiffs' counsel also seek a combined total of \$22,000 in expenses, nearly all of it

20
 21 ¹⁵ Authority providing that current rates may be utilized to compensate for delay in
 22 payments does not apply to the United States. In *Library of Congress v. Shaw*, 478 U.S. 310,
 23 314 (1986), the Supreme Court reaffirmed the long-standing principle that "[i]n the absence of
 24 express congressional consent to the award of interest separate from a general waiver of
 25 immunity to suit, the United States is immune from an interest award." Courts have recognized,
 26 the payment of attorney's fees at current rates amounts to an award of interest. *See Sorenson v.*
 27 *Mink, supra*, 239 F.3d at 1148; *Bernardi v. Yeutter*, 951 F.2d 971, 976 (9th Cir. 1991). *Cf.*
 28 *Missouri v. Jenkins*, 491 U.S. 274, 281-83 & n.4 (1989) (adjustment to current hourly rate to
 compensate for delay does not apply to the sovereign immunity of the Federal government).
 Assuming Section 1810 of the Foreign Sovereign Immunity Act, 50 U.S.C. § 1810, authorizes an
 award of attorney fees against the United States (which the Government contests), that provision
 does not authorize interest for the hourly rate applicable to an award of attorney fees. Hence,
 only historical rates can be applied in this case.

1 travel costs. *See* Pls. Motion at 10. All of these expenses should be denied. None of the
2 expenses have been adequately documented, and nearly all the travel costs sought are for
3 multiple counsel attending hearings. As set forth above, the attendance of no more than two
4 counsel at a hearing should be compensated (and thus, for example, only the long distance travel
5 expenses of plaintiffs’ “lead/second chair” counsel (Mr. Goldberg), *see* Goldberg Decl. ¶ 13,
6 could be compensable. The Government also objects to expenses Mr. Eisenberg seeks of \$3,772
7 for computerized research because he fails to document the hours researched or the subjects
8 researched. *See Shepard v. Dorsa*, 1998 WL 1799018, at * 4 (C.D. Cal. 1998).

9 Finally the Government objects to expenses requested by Mr. Nelson of \$6,489 (again
10 undocumented) for numerous trips, including to Saudi Arabia to meet with Soliman Al-Buthe,
11 who is not a named plaintiff in this case. The issue plaintiffs litigated in the case to
12 success—partial summary judgment based on public evidence—did not reasonably require trips
13 to Saudi Arabia for consultations. The Government also objects to Mr. Nelson’s requested
14 expenses of \$6,715 for an ethics consultant. Seven attorneys of record in this case should have
15 been able to assess their ethical obligations without hiring another lawyer, and these expenses
16 are not reasonably related to a particular matter litigated.

17 CONCLUSION

18 For the foregoing reasons, plaintiffs’ motion for attorney fees should be denied. The
19 Court should defer an award of fees until after the entry of judgment. At this stage the initial
20 maximum lodestar amount that plaintiffs’ counsel could be awarded could not exceed more than
21 \$606,116 if plaintiffs obtain all the relief they seek, and would be subject to reduction if they do
22 not.

23 Dated: August 5, 2010

Respectfully Submitted,

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