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13 **UNITED STATES DISTRICT COURT**  
 14 **NORTHERN DISTRICT OF CALIFORNIA**

|    |  |   |   |
|----|--|---|---|
| 15 |  | ) | No. M:06-cv-01791-VRW                   |
| 16 | IN RE NATIONAL SECURITY AGENCY                       | ) |   |
| 17 | TELECOMMUNICATIONS RECORDS                           | ) | JOINT CASE MANAGEMENT                   |
| 18 | LITIGATION   | ) | STATEMENT IN <i>Al-Haramain Islamic</i> |
| 19 | <u>This Document Solely Relates To:</u>              | ) | <i>Foundation et al. v. Bush et al.</i> |
| 20 |  | ) |   |
| 21 | <i>Al-Haramain Islamic Foundation et al. v Bush,</i> | ) | Honorable Chief Judge Vaughn R. Walker  |
| 22 | <i>et al. (07-109)</i>                               | ) |   |
| 23 |  | ) |   |

24 **INTRODUCTION**

25 Pursuant to Local Rule 16, the plaintiffs and the defendants sued in their official  
 26 capacity (hereafter “defendants” or “Government defendants”) submit this joint case  
 27 management statement in the *Al-Haramain v. Bush* action (07-109) in order to advise the Court  
 28 that they have conferred regarding further proceedings and set forth herein points of agreement  
 and, where they are unable to agree, their respective positions on further proceedings. The  
 parties have request that any case management conference in this matter be held on the morning  
 of September 12, 2008 – a date on which we have been advised the Court is available.

1 A. *Procedural History*

2 This action was remanded by the Court of Appeals for the Ninth Circuit, *see Al-*  
3 *Haramain Islamic Foundation v. Bush*, 507 F.3d 1190 (9th Cir. 2007), for consideration of  
4 whether the state secrets privilege is preempted by provisions of the Foreign Intelligence  
5 Surveillance Act (“FISA”), 50 U.S.C. §§ 1801-1871. *See id.* at 1205. Following the remand,  
6 this Court held a case management conference on February 7, 2008, and ordered briefing on both  
7 the preemption question and the Government’s position that the Court lacked jurisdiction. *See*  
8 Order, Dkt 427 (06-1791-VRW) (Feb. 11, 2008).

9 Following briefing and argument on the Government’s dispositive motion, the Court  
10 entered an Order on July 2, 2008, dismissing without prejudice plaintiffs’ claim for damages  
11 under Section 1810 of the FISA, 50 U.S.C. § 1810, and granting plaintiffs leave to file an  
12 amended complaint within 30 days of that Order and attempt to establish based on non-classified  
13 evidence that they are “aggrieved persons” within the meaning of 50 U.S.C. § 1801(k) of the  
14 FISA. *See* Order in *Al-Haramain Islamic Found. et al. v. Bush et al.* (07-109-VRW) (July 2,  
15 2008) (Dkt. 453, 06-CV-1791-VRW). The Court ruled that “[p]laintiffs must first establish  
16 ‘aggrieved person’ status without the use of the sealed document and may then bring a ‘motion  
17 or request’ under [FISA Section] 1806(f) [50 U.S.C. § 1806(f)] in response to which the attorney  
18 general may file an affidavit opposing disclosure.” *Id.* at 49. “At that point, in camera review of  
19 materials responsive to the motion or request, including the sealed document, might well be  
20 appropriate.” *Id.*

21 Plaintiffs filed their amended complaint on July 29, 2008. *See* Dkt. # 35 (07-109-VRW).  
22 The plaintiffs and Government defendants have stipulated to an extension of time of the date on  
23 which Government defendants’ response to the amended complaint would be due, *see*  
24 Stipulation, Dkt. 40 (07-CV-109-VRW) (July 31, 2008), but, as set forth below, otherwise have  
25 different views as to how the case should now proceed.

26 B. *Plaintiffs’ Position Concerning Further Proceedings*

27 This Court has stated that, in order to proceed with this lawsuit, plaintiffs must first  
28 establish aggrieved person status and may then bring a motion or request under § 1806(f). Slip

1 Op. at 49. In plaintiffs' view, the first amended complaint filed on July 29, 2008 establishes  
2 aggrieved person status, which means plaintiffs may now proceed under § 1806(f). Defendants  
3 contend otherwise. The question to be resolved by a Case Management Conference is what is  
4 the appropriate procedure for deciding whether the first amended complaint establishes  
5 aggrieved person status. Defendants propose to proceed by a defense "motion," but they do not  
6 identify the nature of the motion they propose to file.

7 According to *Bischoff v. Osceola County, Fla.*, 222 F.3d 874 (11th Cir. 2000), there are  
8 three possible procedures for pretrial adjudication of standing challenges, none of which seems  
9 appropriate here:

10 First, defendants can file a *motion to dismiss based solely on the complaint*. *Id.* at 878.  
11 On such a motion, however, the Court must accept as true all of the plaintiffs' material  
12 allegations. *Id.* at 879. If, in the present case, the material factual allegations of plaintiffs'  
13 amended complaint are taken as true, the dismissal motion would have to be denied. (Also,  
14 defendants would be precluded from challenging the amended complaint's material allegations  
15 with secret filings, to which defendants have repeatedly resorted previously in this case.)

16 Second, defendants can file a *motion for summary judgment based solely on affidavits*  
17 *supporting and opposing the factual allegations in the complaint*. *Id.* at 878. On such a motion,  
18 however, the facts set forth in plaintiffs' affidavits must be taken to be true, and any disputed  
19 facts must be construed in the light most favorable to plaintiffs. *Id.* Here, in opposition to such a  
20 motion, plaintiffs would simply produce the public statements and other non-classified evidence  
21 set forth in the amended complaint. That evidence would have to be taken as true, with any  
22 disputed facts construed in the light most favorable to plaintiffs, so that the summary judgment  
23 motion would have to be denied.

24 Third, the Court can hold, either on defendants' request or sua sponte, a *pretrial*  
25 *evidentiary hearing, on a motion to dismiss or a motion for summary judgment*. *Id.* at 878-80.  
26 Any disputed factual issues concerning standing would be resolved through such an evidentiary  
27 hearing. *Id.* at 879. Defendants may request such a hearing in the context of a motion to dismiss  
28 or a motion for summary judgment. *Id.* at 878-79. In the present case, however, the amended

1 complaint's standing allegations are all indisputable matters of public record or personal  
2 recollections of plaintiffs Belew and Ghafoor regarding the substance of their personal telephone  
3 conversations. There are no disputed factual issues to resolve here.

4 In truth, the pivotal issue at this point in the case is simply this: What is plaintiffs' burden  
5 of establishing their status as aggrieved persons who may proceed under § 1806(f), and do  
6 plaintiffs' indisputable factual allegations regarding such status meet that burden? Plaintiffs will  
7 propose on the upcoming motion (whatever its form) that plaintiffs' burden is to produce prima  
8 facie evidence, direct and/or circumstantial, sufficient to raise a reasonable inference that  
9 plaintiffs were subjected to electronic surveillance. This proposition is directly supported by *In*  
10 *re Sealed Case*, 494 F.3d 139, 147 (D.C. Cir. 2007), which held that electronic surveillance can  
11 be proved by "direct or circumstantial evidence" that "creates a reasonable inference" of  
12 eavesdropping. The proposition is further supported by analogy to case law articulating  
13 standards for establishing aggrieved party status under 18 U.S.C. § 3504 – which this court  
14 described as "certainly relevant" though perhaps not "directly transferrable" to the standing  
15 inquiry under FISA, Slip. Op. p. 50 – by prescribing facts that were essential "to raise a prima  
16 facie issue of electronic surveillance." *United States v. Alter*, 482 F.2d 1016, 1026 (9th Cir.  
17 1973); see *Black's Law Dictionary* 1228 (8th ed. 2004) (defining "prima facie case" as "a party's  
18 production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the  
19 party's favor"). The purely legal issue of the nature of plaintiffs' burden is easily resolved as a  
20 threshold question at the outset of a § 1806(f) motion – and, in plaintiffs' view, once the  
21 applicable standard is established, the conclusion that plaintiffs have met that standard is  
22 inevitable, for plaintiffs' amended complaint demonstrates the "rich lode of disclosure" that this  
23 Court has indicated will be sufficient. Slip Op. at 51.

24 In contrast, none of the three alternative procedures prescribed by *Bischoff* for pretrial  
25 adjudication of standing issues seems appropriate here. A motion to dismiss would be restricted  
26 by the rule requiring the amended complaint's allegations to be taken as true. A motion for  
27 summary judgment would be restricted by the rule requiring plaintiffs' evidence to be taken as  
28 true, with any disputed facts construed in the light most favorable to the plaintiffs. And there

1 does not seem to be any need for an evidentiary hearing. A § 1806(f) motion seems to be the  
2 best fit.

3         Going forward on a § 1806(f) motion will also avoid disagreements between the parties  
4 regarding the standards governing a motion to dismiss or for summary judgment (e.g., taking the  
5 amended complaint’s allegations as true on a motion to dismiss), on which the parties have been  
6 unable to agree. Finally, a § 1806(f) motion seems to be the best way to avoid the sort of delay  
7 that has plagued this case from its inception. If, on a § 1806(f) motion, the plaintiffs are  
8 determined to be aggrieved persons, this Court can immediately proceed to consider the  
9 treatment of the sealed document under § 1806(f), instead of proceeding by two consecutive  
10 motions, two briefing schedules, and two hearings.

11         Defendants take the position that, because a proceeding under § 1806(f) is a two-step  
12 process requiring a threshold showing of aggrieved persons status before resort to § 1806(f)’s  
13 security procedures, the process must be bifurcated into two separate and consecutive  
14 proceedings – first, some sort of defense motion, the nature of which defendants do not specify;  
15 and then, if the defense motion is unsuccessful, a plaintiff’s motion under § 1806(f). Defendants  
16 do not, however, suggest any reason why this two-step process cannot occur in a single  
17 proceeding on the § 1806(f) motion, with this Court reaching the second step only if the Court  
18 determines on the first step that plaintiffs have made the required threshold showing. Plaintiffs,  
19 in contrast, have demonstrated a compelling reason why the process should not occur in separate  
20 and consecutive proceedings – none of the three alternative procedures for pretrial adjudication  
21 of standing issues seems appropriate in the context of § 1806(f), a point for which defendants  
22 have no answer.

23         As this Court has noted, the lack of precedent for a civil FISA claim “complicates the  
24 task of charting a path forward.” Slip Op. at 56. Plaintiffs believe the simplest and most  
25 expeditious path forward is a § 1806(f) motion wherein this Court can preliminarily determine  
26 plaintiffs’ burden and whether they have sustained it. If the Court determines that plaintiffs have  
27 not sustained their burden, the obvious disposition will be dismissal of the lawsuit; if the Court  
28 determines that plaintiffs have sustained their burden, the Court can immediately proceed to

1 consider the treatment of the sealed document under § 1806(f).

2 If the Court agrees with plaintiffs' position, plaintiffs respectfully propose the following  
3 schedule:

4 Plaintiffs' § 1806(f) motion due September 18, 2008.

5 Defendants' opposition due October 16, 2008.

6 Plaintiffs' reply due October 30, 2008.

7 Hearing on November 13, 2008.

8 **C. Government Defendants' Position Concerning Further Proceedings**

9 In its Order dated July 2, 2008, the Court ruled that "[p]laintiffs must *first* establish  
10 'aggrieved person' status" without the use of the classified sealed document that has been at  
11 issue in this case, and "may *then* bring a 'motion or request' under [FISA Section] 1806(f) in  
12 response to which the attorney general may file an affidavit opposing disclosure." Slip Op. at 49  
13 (emphasis added). "*At that point*, in camera review of materials responsive to the motion or  
14 request, including the sealed document, *might* well be appropriate." *Id.* (emphases added). The  
15 Court also indicated that "[*i*]n the event plaintiffs meet this hurdle" (*i.e.*, establishing aggrieved  
16 status), the Court "would have occasion to consider the treatment of the sealed document." *Id.* at  
17 55 (emphasis added).

18 Notwithstanding the Court's ruling, plaintiffs seek to file and litigate their motion or  
19 request under FISA Section 1806(f) before the Court has made any determination as to whether  
20 the plaintiffs have met their burden of establishing that they are "aggrieved persons" under the  
21 FISA. Defendants submit that the Court should proceed as indicated in its July 2 Order and  
22 address first whether the plaintiffs have met their burden of establishing that they are  
23 "aggrieved" persons under the FISA and thus have standing to proceed. The Court should not  
24 attempt to proceed simultaneously with plaintiffs' motion under Section 1806(f) until that  
25 threshold standing question is resolved. At this stage, plaintiffs have not "first" established their  
26 aggrieved status and, accordingly, the "point" at which plaintiffs may "then" bring a motion  
27 under Section 1806(f) is an "event" that has not yet occurred—and may not occur.

28 Plaintiffs' discussion of the various motions by which the Government defendants may

1 seek to challenge and adjudicate whether plaintiffs have standing is beside the point. Whether  
2 defendants decide to challenge plaintiffs' alleged standing through a motion to dismiss or for  
3 summary judgment, or perhaps utilize both approaches, and how such motions would be  
4 resolved under the applicable standards, are matters to be addressed in litigating the motions  
5 themselves. The case management question for now is whether the standing issue should be  
6 addressed and decided first—before a motion that invokes Section 1806(f) proceedings. In  
7 support of their position, plaintiffs simply assume that they have already prevailed on the  
8 standing question, or will likely prevail on any type of motion defendants bring, by virtue of  
9 assuming the truth of the averments in their Amended Complaint. But that obviously is a matter  
10 that defendants can and will contest by motion. Indeed, as plaintiffs acknowledge, the Court has  
11 not yet even addressed the standard of review for determining whether a person is “aggrieved”  
12 under the FISA. Plaintiffs briefly describe their position in favor of a “prima facie” standard of  
13 review, citing *inter alia*, *United States v. Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973). *See supra*.  
14 But the *Alter* case concerned the standard for proceeding under 18 U.S.C. § 3504, and the Court  
15 has already noted that Section 3504 standards do “not appear directly transferrable to a standing  
16 inquiry for an ‘aggrieved person’ under FISA,” *see* Slip Op. at 50. While plaintiffs again assume  
17 that they “inevitably” will prevail on this key issue, the matter must be addressed and resolved  
18 by motion before any determination as to whether or not plaintiffs have standing.

19 Moreover, plaintiffs' proposed motion under Section 1806(f) is not the proper procedure  
20 for addressing the threshold issue of standing. Section 1806(f) establishes special statutory  
21 procedures for *in camera*, *ex parte* review for seeking discovery into whether any electronic  
22 surveillance at issue was undertaken lawfully by parties that have already established that they  
23 are aggrieved persons. *See* Slip Op. at 48 (“As the court reads section 1806(f), a litigant must  
24 first establish himself as an ‘aggrieved person’ before seeking to make a ‘motion or request’”  
25 under that provision). Indeed, plaintiffs concede that there must be a two-step process—noting  
26 that the 1806(f) process could only be reached only “*if the court determines that plaintiffs have*  
27 *sustained their burden.*” *See supra*.

28 Plaintiffs' contention that filing their Section 1806(f) motion now would allow the Court

1 to “immediately proceed” to consider the treatment of the sealed document under Section  
2 1806(f) if their standing is established—without the delay resulting from a subsequent round of  
3 motions—is clearly flawed. The standing issue must still be decided first as a separate matter in  
4 any event. This may of course lead to dismissal of the case and negate the need to even address  
5 plaintiffs’ motion. More importantly, significant factors—already noted by the Court—weigh  
6 strongly against attempting to proceed simultaneously “in a single proceeding” with plaintiffs’  
7 motion under Section 1806(f) in order to address their claim for damages under FISA Section  
8 1810, 50 U.S.C. § 1810. The Court observed in its July 2 Order that “section 1810 is not user  
9 friendly,” that “the impediments to using it may yet prove insurmountable,” *see* Slip Op. at 52,  
10 and that “significant practical challenges” exist for adjudicating plaintiffs’ claim, *see id.* at 56.  
11 In particular, plaintiffs contemplate that their Section 1806(f) would concern whether the  
12 classified sealed document may be used in further proceedings—as the Court has indicated may  
13 occur, *see* Slip Op. at 55, and their motion would also call for an affidavit by the Attorney  
14 General under Section 1806(f). Accordingly, the significant and complex issues raised by the  
15 Court’s July 2 Order concerning whether and how this case should proceed under Section  
16 1806(f), along with the underlying national security interests at stake, would immediately be  
17 subject to litigation upon the filing of plaintiffs’ motion—before any determination is made as to  
18 whether plaintiffs have established their standing. The Court’s July 2 Order appears to  
19 contemplate that such issues not be confronted until after a determination that the case will  
20 proceed, and the Government defendants respectfully request that the Court adhere to that order  
21 of proceeding.

22 Finally, we note that the Court proceeded in a similar fashion during the last round of  
23 motions in this case. At that time, plaintiffs wished to proceed immediately with their motion for  
24 summary judgment addressing the merits of their claims, and the Government proposed to  
25 address first whether Section 1806(f) preempted the state secrets privilege and other  
26 jurisdictional issues. *See* Defendants’ Case Management Statement (Dkt. 14) (07-CV-109-  
27 VRW) (Feb. 6, 2008). The Court decided against considering plaintiffs’ summary judgment  
28 motion until after it decided whether the case would proceed and, indeed, ultimately dismissed



1 plaintiffs' pending FISA claim without prejudice. In light of the Court's action, this case  
2 remains in a similar posture, and the proper course again would be to consider whether the case  
3 should proceed before addressing the significant and complex issues that would be raised by  
4 attempting to proceeding simultaneously under FISA Sections 1806(f) and 1810.

5 If the Court agrees with Government defendants' approach to further proceedings, we  
6 respectfully propose the following schedule for briefing and a hearing on our forthcoming  
7 dispositive motion:

|  |                    |
|--|--------------------|
| 8 Government Defendants' Dispositive Motion<br>9 in Response to Amended Complaint: | September 18, 2008 |
| 10 Plaintiffs' Opposition:   | October 16, 2008   |
| 11 Government Defendants' Reply:   | October 30, 2008   |
| 12 Hearing:  | November 13, 2008  |

1 DATED: August 18, 2008

Respectfully Submitted,

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1                   **DECLARATION PURSUANT TO GENERAL ORDER 45, § X.B**

2                   I, ANTHONY J. COPPOLINO, hereby declare pursuant to General Order 45, § X.B, that  
3 I have obtained the concurrence in the filing of this document from the other signatory listed  
4 below.

5                   I declare under penalty of perjury that the foregoing declaration is true and correct.

6                   Executed on August 18, 2008, in the City of Washington, District of Columbia.

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