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24 **IN THE UNITED STATES DISTRICT COURT**
25 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

26 **IN RE NATIONAL SECURITY) MDL Docket No. 06-1791 VRW**
27 **AGENCY TELECOMMUNICATIONS)**
28 **RECORDS LITIGATION) PLAINTIFFS' CASE**
29 **) MANAGEMENT STATEMENT**

30 This Document Relates Solely To:)
31) Date: Friday, January 23, 2009
32 *Al-Haramain Islamic Foundation, Inc., et al.*) Time: 10:30 a.m.
33 *v. Bush, et al. (C07-CV-0109-VRW)*) Court: Courtroom 6, 17th Floor
34) Honorable Vaughn R. Walker
35 **AL-HARAMAIN ISLAMIC)**
36 **FOUNDATION, INC., et al.,)**
37)
38)

1 proceedings. Mr. Eisenberg advised Mr. Coppolino of plaintiffs' view that defendants' notice of
2 appeal does not effect a stay of further proceedings in this Court if the order of January 5, 2009 is not
3 directly appealable, and asked Mr. Coppolino to state the grounds on which the government believes
4 the order is directly appealable, so that plaintiffs could effectively address, in their case management
5 statement, appealability and its effect on further district court proceedings. Mr. Coppolino responded
6 that "the Solicitor General has determined that the order is appealable under the collateral order
7 doctrine and 1292 and other authority," but Mr. Coppolino declined to specify that "other authority."
8 Mr. Coppolino suggested that plaintiffs could file a separate case management statement or that,
9 alternatively, the parties could attempt to prepare and file a joint statement on January 21, 2009. Mr.
10 Coppolino added, however, that in his view it would be "more reasonable" for plaintiffs to address the
11 appealability issue in opposition to the stay motion. Mr. Coppolino also suggested that the parties
12 stipulate to a continuance of the case management conference to January 30, 2009. Mr. Eisenberg
13 responded that plaintiffs would so stipulate if defendants would agree not to file their stay motion in
14 this Court until after 12:00 noon Eastern time on January 20, 2009. Mr. Coppolino refused to so agree.

15 At 10:56 p.m. Eastern time on January 19, 2009 – 64 minutes before midnight on the last day
16 of the Bush presidency – defendants filed a motion for a stay pending appeal and for certification of
17 an interlocutory appeal under 28 U.S.C. section 1292(b). The motion also summarily asserts that this
18 Court's order of January 5, 2009 is *directly* appealable, stating that defendants "believe that several
19 possible grounds exist for appealing the Court's Order under 28 U.S.C. § 1292, including the collateral
20 order and mandamus doctrines." Doc. #60, at 15, n. 11.

21 Plaintiffs have chosen to submit this separate statement today, rather than making any further
22 attempts to get defendants' agreement to a joint statement, because in plaintiffs' view too much delay
23 has already occurred in the filing of statements that were due a week ago. Plaintiffs also have chosen
24 to address the appealability issue in this statement, rather than later in opposition to the stay motion,
25 because that issue is critical to this Court's decision on how to proceed in light of defendants' notice
26 of appeal. Plaintiffs do not at this time respond to defendants' motion for a stay and certification of
27 an interlocutory appeal, but will do so in due course according to the applicable deadline for filing
28 opposition.

THE EFFECT OF DEFENDANTS' APPEAL

1
2 In plaintiffs' view, defendants' filing of a notice of appeal from this Court's order of January
3 5, 2009 has no effect on this Court's jurisdiction to proceed with the adjudication of plaintiffs' Article
4 III standing, because that order is not appealable. However, because defendants have not provided any
5 details with regard to their theories of appealability – other than to mention in their newly-filed motion
6 the collateral order doctrine and mandamus – plaintiffs must necessarily address several possible
7 theories, each of which is meritless.

8 We begin with the collateral order doctrine, which permits a direct appeal from an interlocutory
9 order if (1) the order “conclusively determine[s]” a disputed question, (2) the question is “completely
10 separate from the merits of the action” and is not “enmeshed in the factual and legal issues comprising
11 the plaintiff's cause of action,” and (3) the order is “effectively unreviewable on appeal from a final
12 judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978) (emphasis and internal
13 quotation marks omitted). This Court's order of January 5, 2009 is not appealable under the collateral
14 order doctrine unless all three of these requirements are met.

15 The January 5 order has two elements. The first is the denial of defendants' third dismissal
16 motion for purported lack of standing. The law is well settled that this element of the order is not
17 appealable under the collateral order doctrine because “the issue of standing is not effectively
18 unreviewable on appeal from a final judgment and, thus, fails the last prong of the collateral order
19 doctrine.” *Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999); *see also*
20 *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 497 n. 2 (7th Cir. 1993) (“a denial of a motion to
21 dismiss for lack of standing does not qualify as a final judgment and thus is not eligible for review at
22 this time”).

23 The second element of the January 5 order is the granting of plaintiffs' motion under 50 U.S.C.
24 section 1806(f). This element of the order is not appealable under the collateral order doctrine because
25 it fails both the first and second prongs of the doctrine. It fails the first prong because it does not
26 “conclusively determine” the issue of disclosure of the Sealed Document and/or defendants' classified
27 submissions. *See Coopers & Lybrand*, 437 U.S. at 468; *accord, Eisen v. Carlisle & Jacquelin*, 417
28 U.S. 156, 171 (1974) (issue must be “settled conclusively”). That is because this Court has *not yet*

1 *ordered disclosure* of anything. A key provision of the January 5 order is its requirement that
2 defendants

3 shall review the Sealed Document and their classified submissions to date in this
4 litigation and determine whether the Sealed Document and/or any of defendants'
5 classified submissions may be declassified, take all necessary steps to declassify those
6 that they have determined may be declassified and, no later than forty-five (45) days
7 from the date of this order, serve and file a report of the outcome of that review.

8 Doc. #50, at 24-25. If defendants decide to *declassify* the Sealed Document or an appropriately
9 redacted portion of it, and/or their classified submissions, it may not be necessary for this Court to
10 order any disclosure at all, because such disclosure will have occurred by defendants' voluntary
11 declassification. And, as defendants make clear in their stay motion, they have "commenced the
12 declassification review process," Doc. #60, at 6, n. 3 – which evidently means they have not yet made
13 any decisions with regard to declassification, so that it is still quite possible there will be
14 declassification and thus no issue of compelled disclosure. Thus, the issue whether defendants must
15 disclose anything is not yet conclusively determined.

16 With the advent of the Obama presidency, defendants might very well choose to declassify
17 some portions of the Sealed Document and/or the classified submissions. In a speech to the American
18 Constitution Society last summer, Attorney General designate Eric Holder condemned the warrantless
19 wiretapping program, saying:

20 We owe the American people a reckoning I never thought that I would see that
21 a president would act in direct defiance of federal law by authorizing warrantless NSA
22 surveillance of American citizens. This disrespect for the rule of law is not only
23 wrong, it is destructive in our struggle against terrorism. . .

24 See <http://www.acslaw.org/node/6720> (last visited Jan. 18, 2009).

25 In a law review article last spring, President Obama's pick to head the Department of Justice's
26 Office of Legal Counsel, Dawn E. Johnsen, wrote of defendants' asserted justifications for the
27 warrantless wiretapping program – the so-called "unitary executive" theory and defendants'
28 "Commander-in-Chief" theory – that:

The Bush administration's 'unitary executive' and 'Commander-in-Chief' theories, in
my view, are clearly wrong and threaten both the constitutionally prescribed balance
of powers and individual rights.

1 Dawn E. Johnsen, *What's a President to do? Interpreting the Constitution in the Wake of Bush*
2 *Administration Abuses*, 88 B.U.L. Rev. 395, 417 (2008).

3 It would be a remarkable turnabout for the new Department of Justice, under the guidance of
4 Mr. Holder and Ms. Johnsen, to refuse any declassification here and continue the effort to resist a
5 decision on plaintiffs' standing and this Court's adjudication of the Bush administration's "unitary
6 executive" and Commander-in-Chief" theories.

7 This Court's 1806(f) ruling fails the second prong of the collateral order doctrine because the
8 key question that is implicated and may be resolved on plaintiffs' 1806(f) motion – whether plaintiffs'
9 surveillance "was lawfully authorized and conducted," 50 U.S.C. § 1806(g) – is not "completely
10 separate from the merits of the action," *Coopers & Lybrand*, 437 U.S. at 468, but, quite to the contrary,
11 is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action," *id.* The 1806(f)
12 issue – whether plaintiffs were subjected to unlawful surveillance – is hardly collateral to the merits
13 issue, but *is* the merits issue.

14 In short, this Court's order of January 5, 2009 cannot be directly appealable under the collateral
15 order doctrine. As for defendants' other theory of "appealability" – mandamus – that is not a theory
16 of appealability at all, for mandamus is a writ, not an appeal. Defendants have not even filed a petition
17 for writ of mandamus. They cannot claim the benefit of mandamus when they have not requested it.

18 We also note that, according to 50 U.S.C. section 1806(h), an order to disclose materials
19 relating to electronic surveillance is "final." That provision, however, does not make this court's
20 1806(f) order appealable, for one of the same reasons it is not appealable under the collateral order
21 doctrine: It does not yet order disclosure of anything – that is, it does not conclusively determine the
22 matter of disclosure – and thus is not final.

23 Finally, there is reason to doubt that defendants truly believe the January 5 order is directly
24 appealable, when they have filed a 16-page motion for certification of an interlocutory appeal and a
25 discretionary stay yet devote only half a sentence in a footnote to a contradictory and unsupported
26 claim that the order is directly appealable.

27 Because no direct appeal lies from the January 5, 2009 order, defendants' purported appeal
28 from that order has no effect on this Court's jurisdiction to proceed with the adjudication of plaintiffs'

1 Article III standing. Purported appeals from unappealable orders “do not transfer jurisdiction to the
2 appellate court and thus do not strip the district court of jurisdiction to conduct further proceedings in
3 the case.” *Nascimento v. Dummer*, 508 F.3d 905, 910 (9th Cir. 2007); accord, *Estate of Conners*, 6
4 F.3d 656, 658 (9th Cir. 1993).

5 **PLAINTIFFS’ PROPOSED PLAN**

6 In plaintiffs’ view, as explained at pages 20-21 of Plaintiffs’ Opposition To Defendants’ Third
7 Motion To Dismiss Or, In The Alternative, For Summary Judgment, Doc. #50, at 29-30, this Court
8 can and should adjudicate plaintiffs’ Article III standing upon plaintiffs’ 1806(f) motion in the course
9 of determining “whether the surveillance of the aggrieved person[s] was lawfully authorized and
10 conducted.” 50 U.S.C. § 1806(f).

11 Before this Court decides the standing issue, plaintiffs propose a round of briefing in which
12 plaintiffs have the opportunity to address how the Sealed Document contributes to plaintiffs’ showing
13 of Article III standing. That briefing should occur after defendants have decided whether the Sealed
14 Document or an appropriately redacted portion of it and/or any of defendants’ classified submissions
15 will be declassified and have completed any such declassification, and after plaintiffs’ counsel receive
16 their TS/SCI clearances and have reviewed any remaining classified material under secure conditions.
17 Briefing by plaintiffs’ counsel addressing still-classified information should be prepared under secure
18 conditions similar to those under which plaintiffs’ counsel prepared sealed filings during litigation in
19 the Ninth Circuit Court of Appeals.

20 This Court’s order of January 5, 2009 prescribes the following schedule for upcoming
21 proceedings:

- 22 • January 20: Deadline for the Court’s review of the Sealed Document (14 days from
23 filing of order).
- 24 • February 13: Deadline for processing of applications by plaintiffs’ counsel for
25 TS/SCI security clearances (date specified in order).
- 26 • February 19: Deadline for defendants’ report on declassification (45 days from filing
27 of order).

28 Pursuant to the Court’s order of January 5, 2009, three of plaintiffs’ counsel (Jon B. Eisenberg, Steven

1 Goldberg, and J. Ashlee Albies) have applied for TS/SCI security clearances, and the FBI has
2 commenced investigations of counsel upon their applications.

3 Plaintiffs propose the following schedule for filing briefs on the issue of Article III standing,
4 with portions of plaintiffs' briefs to be prepared under secure conditions and filed under seal to the
5 extent they address still-classified information:

- 6 • March 19, 2009: Plaintiffs' opening brief.
- 7 • April 16, 2009: Defendants' opposition brief.
- 8 • April 30, 2009: Plaintiffs' reply brief.
- 9 • May 2009: Hearing date selected by the Court.

10 This schedule assumes that plaintiffs' counsel will receive their security clearances by February
11 13, 2009, as contemplated by the Court's order of January 5, 2009, and then will promptly review any
12 still-classified and declassified materials. Regrettably, however, in defendants' newly-filed motion,
13 defendants have advised this Court that, even if counsel receive the security clearances, defendants will
14 refuse to give counsel access to classified material – yet another act of defiance of the current access
15 proceedings under section 1806(f). Plaintiffs are at a loss at this time to propose how the Court should
16 go forward in light of that refusal, but suggest that the Court defer that decision until the new Obama
17 administration has decided whether to change course in this regard.

18 Plaintiffs do not anticipate the need for any discovery on the issue of Article III standing unless
19 defendants request an evidentiary hearing to resolve disputed factual issues pertaining to Article III
20 standing and proffer evidence that they contend defeats plaintiffs' Article III standing. If that happens,
21 then plaintiffs may request further discovery under section 1806(f) on the disputed factual issues that
22 defendants raise, to be completed before the Court hears oral argument and rules on standing. It is
23 anticipated that this point will be addressed at the case management conference on January 23, 2009.

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CERTIFICATE OF SERVICE

**RE: In Re National Security Agency Telecommunications Records Litigation
MDL Docket No. 06-1791 VRW**

I am a citizen of the United States and employed in the County of San Francisco, State of California. I am over eighteen (18) years of age and not a party to the above-entitled action. My business address is Eisenberg and Hancock, LLP, 180 Montgomery Street, Suite 2200, San Francisco, CA, 94104. On the date set forth below, I served the following documents in the manner indicated on the below named parties and/or counsel of record:

• **PLAINTIFFS' CASE MANAGEMENT STATEMENT**

— **Facsimile** transmission from (415) 544-0201 during normal business hours, complete and without error on the date indicated below, as evidenced by the report issued by the transmitting facsimile machine.

— **U.S. Mail**, with First Class postage prepaid and deposited in a sealed envelope at San Francisco, California.

XX **By ECF:** I caused the aforementioned documents to be filed via the Electronic Case Filing (ECF) system in the United States District Court for the Northern District of California, on all parties registered for e-filing in In Re National Security Agency Telecommunications Records Litigation, Docket Number M:06-cv-01791 VRW, and *Al-Haramain Islamic Foundation, Inc., et al. v. Bush, et al.*, Docket Number C07-CV-0109-VRW.

I am readily familiar with the firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service, and said correspondence would be deposited with the United States Postal Service at San Francisco, California that same day in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 20, 2009 at San Francisco, California.

_____/s/ Jessica Dean

JESSICA DEAN