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

13 CAROLYN JEWEL, et al., )  
 14 )  
 Plaintiffs, )  
 15 )  
 v. )  
 16 )  
 NATIONAL SECURITY AGENCY, et al., )  
 17 )  
 Defendants. )  
 18 )

**No. 08-4373 VRW**

**INDIVIDUAL CAPACITY  
 DEFENDANTS' REPLY IN SUPPORT  
 OF THEIR MOTION FOR RELIEF  
 FROM THE COURT'S ORDERS OF  
 APRIL 27, 2009, AND MAY 8, 2009**

Date: September 17, 2009  
 Time: 10:00 a.m.  
 Courtroom: 6, 17th Floor

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## INTRODUCTION

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2 In their “Motion for Relief from the Court’s Orders of April 27, 2009, and May 8, 2009”  
3 (“Motion”) (Doc # 32), the individual capacity defendants demonstrated that it would be  
4 inherently and irreparably prejudicial to them if they were required to answer or otherwise  
5 respond to plaintiffs’ complaint before there is a final resolution of whether information subject  
6 to the Government’s state secrets and related statutory privileges is necessary to litigate this case.  
7 Because the United States’ privilege assertion protects all information relevant to addressing  
8 plaintiffs’ allegations and thereby precludes the individual defendants from using any of the  
9 protected information to support what may be an otherwise available and complete qualified  
10 immunity defense, those defendants cannot adequately defend themselves until the privilege  
11 issues are finally resolved. Ordering the individual defendants to respond at this point also  
12 would violate the purpose of qualified immunity, which is to ensure that public officials are not  
13 unnecessarily subjected to the burdens of litigation.

14 Plaintiffs’ opposition to the individual capacity defendants’ Motion largely avoids  
15 confronting these (and most other) arguments. It begins by applying the wrong standard of  
16 review which leads to the erroneous premise that the individual defendants must prove the  
17 United States is likely to succeed on its own motion to dismiss and for summary judgment. See  
18 Doc # 42 at 2-5. Plaintiffs then argue it would be inappropriate for the individual defendants to  
19 rely on privileged information in seeking prediscovery summary judgment because plaintiffs  
20 would not have “equal access” to that information. See id. at 6-7. But the fact that the individual  
21 defendants cannot rely on the privileged information is precisely why their Motion should be  
22 granted. Next, plaintiffs present a false choice by suggesting that the individual defendants must  
23 either file a motion to dismiss based solely on the pleadings or “concede that they have no such  
24 motion” (in which case plaintiffs would “not oppose” a stay pending the Court’s decision on the  
25 United States’ motion). See id. at 7-9. What plaintiffs fail to grasp is that the individual capacity  
26 defendants are presently foreclosed from using any of the privileged information to raise  
27 qualified immunity arguments in a threshold motion for summary judgment in combination with  
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1 and as an alternative to a motion to dismiss on qualified immunity grounds (and in these  
2 circumstances obviously cannot concede any defense). As explained below, it would be contrary  
3 to the purpose of qualified immunity and relevant precedent (which plaintiffs either ignore or  
4 mischaracterize) to force the individual defendants to assert their qualified immunity defense  
5 before the privilege issues have been decided. On the other hand, a stay of the individual  
6 capacity claims would not cause any hardship to plaintiffs because, as even they admit, the next  
7 step in this case requires resolution of those privilege issues.

### 8 DISCUSSION

9 As an initial matter, plaintiffs have inexplicably likened the individual defendants'  
10 request to be temporarily relieved of their obligation to answer or otherwise respond as a "request  
11 for a stay pending appeal." Id. at 2. From there they jump to insisting that the individual  
12 defendants must satisfy the "test for a preliminary injunction" to obtain their requested relief.  
13 See id. at 2-3. None of this frames the issue in a legally relevant way.

14 Most obviously there is no appeal pending in this case. The only thing pending is the  
15 United States' dispositive motion, which now has been fully briefed and argued. See Docs # 18,  
16 36. This means the issue before the Court is not whether it should stay the individual capacity  
17 claims pending a non-existent appeal, but whether it should require the individual defendants to  
18 answer or otherwise respond to the claims against them before there is a final resolution of the  
19 United States' privilege assertion and other issues raised in its motion.

20 With that, plaintiffs' invocation of the standard for granting a stay pending appeal, as well  
21 as their transitive argument that the individual defendants need to meet the standard for obtaining  
22 a preliminary injunction—i.e., that they "must demonstrate that the Government has a likelihood  
23 of success on the merits of its motion to dismiss based on the state secrets privilege"—are wholly  
24 inapposite. See Doc # 42 at 2-3, 4-5. In no way have the individual defendants sought injunctive  
25 relief to which the preliminary injunction test might apply. To the contrary, the very point of  
26 their Motion is that, regardless of how the Court rules on the United States' motion, they cannot  
27 fully respond or defend themselves until there is a final resolution—one way or the other—of the  
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1 privilege issues. They even have pointed out that they would expect to seek dismissal and/or  
2 summary judgment on qualified immunity grounds if the privilege assertion was ultimately  
3 rejected (and all appeals had been exhausted and the information necessary to litigate the case  
4 was no longer protected by the Government). See Doc # 32 at 9-10. It is therefore the  
5 unresolved nature of the privilege assertion, not the likelihood of its success or failure on the  
6 merits, that justifies granting the individual defendants their requested relief.<sup>1</sup>

7 Plaintiffs get closer to an appropriate legal standard by citing Landis v. North American  
8 Co., 299 U.S. 248 (1936), and its progeny. See Doc # 42 at 3-4. That line of cases addresses the  
9 issue of when a court may stay an entire law suit pending the disposition of a separate proceeding  
10 in another forum. See Landis, 299 U.S. at 249; Leyva v. Certified Grocers of California, Ltd.,  
11 593 F.2d 857, 863-64 (9th Cir. 1979). From this precedent it is well-established that “the power  
12 to stay proceedings is incidental to the power inherent in every court to control the disposition of  
13 the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”  
14 Landis, 299 U.S. at 254. Exercising that power requires a court to weigh a variety of  
15 considerations: “the balance of hardships between the parties,” the “prospect of narrowing the  
16 factual and legal issues,” and the length of the stay. Lockyer v. Mirant Corp., 398 F.3d 1098,  
17 1112 (9th Cir. 2005); see Landis, 299 U.S. at 254-57. Assuming for the sake of argument that  
18 these same factors should be applied where, as here, one defendant seeks to stay the claims  
19 against it pending the resolution of claims against or issues raised by a co-defendant in the same  
20 case, they overwhelmingly tilt in favor of granting the individual capacity defendants’ Motion.

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25 <sup>1</sup> Plaintiffs’ rehashed argument that the individual defendants’ Motion is really one for  
26 reconsideration and must comply with Local Rule 7-9 is similarly off the mark. See Doc # 42 at  
27 2. That Motion merely renews a prior request for relief that the Court originally denied “without  
28 prejudice.” See Doc # 25 at 2. Plaintiffs have cited no authority, and the individual defendants  
are aware of none, that requires a party to file a motion for leave to seek reconsideration of a  
ruling that was denied without prejudice.

1 **I. THE INDIVIDUAL DEFENDANTS WOULD BE SEVERELY PREJUDICED IF**  
2 **REQUIRED TO ANSWER OR RESPOND AT THIS TIME**

3 In their Motion the individual capacity defendants demonstrated that ordering them to  
4 respond to plaintiffs' complaint before a resolution of the United States' assertion of the state  
5 secrets and related statutory privileges would work a substantial hardship on them. To  
6 summarize: the individual defendants have an absolute right to raise a qualified immunity  
7 defense in a pre-discovery motion for summary judgment when initially responding; they also  
8 have the right to a decision on that defense at the earliest possible stage of the litigation in order  
9 to give meaning to the "basic thrust of the qualified-immunity doctrine," which "is to free  
10 officials from the concerns of litigation," Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009)  
11 (internal quotations and citation omitted); the Government's privilege assertion precludes them  
12 from using certain information to raise a qualified immunity defense in a threshold summary  
13 judgment motion; therefore, requiring the individual defendants to respond while the privilege  
14 issues remain unresolved would force them to forego an essential personal defense and deprive  
15 them of the intended benefits of that defense. See Doc # 32 at 2-8.

16 The crux of plaintiffs' opposition is to say in essence that for the individual capacity  
17 defendants it should be a motion to dismiss or nothing. See Doc # 42 at 5-9. That position  
18 defies logic and the law. Plaintiffs do not—because they cannot—dispute that a defendant is  
19 entitled to seek summary judgment "at any time." Fed. R. Civ. P. 56(b). They nevertheless seem  
20 to imply, without any supporting authority, that resolving a pre-discovery summary judgment  
21 motion "in a qualified immunity context" is somehow improper because it would allow a  
22 defendant to "sandbag a plaintiff with new, untested evidence." Doc # 42 at 7. This is flatly  
23 incorrect, as the Supreme Court has instructed courts to decide qualified immunity on such  
24 threshold motions if at all possible. See Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)  
25 (explaining that individual capacity claims against government officials should "be resolved prior  
26 to discovery and on summary judgment if possible") (emphasis added); Harlow v. Fitzgerald,  
27 457 U.S. 800, 818 (1982) (same); Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (holding that

1 plaintiff must “put forward specific, nonconclusory factual allegations . . . in order to survive a  
2 prediscovery motion for dismissal or summary judgment” on qualified immunity grounds)  
3 (emphasis added) (internal quotations and citation omitted). Plaintiffs again have no answer to  
4 this binding precedent.<sup>2</sup>

5         Instead they contend it would be unfair for the individual defendants to seek summary  
6 judgment based on information protected by the state secrets and related statutory privileges  
7 because plaintiffs would “not have equal access” to it. Doc # 42 at 6. This argument not only  
8 rests on a false assumption, but it is yet another reason why it would be inappropriate to order the  
9 individual defendants to respond to plaintiffs’ complaint before the privilege issues have been  
10 decided. It bears repeating that the state secrets and related statutory privileges are for the United  
11 States, and the United States alone, to claim, waive, and control. See Doc # 32 at 5-6. Because  
12 the individual capacity defendants are thus barred from using the privileged information as well,  
13 plaintiffs’ concerns about having “equal access” to it are non-existent. Moreover, and by  
14 plaintiffs’ own logic, the individual capacity defendants should not be required to answer or  
15 otherwise respond until there is a final resolution of the privilege assertion addressing whether all  
16 parties would have access to information that is subject to the assertion and necessary to litigate  
17 the case.<sup>3</sup>

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19         <sup>2</sup> At most plaintiffs mischaracterize similar case law cited in the individual defendants’  
20 opening brief as involving “a motion to test the sufficiency of a plaintiff’s alleged facts against  
21 the objective qualified immunity standard.” Doc # 42 at 7 n.2. In doing so they omit that the  
22 defendant-officials in those cases tested the sufficiency of the allegations via a prediscovery  
23 summary judgment motion on qualified immunity grounds and that the court in each case held  
24 that summary judgment was appropriate on that basis. See Doc # 32 at 4 n.2 (citing Kluver v.  
25 Sheets, 27 Fed. Appx. 873, 875 (9th Cir. 2001); Elliott v. Thomas, 937 F.2d 338, 345-46 (7th  
26 Cir. 1991); and Lewis v. City of Ft. Collins, 903 F.2d 752, 759-60 (10th Cir. 1990)).

27         <sup>3</sup> Separately, and somewhat inconsistently, plaintiffs make the bald assertion that “the  
28 state secrets privilege has no bearing on [the] ability [of the individual capacity defendants] to  
raise qualified immunity as a threshold matter.” Doc # 42 at 5. This appears to be linked to their  
argument that the individual defendants have “confuse[d] qualified immunity . . . with the myriad  
different ways that a government official might defeat a plaintiff’s claim on the merits.” Id. at 8  
n.3. It is actually plaintiffs who have confused the qualified immunity analysis. Evidence  
establishing, for example, a defendant’s lack of participation in the alleged activities, that a

1 All that said, the most serious flaw in plaintiffs' attempt to limit the individual defendants  
2 to only a motion to dismiss when initially responding to their complaint is that it contravenes the  
3 rationale behind qualified immunity. As noted in the individual capacity defendants' Motion, the  
4 Supreme Court repeatedly has described qualified immunity as an "entitlement not to stand trial  
5 or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). See  
6 Iqbal, 129 S. Ct. at 1953; Harlow, 457 U.S. at 806. It is for this reason the Court also insists that  
7 a motion raising a qualified immunity defense be decided "at the earliest possible stage."  
8 Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (internal quotations and citation omitted).

9 As the individual defendants have shown throughout the briefing of their Motion, a  
10 government official may raise qualified immunity in a motion to dismiss or for summary  
11 judgment when initially responding to a complaint. But in this case the summary judgment  
12 option is off the table due to the Government's privilege assertion. Forcing the individual  
13 defendants to respond under these circumstances would deprive them of the intended benefits of  
14 qualified immunity in several ways.

15 First, ordering the individual defendants to respond at all potentially subjects them to  
16 unnecessary pretrial proceedings if the Court were to uphold the state secrets privilege assertion  
17 and grant the Government's dispositive motion. That is precisely the sort of litigation burden the  
18 doctrine of qualified immunity is meant to avoid. Second, requiring the individual defendants to  
19 respond to the complaint while the privilege assertion remains unresolved means they would  
20 have to do so without the use of information relevant to a qualified immunity defense in

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22 plaintiff was not subjected to the alleged activities, or that the actual activities are not as alleged,  
23 see Doc # 32 at 4 n.3, go directly to the qualified immunity inquiry—i.e., whether the particular  
24 facts of a case give rise to a violation of "clearly established" law. See Anderson, 483 U.S. at  
25 639-41; Mitchell, 472 U.S. at 527-28. And even if there were a genuine issue of fact regarding  
26 such matters, that does not make them any less relevant to a qualified immunity defense. Cf.  
27 Johnson v. Jones, 515 U.S. 304, 311-14 (1995). Again, the individual capacity defendants make  
28 no representation about the particular type(s) of qualified immunity argument(s) that the  
privileged information in this case may or may not support, see Doc # 32 at 4 n.3, but it is simply  
meritless to suggest that such information would have "no bearing" on them raising qualified  
immunity in a threshold motion for summary judgment.

1 whatever threshold motion they might file. This makes it impossible for them to not only fully  
2 defend themselves, but to obtain a prompt ruling on arguments that could result in their dismissal  
3 from the case. Third, and relatedly, litigating threshold qualified immunity defenses in the  
4 fashion implied by plaintiffs' opposition—e.g., filing a motion to dismiss followed later by a  
5 pre-discovery motion for summary judgment—would even more clearly run afoul of qualified  
6 immunity principles, as the individual defendants then would have to endure duplicative (and  
7 still potentially unnecessary) pretrial proceedings.

8         Given the foregoing, it is hard to imagine how the individual defendants could make a  
9 stronger “case of hardship or inequity in being required to go forward.” Landis, 299 U.S. at 255.  
10 Were they “required to go forward” before the privilege issues are resolved, they would be  
11 unable to raise at the outset what may be an otherwise available qualified immunity defense and  
12 would be deprived of the intended benefits of that defense, including the right to avoid the  
13 burdens of litigation to the maximum extent possible. In this sense plaintiffs have it exactly  
14 backwards when they note that ““being required to defend a suit . . . does not constitute a clear  
15 case of hardship or inequity within the meaning of Landis.”” Doc # 42 at 4 (quoting Dependable  
16 Highway Express, Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007)) (internal  
17 quotations and citation omitted). It is not because the individual capacity defendants would have  
18 to defend themselves that they should be relieved of their obligation to answer or otherwise  
19 respond to plaintiffs' complaint, but because the Government's privilege assertion prevents them  
20 from fully defending themselves.<sup>4</sup>

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24         <sup>4</sup> Adding to the individual defendants' potential prejudice is the discovery plaintiffs have  
25 requested in response to the United States' motion, which includes taking the depositions of  
26 nearly all the individual capacity defendants. See Doc # 29 at 23 n.11; Doc # 30 ¶ 7. As  
27 explained in the individual defendants' opening brief, the Court should not permit such discovery  
28 under the circumstances because doing so would result in a de facto denial of qualified  
immunity. See Doc # 32 at 8-9. By not responding to this discussion at all, plaintiffs have tacitly  
conceded the point.



1 **II. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY WOULD BE HARMED**  
2 **IF THE INDIVIDUAL DEFENDANTS' MOTION WERE GRANTED**

3 In contrast to the severe and indisputable inequity the individual capacity defendants have  
4 demonstrated, plaintiffs have failed completely to show that granting the individual defendants'  
5 Motion would "work damage" to them. Landis, 299 U.S. at 255. The most that they offer is a  
6 cursory and generalized complaint about "delay[ing] justice." Doc # 42 at 9. Their argument in  
7 this regard is inaccurate, misdirected, and self-defeating.

8 First, plaintiffs reference a related case they brought "three and a half years ago" against a  
9 telecommunications carrier. Id. at 1. Considering that they did not name the individual capacity  
10 defendants in that suit, they obviously cannot use their own failure to sue those defendants sooner  
11 as a reason for opposing a stay in this case.

12 Second, virtually all of plaintiffs' talk of delay is directed at, in their words, "the  
13 Government's strategy of raising and re-raising the same arguments based on the state secrets  
14 privilege and other governmental privileges." Id. That "delay" again cannot be attributed to the  
15 individual capacity defendants and it would be improper to use that as a basis for denying their  
16 Motion. To repeat, the individual defendants have no control over the United States' decision to  
17 assert the various privileges, see Doc # 32 at 5-6, and that decision affects their interests just as  
18 much as, if not more than, plaintiffs' interests.

19 Third, and relatedly, granting the individual defendants' Motion would not add any more  
20 "delay" to the proceedings than is already inherent in resolving the Government's privilege  
21 assertion. Plaintiffs effectively admit this when they propose that if the individual capacity  
22 defendants were to "concede" that "there is no dispositive motion they can make based solely on  
23 the pleadings," then plaintiffs would "not oppose a stay pending the outcome of the  
24 Government's motion to dismiss." Doc # 42 at 8-9. This recognizes that, whether or not the  
25 individual defendants were to file a motion to dismiss before a final resolution of the privilege  
26 issues, the parties still will have to wait until then for the case to move forward. And because  
27 plaintiffs are willing to agree to an arrangement that would do nothing to reduce the "delay" that  
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1 is the only kind of harm they claim would befall them if the individual defendants' Motion were  
2 granted, their argument in this regard rings hollow.<sup>5</sup>

3         Apart from their poorly developed claim of delay, plaintiffs do not offer a single reason  
4 why the individual defendants should be required to answer or respond while the United States'  
5 motion remains pending or explain how they would be harmed if the individual capacity claims  
6 were stayed. At best, plaintiffs seek only to extract a concession out of the individual capacity  
7 defendants regarding the legal sufficiency of their allegations. That is obviously not a valid  
8 consideration in balancing the "hardships between the parties," Lockyer, 398 F.3d at 1112, and is  
9 utterly inadequate when weighed against the very real and very serious prejudice that the  
10 individual defendants would suffer if "required to go forward," Landis, 299 U.S. at 255.

11 **III. RESOLVING THE GOVERNMENT'S PRIVILEGE ASSERTION IN THE FIRST**  
12 **INSTANCE WOULD SIGNIFICANTLY NARROW THE FACTUAL AND**  
13 **LEGAL ISSUES IN THIS CASE**

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14         The "prospect of narrowing the factual and legal issues," Lockyer, 398 F.3d at 1112, is  
15 another compelling justification for relieving the individual defendants of their obligation to  
16 answer or otherwise respond until there is a final resolution of the privilege issues. Plaintiffs do  
17 not address this factor at all in their opposition brief, and for good reason as it obviously weighs  
18 in the individual defendants' favor. If the privileges are sustained by the courts, then the entire  
19 case, including the individual capacity claims, should be dismissed. If, on the other hand, the  
20 Government's privilege assertion and motion were ultimately rejected, then it may be that  
21 plaintiffs' claims can be litigated at some point. Either way, resolving the United States' motion  
22 in the first instance would significantly narrow, and may eliminate altogether, the issues  
23 surrounding the individual capacity claims.

24         The wisdom of this approach is evidenced by the fact that every court confronting a  
25 similar situation, where the United States has asserted the state secrets privilege in a case alleging

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26         <sup>5</sup> If anything, plaintiffs' proposed course would result in more delay, as it should be  
27 apparent that attempting to litigate a qualified immunity defense with unavailable information is  
28 not only impossible, but would waste the time needed to address and resolve the underlying  
privilege assertion.

1 individual capacity claims against federal officials, has addressed the privilege assertion as the  
 2 first order of business (and in each instance dismissed the entire action, or at least part of it, on  
 3 that basis). See Doc # 32 at 6 n.7 (citing In re Sealed Case, 494 F.3d 139 (D.C. Cir. 2007);  
 4 El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007); and Black v. United States, 900 F. Supp.  
 5 1129 (D. Minn. 1994), aff'd, 62 F.3d 1115 (8th Cir. 1995)). Plaintiffs tellingly do not mention,  
 6 let alone discuss, any of this precedent. Nor do they cite a single case in which the court has  
 7 required an individual capacity defendant to answer or respond before resolving an assertion of  
 8 the state secrets privilege.<sup>6</sup> That is almost certainly because doing so would unnecessarily  
 9 multiply the proceedings at the expense of a defendant's qualified immunity defense,  
 10 conservation of the courts' and litigants' resources, and an orderly disposition of the case.

11 **IV. AN INDETERMINATE STAY OF THE INDIVIDUAL CAPACITY CLAIMS IS**  
 12 **JUSTIFIED UNDER THE CIRCUMSTANCES OF THIS CASE**

13 Throughout their response plaintiffs criticize the individual capacity defendants for  
 14 seeking an "indefinite stay." Doc # 42 at 1, 9. But as noted above, plaintiffs themselves would  
 15 consent to such an indefinite stay "pending the outcome of the Government's motion to dismiss"  
 16 (as long as the individual defendants "concede that they have no dispositive motion they can  
 17 bring based solely on the pleadings"). Id. at 7-9. They cannot have it both ways. Because  
 18 plaintiffs have effectively endorsed a "stay" of the individual capacity claims that is, at least in  
 19 terms of its indeterminate length, materially indistinguishable from the individual capacity  
 20 defendants' requested relief, their objection to that relief on this basis is illusory.

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 22 <sup>6</sup> The most that plaintiffs can muster is to point out that the defendants in "Hepting v.  
 23 AT&T and the MCI/Verizon cases" (which are related to the instant action) "filed motions  
 24 seeking various forms of immunity simultaneous with the Government's motion to dismiss based  
 25 on state secrets." Doc # 42 at 8. The critical difference, of course, is that the plaintiffs in those  
 26 cases had not sued government officials in their individual capacity. In contrast, the parties in the  
 27 only case related to this one that definitively includes an individual capacity claim entered into a  
 28 stipulation that the individual capacity defendant in that case would not be required to answer or  
 otherwise respond to the complaint until after there is a determination that the plaintiffs have  
 standing to proceed despite the Government's assertion of the state secrets privilege. See Al-  
Haramain Islamic Found., Inc. v. Bush, No. 07-109 VRW (N.D. Cal.), Doc # 39.



1 Respectfully submitted this 3rd day of September, 2009,

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