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

15	IN RE NATIONAL SECURITY AGENCY)	No. M:06-CV-01791-VRW
	TELECOMMUNICATIONS RECORDS)	
16	LITIGATION)	GOVERNMENT DEFENDANTS'
)	RESPONSE IN OPPOSITION TO
17	<u>This Document Solely Relates To:</u>)	PLAINTIFFS' PROPOSED
)	JUDGMENT AND RE:
18	<i>Al-Haramain Islamic Foundation et al.</i>)	ALTERNATIVE FORM OF
	<i>v. Obama, et al.</i> (07-cv-109-VRW))	JUDGMENT.
19)	Date: (No Hearing Set)
)	Time:
20)	Courtroom: 6, 17 th Floor
)	Chief Judge Vaughn R. Walker

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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”). *See* Dkts.
5 721/115.^{1/} On April 16, 2010, plaintiffs submitted a motion to dismiss all remaining counts of
6 their amended complaint (*see* Dkts. 722/116), and a proposed form of judgment as to their FISA
7 Section 1810 claim (*see* Dkts. 723/117). The Court granted the Government Defendants 14 days
8 to either submit an alternative form of judgment or a written response to plaintiffs’ submissions.
9 *See* Dkts. 721/115 at 45. The Government Defendants oppose the entry of judgment against it in
10 this case and the specific damages and relief plaintiffs seek.

11 Although the Court has made a finding of liability as to plaintiffs’ FISA claim (with
12 which the Defendants respectfully disagrees), plaintiffs cannot merely rely on that determination
13 at this stage. Rather, the entry of damages and other equitable relief is a separate matter, and
14 plaintiffs have failed to demonstrate that there is any basis for the Court to award them the
15 amount of liquidated damages they seek, punitive damages, or the other forms of relief set forth
16 in plaintiffs’ proposed judgment.

17 First, plaintiffs’ proposed judgment fails to set forth any basis for an award of statutory
18 liquidated daily damages in the amount of \$20,400 per plaintiff. While FISA Section 1810, *inter*
19 *alia*, sets a fixed amount of damages for each day of electronic surveillance in violation of
20 Section 1809, *see* 50 U.S.C. §§ 1809, 1810, plaintiffs do not explain or demonstrate why they
21 would be entitled to an award for a 204 day period.

22 Second, plaintiffs’ proposed judgment fails to set forth any basis in law or fact for an
23 award of punitive damages of \$183,600 per plaintiff. FISA Section 1810 does not expressly
24 waive the sovereign immunity of the United States as to punitive damages and, even if punitive
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26
27 ¹ The two docket citations are to the MDL docket (M: 06-1791-VRW) and the docket in
28 this case (C: 07-109-VRW).

1 damages were available against the Government under Section 1810, plaintiffs' proposed
2 judgment fails to establish any grounds for such an award.^{2/}

3 Third, plaintiffs' demand that any documents related to alleged warrantless surveillance
4 of them be "suppressed" pursuant to Section 1806(g) of the FISA and destroyed is without any
5 basis in law. Section 1806(g) does not apply to "suppress" evidence here, and Section
6 1810—the cause of action at issue—does not authorize this relief. Plaintiffs' request for the
7 destruction of records is similarly not authorized by FISA as "further equitable relief" (*see* Dkts.
8 723/117 at 3).

9 Fourth, plaintiffs' request for a declaratory judgment should be denied. Such relief is not
10 authorized by Section 1810, and, in any event, a declaratory judgment cannot be entered as to a
11 program or activity that no longer exists, even where past injury has been found, because there is
12 no real and immediate threat that such an injury will recur. *City of Los Angeles v. Lyons*, 461
13 U.S. 95, 104 (1983).

14 Finally, the Government requests that the Court refrain from making any determination
15 as to whether plaintiffs are eligible to recover attorneys' fees pursuant to FISA Section 1810(c).
16 *See* 50 U.S.C. § 1810(c). The Court has not yet entered a final judgment in plaintiffs' favor, and,
17 as we show below, plaintiffs are not entitled to the relief they seek. Even if the Court were to
18 now grant plaintiffs some relief, the question of fees is appropriately deferred until at least after
19 the entry of judgment.

20 **BACKGROUND**^{3/}

21 Plaintiffs sought partial summary judgment on the issue of standing and liability as to

22 ² By Order dated April 19, 2010 (Dkts. 724/118), the Court directed plaintiffs to submit a
23 memorandum by May 7, 2010 that "identifies the applicable legal standard and the evidence in
24 the record that plaintiffs contend will support an award of punitive damages." The Government
25 Defendant's reply on this issue is due on May 21, 2010.

26 ³ This section sets forth background related solely to the instant proceeding on plaintiffs'
27 proposed judgment for damages and other equitable relief. The Government has previously set
28 forth the background of the entire case. *See* Defendants' Fourth Motion to Dismiss and For
Summary Judgment (Dkts. 668/103) at 11-17; Defendants' Response to the Court's Order to
Show Cause of May 22, 2009 (Dkts. 636/93) at 3-14.

1 their FISA Section 1810 claim, *see* Dkts. 654/99 at 9, 40, and the Court’s March 31 Order
2 granted plaintiffs’ motion, pursuant to Rule 56(d), on the issue of liability. *See* Dkts. 721/115 at
3 2, 42. The Court then directed plaintiffs either to proceed with any remaining non-FISA claim or
4 to dismiss those claims and submit a proposed form of judgment reflecting their computation of
5 damages due pursuant to FISA Section 1810, their entitlement for attorneys’ fees under Section
6 1810(c), and the items of equitable relief to which plaintiffs believe they are entitled. *See id.* at
7 45. The Court granted plaintiffs an opportunity to request “further proceedings . . . to determine
8 the quantum of damages or other specifics of the judgment.” *Id.* As noted, the Court granted
9 defendants 14 days to submit an alternative form of judgment or this written response to
10 plaintiffs’ submissions. *See id.*^{4/}

11 On April 16, 2010, pursuant to the Court’s Order, plaintiffs submitted a motion to dismiss
12 all remaining counts of their amended complaint (*see* Dkts. 722/116), and a proposed form of
13 judgment as to their FISA Section 1810 claim (*see* Dkts. 723/117). Plaintiffs’ proposed
14 judgment, *inter alia*, seeks: (1) liquidated damages for each of the three plaintiffs in the sum of
15 \$20,400 (computed, pursuant to 50 U.S.C. § 1810(a), by multiplying \$100 for an assumed 204
16 days of alleged surveillance from February 19, 2004 to September 9, 2004); (2) punitive
17 damages for each of the three plaintiffs individually in the sum of \$183,600, pursuant to 50
18 U.S.C. § 1810(b); (3) a declaratory judgment that warrantless electronic surveillance of plaintiffs
19 was unlawful as a violation of FISA; (4) an order for the “suppression of evidence,” pursuant to
20 50 U.S.C. §1806(g), that information obtained by any electronic surveillance of plaintiffs in
21 violation of FISA Section 1809 “shall not be used by the United States government, either
22 directly or derivatively, in any administrative, civil, or criminal proceeding in which the United
23 States is a party” and, upon the final resolution of all such proceedings potentially involving
24 such information, that “all files and records containing such information shall be purged and

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26 ⁴ As set forth herein, the Government Defendants do not merely oppose the “form” of
27 plaintiffs’ proposed judgment, but the entry of any judgment against the Government in this case
28 and the specific relief plaintiffs seek. Pursuant to the Court’s Orders of March 31 and April 19,
the Government also submits an alternative “form” of judgment which reflects the discussion set
forth herein.

1 destroyed, except to the extent that defendants may have an existing legal obligation to preserve
 2 exculpatory evidence”; and (5) an order that plaintiffs shall recover reasonable attorneys’ fees
 3 and other investigation and litigation costs, pursuant to 50 U.S.C. § 1810(c).

4 ARGUMENT

5 **I. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY ARE ENTITLED TO STATUTORY LIQUIDATED DAMAGES OF \$20,400 PER PLAINTIFF.**

6 Where a court decides solely the question of liability, proceedings on damages and other
 7 remedies are a separate phase of the litigation. *See* 9A Charles Alan Wright & Arthur R. Miller,
 8 Federal Practice & Procedure § 3390 (4th ed. 2009) (describing bifurcation of liability and
 9 damage determinations).^{5/} The burden is on plaintiffs to establish its entitlement to the particular
 10 damages sought, and the defendant has the opportunity to contest the claimed damages. *See*
 11 *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir.1992).^{6/}

12 Where liability has been determined pursuant to Section 1810 of the FISA, that provision
 13 authorizes a party to recover “actual damages, but not less than liquidated damages of \$1,000 or
 14 \$100 per day for each day of violation, whichever is greater[.]” 50 U.S.C. § 1810. Plaintiffs do
 15 not seek actual damages, nor the statutory minimum of \$1,000 in liquidated damages. Rather,
 16 plaintiffs seek liquidated damages of \$100 per day for 204 days (or \$20,400 for each plaintiff),
 17 based on an assumption, which plaintiffs ask the court to now enter as a finding, that the
 18 “plaintiffs were subjected to unlawful warrantless surveillance in violation of the FISA occurring
 19 for 204 days from February 19, 2004 to September 9, 2004.” *See* Proposed Judgment (Dkts.
 20

21 ⁵ Rule 56(d) contemplates this bifurcation, providing that an “interlocutory summary
 22 judgment may be rendered on liability alone, even if there is a genuine issue on the amount of
 23 damages.” *See* Fed. R. Civ. P 56(d).

24 ⁶ Notice and an opportunity to contest damages applies even where a defendant has
 25 defaulted at the liability stage. *See Greyhound Exhibitgroup*, 973 F.2d at 158; *accord Antoine v.*
 26 *Atlas Turner, Inc.*, 66 F.3d 105, 110-111 (6th Cir. 1995); *La Barbera v. Federal Metal & Glass*
 27 *Corp.*, 666 F. Supp. 2d 341, 348-49 (E.D. N.Y. 2009); *see also Geddes v. United Fin. Group*,
 28 559 F.2d 557, 560 (9th Cir. 1977) (even for default judgment, allegations regarding the amount
 of damages must be supported by some evidence); *Penpower Technology Ltd. v. S.P.C.*
Technology, GLZ, 627 F. Supp. 2d 1083,1093-94 (N.D. Cal. 2008) (Conti, J.) (same) (citing
Geddes).

1 723/117) at 2. Plaintiffs offer no evidence in support of their proposed finding or the amount of
2 daily liquidated damages they seek.

3 It appears that the start date of plaintiffs' proposed "damages period" (February 19, 2004)
4 is the date on which the Department of the Treasury blocked the assets of plaintiff Al-Haramain
5 Islamic Foundation of Oregon ("AHIF-Oregon"), and the end date (September 9, 2004) is the
6 date on which AHIF was first designated as a Specially Designated Global Terrorist with ties to
7 Osama Bin Laden. *See* Dkts. 721/115 at 38, ¶ 9 and 40, ¶ 12. Plaintiffs argued at the liability
8 stage that the September 2004 designation must have been based on an interception of plaintiffs'
9 communications sometime during this period. But, as plaintiffs' proposed judgment
10 acknowledges, the Court did not find at the liability stage that plaintiffs were subject to
11 surveillance for 204 days continuously from February 19 to September 9, 2004. While the \$100
12 per day of violation is an alternative amount of liquidated damages under Section 1810, that
13 alternative turns on the fact issue of how many days the purported violation occurred. Thus, the
14 total amount sought for daily damages must be supported not merely by a finding that plaintiffs
15 had been intercepted, but on how many days that any violation of FISA Section 1809 occurred.

16 In support of their motion for partial summary judgment, plaintiffs averred that plaintiff
17 Belew spoke with Soliman al-Buthi, a Saudi national and once an officer of AHIF-Oregon, on
18 ten dates (March 10, 11, and 25, April 16, May 13, 22, and 26 and June 1, 2, and 10, 2004), and
19 that plaintiff Ghafoor spoke daily with Mr. al-Buthi daily from February 19 to February 29, 2004
20 —or 11 days—and "approximately" weekly thereafter. This is the extent of the communications
21 that plaintiffs' claim were unlawfully surveilled, and this is the extent of the evidence submitted
22 by plaintiffs as to the duration of any alleged surveillance.⁷ Thus, if plaintiffs are seeking
23 liquidated damages based on alleged continuous surveillance for 204 consecutive days between

24
25 ⁷ Plaintiffs also submitted a Treasury Department document indicating that Mr. al-Buthi
26 was intercepted on February 1, 2003 speaking with Mr. Ali al-Timimi. *See* Exhibit Z to the
27 Declaration of Jon Eisenberg, Dkt. 657-4/099-4 at 37; *see also* Dkts. 721/115 at 31, 37. Mr. Al-
28 Buthi is not a plaintiff in this case, and plaintiffs do not seek damages for this intercept in
February 2003. Plaintiffs offer no evidence of alleged surveillance of AHIF-Oregon for the 204
day period between February 19 and September 9, 2004.

February 19 and September 9, 2004, as it appears they are, no evidence supports that finding.^{8/}

1
2 Plaintiffs cannot be heard to contend that the burden of proof must be shifted to the
3 Government to disprove the existence of continuous surveillance for this 204 day period. While
4 the Court held at the liability stage that the burden would be on the Government to come forward
5 with evidence it exclusively possessed—a conclusion with which the Government disagrees—
6 here, the record shows that plaintiffs knew when and with whom they spoke on the phone. Even
7 if the Court assumed that surveillance occurred on every one of the limited dates on which
8 plaintiffs Belew and Ghafoor spoke with Mr. al-Buthi, that still would not support granting those
9 plaintiffs liquidated daily damages for the 204 days between February 19 and September 9,
10 2004. The Court’s liability determination was premised on its finding that plaintiffs were
11 intercepted in violation of the FISA, but does not support the speculative conclusion that any
12 such surveillance occurred on every one of the limited dates plaintiffs identified in 2004, let
13 alone for 204 days. At most, based on the Court’s finding that plaintiffs Belew and Ghafoor had
14 been subject to surveillance in violation of the FISA at some point, they could be awarded only
15 the statutory minimum of \$1,000 in liquidated damages. The Government does not concede the
16 correctness of the Court’s liability determination, nor consent to judgment for any amount of
17 damages, but simply notes that this is all that could be supported by the Court’s finding at the
18 liability stage—not \$20,400 per plaintiff.

19 Finally, to the extent that the burden is shifted to the Government to disprove the amount
20 of daily liquidated damages plaintiffs seek, such an approach would again be improper. Indeed,
21 the harms to national security would be even greater if the Government were required to
22 disprove the particular amount of daily damages sought or face a judgment for the entire claimed
23 amount. Not only would the Government have to confirm or deny whether or not any of the
24 plaintiffs were subject to electronic surveillance (information that we continue to hold is
25 properly privileged), but specifically whether any electronic surveillance as defined by the FISA

26
27 ⁸ And if plaintiffs’ claim for 204 days of daily liquidated damages is based on some
28 other theory, the Defendants would have to address that in a reply.

1 (see 50 U.S.C. 1801(f)) occurred on a particular number of days during a defined and limited
2 period of time. This would compound the harms to national security at stake by risking or
3 requiring disclosure of whether or to what extent particular methods of surveillance may or may
4 not have been used against particular persons for a particular period, and would reveal with even
5 more clarity whether or not certain channels of communications by those individuals were secure
6 or compromised at a given time, and whether or not particular intelligence had been captured by
7 the Government during that period. See *Al-Haramain Islamic Foundation et. al. v. Bush*, 507
8 F.3d 1190, 1204 (9th Cir. 2007) (disclosure of information concerning the “sources and methods
9 of intelligence gathering in the context of this case would undermine the government’s
10 intelligence capabilities and compromise national security”).^{9/}

11 Especially where one of the plaintiffs in this case—the Al-Haramain Islamic Foundation
12 of Oregon—has been found to have supported specially designated global terrorists as a branch
13 of AHIF-Saudi Arabia, and the non-party with whom two other plaintiffs claim they spoke—Mr.
14 al-Buthi—was a senior official of AHIF-Saudi Arabia also found to have supported specially
15 designated global terrorists and terrorist activities,^{10/} the Government should not again be
16 presented the untenable choice of either being forced to disclose sensitive intelligence
17 information, including to cleared counsel, in order to litigate the quantum of damages, or face a
18 judgment for a presumed amount of damages. Such a course would again impermissibly require
19 the Government to either waive its successful privilege assertion before final appellate review of
20 whether the FISA preempts the privilege, or face the imposition of a damages judgment
21
22

23
24 ⁹ See also *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (“A number of inferences
25 flow from the confirmation or denial of acquisition of a particular individual’s international
26 communications” including alerting any foreign government or organization that has dealt with a
27 plaintiff which communications might have been compromised, what channels were or were not
28 secure, and the focus and concerns of our nation’s intelligence agencies.).

¹⁰ See *Al-Haramain Islamic Foundation Inc. v. United States Dep’t. of the Treasury*, 585
F. Supp. 2d 1233, 1251-52 (D. Or. 2008); see also *id.* 2009 WL 3756363 at *4,

essentially as a default sanction for protecting national security.^{11/}

For the foregoing reasons, the Court should reject plaintiffs' request for daily liquidated damages in paragraph two (2) of the proposed judgment in the amount of \$20,400 per plaintiff.

II. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY ARE ENTITLED TO PUNITIVE DAMAGES OF \$183,600 PER PLAINTIFF.

Paragraph three (3) of plaintiffs' proposed judgment seeks an award of punitive damages of \$183,600 per plaintiff. Pursuant to the Court's Order of April 19, 2010, *see* Dkts. 723/117, the Government will address this issue further in its reply due on May 21, 2010. For now, we note that an award of punitive damages against the United States would be permissible only pursuant to an express waiver of sovereign immunity. *Siddiqui v. United States*, 359 F.3d 1200, 1204 (9th Cir. 2004); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-70 (1981) (finding "no evidence" that Congress intended to waive the immunity of municipalities for punitive damages under 42 U.S.C. § 1983); *see also id.* at 268-69 (because punitive damages are intended to punish a tortfeasor whose wrongful action was intentional and malicious, and to deter such future misconduct, they are not sensibly assessed against a governmental entity and borne by taxpayers); *cf. Vermont Agency of Natural Resources v. United States ex rel Stevens*, 529 U.S. 765, 784-85 (2000) (there is a "presumption against imposition of punitive damages on governmental entities").

¹¹ As the Court is aware, plaintiff AHIF-Oregon has been designated by the United States as a Specially Designated Global Terrorist, and litigation over that matter is pending in a separate action now on appeal to the Ninth Circuit. *See AHIF v. U.S. Dep't. of the Treasury*, 585 F. Supp. 2d 1233 (D. Or. 2008) (first decision on summary judgment *inter alia*, upholding redesignation of AHIF-Oregon); *see also id.* 2009 WL 2756363 (D. Or. 2009) (second decision resolving open issues). Under applicable Treasury Department regulations, any property and interests in property of AHIF-Oregon in the United States or in the possession or control of a U.S. person are blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in unless licensed or otherwise authorized by OFAC. *See* 31 C.F.R. § 594.201(a). The regulations apply to the transfer of any assets to a blocked party pursuant to a court judgment. *See id.* § 594.202(e). Thus, while for the reasons stated herein there should be no basis to award any damages to AHIF-Oregon, should the Court determine to do so, any funds awarded to AHIF-Oregon as damages would be subject to OFAC's licensing requirements and must be placed in a blocked interest-bearing account in the United States. *See id.* § 594.203. It should not be necessary to address this issue further at this stage, because absent a final, non-appealable judgment, a transfer of damages to AHIF-Oregon should not occur.

1 While the Court has concluded that Section 1810 of the FISA waives sovereign immunity
2 of the United States, nothing in that provision indicates unambiguously that any such waiver
3 extends to authorizing punitive damages against the United States. *See, e.g.*, 26 U.S.C.
4 § 7431(a)(1) and (c)(1)(B) (expressly authorizing damages action “*against the United States*”
5 where “any officer or employee of the United States” knowingly or negligently inspects or
6 handles a tax return and authorizing punitive damages); *but see Siddiqui*, 359 F.3d at 1204
7 (section 7431(c)(1)(B) does not expressly waive sovereign immunity for punitive damages
8 without proof of actual damages). The Government continues to disagree that Section 1810
9 waives the sovereign immunity of the United States at all. But, in any event, because Section
10 1810 applies to “persons” other than the United States, the Court would have to conclude that
11 Section 1810(b)’s authorization of punitive damages expressly applies to the United States
12 before considering whether plaintiffs have established any basis in fact for such an award.

13 In addition, even if punitive damages were available against the United States under
14 Section 1810(b), plaintiffs’ proposed judgment fails to establish any factual basis for such an
15 award. *See Molzoff v. United States*, 502 U.S. 301, 309 (1992) (punitive damages “embodies an
16 element of the defendants’s conduct that must be proved before such damages are awarded”).

17 Accordingly, pending further briefing on the matter, plaintiffs’ proposed judgment sets
18 forth no basis for an award of punitive damages, and the Court should not enter any judgment for
19 the punitive damages requested in paragraph three (3) of plaintiffs’ proposed judgment.

20 **III. PLAINTIFFS’ REQUEST FOR THE SUPPRESSION AND EXPUNGEMENT OF
21 ANY ELECTRONIC SURVEILLANCE EVIDENCE SHOULD BE REJECTED.**

22 In paragraph seven (7) of their proposed judgment, plaintiffs seek an order that
23 “information obtained by means of plaintiffs’ unlawful electronic surveillance shall not be used
24 by the United States government, either directly or derivatively, in any administrative, civil, or
25 criminal proceeding in which the United States is a party.” Dkts. 723/117 at 3. They further
26 seek an order that such information be expunged from all files and records after the completion
27 of “all such proceedings potentially involving such information.” *Id.* This relief is sought
28 pursuant to 50 U.S.C. § 1806(g) and “[a]s further equitable relief.” *Id.* The Court should reject

1 this proposed relief as unauthorized by FISA and as an inappropriate exercise of the Court's
2 equitable powers.

3 As a threshold matter, the equitable relief plaintiffs seek as to alleged documents and
4 information is not authorized by the cause of action at issue here. *See* 50 U.S.C. § 1810;
5 *compare* 18 U.S.C. § 2520(b) (Wiretap Act cause of action authorizes "equitable relief as may be
6 appropriate"); 18 U.S.C. § 2707(b) (same for Stored Communications Act). Nor does the
7 suppression remedy provided by 50 U.S.C. § 1806(g) apply here for two reasons. First, Section
8 1806(g) states that "[i]f the United States district court *pursuant to subsection (f) of this section*
9 determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance
10 with the requirements of law, suppress the evidence which was unlawfully obtained or derived
11 from electronic surveillance of the aggrieved person or otherwise grant the motion [to suppress]
12 of the aggrieved person." 50 U.S.C. § 1806(g) (emphasis added). The Court's March 31, 2010
13 order granting plaintiffs' motion for summary judgment, finding defendants liable for unlawful
14 surveillance under FISA, was not made utilizing the procedures of Section 1806(f). *See* Mar. 31,
15 2010 order at 18 (directing plaintiffs to seek summary judgment based on public evidence); *see*
16 *also id.* at 23 (noting that defendants declined to invoke Section 1806(f)). Thus, under the plain
17 language of Section 1806(g), the Court may not grant plaintiffs' suppression request pursuant to
18 that section.

19 Second, Section 1806(g), in combination with Section 1806(e) ("Motion to suppress"),
20 authorizes suppression of evidence unlawfully acquired by electronic surveillance in the context
21 of an ongoing proceeding where the use of such evidence is at issue. Section 1806(e) provides
22 that "[a]ny person against whom evidence obtained or derived from an electronic surveillance to
23 which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed
24 in any trial, hearing, or other proceeding in or before any court . . . may move to suppress the
25 evidence. *See* 50 U.S.C. § 1806(e). It further states that "[s]uch a motion [to suppress] shall be
26 made before the trial, hearing, or other proceeding unless there was no opportunity to make such
27 a motion or the person was not aware of the grounds of the motion." *Id.* Here, there is no

1 ongoing proceeding in which the Government’s use of any evidence obtained by electronic
 2 surveillance against plaintiffs (if any) is alleged to be at issue. Rather, plaintiffs seek an open-
 3 ended, unbounded-in-time, order prohibiting the Government from using “plaintiffs’ unlawful
 4 electronic surveillance . . . in *any* administrative, civil, or criminal proceeding in which the
 5 United States is a party,” even one where plaintiffs may not be parties. *See* Dkts. 723/117 at 3
 6 (emphasis added).^{12/}

7 Nor does § 1806(g) authorize the expungement remedy that plaintiffs seek. That
 8 subsection only provides for suppression of evidence unlawfully acquired by electronic
 9 surveillance of an aggrieved person with standing in an ongoing proceeding. There is no
 10 provision under § 1806(g) for ordering the Government to “purge and destroy” such information
 11 from “all files and records,” as plaintiffs request. Dkts. 723/117 at 3. To the extent that
 12 plaintiffs rely on the Court’s equitable powers as authority for their expungement request,
 13 “[f]ederal courts have the equitable power to order the expungement of Government records
 14 where necessary to vindicate rights secured by the Constitution or by statute.” *Fendler v. United*
 15 *States Bureau of Prisons*, 846 F.2d 550, 554 (9th Cir. 1988) (internal quotations and citations
 16 omitted). “Courts which have recognized an equitable power to expunge have unanimously
 17 observed that it is a narrow power, appropriately used only in extreme circumstances.” *United*
 18 *States v. Smith*, 940 F.2d 395, 396 (9th Cir. 1991). The Court must find that there is a “real and
 19 immediate threat of irreparable harm before it can allow expungement.” *Fendler v. United*
 20 *States Parole Commission*, 774 F.2d 975, 979 (9th Cir. 1985) (quoting *Reuber v. United States*,

21
 22 ¹² In a separate lawsuit in the District of Oregon, plaintiff AHIF-Oregon has challenged
 23 its designation as a “Specially Designated Global Terrorist” (“SDGT”) and, as part of that
 24 lawsuit, challenged the alleged use of the Sealed Document in the designation. On November 6,
 25 2008, Judge King issued a decision that, *inter alia*, granted summary judgment for the
 26 Government with respect to OFAC’s February 2008 redesignation of AHIF-Oregon, which did
 27 not rely on the classified Sealed Document. *See Al-Haramain Islamic Found. et al. v. Dep’t. of*
 28 *Treasury*, 585 F. Supp. 2d at 1249-54; 1247, n.7. The court noted that the classified Sealed
 Document was removed from the administrative record and dismissed plaintiffs’ claim that the
 designation or redesignation was based in part on privileged attorney-client communications.
See id at 1247, n.7. The relief plaintiffs seek here pursuant to Section 1806(g) is unmoored from
 any ongoing proceeding in which the use of any information is even alleged to be at issue.

1 750 F.2d 1039, 1068 (D.C. Cir. 1984) (Bork, J., concurring)). *See also Fendler*, 846 F.2d at 554-
2 55. The propriety of an expungement order is determined by applying a balancing test in which
3 the harm caused to an individual by the existence of any records is weighed against the utility to
4 the Government of their maintenance. *Doe v. United States Air Force*, 812 F.2d 738, 741 (D.C.
5 Cir. 1987).

6 Plaintiffs have not alleged or shown that they are facing any threat of irreparable harm,
7 let alone a real and immediate threat of irreparable harm, from the alleged existence of the
8 allegedly unlawful electronic surveillance in the Government's files and records. As noted
9 above, plaintiffs' request is not made in the context of any ongoing proceeding against them, nor
10 have they made any showing of any anticipated action against them. Finally, balancing the
11 relevant interests would again require disclosure of whether or not plaintiffs were in fact subject
12 to electronic surveillance, whether any information derived from such surveillance exists and
13 what it may indicate—information that the Ninth Circuit found is protected by the state secrets
14 privilege. *See Al-Haramain Islamic Foundation*, 507 F.3d at 1205. Particularly where the
15 alleged collection of foreign intelligence information concerning Specially Designated Global
16 Terrorists may be at issue, the Court should not enter an order providing for the destruction of
17 any information the Government may possess because the consequences of such an order on
18 national security considerations cannot be disclosed or litigated in this case.

19 For the foregoing reasons, the Court should not enter the relief requested in paragraph
20 seven (7) of plaintiffs' proposed judgment.

21 **IV. THE COURT LACKS JURISDICTION TO ENTER A DECLARATORY 22 JUDGMENT.**

23 Paragraph six (6) of plaintiffs' proposed judgment also seeks the "equitable relief" of a
24 declaratory judgment that the "defendants' warrantless surveillance of plaintiffs was unlawful as
25 a violation of FISA." *See* Dkts. 723/117 at 3. The Court lacks jurisdiction to enter such relief.
26 Section 1810 does not authorize the entry of any equitable declaratory or injunctive relief. *See*
27

1 50 U.S.C. § 1810; compare 18 U.S.C. §§ 2520(b), 2707(b).^{13/} Moreover, the law is clear that a
2 declaratory judgment cannot be entered as to a program or activity that no longer exists, even
3 where past injury has been found, because there is no real and immediate threat that any such
4 injury will recur. *Lyons*, 461 U.S. at 104 (plaintiff's assertion that he may again be subject to
5 illegal activity "does not create the actual controversy that must exist for a declaratory judgment
6 to be entered."); *Golden v. Zwickler*, 394 U.S. 103, 107-110 (1969) (dismissing declaratory
7 judgment action because there was no case or controversy of "sufficient immediacy and
8 reality"); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (Declaratory Judgment
9 Act does not do away with the requirement that there be a controversy of "sufficient immediacy
10 and reality to warrant the issuance of a declaratory judgment."); see also *Center for Biological*
11 *Diversity v. Lohn*, 511 F.3d 960, 963-64 (9th Cir. 2007) (rejecting declaratory relief on grounds
12 that no live controversy exists where the challenged activity has "evaporated or disappeared")
13 (quoting *Headwaters, Inc. v. Bureau of Land Mgmt.*, 893 F.2d 1012, 1015 (9th Cir.1989) (stating
14 that "[a] case or controversy exists justifying declaratory relief only when 'the challenged
15 government activity ... is not contingent, has not evaporated or disappeared, and, by its
16 continuing and brooding presence, casts what may well be a substantial adverse effect on the
17 interests of the petitioning parties' ") (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115,
18 122 (1974)). Plaintiffs have not made any showing that they face an imminent threat of future
19 warrantless surveillance in violation of the FISA, and the existence of any past surveillance (if
20 any) cannot be the basis on which to enter declaratory relief.

21 For these reasons, the Court should not enter the declaratory relief requested in paragraph
22 six (6) of plaintiffs' proposed judgment.
23
24
25

26 ¹³ See *ACLU v. NSA*, 493 F.3d 644, 683 (6th Cir. 2007) (FISA Section 1810 does not
27 authorize declaratory or injunctive relief); *ACLU v. Barr*, 952 F.2d 457, 470 (D.C. Cir. 1991)
28 (same).

V. **THE COURT SHOULD NOT ORDER THAT PLAINTIFFS ARE ENTITLED TO RECOVER ATTORNEYS' FEES.**

In paragraph eight (8) of their proposed judgment, plaintiffs request an order that “[p]laintiffs shall recover reasonable attorney’s fees and other investigation and litigation costs pursuant to 50 U.S.C. § 1810(c).” Dkts. 117/723 at 3. The Court should defer any ruling as to plaintiffs’ entitlement to fees until at least after the entry of any judgment.

Section 1810(c) provides, *inter alia*, that an aggrieved person who has been subjected to electronic surveillance in violation of 50 U.S.C. § 1809 shall be entitled to recover “reasonable attorney’s fees and other investigation and litigation costs reasonably incurred.” 50 U.S.C. § 1810. However, as the Government has previously argued in this case, § 1810 does not waive the sovereign immunity for plaintiffs’ claims against the United States Government defendants. *See, e.g.*, Dfs. 2d MSJ (Dkts. 432/17) at 18-22; Dfs. 2d MSJ Reply (Dkts. 446/29) at 9-12; Dfs. 4th MSJ (Dkts. 668/103) at 20. If plaintiffs cannot maintain an action against United States agencies or officials in their official capacities under Section 1810, plaintiffs are not able to seek attorneys’ fees from the Government. *See Kentucky v. Graham*, 473 U.S. 159, 164-65 (1985); *Bergman v. United States*, 844 F.2d 353, 355-56 (6th Cir. 1988); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1140 n. 9 (9th Cir. 1986).¹⁴ While the Equal Access to Justice Act, 28 U.S.C. § 2412(b), waives sovereign immunity for a fee award against the United States, there can be no liability for fees where there is no underlying cause of action against the United States. *See id.* This issue must be resolved before eligibility for attorney fees can be finally determined.

For similar reasons, plaintiffs’ request that the Court determine that plaintiffs are entitled to recover attorneys’ fees now is premature until after there is a final judgment. Ordinarily, “the district court [should] . . . refrain from passing on the question of attorney fees until the litigation is final . . . [so as to] avoid deciding an issue that may become moot if the government prevails on appeal.” *Harmon v. United States*, 101 F.3d 574, 587 (8th Cir. 1996). That is because, if any

¹⁴ Again, FISA does not authorize declaratory or injunctive relief, *see ACLU v. NSA*, 493 F.3d at 683; *ACLU v. Barr*, 952 F.2d at 470, so such relief cannot provide the sovereign immunity waiver for liability purposes on which an award of fees could be based. *See Bergman*, 844 F.2d at 356.

1 judgment by the Court in favor of plaintiffs is reversed on appeal, plaintiffs will no longer be a
 2 prevailing party entitled to fees. *See Poland v. Chertoff*, 494 F.3d 1174, 1187 (9th Cir. 2007)
 3 (after damage award was vacated on appeal, plaintiff was not a prevailing party entitled to
 4 attorneys' fees); *U.S. ex rel. Walton Tech., Inc. v. Weststar Eng'g, Inc.*, 290 F.3d 1199, 1202 (9th
 5 Cir. 2002) (where judgment was reversed and remanded, district court's award of attorneys' fees
 6 was premature). Moreover, a decision by this Court regarding attorney fees would be premature
 7 because the plaintiffs must consider the relief that this Court enters in its judgment. It is well
 8 settled that "the most critical factor" in determining the reasonableness of a fee award "is the
 9 degree of success obtained," *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) (quoting *Hensley v.*
 10 *Eckerhart*, 461 U.S. 424, 436 (1983)), and that also could not be determined until at least after
 11 any judgment is entered by the Court and ultimately becomes final.^{15/}

12 For these reasons, the Court should defer consideration of plaintiffs' entitlement to fees
 13 until at least after the entry of judgment when the question of any fee eligibility or award can be
 14 addressed depending on the judgment entered and any further proceedings in this case.

15 **VI. THE GOVERNMENT DOES NOT OPPOSE DISMISSAL OF PLAINTIFFS'
 16 REMAINING CLAIMS.**

17 The Government does not oppose the dismissal of the plaintiffs' remaining non-FISA
 18 claims. However, as set forth in our prior motions, we believe those claims should be dismissed
 19 with prejudice pursuant to the Ninth Circuit's decision in *Al-Haramain v. Bush, supra*. To the
 20 extent plaintiffs seek dismissal of their non-FISA claims in order to obtain a final judgment now
 21 on their FISA claim, and later re-file their other claims, the Government reserves its position that
 22 the non-FISA claims are foreclosed by the Ninth Circuit's ruling.

23 **CONCLUSION**

24 For the foregoing reasons, the Government Defendants oppose the entry of judgment

25 ¹⁵ The Government again notes that, because one of the plaintiffs (AHIF-Oregon) is an
 26 SDGT, an award of attorney fees would constitute a transfer of an property interest in which
 27 AHIF-Oregon has an interest and, thus, would be subject to OFAC licensing requirements. It
 28 should not be necessary to address this issue further at this stage, because absent a final, non-
 appealable judgment, a transfer of funds for fees should not occur.

1 against them in this action, including for the damages and other relief sought in plaintiffs'
2 proposed judgment. Should the Court determine to enter judgment against the Defendants over
3 their objection, Defendants have submitted an alternative form of judgment pursuant to the
4 Court's March 31 and April 19 Orders. By the submission of this alternative form of judgment,
5 the Defendants do not consent to the entry of any judgment against them in this case for any
6 damages or relief (including the alternative judgment), and we continue to oppose the Court's
7 liability determination on which any such judgment would be based. Rather, Defendants have
8 submitted this alternative form of judgment solely to set forth their view, discussed herein, that
9 only limited relief would be available to plaintiffs in any event under the Court's contested
10 decision finding liability and applicable law. Any judgment entered against the Defendants
11 (including the alternative form of judgment) would then be subject to appeal by Defendants.

12 Dated: April 30, 2010

Respectfully Submitted,

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