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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

<p>9 CAROLYN JEWEL, et al.,</p> <p>10 Plaintiffs,</p> <p>11 v.</p> <p>12 NATIONAL SECURITY AGENCY, et al.,</p> <p>13 Defendants.</p>	<p>No. 08-4373 VRW</p> <p>INDIVIDUAL CAPACITY DEFENDANTS’ MOTION FOR ADMINISTRATIVE RELIEF TO ENLARGE THE TIME TO ANSWER OR OTHERWISE RESPOND TO PLAINTIFFS’ COMPLAINT</p>
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15 Pursuant to Civil Local Rules 6-3 and 7-11, all Government defendants sued in their
16 individual capacity (George W. Bush, Richard B. Cheney, David S. Addington, Keith B.
17 Alexander, Michael V. Hayden, John D. McConnell, John D. Negroponte, Michael B. Mukasey,
18 Alberto R. Gonzales, and John D. Ashcroft) respectfully request that the Court enter an order that
19 they not be required to answer or otherwise respond to plaintiffs’ complaint until after there is a
20 determination that plaintiffs have standing to proceed in this action.¹

21 On September 18, 2008, plaintiffs filed a complaint alleging violations of the
22 Constitution and various federal statutes arising out of alleged warrantless surveillance and
23 raising claims against the National Security Agency (“NSA”), the Department of Justice
24 (“DOJ”), and numerous Government officials in their official and individual capacities. See Doc
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27 ¹ By filing this motion, the individual capacity defendants do not waive, and expressly
28 reserve, all defenses available to them relating to all aspects of this action.

1 # 1. Upon plaintiffs' unopposed motion, the Court entered an order finding this case is related to
2 Hepting v. AT&T Corp., No. 06-0672 VRW (N.D. Cal.), see Doc # 9, which itself is
3 consolidated with other actions before this Court by Order of the Judicial Panel on Multidistrict
4 Litigation, see In re Nat'l Sec. Agency Telecomm. Records Litig., MDL No. 06-1791 VRW
5 (N.D. Cal.).

6 The individual capacity defendants originally were required to answer or otherwise
7 respond to plaintiffs' complaint by February 2, 2009, based on the date plaintiffs effected service
8 on those defendants. On January 30, 2009, however, the Court granted an unopposed motion
9 filed by all defendants (in all capacities) for an extension of time to answer or otherwise respond
10 to plaintiffs' complaint no later than today, April 3, 2009. See Doc # 17.

11 On this same date the federal agency and official capacity defendants (collectively
12 referred to as the "United States") have filed the "Government Defendants' Motion to Dismiss
13 and for Summary Judgment." In that motion the United States argues, among other things, that
14 the state secrets and related statutory privileges require the exclusion of information necessary to
15 litigate this case, including information necessary to litigate whether or not plaintiffs can
16 establish their standing. If the Court grants the United States' motion, then plaintiffs will be
17 unable to proceed with any of their claims against any of the defendants, including the individual
18 capacity defendants. The Court therefore should not require the individual capacity defendants to
19 answer or otherwise respond to plaintiffs' complaint until the issues identified in the United
20 States' motion, including plaintiffs' standing to bring suit, have been resolved. Cf. El-Masri v.
21 United States, 479 F.3d 296, 300-01, 304-13 (4th Cir. 2007) (finding that United States properly
22 asserted state secrets privilege after intervening in case solely for that purpose and that all of
23 plaintiff's claims, including individual capacity claim against the Director of the Central
24 Intelligence Agency, should be dismissed on that basis without considering whether plaintiff had
25 adequately pled his underlying claims).

26 That is in fact precisely the procedure being followed in Al-Haramain Islamic Found.,
27 Inc. v. Bush, No. 07-109 VRW (N.D. Cal.), another case that has been consolidated with cases

1 related to this one. In Al-Haramain, the parties entered into a stipulation that the individual
2 capacity defendant in that case (Robert S. Mueller III, the Director of the Federal Bureau of
3 Investigation) would not be required to answer or otherwise respond to the plaintiffs' complaint
4 "until after there is a determination that Plaintiffs have standing to proceed in [that] action." See
5 Al-Haramain, No. 07-109 VRW Doc # 39 at 1.

6 As in Al-Haramain, the United States' assertion of the state secrets privilege poses unique
7 challenges to the individual capacity defendants in this case. Because the United States has
8 invoked that privilege, the individual capacity defendants have no access to information that is
9 central to plaintiffs' allegations. Requiring these defendants, most of whom are no longer even
10 in government service, to respond to plaintiffs' complaint without access to that evidence and
11 before it is determined whether the United States has properly asserted the state secrets privilege
12 over that evidence, would be extremely prejudicial to the individual capacity defendants and their
13 ability to mount a complete defense. See El-Masri, 479 F.3d at 309-10 (dismissing individual
14 capacity claims where United States asserted state secrets privilege in part because the individual
15 capacity "defendants could not properly defend themselves without using privileged evidence").

16 Counsel for the individual capacity defendants has consulted with plaintiffs' counsel
17 regarding the instant motion, and the latter indicated that plaintiffs would not agree to a
18 stipulation in this case similar to the one entered in Al-Haramain and likely would oppose the
19 motion at hand. The Court nevertheless should, for all of the reasons discussed above, enter an
20 order with similar effect, to wit, that the individual capacity defendants need not answer or
21 otherwise respond to plaintiffs' complaint until after it has been determined that plaintiffs have
22 standing to bring suit.

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

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11 Gonzales, and John D. Ashcroft, in their individual capacity

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