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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12) No. M:06-CV-01791-VRW
13 IN RE NATIONAL SECURITY AGENCY)
TELECOMMUNICATIONS RECORDS)
14 LITIGATION) **GOVERNMENT DEFENDANTS’**
) **REPLY IN SUPPORT OF MOTION TO**
15 This Document Solely Relates To:) **STAY PROCEEDINGS PENDING**
) **APPEAL AND CERTIFICATION OF**
16 *Al-Haramain Islamic Foundation et al.*) **INTERLOCUTORY APPEAL**
v. Obama, et al. (07-CV-109-VRW)) **UNDER 28 U.S.C. § 1292(b)**
) **REQUEST FOR INTERIM STAY**
17)
)
18) Date: April 9, 2009
) Time: 2:30 pm
19) Courtroom: 6, 17th Floor
)
20) Honorable Vaughn R. Walker

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INTRODUCTION

1 Plaintiffs' Opposition to Defendants' Motion for a Stay Pending Appeal and for
2 Certification of an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) (Dkt. 69) ("Pls.
3 Opp."),¹ fails to address the significant issues now before the Court. As set forth below, the
4 grounds for certification of an interlocutory appeal of the Court's January 5, 2009 Order are
5 amply satisfied, and the need for a stay pending appeal should be clear—indeed, we respectfully
6 submit that certification of the Court's Order, or the entry of a stay pending appeal, are not close
7 questions under the present circumstances.

8 Certification of the Court's Order under 1292(b) is plainly appropriate. The Court of
9 Appeals has previously determined that plaintiffs' case cannot proceed without critical
10 information that the state secrets privilege was properly asserted to protect—including whether
11 or not plaintiffs were subject to alleged surveillance and, in particular, the classified sealed
12 document at issue in this case. *See Al-Haramain v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007).
13 The Court of Appeals agreed that disclosure of this information would harm the national security
14 of the United States. *See id.* at 1203-04 (disclosure of information concerning the Sealed
15 Document and the means, sources and methods of intelligence gathering in the context of this
16 case would undermine the government's intelligence capabilities and compromise national
17 security). This Court has now held that Section 106(f) of the Foreign Intelligence Surveillance
18 Act ("FISA"), 50 U.S.C. § 1806(f), displaces the state secrets privilege, and that the case will
19 now proceed under that provision to adjudicate the very fact question at issue in the privilege
20 assertion, using the document previously excluded by the Court of Appeals. The Court has also
21 held that due process requires that plaintiffs' counsel obtain security clearances for access to the
22 classified privileged information in order to litigate their claims. The proper and prudent course
23 is to permit the Court of Appeals to review the key issue previously remanded—whether the
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25 ¹ All docket numbers herein are to the docket in Civil Action 07-cv-109-VRW. The
26 Court's January 5 Order is at Dkt. 57. The Government filed a Notice of Appeal on January 16,
27 2009. *See* Dkt. 59. The Government filed a Motion for a Stay Pending Appeal and for
28 Certification of Interlocutory Appeal ("USG Stay") on January 19, 2009. *See* Dkt 60.

1 FISA permits the proceedings now ordered by the Court—before steps are taken that would risk
2 or require disclosures that would negate the privilege assertion already upheld by the Ninth
3 Circuit.

4 A stay pending appeal (whether the Government’s appeal of right or permissive appeal
5 under Section 1292(b)) is likewise the proper and reasonable course now. To risk or require the
6 disclosure of privileged information while the Government challenges the legal basis for doing
7 so would plainly impose irreparable harm—not merely on to the Government’s position in this
8 litigation, but the grave harm to national security identified by the Ninth Circuit when it upheld
9 the privilege assertion.

10 Plaintiffs’ objections to 1292(b) certification and a stay pending appeal are insubstantial.
11 Plaintiffs’ primary contention as to why 1292(b) certification should be denied is that the
12 Government did not seek certification of the Court’s July 2, 2008 decision on FISA preemption.
13 *See* Pls. Opp. (Dkt. 69) at 1-4. That argument is clearly meritless. The plaintiffs’ pending
14 complaint was *dismissed* by the July 2 Order, rendering interlocutory review at that time
15 senseless. Moreover, the law does not foreclose appellate review of an issue decided in the July
16 2 Order that is material to the January 5 Order. Likewise, plaintiffs’ contention that there is no
17 risk of irreparable harm to the Government warranting a stay pending appeal of the January 5
18 Order is also wrong. Under the January 5 Order, classified information protected by the
19 Government’s privilege assertion is subject to disclosure after February 13, 2009—not months
20 later as plaintiffs contend.

21 Accordingly, the Government requests that the Court not only certify its Order and enter
22 a stay pending appeal, but that it put in place an interim stay to ensure that no disclosures occur
23 in the meantime, and to permit the Government to seek a stay from the Court of Appeals, if
24 necessary. The Government has submitted proposed Orders that would either grant 1292(b)
25 certification, or a stay pending appeal, or an interim stay while the Government seeks relief from
26 the Ninth Circuit. The Government respectfully requests that the Court indicate how it will
27 proceed by 3 p.m. on February 13, 2009. In order to protect its interests, the Government plans

1 to seek relief from the Ninth Circuit before the close of business that day in the absence of relief
2 from this Court.

3 ARGUMENT

4 **I. THE COURT SHOULD CERTIFY ITS JANUARY 5 ORDER FOR 5 INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b).**

6 Plaintiffs' opposition to the Government's motion to certify the January 5 Order rests
7 primarily on erroneous procedural objections and devotes little attention to the central question
8 at hand: whether 1292(b) certification is warranted because there are substantial grounds for a
9 difference of opinion on a controlling question of law as to which appellate review may
10 materially advance termination of the litigation. *See In re Cement Antitrust Litigation*, 673 F.2d
11 1020, 1026 (9th Cir. 1981). As set forth in our opening motion, *see* USG Stay (Dkt. 60) at 15-16,
12 the Court's determination that the case will now proceed under FISA Section 1806(f) controls all
13 further proceedings in this case. Under that legal framework, which remains very much in
14 dispute, the Court has ruled that it will decide a threshold jurisdictional question—whether the
15 plaintiffs in fact have been subject to alleged surveillance and thus have standing—in the face of
16 the Ninth Circuit's prior ruling that the case would otherwise have to be dismissed under the
17 state secrets privilege. *See Al-Haramain v. Bush*, 507 F.3d at 1205.

18 Moreover, there are substantial grounds for a difference of opinion as to the Court's
19 Order. We are aware of no prior case where the state secrets privilege has been held to be
20 preempted by statutory law, nor any case that has applied Section 1806(f) in the manner in which
21 the Court is now proceeding—to decide whether alleged surveillance has occurred and to grant
22 security clearances for the disclosure of classified information to a party seeking that information
23 in order to litigate their claims. An immediate appeal would also materially advance the
24 termination of this litigation. If the Court of Appeals finds that the Court has erred in applying
25 Section 1806(f) of the FISA to adjudicate matters at issue in the Government's privilege
26 assertion, then the case would be dismissed. At a minimum, the Court of Appeals may provide
27 further guidance as to how the Court should proceed in unprecedented circumstances.

28 Plaintiffs oppose 1292(b) certification primarily “for the simple reason that the

1 defendants do not seek interlocutory review of an issue decided in the January 5, 2009 Order”
2 but “[r]ather seek review of an issue that this Court decided in its order of July 2, 2008—whether
3 FISA preempts the state secrets privilege.” *See* Pls. Opp. (Dkt. 69) at 2. But that simply is
4 wrong; the Government expressly seeks certification of the January 5 *Order*.² And the January 5
5 Order clearly and expressly applies the procedures of Section 1806(f) to preempt the
6 Government’s state secrets privilege assertion. Moreover, under applicable law, the fact that the
7 FISA preemption issue was addressed in the Court’s July 2 decision is of no consequence to
8 whether the Court should certify its January 5 Order.

9 As plaintiffs assert, the Supreme Court stated in *Yamaha Motor Corporation v. Calhoun*,
10 516 U.S. 199 (1996), that a court of appeals reviewing an order under Section 1292(b) “may not
11 reach beyond the certified order to address other orders made in the case.” *Id.* at 205; *see* Pls.
12 Opp. (Dkt. 69) at 2. But “the *Yamaha* opinion did not end with [that] sentence.” *United States v.*
13 *Philip Morris USA, Inc.*, 396 F.3d 1190, 1194 (D.C. Cir. 2005). The Supreme Court went on to
14 state in *Yamaha* that “the appellate court may address any issue fairly included within the
15 certified order because ‘it is the *order* that is appealable, and not the controlling question
16 identified by the district court.’” *Yamaha*, 516 U.S. at 205 (citations omitted) (original
17 emphasis). As this statement indicates, a key purpose of the rule that *orders* are reviewed under
18 1292(b) is to prevent a limitation on appellate review based on how a district court may
19 characterize the controlling issue of law being certified. But plaintiffs’ reading of this authority
20 to mean that issues addressed in other orders may never be reviewed under 1292(b) is wrong.

21 As the Ninth Circuit and other courts have held, review of a certified order “may address
22 those issues *material* to the order from which an appeal has been taken.” *In re Cinematronics,*
23 *Inc.*, 916 F.2d 1444, 1449 (9th Cir. 1990) (original emphasis) (citing *Ducre v. Executive Officers*
24 *of Halter Marine, Inc.*, 752 F.2d 975, 983 n.16 (5th Cir. 1985)). The fact that an issue may have

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26 ² *See* Dkt. 60 at 22 (the Government “request(s) that the Court certify its *Order* for
27 interlocutory appeal”) and *id.* (after discussing applicable standards for 1292(b) review stating
28 that “[t]he Court’s January 5 *Order* meets this standard) (emphases added).

1 been decided in another order is irrelevant to whether that issue may be considered in review of
2 the certified order. In *In re Cinematronics*, the Ninth Circuit, in exercising review of a certified
3 district court order under 1292(b), considered a prior ruling by a bankruptcy court because “the
4 validity of the district court decision. . . [was] inextricably tied to the bankruptcy judge’s earlier
5 ruling.” See 916 F.2d at 1449. Likewise, in *Lee v. American National Insurance Co.*, 260 F.3d
6 997, 1000 (9th Cir. 2001), the Ninth Circuit reviewed under 1292(b) an order denying a motion
7 to remand a case to state court that was based on the district court’s previous holding that the
8 court lacked jurisdiction over the plaintiffs’ claim. See also *Philip Morris, USA Inc.*, 396 F.3d at
9 458 (rejecting contention that appellate review under 1292(b) must be limited solely to a new
10 specific theory set forth in the certified order and could not extend to a theory that had been
11 reiterated from a prior order).^{3/} Accordingly, there is no bar to 1292(b) certification of an order
12 where a related material issue has been addressed in a prior separate order.

13 Plaintiffs’ contention that the January 5 Order “merely mentions [the July 2 ruling] in
14 reciting the case’s multi-faceted procedural history,” see Pls. Opp. (Dkt. 69) at 4, is wholly
15 inaccurate. On the contrary, there should be no question that issues decided in the Court’s July 2
16 Order are material to the January 5 Order and, indeed, are inextricably bound up in that Order.
17 While the Court generally concluded on July 2 that FISA Section 1806(f) preempted the state
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19 ³ The case on which plaintiffs rely extensively, *Durkin v. Shea & Gould*, 92 F.3d 1510
20 (9th Cir. 1996), is not to the contrary. The issue in *Durkin* was whether the Court of Appeals, in
21 reviewing the denial of a motion for summary judgment under 1292(b), could exercise
22 jurisdiction over the denial of a motion to dismiss claims in a *separate* companion case. In that
23 context, the Ninth Circuit held that its review was limited to the particular certified order and
24 that it would not review a non-certified order in a separate case based merely on a passing
25 reference to it in the certified order. See *Durkin*, 92 F.3d at 1515 n.12. Likewise the Supreme
26 Court’s decision in *United States v. Stanley*, 483 U.S. 669 (1987), is inapposite here. In *Stanley*,
27 the Supreme Court held that, in reviewing a certified order that denied dismissal of certain
28 *Bivens* claims, the court of appeals did not have jurisdiction to remand the case for consideration
of whether the plaintiff’s long dismissed claims against the Government under the Federal Tort
Claims Act might be viable under recent case law, since the dismissal of the FTCA claims was
an “issue [that] had not been addressed in the order from which the interlocutory appeal was
taken.” See *id.* at 675.

1 secrets privilege, *see Al-Haramain v. Bush*, 564 F. Supp. 2d 1109, 1115-25 (N.D. Cal. 2008), it
2 did not order that Section 1806(f) proceedings commence or even that they would be applied in
3 this case. The Court stated that the plaintiffs must first establish whether they were “aggrieved
4 persons” who would have standing to invoke Section 1806(f). *See id.* at 1134. And, specifically
5 in accord with the Ninth Circuit’s ruling on the state secrets privilege, the Court barred plaintiffs
6 from using the classified sealed document to establish their aggrieved status. *See id.* The Court
7 then dismissed the original complaint without prejudice while granting plaintiffs leave to file an
8 amended complaint. *See id.* at 1137.

9 After plaintiffs filed an amended complaint, this lawsuit returned to the pleading stage of
10 the case, and the Government then filed its Third Motion to Dismiss or for Summary Judgment
11 challenging the new complaint. *See* Dkt. 49. The Government’s motion was based on all of the
12 prior grounds for dismissal and summary judgment that the Government had previously raised in
13 this case, including on its position that the FISA did not preempt the state secrets privilege. *See*
14 Government’s Notice of Motion and Motion to Dismiss or for Summary Judgment (Dkt. 49) at
15 1-3; *see also* Memorandum in Support of the Government’s Third Motion to Dismiss or for
16 Summary Judgment (Dkt. 49) at 23-25. The January 5 Order denied the Government’s motion
17 and granted the plaintiffs’ motion to proceed with discovery under FISA Section 1806(f) (Dkt.
18 46). *See* Dkt. 57. Thus, all of the issues related to the denial of the Government’s motion and
19 the granting of plaintiffs’ motion— including the FISA preemption issue—would properly be
20 subject to interlocutory review if the Order is certified.

21 Plaintiffs’ contention that there is “nothing” in the January 5 Order that merits
22 certification, *see* Pls. Opp. (Dkt. 69) at 4, is also clearly wrong. That Order was not limited to
23 merely deciding the standard for invoking Section 1806(f), or merely to facilitate the processing
24 of security clearances, or to direct a declassification review as plaintiffs’ contend. *See id.*
25 Rather, the Court went on to decide that that this case would actually proceed under Section
26 1806(f) of the FISA. After finding that, at the “pleading stage,” plaintiffs “have alleged enough
27 to plead ‘aggrieved person’ status so as to proceed to the next step in proceedings under FISA’s

1 section 1806(f) and 1810,” *see* Dkt. 57 at 14-18,^{4/} the Court ruled as to how FISA Section
2 1806(f) would now be applied. *See id.* at 19-22.

3 The Court held that, despite the absence of an Attorney General determination to invoke
4 Section 1806(f), the Court would proceed nonetheless on the ground that nothing in FISA
5 “prohibits the court from exercising its discretion to conduct an *in camera, ex parte* review
6 following the plaintiffs’ motion and entering other orders appropriate to advance the litigation if
7 the Attorney General declines to act.” *See* Dkt. 57 at 22. The Court then held that it would
8 review, initially *ex parte*, the Sealed Document that was the subject of the state secrets privilege
9 assertion and will then issue an order regarding a factual question at issue in that privilege
10 assertion— “whether the Sealed Document establishes that plaintiffs were subject to electronic
11 surveillance not authorized by FISA.” *Id.* at 23. The Order then adds that fully *ex parte*
12 proceedings under Section 1806(f) “would deprive plaintiffs of due process to an extent
13 inconsistent with Congress’ purpose in enacting FISA Sections 1806(f) and 1810.” *Id.*
14 Accordingly, the Order “provides for members of plaintiffs’ litigation team to obtain the security
15 clearances necessary to be able to litigate the case, including, but not limited to, reading and
16 responding to the court’s future orders.” *Id.* The Court’s Order also “specifically rejected” the
17 Government’s assertion that the Executive branch controls access to classified information, *see*
18 *id.* at 21, and held that Section 1806(f) “leaves the court free to order discovery of the materials
19 or other information sought by the ‘aggrieved person’ in whatever manner it deems consistent
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22 ⁴ The Court initially reviewed the allegations in the amended complaint to determine
23 whether the case may proceed to Section 1806(f) proceedings. *See* Dkt. 57 at 2-8. The Court
24 then considered and rejected the Government’s contention that the public evidence cited in the
25 amended complaint was insufficient to establish plaintiffs’ standing to proceed under Section
26 1806(f) as “aggrieved persons” subject to the alleged surveillance. *See id.* at 9. In making this
27 determination, the Court decided an issue held open in its July 2 decision: what the standard
would be for determining whether the case could proceed under Section 1806(f), *see id.* at 10-12
(discussing standard applicable under 18 U.S.C. § 3504), and then decided for the first time that
it was sufficient for plaintiffs merely to establish a *prima facie* case of alleged surveillance, *see*
id. at 13.

1 with section 1806(f)'s text and purpose." *Id.* at 22.^{5/}

2 Thus, in denying the Government's Third Motion to Dismiss or for Summary Judgment,
3 and granting plaintiffs' motion that the case proceed to discovery under Section 1806(f), the
4 January 5 Order operates to supplant the Government's state secrets privilege assertion with
5 actions that will now be taken under Section 1806(f) procedures. To the extent review of the
6 Court's prior analysis of the preemption issue is necessary to review the January 5 Order, that
7 issue is clearly material to and inextricably bound up in the Order. *See Bassidji v. Goe*, 413 F.3d
8 928, 935 (9th Cir. 2005) (where the relevant district court order being certified is the denial of a
9 motion to dismiss, any issue material to the effect of the controlling issue on the propriety of
10 dismissing the action is "fairly included" within the certified order).

11 Accordingly, there simply was no need for the Government to have sought certification
12 of the July 2 Order in order for the January 5 Order to be certified. Moreover, certification of the
13 July 2 Order would have made no sense. The July 2 Order ended the case, at least at that point.
14 For purposes of seeking an appeal, the possibility existed that either the plaintiffs would not
15 pursue the matter further or that the Court would reject their subsequent attempts to re-start the
16 case under the terms of the July 2 Order. Thus, certification of the July 2 Order would not have
17 advanced the termination of a case that had just been terminated, and which might never have
18 proceeded to Section 1806(f) proceedings. The January 5 Order may properly be certified, even
19 where the related FISA preemption issue was addressed in the July 2 Order. As set forth above,
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23 ⁵ It bears noting that the Court's January 5 Order appears to shift course from aspects of
24 the July 2 ruling. Whereas the Court appeared to hold on July 2 that the plaintiffs could not
25 utilize Section 1806(f) to determine whether in fact they are aggrieved, *see Al-Haramain*, 564 F.
26 Supp. 2d at 1134, the January 5 Order provides that Section 1806(f) proceedings would be
27 utilized first to decide whether the plaintiffs have been subject to the alleged surveillance at
issue. *See* Dkt. 57 at 23. In addition, whereas the July 2 Order did not permit use of the sealed
document in adjudication of whether or not plaintiffs are aggrieved, *see Al-Haramain*, 564 F.
Supp. 2d at 1134, under the January 5 Order, that document will now be used to decide whether
the plaintiffs have standing. *See* Dkt. 57 at 23.

1 the requirements for certification of the January 5 Order are easily satisfied.^{6/}

2 **II. THE COURT SHOULD STAY PROCEEDINGS PENDING APPEAL.**

3 The Court should also enter a stay pending either the appeal taken by the Government or
4 any appeal certified by the Court. The Government also requests that at least an interim stay be
5 entered by February 13, 2009—the date after which further proceedings may commence under
6 the January 5 Order.

7 **A. A Stay Pending The Government’s Appeal of the January 5
8 Order Should be Entered.**

9 The question of whether to stay this case pending appeal is straightforward: where
10 national security information has been successfully protected under the state secrets privilege, no
11 action should be taken in district court that might risk or require disclosure of that information
12 until the Court of Appeals determines that it will hear the appeal and then decides whether the
13 course on which the Court is now embarked is proper. Under these circumstances, the harms to
14 national security recognized by the Ninth Circuit should not be risked before it is conclusively
15 determined that further proceedings under the FISA are proper. *See* USG Stay Mem. (Dkt. 60) at
16 7-14; *Al-Haramain*, 507 F.3d at 1203-04.^{7/}

17 ⁶ In addition, plaintiffs’ contention that the Government would have had standing to
18 appeal the Court’s ruling on FISA preemption in the July 2 decision is irrelevant. The question
19 is whether 1292(b) certification of the July 2 Order would have been appropriate, not whether
20 the Government had standing to appeal. Likewise, plaintiffs’ contention that the Government
21 could have appealed the July 2 Order because it is somehow collaterally estopped by that Order,
22 *see* Pls. Opp. (Dkt. 69) at 6, is meritless as well, because the Court’s preemption analysis was not
23 a final judgment and, in any event, was immaterial to dismissal of plaintiffs’ original complaint.
24 *See Environmental Prot. Info. Ctr. v. Pacific Lumber Co.*, 257 F.3d 1071, 1075-76 (9th Cir.
25 2001); *United States v. Good Samaritan Church*, 29 F.3d 487, 488-89 (9th Cir. 1994). The
26 Court could simply have held that, assuming *arguendo* that FISA Section 1806(f) were
27 applicable, the plaintiffs had failed to fall within its terms as “aggrieved persons” based on the
28 evidence they had presented to date and, thus, that their case must be dismissed. As set forth
herein, it was not until after the Government challenged the amended complaint that the Court held, in its January 5 Order, that the case would proceed under FISA Section 1806(f).

⁷ Plaintiffs’ contention that the Government made “no effort at all to demonstrate a
probability of success on the merits” of any appeal, *see* Pls. Opp. (Dkt. 69) at 8-9, is wrong and
misapprehends the nature of the stay inquiry. The Government obviously contends that all of its
arguments on the substantive legal issues at stake are correct on the merits, including that the

1 Plaintiffs' primary objection to the entry of a stay pending the appeal is that the Court has
2 already found the pending notice of appeal to be a nullity. *See* Pls. Opp. (Dkt. 69) at 7-8. But
3 that does not address the question at hand: whether a stay is appropriate before privileged
4 national security information is put at risk of disclosure. While the Government believes that the
5 January 5 Order is appealable and, thus, that the Court presently lacks any jurisdiction to
6 proceed, that question will undoubtedly be litigated in the Court of Appeals, and this Court
7 should act to preserve the status quo and avoid irreparable harm before the Ninth Circuit reviews
8 the matter.

9 Plaintiffs do not dispute that, under the January 5 Order, further proceedings would entail
10 the disclosure of classified information, including to plaintiffs' counsel. They concede that,
11 absent certification and a stay, the Court would now proceed to apply Section 1806(f) to decide
12 the very question at issue in the privilege assertion pursuant to procedures where plaintiffs'
13 counsel would receive classified information. Plaintiffs' main response is that the procedures of
14 Section 1806(f) could be utilized to foreclose any harmful disclosure to the public; that there
15 would be no disclosures to plaintiffs' counsel until after their clearance suitability determinations
16 are completed on February 13, 2009; and that, under plaintiffs' litigation plan, any final
17 adjudication of whether they had standing would not occur until May 2009—by which time the
18 Court of Appeals would have decided whether it has jurisdiction to hear a 1292(b) appeal (if
19 certified by the Court). *See* Pls. Opp. (Dkt. 69) at 10.

20 But the very issue raised by the Government's appeal of the January 5 Order is *whether*
21 the Section 1806(f) procedures should be applied as now directed by the Court, including

22 _____
23 FISA does not preempt the state secrets privilege, and that any information subject to the
24 privilege assertion may not be disclosed in any further proceedings. But the applicable standard
25 for a stay pending appeal does not require the district court to find that its own decision was
26 likely in error. Rather, a stay may be granted either where the moving party demonstrates
27 probable success on the merits and the possibility of irreparable harm, or that serious questions
28 have been raised and the balance of hardships tips decidedly toward the moving party. *Artukovic*
v. Rison, 782 F.2d 1354, 1355 (9th Cir. 1986). The Government's motion satisfies all factors at
either end of the continuum, but emphasized the serious constitutional nature of the issues to
indicate that the Court need not find that it had likely erred in order to grant a stay.

1 whether plaintiffs' counsel should be granted access to classified information. That issue is ripe
2 now—not in May 2009. The Court ordered the Government to expedite security clearances by
3 February 13, 2009; after that date, there is no stay in place on any further proceedings under the
4 Order. While the Court indicated that it would not act until after February 13, 2009, to carry out
5 the provisions of the Order,^{8/} including to review the sealed document or disclose any classified
6 information to the plaintiffs' counsel once cleared, the time for those further proceedings is now
7 upon us. Indeed, plaintiffs' May 2009 timetable assumes that their counsel will receive
8 immediate access to classified information after February 13, 2009. *See* Plaintiffs' Case
9 Management Statement (Dkt. 64) at 8 (the May 2009 hearing schedule proposed by plaintiffs
10 "assumes plaintiffs' counsel will receive their security clearances by February 13, 2009, as
11 contemplated by the Court's Order of January 5, 2009, and then will promptly review any still-
12 classified and de-classified materials.").

13 The January 5 Order thus presents a clear-cut conflict between the Court and the
14 Executive Branch over whether plaintiffs may receive classified information. *See* Declaration of
15 Ariane Cerlenko, National Security Agency ¶ 9 (NSA finds that plaintiffs have no "need to-
16 know" classified information under applicable executive orders). The Court's Order operates to
17 take that determination from the Government in proceedings under Section 1806(f). In addition,
18 as the Government has previously set forth, even fully *ex parte* proceedings (which are not
19 contemplated by the Order) are used to adjudicate the privileged factual question of whether
20 plaintiffs have been subject to alleged surveillance, they cannot be undertaken without risking or
21 requiring the disclosure of privileged information. *See* USG Stay (Dkt. 60) at 9-10. Under these
22 circumstances, the Government cannot stand by and wait for further interim steps that might

23
24 ⁸ *See* Transcript of Jan. 23, 2009 Hearing at 31:17-32:23 (Court declines Government's
25 request and leaves the February 13, 2009 deadline in place for clearance suitability
26 determination); *id.* at 33:12-18 (Court indicates that disclosure of the sealed document would not
27 occur until after suitability determination and "we can evaluate what to do in the next step"); *id.*
at 34:11-22 (Court indicates that sealed document would not be reviewed or disclosed prior to
February 13, 2009 and a process is in place "in which both parties have access to the material
upon which the Court makes a decision").

1 occur before its privilege assertion is negated in future proceedings under the terms of this
 2 Order.^{9/}

3 **B. A Stay Should Be Entered Pending 1292(b) Interlocutory Appeal.**

4 Plaintiffs' separate contention—that the Court should not issue a stay pending
 5 interlocutory appeal under 28 U.S.C. § 1292(b) because the Court would be automatically
 6 divested of jurisdiction if such review is granted by the Court of Appeals—is meritless.

7 Assuming the Court certifies its January 5 Order, a stay is necessary pending a decision on the
 8 granting of an interlocutory appeal to prevent any disclosures in the interim.^{10/} Contrary to
 9

10 ⁹ For these reasons, the pending appeal is on solid jurisdictional ground under, *inter alia*,
 11 28 U.S.C. § 1291. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *In re: PUC*,
 12 813 F.2d 1473, 1475-76 (9th Cir. 1987) (describing standards for collateral order review). The
 13 Order conclusively determines that this case will now proceed under Section 1806(f)—a
 14 question distinct from the merits issue of whether any alleged surveillance violated the law.
 15 Moreover, the collateral order doctrine generally applies where the disclosure of privileged
 16 information is at stake and the privilege is a sufficiently important one. *See In re Napster, Inc.*
 17 *Copyright Litig.*, 479 F.3d 1078, 1088-89 (9th Cir. 2007); *see also In re Copley Press*, 518 F.3d
 18 1022, 1025 (9th Cir. 2008) (collateral order review of disclosure requirement because “[s]ecrecy
 19 is a one-way street: Once information is published [or disclosed], it cannot be made secret
 20 again,” and thus orders of disclosure are “effectively unreviewable on appeal from a final
 21 judgment.”); *see also Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989)
 22 (appeal after disclosure of privileged information is “an inadequate remedy”). The Order is also
 23 appealable under 28 U.S.C. § 1292(a) because it has the practical effect of granting an
 24 “injunction,” has serious or irreparable consequences, and can be effectively challenged only by
 25 immediate appeal. *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1097 (9th Cir. 2008); *Orange*
 26 *County Airport Hotel Assocs. v. HSBC Ltd.*, 52 F.3d 821, 825-26 (9th Cir. 1995). In addition,
 27 the order is not only directed at a party and enforceable by contempt but would “accord or
 28 protect ‘some or all of the substantive relief sought by a complaint.’” *HSBC*, 52 F.3d at 825-26.
 Here, the Court’s Order is squarely directed at the Government and imposes requirements that
 imminently risk or require the disclosure of privileged information, including to plaintiffs’
 counsel after they obtain security clearances. Moreover, part of the actual relief sought by the
 plaintiffs in this case is a mandatory injunction that would require disclosure to plaintiffs of any
 information related to the alleged surveillance. *See Am. Compl.*, Dkt. 30, Prayer for Relief ¶¶ 2-
 3 (seeking disclosure of information related to alleged surveillance). While we acknowledge that
 this Court has concluded that an appeal of right is premature, we respectfully disagree and
 submit that the Court of Appeals is the most appropriate body to make that determination.

¹⁰ In April 2007, when this case was previously pending on interlocutory appeal, the
 Court of Appeals entered a stay of this Court’s Order of March 13, 2007 (*see* Dkt. 3), which had
 ordered briefing on plaintiffs’ motion for partial summary judgment. *See* Dkt. 5.

1 plaintiffs' assertion, there is no certainty that this process will be completed by May 2009, *see*
2 Pls. Opp. at 10, and disclosures should not occur at any point in the interim. Thus, while we
3 agree that the granting of a petition to hear an interlocutory appeal by the Ninth Circuit would
4 automatically stay further proceedings in district court, a stay should be entered while that
5 petition is pending to preserve the status quo and avoid irreparable harm.^{11/}

6 **C. The Court Should At Least Enter an Immediate Interim Stay.**

7 Finally, because further proceedings under the January 5 Order would commence as soon
8 as after plaintiffs' counsel receive their clearances by the February 13, 2009 deadline set by the
9 Court, the Government requests that the Court either rule on this instant motion or at least enter
10 an interim stay of further proceedings—either to allow the Court additional time to consider this
11 motion or to permit the Government to seek a stay from the Court of Appeals should the Court
12 deny this motion. As indicated above, the Government respectfully requests that the Court rule
13 on at least interim relief by 3 p.m. on February 13, 2009. In order to protect its interests, the
14 Government plans to seek relief from the Ninth Circuit before the close of business that day.

15 **CONCLUSION**

16 For the foregoing reasons, the Court should certify its January 5, 2009 Order for appeal
17 pursuant to 28 U.S.C. § 1292(b), and enter a stay of further proceedings pending the current
18 appeal by the Government Defendants noticed on January 19, 2009 (Dkt. 59), or the disposition
19 of any appeal certified by the Court under 1292(b), or enter an interim stay pending disposition
20 of this motion or to permit the Government to seek a stay from the Court of Appeals. Alternative
21 proposed orders are attached hereto.

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23
24
25 ¹¹ Plaintiffs also contend that the declassification review ordered by the Court may also
26 foreclose any harm to the Government. *See* Pls. Opp. (Dkt. 69) at 10 n. 1. The Court ordered
27 that process to be completed by February 19, 2009, the Government expects that the relevant
information at issue in the privilege assertion will remain classified, if not all of the information
contained in prior classified submissions.

1 Dated: February 11, 2009

Respectfully Submitted,

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