1 ELECTRONIC FRONTIER FOUNDATION THOMAS E. MOORE III (115107) tmoore@moorelawteam.com CINDY COHN (145997) 2 cindy@eff.org THE MOORE LAW GROUP LEE TIEN (148216) 228 Hamilton Avenue, 3rd Floor Palo Alto, CA 94301 3 KURT OPSAHL (191303) KEVIN S. BANKSTON (217026) Telephone: 650/798-5352; Fax: 650/798-5001 4 JAMES S. TYRE (083117) 454 Shotwell Street KEKER & VAN NEST, LLP 5 San Francisco, CA 94110 RACHAEL E. MENY (178514) Telephone: 415/436-9333; Fax: 415/436-9993 rmeny@kvn.com PAUL L. BLIZZARD (207920) 6 RICHARD R. WIEBE (121156) MICHAEL S. KWUN (198945) wiebe@pacbell.net 7 AUDREY WALTON-HADLOCK (250574) LAW OFFICE OF RICHARD R. WIEBE 710 Sansome Street 8 425 California Street. Suite 2025 San Francisco, CA 94111-1704 San Francisco, CA 94104 Telephone: 415/391-5400; Fax: 415/397-7188 9 Telephone: 415/433-3200; Fax: 415/433-6382 Attorneys for Plaintiffs 10 11 UNITED STATES DISTRICT COURT 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA 13 SAN FRANCISCO DIVISION 14 CASE NO. C-08-4373-VRW CAROLYN JEWEL, et al., 15 **PLAINTIFFS' MOTION FOR** Plaintiffs, 16 ADMINISTRATIVE RELIEF FROM **IMPROPER MOTION FOR** V. 17 RECONSIDERATION BY INDIVIDUAL NATIONAL SECURITY AGENCY, et al., CAPACITY DEFENDANTS 18 Defendants. REQUEST FOR IMMEDIATE STATUS 19 **CONFERENCE ON JULY 15, 2009** 20 Local Rule 7-11 21 22 23 24 25 26 27 439395.01 28 Case No. C-08-4373-VRW PLAINTIFFS' MOTION FOR ADMINISTRATIVE RELIEF FROM IMPROPER MOTION FOR RECONSIDERATION

Case3:08-cv-04373-VRW Document33 Filed07/13/09 Page1 of 5

Pursuant to Civil Local Rule 7-11, Plaintiffs hereby move for administrative relief from the 1 2 Individual Capacity Defendants' improperly filed Motion for Relief from this Court's April 28 and 3 May 8 Orders (Dkt. No. 32), filed on the afternoon of Friday, July 10, 2009. Plaintiffs respectfully 4 request that Defendants' motion be treated as a motion for reconsideration, denied as such, and 5 Defendants be held to the requirement that they answer or otherwise respond to the Complaint by the date ordered by this Court: July 15, 2009. Alternatively, Plaintiffs seek a status conference after 6 7 the hearing on the Motion to Dismiss on July 15, 2009 to discuss the procedure for moving forward 8 this portion of the case. Plaintiffs' counsel contacted defense counsel on the morning of July 13, 9 2009 to request that the motion be withdrawn. Defense counsel declined. Plaintiffs' counsel and defense counsel agree, however, that if a status conference is to be held it would be most efficient 10 11 for the court and all parties if it was held on July 15, 2009 after the hearing on the Motion to

Dismiss brought by the other defendants in this action. Cohn Decl, paras. 3-5.

The Individual Capacity Defendants previously moved this Court for

The Individual Capacity Defendants previously moved this Court for a stay such that they did not have to respond to the Complaint until after the government's motion to dismiss was resolved. (Dkt. No. 22). That motion was filed on the day that the government's response was due. This Court denied their administrative motion and ordered them to respond on July 15, 2009. (Dkt. Nos. 25, 27). Now, the Individual Capacity Defendants have effectively moved for reconsideration of the Court's Order, and have filed a motion noticed for September 17, 2009 (Dkt. No. 32). Effectively, said Defendants have unilaterally given themselves at least an additional two-month stay. This is unacceptable.

While styled as a "Motion for Relief from Court's Orders," Defendants' motion plainly seeks reconsideration of this Court's Orders, and should be treated as a Motion for Reconsideration. *See Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635 (9th Cir.1989) ("nomenclature is not controlling," courts will decide "whether a motion, however styled, is appropriate for the relief request."); *see also e.g. Sodipo v. Caymas Systems, Inc.*, 2006 WL 2850056 (N.D. Cal. 2006); *Saini v. I.N.S.*, 64 F. Supp. 2d 923 (D. Ariz. 1999); *Puckett v. Dyer*, 2007 WL 4180686 (E.D. Cal. 2007). In the Northern District, a motion for reconsideration is governed by Civil Local

28

27

14

15

16

17

18

19

20

21

22

23

24

25

26

Case3:08-cv-04373-VRW Document33 Filed07/13/09 Page3 of 5

Rule 7-9. The Individual Capacity Defendants failed to follow the requirements of Local Rule 7-9
or meet the standard set therein. Under Local Rule 7-9, a Motion for Reconsideration requires
leave of court. See Civil L.R. 7-9(a); Avery v. Thompson, 2009 WL 765105 (N.D. Cal. 2009).
Defendants plainly did not seek leave of Court before filing this motion, and for this reason
alone, the motion could be denied." Flotsam of Cal. v. Huntington Beach Conf. and Visitors Bur.,
2007 WL 1152682 (N.D. Cal. 2007). Nor are Defendants excused from this requirement because
this Court's April 27 Order (Dkt. No. 25) was "without prejudice." Mot. For Relief at 1-2; see e.g.
County of Santa Clara v. Astra USA, Inc., 2009 WL 1765811 (N.D. Cal. 2009) (considering motion
for leave to file motion for reconsideration of prior motion decided without prejudice); Newman v.
McGrath, 2008 WL 512726 (N.D. Cal. 2008) (same).

Nor do Defendants satisfy any of the requirements for a motion for reconsideration. *See* Civil L.R. 7-9(b) (listing requirements for a motion for reconsideration). Indeed, the motion largely restates the arguments that were properly rejected by this Court in its Order of April 27, 2009 (Dkt. No. 25). Local Rule 7-9(c) explicitly prohibits such re-argument.

Plaintiffs have already explained why the Individual Capacity Defendants have not met the standard for a stay of the claims against them, in response to Defendants' first Motion to Enlarge Time, filed on the last deadline for their responsive pleading, April 3, 2009 (Dkt. No. 22). Three more months have now passed, making it nearly ten months since this case was filed, and these Defendants still refuse to provide a responsive pleading.

The only portion of the Individual Capacity Defendants' motion that is arguably new is the dubious and unsupported claim that the individual Defendants have an "absolute right" to file a motion for summary judgment on their qualified immunity defenses prior to discovery, a "right" the Defendants claim they cannot yet exercise due to the government's assertion of the state secrets privilege. Defendants make no effort to explain why they could not have reasonably raised this argument in their original motion (or more than three court days prior to the due date), but more importantly it is meritless.

439395.01 Case No. C-08-4373-VRW

-2-

¹ Nor did Defendants meet and confer with Plaintiffs.

Case3:08-cv-04373-VRW Document33 Filed07/13/09 Page4 of 5

Even if the governments' state secrets argument was likely to succeed,² at this stage the Individual Defendants are only entitled to bring a Motion to Dismiss for qualified immunity, not a motion for summary judgment. As Plaintiffs explained in April, nothing about the pendency of the government's state secrets motion impairs them from bringing such a motion to dismiss, because it would be based on and limited to Plaintiffs' allegations.³

It is finally time for the claims against these Defendants to get underway. Defendants' Motion for Relief from the April 7 and May 8 Orders is procedurally improper and borders on frivolous. As with its first motion, this was brought so close to the deadline as to create a *de facto* extension of time and was brought without appropriate efforts to meet and confer with Plaintiffs.

Plaintiffs respectfully request that Defendants' Motion be treated as a motion for reconsideration, denied on that basis and that the individual capacity Defendants be held to respond to the Complaint by the date previously set by this Court, July 15, 2009. Alternatively, Plaintiffs request a status conference on July 16, 2009, or as soon thereafter as this matter may be heard so that the parties and the Court may jointly discuss how these claims can proceed.

DATED: July 13, 2009

2.1

By /s/Cindy A. Cohn
ELECTRONIC FRONTIER FOUNDATION
CINDY COHN
LEE TIEN
KURT OPSAHL

439395.01 Case No. C-08-4373-VRW ² As explained in Plaintiffs' Opposition to Motion to Enlarge Time (Dkt. No. 23), the government's state secrets argument is not likely to succeed. *See also* Plaintiffs' Opposition to Motion to Dismiss (Dkt. No. 29).

Regardless, as Plaintiffs also explained in April, to the extent that the individual Defendants intend to file an answer to the Complaint or a motion requiring supporting evidence that they believe may be subject to national security concerns, Plaintiffs have no objection to the individual Defendants initially filing a sealed answer or declaration (along with an appropriately redacted public version) that would be treated pursuant to Section 1806(f) until such time as the Court could determine if the stated concerns are valid. Such a procedure would also be permissible under the state secret privilege doctrine. *Fitzgerald v. Penthouse Intern, Ltd.*, 776 F.2d 1236, 1238, n.312 (4th Cir. 1985) (advising courts to use "creativity and care" in devising procedures to promote the ultimate resolution on the merits); *see also Halpern v. U.S.*, 258 F.2d 36, 43 (2nd Cir. 1958); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2nd Cir. 1977); *Spock v. U.S.*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978) (endorsing creative solutions to manage state secret privilege issues).

Case3:08-cv-04373-VRW Document33 Filed07/13/09 Page5 of 5 KEVIN S. BANKSTON 1 JAMES S. TYRE 454 Shotwell Street 2 San Francisco, CA 94110 3 Telephone: 415/436-9333 415/436-9993 (fax) 4 RICHARD R. WIEBE LAW OFFICE OF RICHARD R. WIEBE 5 425 California Street, Suite 2025 San Francisco, CA 94104 6 Telephone: (415) 433-3200 7 Facsimile: (415) 433-6382 THOMAS E. MOORE III 8 THE MOORE LAW GROUP 9 228 Hamilton Avenue, 3rd Floor Palo Alto, CA 94301 Telephone: (650) 798-5352 10 Facsimile: (650) 798-5001 11 KEKER & VAN NEST, LLP 12 RACHAEL E. MENY PAUL L. BLIZZARD MICHAEL S. KWUN 13 AUDREY WALTON-HADLOCK 14 710 Sansome Street San Francisco, CA 94111-1704 15 Telephone: 415/391-5400; Fax: 415/397-7188 16 Attorneys for Plaintiffs 17 18 19 20 21 22 23 24 25 26 27 28 439395.01 Case No. C-08-4373-VRW PLAINTIFFS' MOTION FOR ADMINISTRATIVE RELIEF