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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILEY GILL; JAMES PRIGOFF; TARIQ
RAZAK; KHALED IBRAHIM; and AARON
CONKLIN,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE; LORETTA
LYNCH, in her official capacity as the
Attorney General of the United States;
PROGRAM MANAGER – INFORMATION
SHARING ENVIRONMENT;
KSTEMENDRA PAUL, in his official
capacity as the Program Manager of the
Information Sharing Environment,

Defendants.

Case No. 3:14-cv-03120-RS

JOINT CASE MANAGEMENT
STATEMENT & [PROPOSED] ORDER

The Parties to the above-entitled action, Plaintiffs Wiley Gill, James Prigoff, Tariq Razak, Khaled Ibrahim, and Aaron Conklin (collectively “Plaintiffs”), by and through their attorneys of record, and Defendants Department of Justice (“DOJ”), Loretta Lynch (“Lynch”), Program Manager – Information Sharing Environment (“PM-ISE”), and Kshemendra Paul (“Paul”), jointly submit this JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER pursuant to the Standing Order for All Judges of the Northern District of California dated July 1, 2011 and Civil Local Rule 16-9.¹ The parties have previously submitted two joint case management statements (ECF Nos. 36 & 40), which provide a more complete statement of some of the items listed below.

¹ Counsel for the parties met and conferred by telephone on July 29, 2015. Linda Lye, Nasrina Bargzie, and Nicole Sadler participated on behalf of Plaintiffs. Paul Freeborne and Kieran Gostin participated on behalf of Defendants.

1 1. Jurisdiction & Service

2 This is an action pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 500 *et*
3 *seq.* In its Order Denying Motion to Dismiss at 7 (Feb. 20, 2015) (Dkt No. 38), this Court held
4 that Plaintiffs have alleged sufficient facts regarding injury to survive dismissal for lack of
5 standing at the Federal Rule of Civil Procedure 12 stage. The Court also found that venue is
6 proper. Plaintiffs allege that this Court has subject matter jurisdiction pursuant to 28 U.S.C.
7 § 1331 (federal question). Defendants do not waive arguments regarding subject-matter
8 jurisdiction and reserve the right to raise such issues in a motion for summary judgment. All
9 parties in this action have been served.

10 2. Facts

11 Plaintiffs in this action challenge the standards issued by Defendants in connection with
12 the Nationwide Suspicious Activity Reporting Initiative (“NSI”), which involves the sharing
13 among federal, state, local, and tribal law enforcement entities of reports about observed activities
14 and entities deemed to be suspicious. These reports are generally referred to as “suspicious
15 activity reports” (“SARs”). Plaintiffs allege that they are each the subject of a SAR. Plaintiffs
16 challenge both the Functional Standard for Suspicious Activity Reporting Version 1.5
17 (“Functional Standard 1.5”), issued by Defendant PM-ISE, as well as an alleged separate standard
18 for suspicious activity reporting issued by Defendant DOJ, which Plaintiffs contend exists and is
19 broader than Functional Standard 1.5.

20 3. Legal Issues

21 The primary legal issues in this case at summary judgment are likely to be: (1) whether
22 the Court has jurisdiction; (2) whether PM-ISE’s issuance of the Functional Standard and the
23 DOJ’s alleged issuance of a separate standard each constitute final agency action within the
24 meaning of the APA, (3) whether the PM-ISE’s issuance of the Functional Standard and the
25 DOJ’s alleged issuance of a separate standard were arbitrary and capricious or not in accordance
26 with law, and (4) whether the Functional Standard and alleged DOJ standard constitute a
27 legislative rule that should have been promulgated with notice and comment.
28

1 4. Motions

2 Defendants previously brought and this Court denied a motion to dismiss Plaintiffs'
3 claims. *See* ECF Nos. 21, 38.

4 In response to the Court's invitation at the last Case Management Conference on
5 March 12, 2015, Plaintiffs have brought a motion seeking leave to take discovery on Defendant
6 DOJ's alleged standard for suspicious activity reporting. Defendants contend that review in this
7 case should be limited to the administrative record and that Defendant DOJ has not, in any event,
8 issued a separate standard for suspicious activity reporting. As part of their opposition,
9 Defendants have renewed their motion to dismiss Plaintiffs' claims relating to the alleged
10 separate DOJ Standard. Plaintiffs' motion is fully briefed and set for a hearing before this Court
11 on August 20, 2015 at 1:30 pm, the same time as the case management conference in this matter.

12 In light of Defendants' position that review in this case should be limited to the
13 administrative record, the parties may also dispute whether discovery about Defendant PM-ISE's
14 Functional Standard is appropriate. Defendants have certified a record as to the Functional
15 Standard. *See* ECF Nos. 52-53. Plaintiffs have concerns that this record is incomplete, but the
16 parties are currently meeting and conferring in an attempt to resolve these concerns without
17 motion practice. If the parties are unable to resolve these concerns, Plaintiffs may move to
18 complete and/or supplement the record.

19 The parties expect to file motions for summary judgment.

20 5. Amendment of Pleadings

21 Plaintiffs do not anticipate amending the complaint, but propose to supplement the
22 complaint to address facts arising after it was filed, in particular, the issuance of a revised
23 Functional Standard (known as Functional Standard 1.5.5) by Defendant PM-ISE on February 23,
24 2015. Plaintiffs will file a motion seeking leave to file a supplemental complaint by August 27,
25 2015. Defendant will take a position on Plaintiffs' motion after reviewing the motion and
26 attached proposed supplemental complaint.

27 6. Evidence Preservation

28 The Parties certify that they have reviewed the Guidelines Relating to the Discovery of

1 Electronically Stored Information and confirm that the Parties have met and conferred pursuant to
2 Federal Rule of Civil Procedure 26(f) regarding reasonable and proportionate steps taken to
3 preserve evidence relevant to the issues reasonably evident in this action.

4 7. Disclosures

5 The parties have not yet exchanged initial disclosures. As Defendants-more fully
6 explained in Paragraph 8 of the parties' prior case management statements (ECF Nos. 36 & 40),
7 and in Defendants' Opposition to Plaintiffs' motion for leave to seek discovery about an alleged
8 DOJ standard for suspicious activity reporting, Defendants contend that these proceedings are
9 exempt from initial disclosures under Federal Rule of Civil Procedure 26(a)(1)(B)(i) because
10 Plaintiffs solely bring claims under the APA. Plaintiffs dispute that these proceedings are exempt
11 from initial disclosures. For the reasons set forth at Paragraph 8 of the parties' prior case
12 management statements (ECF Nos. 36 & 40), as well as Plaintiffs' pending motion for leave to
13 seek discovery about DOJ's standard for suspicious activity reporting, Plaintiffs contend that
14 review in this case is not limited to the "administrative record." Fed. R. Civ. P. 26(a)(1)(B)(i).

15 8. Discovery

16 Defendants contend that review of the merits in this action should be limited to the
17 administrative record. Plaintiffs contend that discovery is appropriate, and review should not be
18 limited to the administrative record as to both jurisdictional and merits issues. The parties have
19 set forth their respective positions on this issue in Paragraph 8 of the prior case management
20 statements (ECF Nos. 36 & 40).

21 *Discovery with respect to Plaintiffs' challenge to Defendant DOJ's Alleged Standard for*
22 *Suspicious Activity Reporting:* In light of Defendants' position that DOJ has not issued a separate
23 standard for SAR reporting, the court at the prior case management conference invited Plaintiffs
24 to file a motion setting forth why discovery as to the alleged DOJ standard would be appropriate.
25 That motion is now pending before this Court, with a hearing noticed for August 20, 2015 at
26 1:30 pm, the same time as the case management conference in this matter.

27 *Discovery with respect to Plaintiff's challenge to Defendant PM-ISE's Functional*
28 *Standard:* At the prior case management conference, the Court also instructed Defendants to

1 provide an administrative record with respect to the PM-ISE's Functional Standard, which
2 Defendants have now certified. *See* ECF Nos. 41, 52, 53. Plaintiffs believe the record certified is
3 incomplete and have shared their concerns with Defendants. The parties are now meeting and
4 conferring to avoid the necessity of motion practice on this issue.

5 *Discovery with respect to the Court's jurisdiction:* Plaintiffs previously explained that
6 discovery to establish jurisdictional issues is appropriate in this APA action. *See* ECF No. 40 at
7 ¶ 8 (citing *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir.
8 1997); *Cent. Sierra Env'tl. Res. Ctr. v. U.S. Forest Serv.*, 916 F. Supp. 2d 1078, 1086 (E.D. Cal.
9 2013)). While Defendants agree that the Court may consider extra-record material in resolving
10 Article III issues such as standing, they assert that judicial review of final agency action on the
11 merits is subject to record review under the APA. *Bonneville Power*, 177 F.3d at 1527-28
12 (considering affidavits on the issue of standing "not in order to supplement the administrative
13 record on the merits, but rather to determine whether petitioners can satisfy a prerequisite to this
14 court's jurisdiction"). Moreover, Defendants contend that if the Court determines that the record
15 is insufficient to determine whether Defendants' issuance of the Functional Standard constitutes
16 final agency action, Defendants should be permitted the opportunity to supplement the record
17 with appropriate evidence, including affidavits. The parties are exploring the possibility of
18 factual stipulations to avoid the need for discovery as to the facts bearing on issues such as
19 standing and final agency action.

20 9. Class Actions

21 This is not a class action.

22 10. Related Cases

23 The Parties are not aware of any related cases or proceedings pending before another
24 judge of this court or before another court or administrative body.

25 11. Relief

26 Plaintiffs seek declaratory and injunctive relief, and attorney's fees and costs.

27 12. Settlement and ADR

28 The Parties requested an ADR Phone Conference, which took place on January 6, 2015.

1 The Parties agreed that the case is not amenable to resolution through ADR at this early stage, but
2 would like to reserve the option of requesting assistance of a magistrate judge for settlement
3 purposes at a future juncture.

4 13. Consent to Magistrate Judge For All Purposes

5 The Parties do not consent to have a magistrate judge conduct all further proceedings,
6 including trial and entry of judgment.

7 14. Other References

8 The Parties agree that this case is not suitable for reference to binding arbitration, a special
9 master, or the Judicial Panel on Multidistrict Litigation.

10 15. Narrowing of Issues

11 It is premature to determine whether any issue can be narrowed. The Parties are willing to
12 meet and confer again to ascertain whether issues can be narrowed by agreement, or after initial
13 discovery has been completed.

14 16. Expedited Trial Procedure

15 The Parties agree that this case is not suitable for expedited trial pursuant to the Expedited
16 Procedure of General Order 64. Defendant disputes that this case is suitable for trial at all.

17 17. Scheduling

18 Plaintiffs contend that the scheduling of summary judgment or trial dates would be
19 premature before the threshold discovery issues are resolved. Defendants contend that this APA
20 proceeding should proceed to summary judgment briefing before any discovery. As noted below,
21 Defendants do not believe that a trial is necessary or appropriate in this APA action.

22 18. Trial

23 Defendants contend that this matter should be resolved by motion and is not appropriate
24 for trial because Plaintiffs solely assert claims under the APA. Plaintiffs state that if the Court
25 denies both Parties' summary judgment motions, a trial would be necessary and anticipate that it
26 would last five to six days.

27 19. Disclosure of Non-party Interested Entities or Persons

28 Plaintiffs have filed the Certification of Interested Entities or Persons required by Civil

1 Local Rule 3-15. Defendants are federal government entities exempt from this disclosure
2 requirement. *See* Local Rule 3-15(a).

3 20. Professional Conduct

4 The attorneys for the Parties have reviewed the Guidelines for Professional Conduct for
5 the Northern District of California.

6 21. Other

7 The Parties are not currently aware of any other additional issue that may facilitate the
8 just, speedy, and inexpensive disposition of this matter.

9
10 Dated: August 12, 2015

/s/ Nicole R. Sadler

11 Counsel for Plaintiffs²

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² I, Nicole R. Sadler, hereby attest, in accordance with Local Rule 5-1(i)(3), the concurrence in the filing of this document has been obtained from the other signatory listed here.

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Dated: August 12, 2015

/s/ Paul G. Freeborne

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CASE MANAGEMENT ORDER

The above JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. In addition, the Court makes the further orders stated below:

IT IS SO ORDERED.

Dated: August __, 2015

UNITED STATES DISTRICT/MAGISTRATE
JUDGE