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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 YINAN ZHANG, ALIA AHMEDI, ZHONG
14 FU, ABDUL GHAFOOR, MIAO LING
15 HUANG, SANA JALILI, YAN WANG, YAN
YIN,

16 Plaintiffs-Petitioners,

17 v.

18 DAVID STILL, District Director, U.S.
Department of Homeland Security, Bureau of
19 Citizenship and Immigration Services, San
Francisco District; EMILIO T. GONZALEZ,
20 Director, U.S. Department of Homeland
Security, Bureau of Citizenship and
21 Immigration Services; MICHAEL
CHERTOFF, U.S. Secretary of Homeland
22 Security; ROBERT S. MUELLER III, Director
of the Federal Bureau of Investigation;
23 ALBERTO GONZALES, Attorney General of
the United States,

24 Defendants-Respondents.
25
26

Case No. 07-CV-0503-SBA

**JOINT CASE MANAGEMENT
STATEMENT AND PROPOSED ORDER**

Date: May 17, 2007
Time: 2:45 p.m.
Courtroom: By telephone conference
Judge: Hon. Sandra Brown Armstrong

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1 The parties to the above-captioned action submit this Joint Case Management
2 Statement pursuant to the Court's Order Setting Initial Case Management Conference and
3 ADR Deadlines dated January 24, 2007; the Court's Case Management Scheduling Order
4 for Reassigned Civil Cases dated February 28, 2007; and the Stipulation To Modify the
5 Court's Case Management Scheduling Order approved by the Court on April 30, 2007.

6 **a. Jurisdiction and service**

7 Plaintiffs contend that the Court has subject matter jurisdiction over this matter
8 pursuant to 8 U.S.C. § 1447(b) (district court jurisdiction to adjudicate delayed
9 naturalization applications), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. §§ 2201
10 and 2202 (declaratory relief). Defendants contend that the Court does not have
11 jurisdiction over Plaintiffs' individual claims under 8 U.S.C. § 1447(b) because the 120-
12 day jurisdictional periods have not run, and that the remaining claims fail to state claims
13 upon which relief may be granted as a matter of law.

14 The parties agree that venue is proper in this District pursuant to 28 U.S.C. §
15 1391(e).

16 Counsel for both plaintiffs and defendants have agreed that service of the First
17 Amended Complaint was completed on February 27, 2007 at the latest.

18 **b. Claims and defenses**

19 The parties have prepared their respective statements setting forth claims and
20 defenses, set forth below.

21 **1. Plaintiffs' claims**

22 Plaintiffs are all long-time green card holders who have made this Nation their
23 permanent home and seek to pledge their allegiance to the United States as citizens. Each
24 Plaintiff meets all statutory requirements for naturalization, but has been awaiting
25 adjudication for more than 120 days since passing all criminal record checks and the
26 naturalization interview. Defendants are responsible for the prolonged delay in
27 processing Plaintiffs' naturalization applications, because of their policy, pattern and
28 practice of requiring "FBI name checks," failing to set reasonable time limits for the

1 processing of those name checks, and failing to adjudicate naturalization applications in a
2 reasonably timely manner. Defendants' conduct violates immigration regulations, 8
3 C.F.R. § 335, and is contrary to Congress's expressed intent that applications for
4 immigration benefits should be adjudicated within 180 days, 8 U.S.C. § 1571. As a result
5 of these extraordinary delays – which have in fact exceeded two years for each of the
6 named Plaintiffs – they are unable to participate fully in U.S. civic society and also are
7 unable to engage in certain contractual relationships with the U.S. government, to travel
8 abroad pursuant to the Visa Waiver Program, to petition for visas for their spouses,
9 children and parents, and to enjoy other privileges and rights of U.S. citizenship.

10 Plaintiffs contend that the Defendants' policies and practices of long-term
11 naturalization delays are unlawful under the Administrative Procedures Act and the Due
12 Process Clause and bring this action against officials of the U.S. Department of
13 Homeland Security; U.S. Citizenship and Immigration Services ("CIS"), the sub-unit of
14 the Department of Homeland Security responsible for naturalization; the Federal Bureau
15 of Investigation ("FBI"), which is responsible for the "name checks" that are causing the
16 naturalization delays, and Attorney General Alberto Gonzales, who has ultimate
17 responsibility for the FBI.

18 Plaintiffs individually seek naturalization by the Court pursuant to 8 U.S.C. §
19 1447(b), which provides that a district court may adjudicate an application for
20 naturalization if the immigration agency has failed to act within 120 days of the
21 preliminary examination on an naturalization application. Plaintiffs represent a putative
22 class of other lawful permanent residents who are similarly situated and similarly affected
23 by systemic delays in the naturalization process. On behalf of the class, Plaintiffs seek
24 injunctive and declaratory relief from the Defendants' policies and practices causing
25 prolonged delays in naturalization. Plaintiffs bring their causes of action for declaratory
26 and injunctive relief under the Administrative Procedures Act, 5 U.S.C. §§ 555 and 706
27 (for unreasonable delays); 5 U.S.C. § 553 (for failure to provide notice and opportunity
28 for public comment prior to promulgating the "FBI name check"); and the Due Process

1 Clause of the Fifth Amendment.

2 **2. Defendants' claims and defenses**

3 Defendants have moved to dismiss the FAC under Federal Rules of Civil
4 Procedure 12(b)(1) and 12(b)(6). Defendants contend that the Court lacks subject matter
5 jurisdiction over Plaintiffs' individual claims for naturalization under 8 U.S.C. § 1447(b)
6 because the 120-day jurisdictional period has not run. Defendants argue, in the
7 alternative, that Plaintiffs' individual claims should be remanded to CIS for adjudication,
8 and that, should the Court not remand the individual claims, the claims are misjoined and
9 should be severed.

10 Defendants also contend that Plaintiffs have failed to state a claim for relief under
11 the Administrative Procedures Act ("APA") on the grounds that there is an adequate
12 remedy at law provided by Congress, that APA review is not available because there is
13 no "final agency action" at issue, that the APA does not permit judicial review because
14 Defendants are not legally required to act, and that, in the alternative, Defendants'
15 procedures are not unreasonable, given limited agency resources and the fact that
16 approximately 90% of all naturalization applications are adjudicated within six months of
17 the filing date of the application, and that approximately 90% of all requests by USCIS to
18 the FBI for name checks are completed within two months.

19 Defendants contend that Plaintiffs have failed to state a claim under the APA for
20 failure to comply with notice-and-comment requirements because the name check
21 process is an interpretive rule that is not subject to those requirements.

22 Defendants contend that the Court should dismiss the claim for injunctive relief
23 because Plaintiffs have shown neither irreparable injury nor inadequate remedies at law.

24 Finally, Defendants contend that Plaintiffs' claim under the Due Process Clause
25 should be dismissed because they do not have a protected liberty or property interest.

26 **c. Summary of proceedings to date**

27 On January 24, 2007, lead Plaintiff Yinan Zhang filed an individual Petition for
28 Hearing on Naturalization Application Under 8 U.S.C. § 1447(b). On February 28, 2007,

1 Plaintiff Zhang and the other named Plaintiffs filed a First Amended Complaint for
2 Declaratory and Injunctive Relief and Petition for Naturalization Pursuant to 8 U.S.C. §
3 1447(b). The First Amended Complaint was filed under Federal Rule of Civil Procedure
4 15(a), which permits amendment of a pleading “once as a matter of course at any time
5 before a responsive pleading is served.”

6 On April 30, 2007, the Defendants filed a Motion to Dismiss, which is set for
7 hearing on July 31, 2007.

8 Initial disclosures pursuant to Rule 26(a) will be exchanged on May 7, 2007, as
9 stipulated by the parties and as ordered by this Court.

10 **d. Pending motions**

11 Defendants’ Motion to Dismiss is pending. Because the motion to dismiss relies
12 on factual assertions supported by exhibits, including a declaration filed by Michael
13 Cannon, the director of the FBI unit responsible for name checks, Plaintiffs will argue
14 that (1) the court must disregard any factual assertions outside the facts alleged in the
15 FAC, or (2) the motion to dismiss should be construed as a motion for summary
16 judgment and the hearing should be continued in order to allow Plaintiffs to conduct
17 discovery necessary to respond to the factual assertions in Defendants’ motion, pursuant
18 to Federal Rule of Civil Procedure 56(f). The parties respectfully request guidance from
19 the Court on the hearing date and briefing schedule for Defendants’ pending motion, and
20 on the parties’ obligations to engage in discovery prior to the Court’s ruling on
21 Defendants’ pending motion.

22 **e. Major motions anticipated before trial**

23 In addition to the motion to dismiss already filed by the Defendants, the parties
24 anticipate other major motions before trial. Plaintiffs intend to file a motion for class
25 certification set for hearing no later than the time of the hearing on Defendants’ motion to
26 dismiss. In addition, the parties anticipate that they will file motions for summary
27 judgment.

28 Defendants intend to request at the Case Management Conference that the Court

1 stay discovery during the pendency of the motion to dismiss and/or the final decision of
2 plaintiffs on the parameters of their complaint. Plaintiffs intend to oppose the request for
3 a stay of discovery on the ground that Defendants' motion to dismiss gives rise to factual
4 disputes and therefore should be deemed a motion for summary judgment. For that
5 reason, the briefing schedule and hearing on Defendants' motion should be continued to
6 allow Plaintiffs to obtain discovery pursuant to Federal Rule of Civil Procedure 56(f)
7 prior to being required to respond to the motion.

8 Plaintiffs also anticipate filing a motion for leave to file a second amended
9 complaint. Plaintiffs have advised Defendants and now advise the Court that a conflict of
10 interest has arisen between Plaintiff Yinan Zhang and the other named Plaintiffs. For that
11 reason, Plaintiffs anticipate that either Mr. Zhang or the other Plaintiffs as a group will
12 move to dismiss their claims voluntarily under Federal Rule of Civil Procedure 41(a)(1),
13 and that the other Plaintiff(s) will then move for leave to file a second amended
14 complaint that will omit the claims and allegations relevant only to the dismissed party.
15 Plaintiffs intend, in any event, to move for leave to file a second amended complaint to
16 make minor corrections to the allegations.

17 **f. Additional parties**

18 As set forth above, Plaintiffs anticipate that either Plaintiff Yinan Zhang or the
19 other Plaintiffs as a group will be dismissed voluntarily from this action, and will re-file a
20 separate action.

21 **g. Anticipated hearings**

22 The parties anticipate that there will be a need for a hearing on Defendants'
23 motion to dismiss, any motion for a protective order under Fed. R. Civ. P. 26(c),
24 Plaintiffs' motion for class certification, and any motions for summary judgment to be
25 filed.

26 **h. Evidence preservation**

27 The parties have complied with the Court's direction to take affirmative steps to
28 preserve evidence related to this action including, without limitation, interdiction of

1 document destruction programs and any ongoing erasures of emails, voice mails, and
2 other electronically recorded material.

3 **i. Stipulated discovery limits**

4 The parties have not stipulated to any discovery limits different from those set
5 forth in the Federal Rules of Civil Procedure.

6 Defendants believe that a protective order is necessary in order to conduct
7 discovery in compliance with Privacy Act obligations and to protect law enforcement
8 interests. The parties intend to propose the necessary protective orders by stipulation if
9 possible.

10 **j. Proposed deadlines and court dates**

11 The parties propose the following schedule:

12 Last day for Plaintiffs to file motion for class certification	June 26, 2007
13 Last day for Plaintiffs to file opposition to Defendants' motion to dismiss ¹ ; last day for Defendants to file opposition to Plaintiffs' motion for class certification	July 10, 2007
14 15 16 Last day to file reply memoranda re motion to dismiss and motion for class certification	July 17, 2007
17 18 Hearing on Defendants' motion to dismiss and Plaintiffs' motion for class certification	July 31, 2007
19 Non-expert discovery cut-off ²	November 1, 2007
20 Deadline for expert witness disclosures	December 1, 2007
21 Expert discovery cut-off	January 15, 2007
22 Last day to file motions for summary judgment	February 26, 2007
23 Last day to file oppositions to motions	March 11, 2007

24 ¹ As set forth above in paragraphs (d) and (e), Plaintiffs believe that Defendants' motion to
25 dismiss should be deemed a motion for summary judgment because it puts facts in dispute.
26 Plaintiffs therefore are entitled to discovery prior to the filing of a response to the motion
pursuant to Federal Rule of Civil Procedure 56(f), and request that the current hearing date be
vacated so that Plaintiffs may have an opportunity for discovery prior to filing a response to the
motion.

27 ² The parties agree to this discovery cut-off date assuming that discovery commences
28 immediately and is not stayed. In the event that discovery is stayed, the parties believe that a
later discovery cut-off date would be appropriate.

1	for summary judgment	
2	Last day to file reply memoranda re motions for summary judgment	March 18, 2007
3	Hearing on motions for summary judgment	April 1, 2007
4	Last day to file trial briefs	April 14, 2007
5	Trial date	May 12, 2007

6 **k. Jury demand**

7 There is no jury demand in this case.

8 **l. Relief sought**

9 Each of the named Plaintiffs seeks naturalization by the Court pursuant to 8
10 U.S.C. § 1447(b). The named Plaintiffs also request that the Court certify a class and
11 grant declaratory and injunctive relief from Defendants' violations of the APA and Due
12 Process Clause as follows:

- 13 (1) Order Defendants to promptly adjudicate, in a time period not to exceed 90 days,
14 the currently pending applications for naturalization of all members of the
15 proposed class;
- 16 (2) Order Defendants to adjudicate, within 120 days of the date of the naturalization
17 examination, all applications for naturalization that shall be submitted in the
18 future by members of the proposed class, as required by governing law;
- 19 (3) Order that any name checks Defendants choose to conduct shall be completed in a
20 manner that does not delay adjudication of naturalization applications by
21 members of the proposed class beyond 120 days of the applicant's naturalization
22 examination;
- 23 (4) Order Defendants to adopt a procedure for identifying naturalization cases
24 awaiting final adjudication based solely on FBI name checks, and for identifying
25 naturalization cases awaiting final adjudication for more than 120 days after
26 successful completion of naturalization examinations;
- 27 (5) Issue a declaratory judgment holding unlawful: (a) the failure of Defendants Still,
28 Emilio Gonzalez and Chertoff to adjudicate applications for naturalization within

1 120 days of the date of the naturalization examination; (b) The failure of
2 Defendants Alberto Gonzales and Mueller to complete “name checks” within a
3 reasonable time; and (c) Defendants’ failures to take all necessary steps to
4 adjudicate applications for naturalization within 120 days of the date of the
5 naturalization examinations.

6 (6) Award reasonable attorney fees and costs pursuant to the Equal Access to Justice
7 Act, 5 U.S.C. § 504, 28 U.S.C. § 2412; and

8 (7) Any and all further relief the Court deems just and proper.

9 **m. Alternative Dispute Resolution**

10 The parties have been conferring jointly and separately with the Court’s ADR
11 program director, Mr. Howard Herman, and are considering ADR options.

12 **n. Assignment to magistrate judge**

13 This matter was originally assigned to Magistrate Judge James Larson.
14 Defendants filed an objection to the assignment to a magistrate judge and the case was
15 randomly assigned to this Court.

16 **o. Service list for all counsel**

17 Following is a service list and contact information for all counsel:

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Dated: May 7, 2007

Respectfully submitted,

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Dated: May 7, 2007

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ORDER

The Joint Case Management Statement is hereby adopted by the Court as a Case Management Order for this matter. The parties are ordered to comply with this Order.

SO ORDERED.

Dated: May ____, 2007

HON. SAUNDRA BROWN ARMSTRONG
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Cecillia D. Wang, declare as follows:

I hereby certify that today I electronically filed the foregoing JOINT CASE MANAGEMENT STATEMENT AND PROPOSED ORDER with the Clerk of the Court using the ECF system which will send notification of such filing to the following email addresses:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: May 7, 2007
San Francisco, California

_____/s/_____
CECILLIA D. WANG