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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
(OAKLAND DIVISION)

14 FIRST UNITARIAN CHURCH OF LOS)
 ANGELES, *et al.*,)

16 Plaintiffs,)
 17 v.)

18 NATIONAL SECURITY AGENCY, *et al.*,)
 19 Defendants.)

Case No. 3:13-cv-03287-JSW

**GOVERNMENT DEFENDANTS’
 RESPONSE TO PLAINTIFFS’
 REQUEST FOR JUDICIAL NOTICE**

The Honorable Jeffrey S. White
 Courtroom 5, 2nd Floor

20 Plaintiffs have requested that the Court take “judicial notice,” under Federal Rule of
 21 Evidence 201, of facts they contend are “established by a [G]overnment filing in the Foreign
 22 Intelligence Surveillance Court (‘FISC’),” and of “an order of the FISC,” respectively attached to
 23 their request as Exhibits A and B. Plaintiffs’ Request for Judicial Notice (ECF No. 136) (“Pls.’
 24 Request”) at 1 & Exhs. A, B. Exhibit B to Plaintiffs’ request is an officially declassified version
 25 of a FISC order, of which this Court may appropriately take notice as the official act of another
 26 judicial body. *See Conopco, Inc. v. Roll Int’l*, 231 F.3d 82, 86 n.3 (2d Cir. 2000); *United States*
 27 *v. Merrick Sponsor Corp.*, 421 F.2d 1076, 1079 n.2 (2d Cir. 1970). Plaintiffs’ request for
 28

Government Defendants’ Response to Plaintiffs’ Request for Judicial Notice, *First Unitarian Church of Los Angeles, et al. v. National Security Agency, et al.*, Case No. 13-cv-03287-JSW

1 judicial notice of facts they contend are established by Exhibit A, however, is improper and
2 should be denied.¹

3 Plaintiffs describe Exhibit A as “confirm[ing]” that particular telecommunications service
4 providers “have participated in the NSA’s phone-records program,” a conclusion they maintain
5 can be drawn from references to company names in the caption of the purported FISC filing. But
6 the identities of the providers that have participated in the Section 215 bulk telephony-metadata
7 program is not “an adjudicative fact,” within the meaning of F.R.E. 201. An adjudicative fact is
8 one that “can be accurately and readily determined from sources whose accuracy cannot
9 reasonably be questioned,” *id.*, such as when the document was filed, *see Trigueros v. Adams*,
10 658 F.3d 983, 987 (9th Cir. 2011). It is not appropriate to take judicial notice of disputed factual
11 matters. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

12 Plaintiffs assert that the document they rely on as support for their request was released
13 by the Government in response to a Freedom of Information Act (FOIA) request. Pls.’ Request
14 at 1. But Plaintiffs do not contend that this document has been declassified, and in fact the
15 Government has not confirmed the authenticity of the document or any of the facts Plaintiffs
16 purport to infer from it. While the Government has acknowledged that Verizon Business
17 Network Services was the recipient of an April 2013 FISC Secondary Order (that expired in July
18 2013), identities of the providers who have participated in the Section 215 bulk-telephony
19 metadata program at any other time remain classified. *See Gov’t Defs.’ Mot. to Dismiss* (ECF
20 No. 66) at 14 n.5.

21 Moreover, the extent to which any other provider has participated in the Section 215
22 program could not be gleaned from the face of this document, even if it were genuine. The
23 nature or extent of any carrier’s participation in a classified Government intelligence-gathering
24 program cannot be deduced merely from the caption of a purported legal filing that does not
25 specify the scope of a proceeding, or state explicitly the nature of the carrier’s involvement in the
26

27 ¹ A similar request for judicial notice of matters supposedly established by the document
28 attached as Exhibit A to Plaintiffs’ request was filed by the plaintiff in *Smith v. Obama*, No. 14-
35555 (9th Cir.), to which the Government has also objected. *See id.*, Response to Plaintiff’s
Request for Judicial Notice (Dkt. Entry 89).

1 aspect of the proceeding being addressed. That is all the more so where, as here, the purported
2 filing is more than five years old, *see* Pls.' Request, Exh. A (dated August 2, 2010), and would
3 shed little light on the current operation of the program or the identities of the carriers involved.

4 **CONCLUSION**

5 For the foregoing reasons, Plaintiffs' request for judicial notice of facts they claim are
6 established by Exhibit A to their request should be denied.

7 Dated: September 25, 2015
8

9
10 Respectfully Submitted,

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13 ANTHONY J. COPPOLINO
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14
15 /s/ James J. Gilligan
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14 FIRST UNITARIAN CHURCH OF LOS)
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Case No. 3:13-cv-03287-JSW

16 Plaintiffs,)

[PROPOSED] ORDER

17 v.)

18 NATIONAL SECURITY AGENCY, *et al.*,)

The Honorable Jeffrey S. White
 Courtroom 5, 2nd Floor

19 Defendants.)

20 This case is before the Court on Plaintiffs' Request for Judicial Notice (ECF No. 136).
 21 Upon consideration of the parties' respective submissions in support of and in opposition to
 22 Plaintiffs' request, IT IS HEREBY ORDERED THAT:

23 Plaintiffs' request for judicial notice of the document attached as Exhibit A to their
 24 request is hereby DENIED.

25 So ORDERED this _____ day of _____, 2015.

27 _____
 28 HON. JEFFREY S. WHITE
 UNITED STATES DISTRICT JUDGE