CASE NOS.: 06-17132, 06-17137

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL, AND ERIK KNUTZEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLEES,

V.

AT&T CORPORATION,

DEFENDANT-APPELLANT, AND

THE UNITED STATES,

INTERVENOR AND APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE VAUGHN R. WALKER, CHIEF DISTRICT JUDGE
CIVIL No. C-06-0672-VRW

CORRECTED PLAINTIFFS-APPELLEES' REPLY TO GOVERNMENT'S RESPONSE TO PLAINTIFFS REQUEST FOR JUDICIAL NOTICE OF ATTORNEY GENERAL TESTIMONY

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PLAINTIFFS-APPELLEES' REPLY TO "GOVERNMENT'S RESPONSE TO PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE"

The Plaintiffs-Appellees in *Hepting v. AT&T Corp.*, No. 06-17132 and *Hepting v. United States* No. 06-17137 (hereinafter collectively "*Hepting*") hereby reply to the Government's August 7, 2007 response to the Plaintiffs-Appellees' request for judicial notice of the July 24, 2007, testimony of the Attorney General of the United States (hereinafter "Gov't Response").

While the Government does not dispute that this Court may take judicial notice of Attorney General Alberto Gonzales's testimony (Gov't Response at p. 1), it nevertheless attempts to minimize the admission that private companies assisted the Government in conducting the warrantless surveillance.

In particular, the Government notes that the Attorney General said "companies," not "telecommunications companies," (Gov't Response at p. 3-4), contending that whether or not the companies who assisted the Government in surveillance of telecommunications were indeed "telecommunications companies" is a state secret. *See also* Gov't Response at p. 5-6 (suggesting that revealing the "type of company" who assisted the Government would result in "potentially grave harm to national security.").

This position has no merit. In addition to the substantial evidence now on the record, earlier this week, Michigan Congressman Peter Hoekstra, the ranking Republican on the House Select Committee on Intelligence and a member of the

Gang of Eight (who have been briefed on the activities at issue in this case), clarified this issue in an interview with the *Wall Street Journal's* "The Journal Editorial Report":

> **[Editorial Page Editor and Vice President of the *Wall Street Journal,* Paul] Gigot**: All right, I understand there's another issue here of telephone company liability. That is, for a while the telephone companies cooperated with the National Security Administration in helping with these wiretaps. But after the program was exposed, some of them said, *Wait, for legal liability we're going to reduce our cooperation or perhaps not cooperate at all*. Is this liability protection something the administration wants, and are Democrats resisting?
>
> **[Representative Peter] Hoekstra**: Absolutely. It's something that our communications companies need. These are companies who were doing the patriotic thing. They were helping the U.S. government, the American people, get the information that we believe we needed to keep us safe. They voluntarily participated, and now that the program is exposed, they've been open to all kinds of lawsuits. You know, Congress is not stepping in to protect them.
>
> They now need to go back and take a look at protecting the equities of their shareholders, their customers and their employees. And it's kind of like they're reconsidering their decision to help the federal government, to help our intelligence community voluntarily, because we're not willing to provide them with the protection that they need from these frivolous lawsuits that are out there. So yeah, they have to--they have to do what's in the best interest of their companies.

Exhibit A at pp. 2-3 (italics and bold in original, underline emphasis added).[1] As an initial matter, this transcript makes clear that the "companies" at issue were

[1] Transcript available at <http://www.opinionjournal.com/jer/?id=110010431>

"communications companies." But Representative Hoekstra went further, clarifying that the communications companies who were helping the Government are the very same who are facing the lawsuits in this case and in *In re National Security Agency Telecommunications Records Litigation* (N.D. Cal. MDL No 06-CV-01791 VRW).

Moreover, in arguing for changes to the Foreign Intelligence Surveillance Act, Representative Hoekstra describes the technology used to conduct warrantless surveillance:

> Technology has changed dramatically from when the FISA law went into effect in 1978. The law never kept pace with technology. Right now you try to steal light off of different cables rather than trying to grab stuff out of the air. So that change in technology has required that for the kind of information that's most important to us, real-time collection of information, now requires a warrant.

Exhibit A at p. 2 (emphasis added). The technology Representative Hoekstra describes—stealing light off of different cables for the real-time collection of information—is exactly the same as the technology of the fiber-optic splitter installed in AT&T's facilities, as described in the record evidence. *See e.g.* SER 1-136; *see generally In re: Sealed Case*, __ F.3d __, 2007 WL 2067029, *7 and *9 (D.C. Cir. July 20, 2007) (holding that circumstantial evidence and inferences therefrom are sufficient to make a *prima facie* case).

In light of the Attorney General's admission, Representative Hoekstra's statements, and all the evidence on the record, the Government's claim that it is a state secret "whether any particular company (or type of company) is assisting the Government" in the alleged activities (Gov't Response at p. 6) is meritless.

CONCLUSION

For the reasons stated above and in the initial request, the Plaintiffs-Appellees respectfully request that this Court take judicial notice that the United States has admitted that it sought and received the participation of companies in conducting its warrantless surveillance program.

Respectfully submitted,

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