PUBLIC UNCLASSIFIED EXCERPTS OF RECORD

No. 06-17137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, et al., Plaintiffs - Appellees,

v.

AT&T CORP., et al., Defendants, and

UNITED STATES OF AMERICA, Intervenor - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EXCERPTS OF RECORD

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. AT&T CORP., AT&T INC. and DOES 1-20, inclusive, Defendants.	No. C-06-0672-JCS CLASS ACTION AMENDED COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF DEMAND FOR JURY TRIAL

1. Plaintiffs, by and through their attorneys, bring this action on behalf of themselves and all others similarly situated, and allege upon personal knowledge and belief as to their own acts, and upon information and belief (based on the investigation of counsel) as to all other matters, as to which allegations Plaintiffs believe substantial evidentiary support exists or will exist after a reasonable opportunity for further investigation and discovery, as follows:

PRELIMINARY STATEMENT

2. This case challenges the legality of Defendants' participation in a secret and illegal government program to intercept and analyze vast quantities of Americans' telephone and Internet communications, surveillance done without the authorization of a court and in violation of federal electronic surveillance and telecommunications statutes, as well as the First and Fourth Amendments to the United States Constitution.

3. In December of 2005, the press revealed that the government had instituted a comprehensive and warrantless electronic surveillance program that violates the Constitution and ignores the careful safeguards set forth by Congress. This surveillance program, purportedly authorized by the President at least as early as 2001 and primarily undertaken by the National Security Agency ("NSA") without judicial review or approval, intercepts and analyzes the communications of millions of Americans. Prior to this revelation, Plaintiffs and class members had no reasonable opportunity to discover the existence of the surveillance program or the violations of law alleged herein.

4. But the government did not act – and is not acting – alone. The government requires the collaboration of major telecommunications companies to implement its unprecedented and illegal domestic spying program.

5. Defendants AT&T Corp. and AT&T Inc. maintain domestic telecommunications facilities over which millions of Americans' telephone and Internet communications pass every day.

They also manage some of the largest databases in the world containing records of most or all communications made through their myriad telecommunications services.

6. On information and belief, AT&T Corp. has opened its key telecommunications facilities and databases to direct access by the NSA and/or other government agencies, intercepting and disclosing to the government the contents of its customers' communications as well as detailed communications records about millions of its customers, including Plaintiffs and class members.

7. This collaboration began before AT&T Corp. was acquired by AT&T Inc. (formerly known as SBC Communications, Inc.). On information and belief, Defendants continue to assist the government in its secret surveillance of millions of ordinary Americans.

8. Plaintiffs are suing to stop this illegal conduct and hold Defendants responsible for their illegal collaboration in the surveillance program, which has violated the law and damaged the fundamental freedoms of the American public.

JURISDICTION AND VENUE

9. This court has subject matter jurisdiction over the federal claims pursuant to Article III of the United States Constitution and 28 U.S.C. §1331, 28 U.S.C. §2201, 50 U.S.C. §1810, 18 U.S.C. §§2520 and 2707, and 47 U.S.C. §605, and over the state claims pursuant to 28 U.S.C. §§1332 and 1367.

10. Plaintiffs are informed, believe and thereon allege that Defendants have sufficient contacts with this district generally and, in particular, with the events herein alleged, that Defendants are subject to the exercise of jurisdiction of this court over the person of such Defendants and that venue is proper in this judicial district pursuant to 28 U.S.C. §1391.

11. Plaintiffs are informed, believe and thereon allege that, based on the places of business of the Defendants identified above and/or on the national reach of Defendants, a substantial

part of the events giving rise to the claims herein alleged occurred in this district and that Defendants and/or agents of Defendants may be found in this district.

12. **Intradistrict Assignment**: Assignment to the San Francisco/Oakland division is proper pursuant to Local Rule 3-2(c) and (d) because a substantial portion of the events and omissions giving rise to this lawsuit occurred in this district and division.

PARTIES

13. Plaintiff Tash Hepting, a customer service manager, is an individual residing in San Jose, California. Hepting has been a subscriber and user of AT&T Corp.'s residential long distance telephone service since at least June 2004, and has used it to call internationally as well as domestically.

14. Plaintiff Gregory Hicks is an individual residing in San Jose, California. Hicks, a retired Naval Officer and systems engineer, has been a subscriber and user of AT&T Corp.'s residential long distance telephone service since February 1995. He has regularly used this service for calls to foreign countries including Korea, Japan and Spain.

15. Plaintiff Carolyn Jewel is an individual residing in Petaluma, California. Jewel, a database administrator and author, has been a subscriber and user of AT&T Corp.'s Worldnet dial-up Internet service since approximately June 2000. She uses this service for web browsing and to send and receive email, including with correspondents in foreign countries such as England, Germany, and Indonesia.

16. Plaintiff Erik Knutzen is an individual residing in Los Angeles, California. Knutzen, a photographer and land use researcher, was a subscriber and user of AT&T Corp.'s Worldnet dial-up Internet service from at least October 2003 until May 2005. He used this service to send and receive personal and professional emails, with both domestic and international correspondents, and for web browsing, including visits to web sites hosted outside of the United States.

17. Defendant AT&T Corp. is a New York corporation with its principal place of business in the State of New Jersey.

18. Defendant AT&T Inc. is a Delaware corporation with its principal place of business in San Antonio, Texas.

19. Both AT&T Corp. and AT&T Inc. are telecommunications carriers, and both offer electronic communications service(s) to the public and remote computing service(s).

20. On or around November 18, 2005, SBC Communications Inc. (SBC) acquired AT&T Corp. At closing, a wholly-owned subsidiary of SBC merged with and into AT&T Corp., and thus AT&T Corp. became a wholly-owned subsidiary of SBC. SBC adopted AT&T, Inc. as its name following completion of its acquisition of AT&T Corp.

21. Prior to the acquisition and merger, AT&T Corp. and SBC both had a significant business presence in California for many years. The new AT&T Inc. and its subsidiary, AT&T Corp., continue to have a significant business presence in California.

22. AT&T Corp. operates through two principal divisions, its business services division and its consumer services division. AT&T Business Services provides a variety of communications services to domestic and multi-national businesses and government agencies. AT&T Consumer Services provides a variety of communications services to mass-market customers. These services include traditional long distance voice services such as domestic and international dial and toll-free services, as well as operator-assisted services. In addition, AT&T Consumer Services provides residential dial-up and DSL Internet services through its "Worldnet" service, as well as offering all-distance services, which bundle AT&T's facilities-based long distance services with local services.

23. AT&T Corp.'s communications facilities constitute one of the world's most advanced communications networks, spanning more than 50 countries.

24. By the end of 2004, on an average business day, AT&T Corp.'s network handled over 300 million voice calls as well as over 4,000 terabytes (million megabytes) of data, including traffic from AT&T Business Services and AT&T Consumer Services, approximately 200 times the amount of data contained in all the books in the Library of Congress.

25. By the end of 2004, AT&T Corp. provided long distance service (including both stand-alone and bundled) to approximately 24.6 million residential customers. Before the acquisition, AT&T Corp.'s bundled local and long distance service was available in 46 states, covering more than 73 million households.

26. By the end of 2004, AT&T Corp. provided its residential Worldnet Internet services to approximately 1.2 million customers. Even prior to its being acquired by SBC, AT&T Corp. was the second largest Internet provider in the country, primarily serving businesses in addition to its Worldnet customers.

27. The new AT&T Inc. constitutes the largest telecommunications provider in the United States and one of the largest in the world. AT&T Inc. is the largest U.S. provider of both local and long distance services, serving millions of customers nationwide. AT&T Inc.'s international voice service carries more than 18 billion minutes per year, reaching approximately 240 countries, linking approximately 400 carriers and offering remote access in approximately 149 countries around the globe.

28. AT&T Inc. is the country's largest provider of broadband DSL Internet service, and its backbone Internet network carries approximately 4,600 terabytes of data on an average business day to nearly every continent and country.

29. According to the *Description of the Transaction, Public Interest Showing, and Related Demonstrations* filed by AT&T Corp. and SBC with the Federal Communications Commission in anticipation of the merger:

> AT&T is a significant provider of telecommunications and information technology services to the federal government. AT&T provides network services, systems integration and engineering, and software development services to a broad range of government agencies, including those involved in national defense, intelligence, and homeland security. AT&T's federal customers include the White House, the State Department, the Department of Homeland Security, the Department of Defense, the Department of Justice, and most branches of the armed forces. AT&T's support of the intelligence and defense communities includes the performance of various classified contracts. To undertake this work, AT&T employs thousands of individuals who hold government security clearances, and it maintains special secure facilities for the performance of classified work and the safeguarding of classified information. In addition to providing services to critical government agencies responsible for national security, both AT&T and SBC support the national security infrastructure through their participation in all of the key fora for supporting U.S. government national security objectives.

30. On information and belief, this characterization was substantially correct when filed, and is substantially correct as to the current AT&T Corp. and AT&T Inc.

31. Plaintiffs are currently unaware of the true names and capacities of Defendants sued herein as Does 1-20, and therefore sue these Defendants by using fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. Upon information and belief each fictitiously named Defendant is responsible in some manner for the occurrences herein alleged and the injuries to Plaintiffs and class members herein alleged were proximately caused in relation to the conduct of Does 1-20 as well as the named Defendants. Hereafter, Defendants AT&T Corp. and Does 1-8 are referred to collectively as "AT&T Corp.," and Defendants AT&T Inc. and Does 9-15 are referred to collectively as "AT&T Inc."

FACTUAL ALLEGATIONS RELATED TO ALL COUNTS

THE NSA SURVEILLANCE PROGRAM

32. The NSA began a classified surveillance program ("the Program") shortly after September 11, 2001 to intercept the telephone and Internet communications of people inside the United States without judicial authorization, a program that continues to this day.

33. The President has stated that he authorized the Program in 2001, that he has reauthorized the Program more than 30 times since its inception, and that he intends to continue doing so.

34. The Attorney General has admitted that, absent additional authority from Congress, the electronic surveillance conducted by the Program requires a court order under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §§1801, *et seq*.).

35. The President and other government officials have admitted that the NSA does not seek judicial review of the Program's interceptions before or after the surveillance, whether by the Foreign Intelligence Surveillance Court or any other court.

36. Neither the President nor the Attorney General personally approves the individual targets of the Program's electronic surveillance before communications are intercepted.

37. Instead, NSA operational personnel identify particular persons, telephone numbers or Internet addresses as potential surveillance targets, and NSA shift supervisors approve those targets.

38. On information and belief, besides actually eavesdropping on specific conversations, NSA personnel have intercepted large volumes of domestic and international telephone and Internet traffic in search of patterns of interest, in what has been described in press reports as a large "data-mining" program.

39. On information and belief, as part of this data-mining program, the NSA intercepts millions of communications made or received by people inside the United States, and uses powerful computers to scan their contents for particular names, numbers, words or phrases.

40. Additionally, on information and belief, the NSA collects and analyzes a vast amount of communications traffic data to identify persons whose communications patterns the government believes may link them, even if indirectly, to investigatory targets.

41. On information and belief, the NSA has accomplished its massive surveillance operation by arranging with some of the nation's largest telecommunications companies, including Defendants, to gain direct access to the telephone and Internet communications transmitted via those companies' domestic telecommunications facilities, and to those companies' records pertaining to the communications they transmit.

AT&T PROVIDES THE GOVERNMENT WITH DIRECT ACCESS TO ITS DOMESTIC TELECOMMUNICATIONS NETWORK

42. On information and belief, AT&T Corp. has provided and continues to provide the government with direct access to all or a substantial number of the communications transmitted through its key domestic telecommunications facilities, including direct access to streams of domestic, international and foreign telephone and Internet communications.

43. On information and belief, AT&T Corp. has installed and used, or assisted government agents in installing or using, interception devices and pen registers and/or trap and trace devices on or in a number of its key telecommunications facilities for use in the Program.

44. On information and belief, the interception devices acquire the content of all or a substantial number of the wire or electronic communications transferred through the AT&T Corp. facilities where they have been installed.

45. On information and belief, the pen registers and/or trap and trace devices capture, record or decode the dialing, routing, addressing and/or signaling information ("DRAS information") for all or a substantial number of the wire or electronic communications transferred through the AT&T Corp. facilities where they have been installed.

46. On information and belief, using these devices, government agents have acquired and are acquiring wire or electronic communications content and DRAS information directly via remote or local control of the device, and/or AT&T Corp. has disclosed and is disclosing those

communications and information to the government after interception, capture, recording or decoding.

47. On information and belief, AT&T Corp. used or assisted in the use of these devices to acquire wire or electronic communications to which Plaintiffs and class members were a party, and to acquire DRAS information pertaining to those communications. On information and belief, Defendants continue to do so.

AT&T HAS PROVIDED AND CONTINUES TO PROVIDE THE GOVERNMENT WITH DIRECT ACCESS TO DATABASES CONTAINING ITS STORED TELEPHONE AND INTERNET RECORDS

48. Defendants AT&T Corp. and AT&T Inc. have provided at all relevant times and continue to provide electronic communication services to the public, *i.e.*, services that provide to users thereof the ability to send or receive wire or electronic communications.

49. Defendants AT&T Corp. and AT&T Inc. have provided at all relevant times and continue to provide computer or storage processing services to the public, by means of wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and/or by means of computer facilities or related electronic equipment for the electronic storage of such communications.

50. Plaintiffs and class members are, or at pertinent times were, subscribers to or customers of one or more of those services.

51. On information and belief, AT&T Corp. has provided and continues to provide the government with direct access to its databases of stored telephone and Internet records, which are updated with new information in real time or near-real time.

52. On information and belief, AT&T Corp. has disclosed and is currently disclosing to the government records concerning communications to which Plaintiffs and class members were a party, and there is a strong likelihood that Defendants will disclose more of the same in the future.

53. As reported by the Los Angeles Times, "AT&T has a database code-named Daytona that keeps track of telephone numbers on both ends of calls as well as the duration of all land-line calls. . . . After Sept. 11, intelligence agencies began to view it as a potential investigative tool, and the NSA has had a direct hookup into the database. . . ." Joseph Menn and Josh Meyer, *U.S. Spying is Much Wider, Some Suspect*, L.A. TIMES, Dec. 25, 2005, at A1. On information and belief, this report is substantially correct.

54. Daytona is a database management technology originally developed and maintained by the AT&T Laboratories division of AT&T Corp., and is used by AT&T Corp. to manage multiple databases.

55. Daytona was designed to handle very large databases and is used to manage "Hawkeye," AT&T Corp.'s call detail record ("CDR") database, which contains records of nearly every telephone communication carried over its domestic network since approximately 2001, records that include the originating and terminating telephone numbers and the time and length for each call.

56. On information and belief, this CDR database contains records pertaining to Plaintiffs' and class members' use of AT&T Corp. long distance service and dial-up Internet service, including but not limited to DRAS information and personally identifiable customer proprietary network information (CPNI) that AT&T Corp. obtained by virtue of its provision of telecommunications service.

57. As of September 2005, all of the CDR data managed by Daytona, when uncompressed, totaled more than 312 terabytes.

58. The Daytona system's speed and powerful query language allow users to quickly and easily search the entire contents of a database to find records that match simple or complex search parameters. For example, a Daytona user can query the Hawkeye database for all calls made to a

particular country from a specific area code during a specific month and receive information about all such calls in about one minute.

59. Daytona is also used to manage AT&T Corp.'s huge network-security database, known as Aurora, which has been used to store Internet traffic data since approximately 2003. The Aurora database contains huge amounts of data acquired by firewalls, routers, honeypots and other devices on AT&T Corp.'s global IP (Internet Protocol) network and other networks connected to AT&T Corp.'s network, including but not limited to DRAS information and personally identifiable CPNI that AT&T Corp. obtained by virtue of its provision of telecommunications service.

60. On information and belief, the Aurora database managed and/or accessed via Daytona contains records or other information, including but not limited to DRAS information and CPNI, pertaining to Plaintiffs' and class members' use of AT&T Corp.'s Internet services.

61. On information and belief, AT&T Corp. has provided the government with direct access to the contents of the Hawkeye, Aurora and/or other databases that it manages using Daytona, including all information, records, DRAS information and CPNI pertaining to Plaintiffs and class members, by providing the government with copies of the information in the databases and/or by giving the government access to Daytona's querying capabilities and/or some other technology enabling the government agents to search the databases' contents.

62. AT&T Inc. has begun a transition process designed to integrate the former SBC's telecommunications network with AT&T Corp.'s network, ultimately leading into unified IP-based networks. AT&T Inc. intends to use AT&T Corp.'s IP network in place of the fee-based transiting and backbone access arrangements it currently has with third parties. In addition, others aspects of both companies will be integrated. For example, SBC Laboratories and AT&T Laboratories will be combined into AT&T Labs to provide technology research and development exclusively to the subsidiaries of AT&T Inc.

63. On information and belief, the facilities and technologies of AT&T Corp, including without limitation the Daytona system and those transmission facilities to which the government has been given direct access as alleged above, are being or will imminently be used by AT&T Inc. to transmit the communications of its customers and to store DRAS information and other records pertaining to those communications. Similarly, the facilities and technologies of the former SBC are being or will imminently be used to transmit the communications of AT&T Corp. customers including Plaintiffs and class members.

64. On information and belief, there is a strong likelihood that Defendants will continue to intentionally intercept, disclose, divulge and use Plaintiffs' and class members' communications and records in cooperation with the Program.

CLASS ACTION ALLEGATIONS

65. Pursuant to Federal Rules of Civil Procedure, Rule 23 (a) and (b), Plaintiffs Hepting, Hicks, Jewel and Knutzen bring this action on behalf of themselves and a Nationwide Class of similarly situated persons defined as:

> All individuals in the United States that are current residential subscribers or customers of Defendants' telephone services or Internet services, or that were residential telephone or Internet subscribers or customers at any time after September 2001.

66. The Nationwide Class seeks certification of claims for declaratory relief, injunctive relief and damages pursuant to 50 U.S.C. §1810, 18 U.S.C. §2520, 47 U.S.C. §605, and 18 U.S.C. §2707, in addition to declaratory and injunctive relief for violations of the First and Fourth Amendments.

67. Plaintiffs Hepting, Hicks, Jewel and Knutzen also bring certain of the claims, identified, on behalf of the following California Subclass:

> All individuals that are residents of the State of California and that are current residential subscribers or customers of Defendants' telephone services or Internet services, or that were residential telephone or Internet subscribers or customers at any time after September 2001.

68. The California Subclass seeks certification of claims for declaratory and injunctive relief, and for restitution pursuant to the Unfair Competition Law (Cal. Bus. and Prof. Code §§17200, *et seq*.).

69. Excluded from the Nationwide Class and California Subclass are the officers, directors, and employees of Defendants, and the legal representatives, heirs, successors, and assigns of Defendants.

70. Also excluded from the Nationwide Class and California Subclass are any foreign powers, as defined by 50 U.S.C. §1801(a), or any agents of foreign powers, as defined by 50 U.S.C. §1801(b(1)(A), including without limitation anyone who knowingly engages in sabotage or international terrorism, or activities that are in preparation therefore.

71. This action is brought as a class action and may properly be so maintained pursuant to the provisions of the Federal Rules of Civil Procedure, Rule 23. Plaintiffs reserve the right to modify the Nationwide Class and the California Subclass definitions and the class period based on the results of discovery.

72. **Numerosity of the Nationwide Class and California Subclass**: Members of the Nationwide Class and California Subclass are so numerous that their individual joinder is impracticable. The precise numbers and addresses of members of the Nationwide Class and California Subclass are unknown to the Plaintiffs. Plaintiffs estimate that the Nationwide Class consists of millions of members and the California Subclass consists of hundreds of thousands of members. The precise number of persons in both the Nationwide Class and California Subclass and their identities and addresses may be ascertained from Defendants' records.

73. **Existence of Common Questions of Fact and Law**: There is a well-defined community of interest in the questions of law and fact involved affecting the members of the Nationwide Class and California Subclass. These common legal and factual questions include:

(a) Whether Defendants, acting as agents or instruments of the government, have violated the First and Fourth Amendment rights of Nationwide Class members, or are currently doing so;

(b) Whether Defendants have subjected Nationwide Class members to electronic surveillance, or have disclosed or used information obtained by electronic surveillance of the Nationwide Class members, in violation of 50 U.S.C. §1809, or are currently doing so;

(c) Whether Defendants have intercepted, used or disclosed Nationwide Class members' communications in violation of 18 U.S.C. §2511, or are currently doing so;

(d) Whether Defendants have divulged or published the existence, contents, substance, purport, effect, or meaning of Nationwide Class members' communications in violation of 47 U.S.C. §605(a), or are currently doing so;

(e) Whether Defendants have divulged the contents of Nationwide Class members' communications in violation of 18 U.S.C. §2702(a)(1) or (a)(2), or are currently doing so;

(f) Whether Defendants have divulged subscriber information or other records pertaining to Nationwide Class members in violation of 18 U.S.C. §2702(a)(3), or are currently doing so;

(g) Whether Defendants' interception, use or disclosure of California Subclass members' communications, or the disclosure of subscriber information or other records pertaining to California Subclass members, constitutes unfair, unlawful and/or fraudulent business practices in violation of California's Unfair Competition Law;

(h) Whether Plaintiffs and California Subclass members are entitled to restitution, disgorgement of profits, or other equitable relief to remedy Defendants' unfair, unlawful and/or fraudulent business practices;

(i) Whether Plaintiffs and class members are entitled to recover compensatory, statutory and punitive damages, whether as a result of Defendants' fraudulent, illegal and deceitful conduct, and/or otherwise; and

(j) Whether Plaintiffs and class members are entitled to an award of reasonable attorneys' fees, pre-judgment interest, and costs of this suit.

74. **Typicality**: Plaintiffs' claims are typical of the claims of the members of the Nationwide Class and California Subclass because Plaintiffs are or were subscribers to the Internet and telephone services of Defendants. Plaintiffs and all members of the Nationwide Class and California Subclass have similarly suffered harm arising from Defendants' violations of law, as alleged herein.

75. **Adequacy**: Plaintiffs are adequate representatives of the Nationwide Class and California Subclass because their interests do not conflict with the interests of the members of the classes they seek to represent. Plaintiffs have retained counsel competent and experienced in complex class action litigation and Plaintiffs intends to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately protect the interests of the members of the Nationwide Class and California Subclass.

76. This suit may also be maintained as a class action pursuant to Federal Rules of Civil Procedure, Rule 23(b)(2) because Plaintiffs and both the Nationwide Class and California Subclass seek declaratory and injunctive relief, and all of the above factors of numerosity, common questions of fact and law, typicality and adequacy are present. Moreover, Defendants have acted on grounds generally applicable to Plaintiffs and both the Nationwide Class and California Subclass as a whole, thereby making declaratory and/or injunctive relief proper.

77. **Predominance and Superiority**: This suit may also be maintained as a class action under Federal Rules of Civil Procedure, Rule 23(b)(3) because questions of law and fact common to the Nationwide Class and California Subclass predominate over the questions affecting only individual members of the classes and a class action is superior to other available means for the fair and efficient adjudication of this dispute. The damages suffered by each individual class member may be relatively small, especially given the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendants' conduct. Furthermore, it would be

virtually impossible for the class members, on an individual basis, to obtain effective redress for the wrongs done to them. Moreover, even if class members themselves could afford such individual litigation, the court system could not. Individual litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties and the court system presented by the complex legal issue of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of a single adjudication, economy of scale and comprehensive supervision by a single court.

COUNT I

Violation of Plaintiffs' and Class Members' Rights Under the First and Fourth Amendments to the United States Constitution (Plaintiffs Hepting, Hicks, Jewel and Knutzen and the Nationwide Class [Including the California Subclass] vs. Defendants)

78. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

79. On information and belief, Plaintiffs and class members have a reasonable expectation of privacy in their communications, contents of communications, and/or records pertaining to their communications transmitted, collected, and/or stored by AT&T Corp.

80. On information and belief, Plaintiffs and class members use AT&T Corp.'s services to speak or receive speech anonymously and to associate privately.

81. On information and belief, the above-described acts of interception, disclosure, divulgence and/or use of Plaintiffs' and class members' communications, contents of communications, and records pertaining to their communications occurred without judicial or other lawful authorization, probable cause, and/or individualized suspicion.

82. On information and belief, at all relevant times, the government instigated, directed and/or tacitly approved all of the above-described acts of AT&T Corp.

83. On information and belief, at all relevant times, the government knew of and/or acquiesced in all of the above-described acts of AT&T Corp., and failed to protect the First and Fourth Amendment rights of the Plaintiffs and class members by obtaining judicial authorization.

84. In performing the acts alleged herein, AT&T Corp. had at all relevant times a primary or significant intent to assist or purpose of assisting the government in carrying out the Program and/or other government investigations, rather than to protect its own property or rights.

85. By the acts alleged herein, AT&T Corp. acted as an instrument or agent of the government, and thereby violated Plaintiffs' and class members' reasonable expectations of privacy and denied Plaintiffs and class members their right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the Constitution of the United States, and additionally violated Plaintiffs' and class members' rights to speak and receive speech anonymously and associate privately under the First Amendment.

86. By the acts alleged herein, AT&T Corp.'s conduct proximately caused harm to Plaintiffs and class members.

87. On information and belief, AT&T Corp.'s conduct was done intentionally, with deliberate indifference, or with reckless disregard of, Plaintiffs' and class members' constitutional rights.

88. On information and belief, there is a strong likelihood that Defendants are now engaging in and will continue to engage in the above-described violations of Plaintiffs' and class members' constitutional rights, as agents of the government, and that likelihood represents a credible threat of immediate future harm.

89. Wherefore, Plaintiffs and class members pray for this court to declare that AT&T Corp. has violated their rights under the First and Fourth Amendments to the United States Constitution, and enjoin Defendants and their agents, successors and assigns from violating the

Plaintiffs' and class members' rights under the First and Fourth Amendments to the United States Constitution.

COUNT II

Electronic Surveillance Under Color of Law in Violation of 50 U.S.C. §1809 (Plaintiffs Hepting, Hicks, Jewel and Knutzen and the Nationwide Class [Including the California Subclass] vs. Defendants)

90. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

91. In relevant part, 50 U.S.C. §1809 provides that:

> (a) Prohibited activities – A person is guilty of an offense if he intentionally – (1) engages in electronic surveillance under color of law except as authorized by statute; or (2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

92. In relevant part 50 U.S.C. §1801 provides that:

> (f) "Electronic surveillance" means – (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes; (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18; (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

93. On information and belief, AT&T Corp. has intentionally acquired, by means of a surveillance device, the contents of one or more wire communications to or from Plaintiffs and class members or other information in which Plaintiffs or class members have a reasonable expectation of privacy, without the consent of any party thereto, and such acquisition occurred in the United States.

94. By the acts alleged herein, AT&T Corp. has intentionally engaged in electronic surveillance (as defined by 50 U.S.C. §1801(f)) under color of law, but which is not authorized by any statute, and AT&T Corp. has intentionally subjected Plaintiffs and class members to such electronic surveillance, in violation of 50 U.S.C. §1809.

95. Additionally or in the alternative, by the acts alleged herein, AT&T Corp. has intentionally disclosed or used information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

96. AT&T Corp. did not notify Plaintiffs or class members of the above-described electronic surveillance, disclosure, and/or use, nor did Plaintiffs or class members consent to such.

97. On information and belief, there is a strong likelihood that Defendants are now engaging in and will continue to engage in the above-described electronic surveillance, disclosure, and/or use of Plaintiffs' and class members' wire communications described herein, and that likelihood represents a credible threat of immediate future harm.

98. Plaintiffs and class members have been and are aggrieved by Defendants' electronic surveillance, disclosure, and/or use of their wire communications.

99. Pursuant to 50 U.S.C. §1810, which provides a civil action for any person who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of 50 U.S.C. §1809, Plaintiffs and class members seek equitable and declaratory relief; statutory damages for each Plaintiff and class member of whichever is the greater of $100 a day for each day of violation or $1,000; punitive damages as appropriate; and reasonable attorneys' fees and other litigation costs reasonably incurred.

COUNT III

Interception, Disclosure and/or Use of Communications in Violation of 18 U.S.C. §2511 (Plaintiffs Hepting, Hicks, Jewel and Knutzen and the Nationwide Class [Including the California Subclass] vs. Defendants)

100. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

101. In relevant part, 18 U.S.C. §2511 provides that:

> (1) Except as otherwise specifically provided in this chapter any person who – (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . . [or](d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. §2511 further provides that:

> (3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

102. By the acts alleged herein, AT&T Corp. has intentionally intercepted, endeavored to intercept, or procured another person to intercept or endeavor to intercept, Plaintiffs' and class members' wire or electronic communications in violation of 18 U.S.C. §2511(1)(a); and/or

103. By the acts alleged herein, AT&T Corp. has intentionally disclosed, or endeavored to disclose, to another person the contents of Plaintiffs' and class members' wire or electronic communications, knowing or having reason to know that the information was obtained through the interception of wire or electronic communications in violation of 18 U.S.C. §2511(1)(c); and/or

104. By the acts alleged herein, AT&T Corp. has intentionally used, or endeavored to use, the contents of Plaintiffs' and class members' wire or electronic communications, while knowing or

having reason to know that the information was obtained through the interception of wire or electronic communications in violation of 18 U.S.C. §2511(1)(d); and/or

105. On information and belief, AT&T Corp. has intentionally divulged the contents of Plaintiffs' and class members' wire or electronic communications to persons or entities other than the addressee or intended recipient, or the agents of same, or other providers of wire or electronic communication service, while those communications were in transmission on AT&T Corp.'s electronic communications services, in violation of 18 U.S.C. §2511(3)(a).

106. AT&T Corp. did not notify Plaintiffs or class members of the above-described intentional interception, disclosure, divulgence and/or use of their wire or electronic communications, nor did Plaintiffs or class members consent to such.

107. On information and belief, there is a strong likelihood that Defendants are now engaging in and will continue to engage in the above-described intentional interception, disclosure, divulgence and/or use of Plaintiffs' and class members' wire or electronic communications, and that likelihood represents a credible threat of immediate future harm.

108. Plaintiffs and class members have been and are aggrieved by Defendants' intentional interception, disclosure, divulgence and/or use of their wire or electronic communications.

109. Pursuant to 18 U.S.C. §2520, which provides a civil action for any person whose wire or electronic communications have been intercepted, disclosed or intentionally used in violation of 18 U.S.C. §2511, Plaintiffs and class members seek equitable and declaratory relief; statutory damages for each Plaintiff and class member of whichever is the greater of $100 a day for each day of violation or $10,000; punitive damages as appropriate; and reasonable attorneys' fees and other litigation costs reasonably incurred.

COUNT IV

Unauthorized Publication and/or Use of Communications in Violation of 47 U.S.C. §605 (Plaintiffs Hepting, Hicks, Jewel and Knutzen and The NationwideClass [Including the California Subclass] vs. Defendants)

110. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

111. In relevant part, 47 U.S.C. §605 provides that:

> (a) Practices prohibited – Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority.

112. AT&T Corp. received, assisted in receiving, transmitted, or assisted in transmitting, Plaintiffs' and class members' interstate or foreign communications by wire or radio.

113. By the acts alleged herein, AT&T Corp. divulged or published the existence, contents, substance, purport, effect, or meaning of such communications, by means other than through authorized channels of transmission or reception, in violation of 47 U.S.C. §605.

114. On information and belief, such divulgence or publication was willful and for purposes of direct or indirect commercial advantage or private financial gain.

115. AT&T Corp. did not notify Plaintiffs or class members of the divulgence or publication of their communications, nor did Plaintiffs or class members consent to such.

116. On information and belief, there is a strong likelihood that Defendants are now engaging in and will continue to engage in the above-described divulgence or publication of Plaintiffs' and class members' wire or radio communications, and that likelihood represents a credible threat of immediate future harm.

117. Plaintiffs and class members have been and are aggrieved by Defendants' divulgence or publication of their wire or radio communications.

118. Pursuant to 47 U.S.C. §605(e)(3)(A), which provides a civil action for any person whose wire or electronic communications have been divulged or published in violation of 47 U.S.C. §605(a), Plaintiffs and class members seek temporary and final injunctions on such terms as the Court deems reasonable to prevent or restrain such violations; statutory damages of not less than $1,000 or more than $10,000 for each violation aggrieving each Plaintiff and class member, as the Court considers just; in the Court's discretion, an increase in the reward of damages to each Plaintiff and class member by an amount of not more than $100,000 for each violation; and the recovery of full costs, including reasonable attorneys' fees.

COUNT V

Divulgence of Communications Contents in Violation of 18 U.S.C. §§2702(a)(1) and/or (a)(2) (Plaintiffs Hepting, Hicks, Jewel and Knutzen and the Natiowide Class [Including the California Subclass] vs. Defendants)

119. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

120. In relevant part, 18 U.S.C. §2702 provides that:

> (a) Prohibitions. – Except as provided in subsection (b) – (1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and (2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service – (A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service; (B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing. . . .

121. On information and belief, AT&T Corp. knowingly divulged to one or more persons or entities the contents of Plaintiffs' and class members' communications while in electronic storage

by an AT&T Corp. electronic communication service, and/or while carried or maintained by an AT&T Corp. remote computing service, in violation of 18 U.S.C. §§2702(a)(1) and/or (a)(2).

122. AT&T Corp. did not notify Plaintiffs or class members of the divulgence of their communications, nor did Plaintiffs or class members consent to such.

123. On information and belief, there is a strong likelihood that Defendants are now engaging in and will continue to engage in the above-described divulgence of Plaintiffs' and class members' communications while in electronic storage by Defendants' electronic communication service(s), and/or while carried or maintained by Defendants' remote computing service(s), and that likelihood represents a credible threat of immediate future harm.

124. Plaintiffs and class members have been and are aggrieved by Defendants' above-described divulgence of the contents of their communications.

125. Pursuant to 18 U.S.C. §2707, which provides a civil action for any person aggrieved by knowing or intentional violation of 18 U.S.C. §2702, Plaintiffs and class members seek such preliminary and other equitable or declaratory relief as may be appropriate; statutory damages of no less than $1000 for each aggrieved Plaintiff or class member; punitive damages as the Court considers just; and reasonable attorneys' fees and other litigation costs reasonably incurred.

COUNT VI

Divulgence Of Communications Records In Violation Of 18 U.S.C. §2702(A)(3)
(Plaintiffs Hepting, Hicks, Jewel and Knutzen and the Nationwide Class [Including the California Subclass] vs. Defendants)

126. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

127. In relevant part, 18 U.S.C. §2702 provides that:

> (a) Prohibitions. – Except as provided in subsection (b) – (3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

128. On information and belief, AT&T Corp., a provider of remote computing service and electronic communication service to the public, knowingly divulged records or other information pertaining to Plaintiffs and class members to a governmental entity in violation of 18 U.S.C. §2702(a)(3).

129. AT&T Corp. did not notify Plaintiffs or class members of the divulgence of these records and other information pertaining to them and their use of AT&T Corp. services, nor did Plaintiffs or class members consent to such.

130. On information and belief, there is a strong likelihood that Defendants are now engaging in and will continue to engage in the above-described divulgence of records or other information pertaining to Plaintiffs and class members, and that likelihood represents a credible threat of immediate future harm.

131. Plaintiffs and class members have been and are aggrieved by Defendants' above-described divulgence of records or other information pertaining to Plaintiffs and class members.

132. Pursuant to 18 U.S.C. §2707, which provides a civil action for any person aggrieved by knowing or intentional violation of 18 U.S.C. §2702, Plaintiffs and class members seek such preliminary and other equitable or declaratory relief as may be appropriate; statutory damages of no less than $1000 for each aggrieved Plaintiff or class member; punitive damages as the Court considers just; and reasonable attorneys' fee and other litigation costs reasonably incurred.

COUNT VII

Unfair, Unlawful And Deceptive Business Practices
(Plaintiffs Hepting, Hicks, Jewel and Knutzen and the California Subclass vs. Defendants)

133. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

134. Defendants have engaged in unfair, unlawful and/or fraudulent business practices as set forth above.

135. By engaging in the acts and practices described herein, Defendants have committed one or more unfair business practices within the meaning of Bus. & Prof. Code §§17200, *et seq*. Specifically, Defendants' business practices offend the public policies set forth in California Constitution Art. 1, section 1.

136. Defendants' above-described deceptive and misleading acts and practices have deceived and/or are likely to deceive Plaintiffs and other California Subclass members. Plaintiffs were, in fact, deceived as to the terms and conditions of services provided by defendants. Plaintiffs and California Subclass members have suffered harm as a result of Defendants' misrepresentations and/or omissions.

137. Defendants' acts and practices are also unlawful because, as described above, they violate the First and Fourth Amendments to the United States Constitution, 50 U.S.C. §1809, 18 U.S.C. §2511, 47 U.S.C. §605, 18 U.S.C. §2702(a)(1) and/or (a)(2), and 18 U.S.C. §2702(a)(3).

138. AT&T Corp.'s acts and practices are also unlawful because they violate 18 U.S.C. §3121.

139. In relevant part, 18 U.S.C. §3121 provides that:

> (a) In general. – Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of this title or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 *et seq*.).

As defined by 18 U.S.C. §3127:

> (3) the term "pen register" means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business;
>
> (4) the term "trap and trace device" means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify

> the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication;

140. On information and belief, AT&T Corp. installed or used pen registers and/or trap and trace devices without first obtaining a court order under 18 U.S.C. §3123 or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §§1801, *et seq.*), and continue to do so.

141. On information and belief, the pen registers and/or trap and trace devices installed and used by AT&T Corp. have captured, recorded, or decoded, and continue to capture, record or decode, dialing, routing, addressing or signaling information pertaining to Plaintiff and/or California Subclass members' wire or electronic communications.

142. AT&T Corp. did not notify Plaintiffs or California Subclass members of the installation or use of pen registers and/or trap and trace devices, nor did Plaintiffs or California Subclass members consent to such.

143. AT&T Corp.'s acts and practices are also unlawful because they violate 47 U.S.C. §222, which in relevant part provides that:

> (c) Confidentiality of customer proprietary network information – (1) Privacy requirements for telecommunications carriers – Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

144. AT&T Corp. is a telecommunications carrier that obtains and has obtained customer proprietary network information by virtue of its provision of telecommunications service.

145. On information and belief, AT&T Corp. used, disclosed and/or provided to government entities individually identifiable customer proprietary network information pertaining to Plaintiffs and California Subclass members, and continue to do so.

146. AT&T Corp. did not notify Plaintiffs or California Subclass members of the disclosure and/or provision of their personally identifiable customer proprietary network information to government entities, nor did Plaintiffs or California Subclass members consent to such.

147. Plaintiffs and the California Subclass have suffered injury in fact and have lost money or property as a result of such unfair and unlawful business practices. Such injuries and losses include, but are not limited to, the service fees and other fees and charges paid to AT&T Corp. Neither the Plaintiffs nor any reasonable California Subclass member would have paid such fees and charges for AT&T Corp. services had they first known of AT&T Corp.'s unlawful acts and practices.

148. On information and belief, there is a strong likelihood that Defendants are now engaging in and will continue to engage in the above-described electronic surveillance, disclosure, and/or use of Plaintiffs' and class members' wire communications, and that likelihood represents a credible threat of immediate future harm.

149. Plaintiffs and the California Subclass seek restitution, disgorgement, injunctive relief and all other relief from Defendants allowed under §§17200, *et seq*. Plaintiffs and the California Subclass also seek attorneys' fees pursuant to Cal. Code Civ. Proc. §1021.5, as well as such other and further relief as the Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs for themselves and all others similarly situated respectfully request that the Court:

A. Declare that Defendants' participation in the Program as alleged herein violates applicable law including without limitation:

(i) The First and Fourth Amendments to the United States Constitution, 50 U.S.C. §1809, 18 U.S.C. §2511, 47 U.S.C. §605, and 18 U.S.C. §2702, as to Plaintiffs and the Nationwide Class; and

(ii) Cal. Bus. & Prof. Code §§17200, *et seq*., as to Plaintiffs and the California Subclass.

B. Award equitable relief, including without limitation, a preliminary and permanent injunction prohibiting Defendants' continued or future participation in the Program:

(i) Pursuant to the First and Fourth Amendments to the United States Constitution, 50 U.S.C. §1810, 18 U.S.C. §2520(b)(1), 47 U.S.C. §605(e)(3)(b)(i), and 18 U.S.C. §2707(b)(1), as to the Plaintiffs and the Nationwide Class; and

(ii) Pursuant to Cal. Bus. & Prof. Code §§17200, *et seq*., as to Plaintiffs and California Subclass;

C. Award statutory damages to the extent permitted by law to each Plaintiff and class member in the sum of:

(i) $100 per day for each day of violation of 50 U.S.C. §1809 aggrieving that Plaintiff or class member or $1,000, whichever is greater, pursuant to 50 U.S.C. §1810(a);

(ii) $100 a day for each violation of 18 U.S.C. §2511 aggrieving that Plaintiff or class member or $10,000, whichever is greater, pursuant to 18 U.S.C. §2520(c)(2)(A);

(iii) Not less than $1,000 or more than $10,000 for each violation aggrieving that Plaintiff or class member, as the court considers just, pursuant to 47 U.S.C. §605(e)(3)(C)(i)(II); and

(iv) $1000 pursuant to 18 U.S.C. §2707(c);

D. Award punitive damages to the extent permitted by law to each Plaintiff and class member, including without limitation:

(i) An appropriate sum pursuant to 50 U.S.C. §1810(b);

(ii) An appropriate sum pursuant to 18 U.S.C. §2520(b)(2); and

(iii) Not more than $100,000 per violation of 47 U.S.C. §605(a) aggrieving that Plaintiff or class member, in the court's discretion, pursuant to 47 U.S.C. §605(e)(3)(C)(ii);

E. Award to Plaintiffs attorneys' fees and other costs of suit to the extent permitted by law, including without limitation pursuant to 50 U.S.C. §1810(c), 18 U.S.C. §2520(b)(3), 47 U.S.C. §605(e)(3)(B)(iii), 18 U.S.C. §2707(b)(3), and Cal. Code Civ. Proc. §1021.5;

F. Award restitution, disgorgement, preliminary and permanent injunctive relief and all other relief allowed under §§17200, *et seq*. to Plaintiffs and the California Subclass;

G. Grant such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby request a jury trial for all issues triable by jury including, but not limited to, those issues and claims set forth in any amended complaint or consolidated action.

DATED: February 22, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ REED R. KATHREIN
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President George W. Bush

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For Immediate Release
Office of the Press Secretary
December 19, 2005

Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence

James S. Brady Briefing Room

8:30 A.M. EST

MR. McCLELLAN: Good morning, everybody. I've got with me the Attorney General and General Hayden here this morning to brief you on the legal issues surrounding the NSA authorization and take whatever questions you have for them on that. The Attorney General will open with some comments and then they'll be glad to take your questions.

And with that, I'll turn it over to General Gonzales.

ATTORNEY GENERAL GONZALES: Thanks, Scott.

The President confirmed the existence of a highly classified program on Saturday. The program remains highly classified; there are many operational aspects of the program that have still not been disclosed and we want to protect that because those aspects of the program are very, very important to protect the national security of this country. So I'm only going to be talking about the legal underpinnings for what has been disclosed by the President.

The President has authorized a program to engage in electronic surveillance of a particular kind, and this would be the intercepts of contents of communications where one of the -- one party to the communication is outside the United States. And this is a very important point -- people are running around saying that the United States is somehow spying on American citizens calling their neighbors. Very, very important to understand that one party to the communication has to be outside the United States.

Another very important point to remember is that we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda. We view these authorities as authorities to confront the enemy in which the United States is at war with -- and that is al Qaeda and those who are supporting or affiliated with al Qaeda.

What we're trying to do is learn of communications, back and forth, from within the United States to overseas with members of al Qaeda. And that's what this program is about.

Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act provides -- requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday, unless there is somehow -- there is -- unless otherwise authorized by statute or by Congress. That's what the law requires. Our position is, is that the authorization to use force, which was passed by the Congress in the days following September 11th, constitutes that other authorization, that other statute by Congress, to engage in this kind of signals intelligence.

Now, that -- one might argue, now, wait a minute, there's nothing in the authorization to use force that specifically mentions electronic surveillance. Let me take you back to a case that the Supreme Court reviewed this past -- in 2004, the Hamdi decision. As you remember, in that case, Mr. Hamdi was a U.S. citizen who was contesting his detention by the United States government. What he said was that there is a statute, he said, that specifically prohibits the detention of American citizens without permission, an act by Congress -- and he's right, 18 USC 4001a requires that the United States government cannot detain an American citizen except by an act of Congress.

We took the position -- the United States government took the position that Congress had authorized that detention in the authorization to use force, even though the authorization to use force never mentions the word "detention." And the Supreme Court, a plurality written by Justice O'Connor agreed. She said, it was clear and unmistakable that the Congress had authorized the detention of an American citizen captured on the battlefield as an enemy combatant for the remainder -- the duration of the hostilities. So even though the authorization to use force did not mention the word, "detention," she felt that detention of enemy soldiers captured on the battlefield was a fundamental incident of waging war, and therefore, had been authorized by Congress when they used the words, "authorize the President to use all necessary and appropriate force."

For the same reason, we believe signals intelligence is even more a fundamental incident of war, and we believe has been authorized by the Congress. And even though signals intelligence is not mentioned in the authorization to use force, we believe that the Court would apply the same reasoning to recognize the authorization by Congress to engage in this kind of electronic surveillance.

I might also add that we also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity. Signals intelligence has been a fundamental aspect of waging war since the Civil War, where we intercepted telegraphs, obviously, during the world wars, as we intercepted telegrams in and out of the United States. Signals intelligence is very important for the United States government to know what the enemy is doing, to know what the enemy is about to do. It is a fundamental incident of war, as Justice O'Connor talked about in the Hamdi decision. We believe that -- and those two authorities exist to allow, permit the United States government to engage in this kind of surveillance.

The President, of course, is very concerned about the protection of civil liberties, and that's why we've got strict parameters, strict guidelines in place out at NSA to ensure that the program is operating in a way that is consistent with the President's directives. And, again, the authorization by the President is only to engage in surveillance of communications where one party is outside the United States, and where we have a reasonable basis to conclude that one of the parties of the communication is either a member of al Qaeda or affiliated with al Qaeda.

Mike, do you want to -- have anything to add?

GENERAL HAYDEN: I'd just add, in terms of what we do globally with regard to signals intelligence, which is a critical part of defending the nation, there are probably no communications more important to what it is we're trying to do to defend the nation; no communication is more important for that purpose than those communications that involve al Qaeda, and one end of which is inside the homeland, one end of which is inside the United States. Our purpose here is to detect and prevent attacks. And the program in this regard has been successful.

Q General, are you able to say how many Americans were caught in this surveillance?

ATTORNEY GENERAL GONZALES: I'm not -- I can't get into the specific numbers because that information remains classified. Again, this is not a situation where -- of domestic spying. To the extent that there is a moderate and heavy communication involving an American citizen, it would be a communication where the other end of the call is outside the United States and where we believe that either the American citizen or the person outside the United States is somehow affiliated with al Qaeda.

Q General, can you tell us why you don't choose to go to the FISA court?

ATTORNEY GENERAL GONZALES: Well, we continue to go to the FISA court and obtain orders. It is a very important tool that we continue to utilize. Our position is that we are not legally required to do, in this particular case, because the law requires that we -- FISA requires that we get a court order, unless authorized by a statute, and we believe that authorization has occurred.

The operators out at NSA tell me that we don't have the speed and the agility that we need, in all circumstances, to deal with this new kind of enemy. You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology --

Q But it's been kind of retroactively, hasn't it?

ATTORNEY GENERAL GONZALES: -- since then. Pardon me?

Q It's been done retroactively before, hasn't it?

ATTORNEY GENERAL GONZALES: What do you mean, "retroactively"?

Q You just go ahead and then you apply for the FISA clearance, because it's damn near automatic.

ATTORNEY GENERAL GONZALES: If we -- but there are standards that have to be met, obviously, and you're right, there is a procedure where we -- an emergency procedure that allows us to make a decision to authorize -- to utilize FISA, and then we go to the court and get confirmation of that authority.

But, again, FISA is very important in the war on terror, but it doesn't provide the speed and the agility that we need in all circumstances to deal with this new kind of threat.

Q But what -- go ahead.

GENERAL HAYDEN: Let me just add to the response to the last question. As the Attorney General says, FISA is very important, we make full use of FISA. But if you picture what FISA was designed to do, FISA is designed to handle the needs in the nation in two broad categories: there's a law enforcement aspect of it; and the other aspect is the continued collection of foreign intelligence. I don't think anyone could claim that FISA was envisaged as a tool to cover armed enemy combatants in preparation for attacks inside the United States. And that's what this authorization under the President is designed to help us do.

Q Have you identified armed enemy combatants, through this program, in the United States?

GENERAL HAYDEN: This program has been successful in detecting and preventing attacks inside the United States.

Q General Hayden, I know you're not going to talk about specifics about that, and you say it's been successful. But would it have been as successful -- can you unequivocally say that something has been stopped or there was an imminent attack or you got information through this that you could not have gotten through going to the court?

GENERAL HAYDEN: I can say unequivocally, all right, that we have got information through this program that would not otherwise have been available.

Q Through the court? Because of the speed that you got it?

GENERAL HAYDEN: Yes, because of the speed, because of the procedures, because of the processes and requirements set up in the FISA process, I can say unequivocally that we have used this program in lieu of that and this program has been successful.

Q But one of the things that concerns people is the slippery slope. If you said you absolutely need this program, you have to do it quickly -- then if you have someone you suspect being a member of al Qaeda, and they're in the United States, and there is a phone call between two people in the United States, why not use that, then, if it's so important? Why not go that route? Why not go further?

GENERAL HAYDEN: Across the board, there is a judgment that we all have to make -- and I made this speech a day or two after 9/11 to the NSA workforce -- I said, free peoples always have to judge where they want to be on that spectrum between security and liberty; that there will be great pressures on us after those attacks to move our national banner down in the direction of security. What I said to the NSA workforce is, our job is to keep Americans free by making Americans feel safe again. That's been the mission of the National Security Agency since the day after the attack, is when I talked -- two days after the attack is when I said that to the workforce.

There's always a balancing between security and liberty. We understand that this is a more -- I'll use the word "aggressive" program than would be traditionally available under FISA. It is also less intrusive. It deals only with international calls. It is generally for far shorter periods of time. And it is not designed to collect reams of intelligence, but to detect and warn and prevent about attacks. And, therefore, that's where we've decided to draw that balance between security and liberty.

Q Gentlemen, can you say when Congress was first briefed, who was included in that, and will there be a leaks investigation?

ATTORNEY GENERAL GONZALES: Well of course, we're not going to -- we don't talk about -- we try not to talk about nvestigations. As to whether or not there will be a leak investigation, as the President indicated, this is really hurting national security, this has really hurt our country, and we are concerned that a very valuable tool has been compromised. As to whether or not there will be a leak investigation, we'll just have to wait and see.

And your first question was?

Q When was Congress first briefed --

ATTORNEY GENERAL GONZALES: I'm not going to -- I'm not going to talk about -- I'll let others talk about when Congress was rst briefed. What I can say is, as the President indicated on Saturday, there have been numerous briefings with certain key nembers of Congress. Obviously, some members have come out since the revelations on Saturday, saying that they hadn't een briefed. This is a very classified program. It is probably the most classified program that exists in the United States overnment, because the tools are so valuable, and therefore, decisions were made to brief only key members of Congress. We ave begun the process now of reaching out to other members of Congress. I met last night, for example, with Chairman pecter and other members of Congress to talk about the legal aspects of this program.

And so we are engaged in a dialogue now to talk with Congress, but also -- but we're still mindful of the fact that still -- this is still a very highly classified program, and there are still limits about what we can say today, even to certain members of Congress.

Q General, what's really compromised by the public knowledge of this program? Don't you assume that the other side thinks we're listening to them? I mean, come on.

GENERAL HAYDEN: The fact that this program has been successful is proof to me that what you claim to be an assumption is certainly not universal. The more we discuss it, the more we put it in the face of those who would do us harm, the more they will respond to this and protect their communications and make it more difficult for us to defend the nation.

Q Mr. Attorney General --

Q -- became public, have you seen any evidence in a change in the tactics or --

ATTORNEY GENERAL GONZALES: We're not going to comment on that kind of operational aspect.

Q You say this has really hurt the American people. Is that based only on your feeling about it, or is there some empirical evidence to back that up, even if you can't --

ATTORNEY GENERAL GONZALES: I think the existence of this program, the confirmation of the -- I mean, the fact that this program exists, in my judgment, has compromised national security, as the President indicated on Saturday.

Q I'd like to ask you, what are the constitutional limits on this power that you see laid out in the statute and in your inherent constitutional war power? And what's to prevent you from just listening to everyone's conversation and trying to find the word "bomb," or something like that?

ATTORNEY GENERAL GONZALES: Well, that's a good question. This was a question that was raised in some of my discussions last night with members of Congress. The President has not authorized -- has not authorized blanket surveillance of communications here in the United States. He's been very clear about the kind of surveillance that we're going to engage in. And that surveillance is tied with our conflict with al Qaeda.

You know, we feel comfortable that this surveillance is consistent with requirements of the 4th Amendment. The touchstone of the 4th Amendment is reasonableness, and the Supreme Court has long held that there are exceptions to the warrant requirement in -- when special needs outside the law enforcement arena. And we think that that standard has been met here. When you're talking about communications involving al Qaeda, when you -- obviously there are significant privacy interests implicated here, but we think that those privacy interests have been addressed; when you think about the fact that this is an authorization that's ongoing, it's not a permanent authorization, it has to be reevaluated from time to time. There are additional safeguards that have been in place -- that have been imposed out at NSA, and we believe that it is a reasonable application of these authorities.

Q Mr. Attorney General, haven't you stretched --

Q -- adequate because of technological advances? Wouldn't you do the country a better service to address that issue and fix it, instead of doing a backdoor approach --

ATTORNEY GENERAL GONZALES: This is not a backdoor approach. We believe Congress has authorized this kind of surveillance. We have had discussions with Congress in the past -- certain members of Congress -- as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.

Q If this is not backdoor, is this at least a judgment call? Can you see why other people would look at it and say, well, no, we don't see it that way?

ATTORNEY GENERAL GONZALES: I think some of the concern is because people had not been briefed; they don't understand the specifics of the program, they don't understand the strict safeguards within the program. And I haven't had a discussion -- an opportunity to have a discussion with them about our legal analysis. So, obviously, we're in that process now. Part of the reason for this press brief today is to have you help us educate the American people and the American Congress about what we're doing and the legal basis for what we're doing.

Q Al, you talk about the successes and the critical intercepts of the program. Have there also been cases in which after listening

in or intercepting, you realize you had the wrong guy and you listened to what you shouldn't have?

GENERAL HAYDEN: That's why I mentioned earlier that the program is less intrusive. It deals only with international calls. The time period in which we would conduct our work is much shorter, in general, overall, than it would be under FISA. And one of the true purposes of this is to be very agile, as you described.

If this particular line of logic, this reasoning that took us to this place proves to be inaccurate, we move off of it right away.

Q Are there cases in which --

GENERAL HAYDEN: Yes, of course.

Q Can you give us some idea of percentage, or how often you get it right and how often you get it wrong?

GENERAL HAYDEN: No, it would be very -- no, I cannot, without getting into the operational details. I'm sorry.

Q But there are cases where you wind up listening in where you realize you shouldn't have?

GENERAL HAYDEN: There are cases like we do with regard to the global SIGIN system -- you have reasons to go after particular activities, particular communications. There's a logic; there is a standard as to why you would go after that, not just in a legal sense, which is very powerful, but in a practical sense. We can't waste resources on targets that simply don't provide valuable information. And when we decide that is the case -- and in this program, the standards, in terms of re-evaluating whether or not this coverage is worthwhile at all, are measured in days and weeks.

Q Would someone in a case in which you got it wrong have a cause of action against the government?

ATTORNEY GENERAL GONZALES: That is something I'm not going to answer, Ken.

Q I wanted to ask you a question. Do you think the government has the right to break the law?

ATTORNEY GENERAL GONZALES: Absolutely not. I don't believe anyone is above the law.

Q You have stretched this resolution for war into giving you carte blanche to do anything you want to do.

ATTORNEY GENERAL GONZALES: Well, one might make that same argument in connection with detention of American citizens, which is far more intrusive than listening into a conversation. There may be some members of Congress who might say, we never --

Q That's your interpretation. That isn't Congress' interpretation.

ATTORNEY GENERAL GONZALES: Well, I'm just giving you the analysis --

Q You're never supposed to spy on Americans.

ATTORNEY GENERAL GONZALES: I'm just giving the analysis used by Justice O'Connor -- and she said clearly and inmistakenly the Congress authorized the President of the United States to detain an American citizen, even though the uthorization to use force never mentions the word "detention" --

Q -- into wiretapping everybody and listening in on --

TTORNEY GENERAL GONZALES: This is not about wiretapping everyone. This is a very concentrated, very limited program ocused at gaining information about our enemy.

Q Now that the cat is out of the bag, so to speak, do you expect your legal analysis to be tested in the courts?

TTORNEY GENERAL GONZALES: I'm not going to, you know, try to guess as to what's going to happen about that. We're oing to continue to try to educate the American people and the American Congress about what we're doing and the basis -- hy we believe that the President has the authority to engage in this kind of conduct.

Q Because there are some very smart legal minds who clearly think a law has been broken here.

ATTORNEY GENERAL GONZALES: Well, I think that they may be making or offering up those opinions or assumptions based on very limited information. They don't have all the information about the program. I think they probably don't have the information about our legal analysis.

Q Judge Gonzales, will you release then, for the reasons you're saying now, the declassified versions of the legal rationale for this from OLC? And if not, why not? To assure the American public that this was done with the legal authority that you state.

ATTORNEY GENERAL GONZALES: We're engaged now in a process of educating the American people, again, and educating the Congress. We'll make the appropriate evaluation at the appropriate time as to whether or not additional information needs to be provided to the Congress or the American people.

Q You declassified OLC opinions before, after the torture -- why not do that here to show, yes, we went through a process?

ATTORNEY GENERAL GONZALES: I'm not confirming the existence of opinions or the non-existence of opinions. I've offered up today our legal analysis of the authorities of this President.

Q Sir, can you explain, please, the specific inadequacies in FISA that have prevented you from sort of going through the normal channels?

GENERAL HAYDEN: One, the whole key here is agility. And let me re-trace some grounds I tried to suggest earlier. FISA was built for persistence. FISA was built for long-term coverage against known agents of an enemy power. And the purpose involved in each of those -- in those cases was either for a long-term law enforcement purpose or a long-term intelligence purpose.

This program isn't for that. This is to detect and prevent. And here the key is not so much persistence as it is agility. It's a quicker trigger. It's a subtly softer trigger. And the intrusion into privacy -- the intrusion into privacy is significantly less. It's only international calls. The period of time in which we do this is, in most cases, far less than that which would be gained by getting a court order. And our purpose here, our sole purpose is to detect and prevent.

Again, I make the point, what we are talking about here are communications we have every reason to believe are al Qaeda communications, one end of which is in the United States. And I don't think any of us would want any inefficiencies in our coverage of those kinds of communications, above all. And that's what this program allows us to do -- it allows us to be as agile as operationally required to cover these targets.

Q But how does FISA --

GENERAL HAYDEN: FISA involves the process -- FISA involves marshaling arguments; FISA involves looping paperwork around, even in the case of emergency authorizations from the Attorney General. And beyond that, it's a little -- it's difficult for me to get into further discussions as to why this is more optimized under this process without, frankly, revealing too much about what it is we do and why and how we do it.

Q If FISA didn't work, why didn't you seek a new statute that allowed something like this legally?

ATTORNEY GENERAL GONZALES: That question was asked earlier. We've had discussions with members of Congress, certain members of Congress, about whether or not we could get an amendment to FISA, and we were advised that that was not likely to be -- that was not something we could likely get, certainly not without jeopardizing the existence of the program, and therefore, killing the program. And that -- and so a decision was made that because we felt that the authorities were there, that we should continue moving forward with this program.

Q And who determined that these targets were al Qaeda? Did you wiretap them?

GENERAL HAYDEN: The judgment is made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply -- and it's a two-person standard that must be signed off by a shift supervisor, and carefully recorded as to what created the operational imperative to cover any target, but particularly with regard to those inside the United States.

Q So a shift supervisor is now making decisions that a FISA judge would normally make? I just want to make sure I understand. Is that what you're saying?

GENERAL HAYDEN: What we're trying to do is to use the approach we have used globally against al Qaeda, the operational necessity to cover targets. And the reason I emphasize that this is done at the operational level is to remove any question in your mind that this is in any way politically influenced. This is done to chase those who would do harm to the United States.

Q Building on that, during --

Q Thank you, General. Roughly when did those conversations occur with members of Congress?

ATTORNEY GENERAL GONZALEZ: I'm not going to get into the specifics of when those conversations occurred, but they have occurred.

Q May I just ask you if they were recently or if they were when you began making these exceptions?

ATTORNEY GENERAL GONZALEZ: They weren't recently.

MR. McCLELLAN: The President indicated that those -- the weeks after September 11th.

Q What was the date, though, of the first executive order? Can you give us that?

GENERAL HAYDEN: If I could just, before you ask that question, just add -- these actions that I described taking place at the operational level -- and I believe that a very important point to be made -- have intense oversight by the NSA Inspector General, by the NSA General Counsel, and by officials of the Justice Department who routinely look into this process and verify that the standards set out by the President are being followed.

Q Can you absolutely assure us that all of the communications intercepted --

Q Have you said that you -- (inaudible) -- anything about this program with your international partners -- with the partners probably in the territories of which you intercept those communications?

ATTORNEY GENERAL GONZALEZ: I'm not aware of discussions with other countries, but that doesn't mean that they haven't occurred. I simply have no personal knowledge of that.

Q Also, is it only al Qaeda, or maybe some other terrorist groups?

ATTORNEY GENERAL GONZALEZ: Again, with respect to what the President discussed on Saturday, this program -- it is tied to communications where we believe one of the parties is affiliated with al Qaeda or part of an organization or group that is supportive of al Qaeda.

Q Sir, during his confirmation hearings, it came out that now-Ambassador Bolton had sought and obtained NSA intercepts of conversations between American citizens and others. Who gets the information from this program; how do you guarantee that it doesn't get too widely spread inside the government, and used for other purposes?

Q And is it destroyed afterwards?

GENERAL HAYDEN: We report this information the way we report any other information collected by the National Security Agency. And the phrase you're talking about is called minimization of U.S. identities. The same minimalizationist standards apply across the board, including for this program. To make this very clear -- U.S. identities are minimized in all of NSA's activities, unless, of course, the U.S. identity is essential to understand the inherent intelligence value of the intelligence report. And that's the standard that's used.

Q General, when you discussed the emergency powers, you said, agility is critical here. And in the case of the emergency powers, as I understand it, you can go in, do whatever you need to do, and within 72 hours just report it after the fact. And as you say, these may not even last very long at all. What would be the difficulty in setting up a paperwork system in which the logs that you say you have the shift supervisors record are simply sent to a judge after the fact? If the judge says that this is not legitimate, by that time probably your intercept is over, wouldn't that be correct?

GENERAL HAYDEN: What you're talking about now are efficiencies. What you're asking me is, can we do this program as efficiently using the one avenue provided to us by the FISA Act, as opposed to the avenue provided to us by subsequent legislation and the President's authorization.

Our operational judgment, given the threat to the nation that the difference in the operational efficiencies between those two sets of authorities are such that we can provide greater protection for the nation operating under this authorization.

Q But while you're getting an additional efficiency, you're also operating outside of an existing law. If the law would allow you to stay within the law and be slightly less efficient, would that be --

ATTORNEY GENERAL GONZALEZ: I guess I disagree with that characterization. I think that this electronic surveillance is within the law, has been authorized. I mean, that is our position. We're only required to achieve a court order through FISA if we don't have authorization otherwise by the Congress, and we think that that has occurred in this particular case.

Q Can you just give us one assurance before you go, General?

ATTORNEY GENERAL GONZALEZ: It depends on what it is. (Laughter.)

Q Can you assure us that all of these intercepts had an international component and that at no time were any of the intercepts purely domestic?

GENERAL HAYDEN: The authorization given to NSA by the President requires that one end of these communications has to be outside the United States. I can assure you, by the physics of the intercept, by how we actually conduct our activities, that one end of these communications are always outside the United States of America.

END 9:02 A.M. EST

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS CAROLYN JEWEL and ERIK KNUTZEN on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

AT&T CORP., AT&T INC. and DOES 1-20, inclusive,

Defendants.

Case No. C-06-0672-VRW

DECLARATION OF JOHN D. NEGROPONTE, DIRECTOR OF NATIONAL INTELLIGENCE

I, John D. Negroponte, declare as follows:

INTRODUCTION

1. I am the Director of National Intelligence (DNI) of the United States. I have held this position since April 21, 2005. From June 28, 2004, until appointed to be DNI, I served as United States Ambassador to Iraq. From September 18, 2001, until my appointment in Iraq, I served as the United States Permanent Representative to the United Nations. I have also served as Ambassador to Honduras (1981-1985), Mexico (1989-1993), the Philippines (1993-1996), and as Deputy Assistant to the President for National Security Affairs (1987-1989).

2. In the course of my official duties, I have been advised of this lawsuit and the allegations at issue in this case. The statements made herein are based on my personal knowledge, as well as on information provided to me in my official capacity as DNI, and on my personal evaluation of that information. In personally considering this matter, I have executed a separate classified declaration dated May 12, 2006, and filed *in camera* and *ex parte* in this case. Moreover, I have read and personally considered the information contained in the *In Camera, Ex Parte* Declaration of Lt. Gen. Keith B. Alexander filed in this case. General Alexander is the

Director of the National Security Agency ("NSA"), and is responsible for directing the NSA, overseeing the operations undertaken to carry out its mission, and by specific charge from the President and the DNI, protecting NSA activities and intelligence sources and methods.

3. The purpose of this declaration is to formally assert, in my capacity as DNI and head of the United States Intelligence Community, the military and state secrets privilege (hereafter "state secrets privilege"), as well as a statutory privilege under the National Security Act, *see* 50 U.S.C. § 403-1(i)(1), in order to protect intelligence information, sources and methods that are implicated by the allegations in this case. Disclosure of the information covered by these privilege assertions reasonably could be expected to cause exceptionally grave damage to the national security of the United States and, therefore, should be excluded from any use in this case. In addition, I concur with General Alexander's conclusion that the risk is great that further litigation will risk the disclosure of information harmful to the national security of the United States and, accordingly, this case should be dismissed. *See* Declaration of Lt. Gen. Keith B. Alexander, Director, National Security Agency.

BACKGROUND ON DIRECTOR OF NATIONAL INTELLIGENCE

4. The position of Director of National Intelligence was created by Congress in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending sections 102 through 104 of the Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the President, the DNI serves as the head of the U.S. Intelligence Community and as the principal advisor to the President, the National Security Council, and the Homeland Security Council, for intelligence-related matters related to national security. *See* 50 U.S.C. § 403(b)(1), (2).

5. The "United States Intelligence Community" includes the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of

specialized national intelligence through reconnaissance programs; the intelligence elements of the military services, the Federal Bureau of Investigation, the Department of Treasury, the Department of Energy, Drug Enforcement Administration, and the Coast Guard; the Bureau of Intelligence and Research of the Department of State; the elements of the Department of Homeland Security concerned with the analysis of intelligence information; and such other elements of any other department or agency as may be designated by the President, or jointly designated by the DNI and heads of the department or agency concerned, as an element of the Intelligence Community. *See* 50 U.S.C. § 401a(4).

6. The responsibilities and authorities of the DNI are set forth in the National Security Act, as amended. *See* 50 U.S.C. § 403-1. These responsibilities include ensuring that national intelligence is provided to the President, the heads of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C. § 403-1(a)(1). The DNI is also charged with establishing the objectives of, determining the requirements and priorities for, and managing and directing the tasking, collection, analysis, production, and dissemination of national intelligence by elements of the Intelligence Community. *Id.* § 403-1(f)(1)(A)(i) and (ii). The DNI is also responsible for developing and determining, based on proposals submitted by heads of agencies and departments within the Intelligence Community, an annual consolidated budget for the National Intelligence Program for presentation to the President, and for ensuring the effective execution of the annual budget for intelligence and intelligence-related activities, and for managing and allotting appropriations for the National Intelligence Program. *Id.* § 403-1(c)(1)-(5).

7. In addition, the National Security Act of 1947, as amended, provides that "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI establishes and implements guidelines for the Intelligence Community for the classification of

information under applicable law, Executive Orders, or other Presidential directives and access and dissemination of intelligence. *Id.* § 403-1(i)(2)(A), (B). In particular, the DNI is responsible for the establishment of uniform standards and procedures for the grant of access to Sensitive Compartmented Information ("SCI") to any officer or employee of any agency or department of the United States, and for ensuring consistent implementation of those standards throughout such departments and agencies. *Id.* § 403-1(j)(1), (2).

8. By virtue of my position as the DNI, and unless otherwise directed by the President, I have access to all intelligence related to the national security that is collected by any department, agency, or other entity of the United States. Pursuant to Executive Order No. 12958, 3 C.F.R. § 333 (1995), as amended by Executive Order 13292 (March 25, 2003), reprinted as amended in 50 U.S.C.A. § 435 at 93 (Supp. 2004), the President has authorized me to exercise original TOP SECRET classification authority. My classified declaration, as well as the classified declaration of General Alexander on which I relied in this case, are properly classified under § 1.3 of Executive Order 12958, as amended, because the public disclosure of the information contained in those declarations could reasonably be expected to cause serious damage to the foreign policy and national security of the United States.

ASSERTION OF THE STATE SECRETS PRIVILEGE

9. After careful and actual personal consideration of the matter, I have determined that the disclosure of certain information implicated by Plaintiffs' claims—as set forth here and described in more detail in my classified declaration and in the classified declaration of General Alexander—could reasonably be expected to cause exceptionally grave damage to the national security of the United States and, thus, must be protected from disclosure and excluded from this case. Thus, as to this information, I formally invoke and assert the state secrets privilege. In addition, it is my judgment that any attempt to proceed in the case will substantially risk the disclosure of the privileged information described briefly herein, and in more detail in the classified declarations, and will cause exceptionally grave damage to the national security of the

United States.

10. Through this declaration, I also invoke and assert a statutory privilege held by the DNI under the National Security Act to protect intelligence sources and methods implicated by this case. *See* 50 U.S.C. § 403-1(i)(1). My assertion of this statutory privilege for intelligence information and sources and methods is coextensive with my state secrets privilege assertion.

INFORMATION SUBJECT TO CLAIMS OF PRIVILEGE

11. In an effort to counter the al Qaeda threat, the President of United States authorized the NSA to utilize its SIGINT capabilities to collect certain "one-end foreign" communications where one party is associated with the al Qaeda terrorist organization for the purpose of detecting and preventing another terrorist attack on the United States. This activity is known as the Terrorist Surveillance Program ("TSP"). To discuss this activity in any greater detail, however, would disclose classified intelligence information and reveal intelligence sources and methods, which would enable adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to the United States' national security interests. Thus, any further elaboration on the public record concerning the TSP would reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent. The classified declaration of General Alexander that I considered in making this privilege assertion, as well as my own separate classified declaration, provide a more detailed explanation of the information at issue and the harms to national security that would result from its disclosure.

12. Plaintiffs also make allegations regarding other purported activities of the NSA, including allegations about NSA's purported involvement with AT&T. The United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, relationships, or targets. For example, disclosure of those who are targeted by such activities would compromise the collection of intelligence information just as disclosure of those who are

not targeted would reveal to adversaries that certain communications channels are secure or, more broadly, would tend to reveal the methods being used to conduct surveillance. The only recourse for the Intelligence Community and, in this case, for the NSA, is to neither confirm nor deny these sorts of allegations, regardless of whether they are true or false. To say otherwise when challenged in litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general. Thus, as with the other categories of information discussed in this declaration, any further elaboration on the public record concerning these matters would reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent. The classified declaration of General Alexander that I considered in making this privilege assertion, as well as my own separate classified declaration, provide a more detailed explanation of the information at issue, the reasons why it is implicated by Plaintiffs' claims, and the harms to national security that would result from its disclosure.

CONCLUSION

13. In sum, I formally invoke and assert the state secrets privilege, as well as a statutory privilege under the National Security Act, to prevent the disclosure of the information detailed in the two classified declarations that are available for the Court's *in camera* and *ex parte* review. Moreover, because proceedings in this case risk disclosure of privileged and classified intelligence-related information, I join with General Alexander in respectfully requesting that the Court dismiss this case to stem the harms to the national security of the United States that will occur if it is litigated.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 5/12/2006

JOHN D. NEGROPONTE
Director of National Intelligence

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS CAROLYN JEWEL and ERIK KNUTZEN on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

AT&T CORP., AT&T INC. and DOES 1-20, inclusive,

Defendants.

Case No. C-06-0672-VRW

DECLARATION OF LIEUTENANT GENERAL KEITH B. ALEXANDER, DIRECTOR, NATIONAL SECURITY AGENCY

I, Keith B. Alexander, declare as follows:

INTRODUCTION

1. I am the Director of the National Security Agency (NSA), an intelligence agency within the Department of Defense. I am responsible for directing the NSA, overseeing the operations undertaken to carry out its mission and, by specific charge of the President and the Director of National Intelligence, protecting NSA activities and intelligence sources and methods. I have been designated an original TOP SECRET classification authority under Executive Order No. 12958, 60 Fed. Reg. 19825 (1995), as amended on March 25, 2003, and Department of Defense Directive No. 5200.1-R, Information Security Program Regulations, 32 C.F.R. § 159a.12 (2000).

2. The purpose of this declaration is to support the assertion of a formal claim of the military and state secrets privilege (hereafter "state secrets privilege"), as well as a statutory privilege, by the Director of National Intelligence (DNI) as the head of the intelligence community. In this declaration, I also assert a statutory privilege with respect to information about NSA activities. For the reasons described below, and in my classified declaration

provided separately to the court for *in camera* and *ex parte* review, the disclosure of the information covered by these privilege assertions would cause exceptionally grave damage to the national security of the United States. The statements made herein, and in my classified declaration, are based on my personal knowledge of NSA operations and on information made available to me as Director of the NSA.

THE NATIONAL SECURITY AGENCY

3. The NSA was established by Presidential Directive in 1952 as a separately organized agency within the Department of Defense. Under Executive Order 12333, § 1.12.(b), as amended, NSA's cryptologic mission includes three functions: (1) to collect, process, and disseminate signals intelligence ("SIGINT") information, of which communications intelligence ("COMINT") is a significant subset, for (a) national foreign intelligence purpose, (b) counterintelligence purposes, and (c) the support of military operations; (2) to conduct information security activities; and (3) to conduct operations security training for the U.S. Government.

4. There are two primary reasons for gathering and analyzing intelligence information. The first, and most important, is to gain information required to direct U.S. resources as necessary to counter external threats. The second reason is to obtain information necessary to the formulation of the United States' foreign policy. Foreign intelligence information provided by NSA is thus relevant to a wide range of important issues, including military order of battle; threat warnings and readiness; arms proliferation; terrorism; and foreign aspects of international narcotics trafficking.

5. In the course of my official duties, I have been advised of this litigation and reviewed the allegations in Plaintiffs' Amended Complaint and Motion for a Preliminary Injunction. As described herein and in my separate classified declaration, information implicated by Plaintiffs' claims is subject to the state secrets privilege assertion in this case by the DNI. The disclosure of this information reasonably could be expected to cause exceptionally

grave damage to the national security of the United States. In addition, it is my judgment that any attempt to proceed in the case will substantially risk disclosure of the privileged information and will cause exceptionally grave damage to the national security of the United States.

6. Through this declaration, I also hereby invoke and assert NSA's statutory privilege to protect information related to NSA activities described below and in more detail in my classified declaration. NSA's statutory privilege is set forth in section 6 of the National Security Agency Act of 1959 (NSA Act), Public Law No. 86-36 (codified as a note to 50 U.S.C. § 402). Section 6 of the NSA Act provides that "[n]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency [or] any information with respect to the activities thereof. . . ." By this language, Congress expressed its determination that disclosure of any information relating to NSA activities is potentially harmful. Section 6 states unequivocally that, notwithstanding *any* other law, NSA cannot be compelled to disclose *any* information with respect to its authorities. Further, NSA is not required to demonstrate specific harm to national security when invoking this statutory privilege, but only to show that the information relates to its activities. Thus, to invoke this privilege, NSA must demonstrate only that the information to be protected falls within the scope of section 6. NSA's functions and activities are therefore protected from disclosure regardless of whether or not the information is classified.

INFORMATION SUBJECT TO CLAIMS OF PRIVILEGE

7. Following the attacks of September 11, 2001, the President of United States authorized the NSA to utilize its SIGINT capabilities to collect certain "one-end foreign" communications where one party is associated with the al Qaeda terrorist organization under the Terrorist Surveillance Program (TSP) for the purpose of detecting and preventing another terrorist attack on the United States. Any further elaboration on the public record concerning the TSP would reveal information that could cause the very harms that the DNI's assertion of the state secrets privilege is intended to prevent. My separate classified declaration provides a more

detailed explanation of the information at issue and the harms to national security that would result from its disclosure.

8. Plaintiffs also make allegations regarding other purported activities of the NSA, including allegations about the NSA's purported involvement with AT&T. Regardless of whether these allegations are accurate or not, the United States can neither confirm nor deny alleged NSA activities, relationships, or targets. To do otherwise when challenged in litigation would result in the exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general. For example, if the United States denied allegations about intelligence targets in cases where such allegations were false, but remained silent in cases where the allegations were accurate, it would tend to reveal that the individuals in the latter cases were targets. Any further elaboration on the public record concerning these matters would reveal information that could cause the very harms that the DNI's assertion of the state secrets privilege is intended to prevent. My separate classified declaration provides a more detailed explanation of the information at issue and the harms to national security that would result from its disclosure.

CONCLUSION

9. In sum, I support the DNI's assertion of the state secrets privilege and statutory privilege to prevent the disclosure of the information detailed in my classified declaration that is available for the Court's *in camera* and *ex parte* review. I also assert a statutory privilege with respect to information about NSA activities. Moreover, because proceedings in this case risk disclosure of privileged and classified intelligence-related information, I respectfully request that the Court not only protect that information from disclosure, but also dismiss this case to stem the harms to the national security of the United States that will occur if it is litigated.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 12 May 06

LT. GEN. KEITH B. ALEXANDER
Director, National Security Agency

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INTENTIONALLY OMITTED

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, et al, **No C-06-672 VRW**

Plaintiffs, **ORDER**

v

AT&T CORPORATION, et al,

Defendants.

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Plaintiffs allege that AT&T Corporation (AT&T) and its holding company, AT&T Inc, are collaborating with the National Security Agency (NSA) in a massive warrantless surveillance program that illegally tracks the domestic and foreign communications and communication records of millions of Americans. The first amended complaint (Doc #8 (FAC)), filed on February 22, 2006, claims that AT&T and AT&T Inc have committed violations of:

(1) The First and Fourth Amendments to the United States Constitution (acting as agents or instruments of the government) by illegally intercepting, disclosing, divulging and/or using plaintiffs' communications;

(2) Section 109 of Title I of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 USC § 1809, by engaging in illegal electronic surveillance of plaintiffs' communications under color of law;

(3) Section 802 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by section 101 of Title I of the Electronic Communications Privacy Act of 1986 (ECPA), 18 USC §§ 2511(1)(a), (1)(c), (1)(d) and (3)(a), by illegally intercepting, disclosing, using and/or divulging plaintiffs' communications;

(4) Section 705 of Title VII of the Communications Act of 1934, as amended, 47 USC § 605, by unauthorized divulgence and/or publication of plaintiffs' communications;

(5) Section 201 of Title II of the ECPA ("Stored Communications Act"), as amended, 18 USC §§ 2702(a)(1) and (a)(2), by illegally divulging the contents of plaintiffs' communications;

(6) Section 201 of the Stored Communications Act, as amended by section 212 of Title II of the USA PATRIOT Act, 18 USC § 2702(a)(3), by illegally divulging records concerning plaintiffs' communications to a governmental entity and

(7) California's Unfair Competition Law, Cal Bus & Prof Code §§ 17200 et seq, by engaging in unfair, unlawful and deceptive business practices.

The complaint seeks certification of a class action and redress through statutory damages, punitive damages, restitution, disgorgement and injunctive and declaratory relief.

On April 5, 2006, plaintiffs moved for a preliminary injunction seeking to enjoin defendants' allegedly illegal activity. Doc #30 (MPI). Plaintiffs supported their motion by filing under seal three documents, obtained by former AT&T technician Mark Klein, which allegedly demonstrate how AT&T has implemented a warrantless surveillance system on behalf of the NSA at a San Francisco AT&T facility. Doc #31, Exs A-C (the "AT&T documents"). Plaintiffs also filed under seal supporting declarations from Klein (Doc #31) and J Scott Marcus (Doc #32), a putative expert who reviewed the AT&T documents and the Klein declaration.

On April 28, 2006, AT&T moved to dismiss this case. Doc #86 (AT&T MTD). AT&T contends that plaintiffs lack standing and were required but failed to plead affirmatively that AT&T did not receive a government certification pursuant to 18 USC § 2511(2)(a)(ii)(B). AT&T also contends it is entitled to statutory, common law and qualified immunity.

On May 13, 2006, the United States moved to intervene as a defendant and moved for dismissal or, alternatively, for summary judgment based on the state secrets privilege. Doc #124-1 (Gov MTD). The government supported its assertion of the state secrets privilege with public declarations from the Director of National Intelligence, John D Negroponte (Doc #124-2 (Negroponte Decl)), and the Director of the NSA, Keith B Alexander (Doc #124-3 (Alexander Decl), and encouraged the court to review additional classified submissions *in camera* and *ex parte*. The government also asserted two statutory privileges under 50 USC § 402 *note* and 50 USC § 403-1(i)(1).

At a May 17, 2006, hearing, the court requested additional briefing from the parties addressing (1) whether this case could be decided without resolving the state secrets issue, thereby obviating any need for the court to review the government's classified submissions and (2) whether the state secrets issue is implicated by an FRCP 30(b)(6) deposition request for information about any certification that AT&T may have received from the government authorizing the alleged wiretapping activities. Based on the parties' submissions, the court concluded in a June 6, 2006, order that this case could not proceed and discovery could not commence until the court examined *in camera* and *ex parte* the classified documents to assess whether and to what extent the state secrets privilege applies. Doc #171.

After performing this review, the court heard oral argument on the motions to dismiss on June 23, 2006. For the reasons discussed herein, the court DENIES the government's motion to dismiss and DENIES AT&T's motion to dismiss.

I

The court first addresses the government's motion to dismiss or, alternatively, for judgment on state secrets grounds. After exploring the history and principles underlying the state secrets privilege and summarizing the government's arguments, the court turns to whether the state secrets privilege applies and requires dismissal of this action or immediate entry of judgment in favor of defendants. The court then takes up how the asserted privilege bears on plaintiffs' discovery request for any government certification that AT&T might have received authorizing the alleged

surveillance activities. Finally, the court addresses the statutory privileges raised by the government.

A

"The state secrets privilege is a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security. Although the exact origins of the privilege are not certain, the privilege in this country has its initial roots in Aaron Burr's trial for treason, and has its modern roots in United States v Reynolds, 345 US 1 (1953)." In re United States, 872 F2d 472, 474-75 (DC Cir 1989) (citations omitted and altered). In his trial for treason, Burr moved for a *subpoena duces tecum* ordering President Jefferson to produce a letter by General James Wilkinson. United States v Burr, 25 F Cas 30, 32 (CCD Va 1807). Responding to the government's argument "that the letter contains material which ought not to be disclosed," Chief Justice Marshall riding circuit noted, "What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country." Id at 37. Although the court issued the subpoena, id at 37-38, it noted that if the letter "contain[s] any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed." Id at 37.

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The actions of another president were at issue in Totten v United States, 92 US 105 (1876), in which the Supreme Court established an important precursor to the modern-day state secrets privilege. In that case, the administrator of a former spy's estate sued the government based on a contract the spy allegedly made with President Lincoln to recover compensation for espionage services rendered during the Civil War. Id at 105-06. The Totten Court found the action to be barred:

> **The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.**

Id at 106, quoted in Tenet v Doe, 544 US 1, 7-8 (2005). Hence, given the secrecy implied in such a contract, the Totten Court "thought it entirely incompatible with the nature of such a contract that a former spy could bring suit to enforce it." Tenet, 544 US at 8. Additionally, the Totten Court observed:

> **It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. * * * Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.**

Totten, 92 US at 107. Characterizing this aspect of Totten, the Supreme Court has noted, "No matter the clothing in which alleged spies dress their claims, Totten precludes judicial review in cases such as [plaintiffs'] where success depends upon the existence of their secret espionage relationship with the Government." Tenet, 544 US at 8. "Totten's core concern" is "preventing the existence of the [alleged spy's] relationship with the Government from being revealed." Id at 10.

In the Cold War era case of Reynolds v United States, 345 US 1 (1953), the Supreme Court first articulated the state secrets privilege in its modern form. After a B-29 military aircraft crashed and killed three civilian observers, their widows sued the government under the Federal Tort Claims Act and sought discovery of the Air Force's official accident investigation. Id at 2-3. The Secretary of the Air Force filed a formal "Claim of Privilege" and the government refused to produce the relevant documents to the court for *in camera* review. Id at 4-5. The district court deemed as established facts regarding negligence and entered judgment for plaintiffs. Id at 5. The Third Circuit affirmed and the Supreme Court granted certiorari to determine "whether there was a valid claim of privilege under [FRCP 34]." Id at 6. Noting this country's theretofore limited judicial experience with "the privilege which protects military and state secrets," the court stated:

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> The privilege belongs to the Government and must be asserted by it * * *. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

Id at 7-8 (footnotes omitted). The latter determination requires a "formula of compromise," as "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," yet a court may not "automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." Id at 9-10. Striking this balance, the Supreme Court held that the "occasion for the privilege is appropriate" when a court is satisfied "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." Id at 10.

The degree to which the court may "probe in satisfying itself that the occasion for invoking the privilege is appropriate" turns on "the showing of necessity which is made" by plaintiffs. Id at 11. "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." Id. Finding both a "reasonable danger that the accident investigation report would contain" state secrets and a "dubious showing of necessity," the court reversed the Third Circuit's decision and sustained the claim of privilege. Id at 10-12.

In Halkin v Helms, 598 F2d 1 (DC Cir 1978) (Halkin I), the District of Columbia Circuit applied the principles enunciated in Reynolds in an action alleging illegal NSA wiretapping. Former Vietnam War protestors contended that "the NSA conducted warrantless interceptions of their international wire, cable and telephone communications" at the request of various federal defendants and with the cooperation of telecommunications providers. Id at 3. Plaintiffs challenged two separate NSA operations: operation MINARET, which was "part of [NSA's] regular signals intelligence activity in which foreign electronic signals were monitored," and operation SHAMROCK, which involved "processing of all telegraphic traffic leaving or entering the United States." Id at 4.

The government moved to dismiss on state secrets grounds, arguing that civil discovery would impermissibly "(1) confirm the identity of individuals or organizations whose foreign communications were acquired by NSA, (2) disclose the dates and contents of such communications, or (3) divulge the methods and techniques by which the communications were acquired by NSA." Id at 4-5. After plaintiffs "succeeded in obtaining a limited amount of discovery," the district court concluded that plaintiffs' claims challenging operation MINARET could not proceed because "the ultimate issue, the fact of acquisition, could neither be admitted nor denied." Id at 5. The court denied the government's motion to dismiss on claims challenging operation SHAMROCK because the court "thought congressional committees investigating intelligence matters had revealed so much information about SHAMROCK that such a disclosure would pose no threat to the NSA mission." Id at 10.

On certified appeal, the District of Columbia Circuit noted that even "seemingly innocuous" information is privileged if that information is part of a classified "mosaic" that "can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." Id at 8. The court affirmed dismissal of the claims related to operation MINARET but reversed the district court's rejection of the privilege as to operation SHAMROCK, reasoning that "confirmation or denial that a particular plaintiff's communications have been acquired would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst." Id at 10. On remand, the district court dismissed plaintiffs' claims against the NSA and individuals connected with the NSA's alleged monitoring. Plaintiffs were left with claims against the Central Intelligence Agency (CIA) and individuals who had allegedly submitted watchlists to the NSA on the presumption that the submission resulted in interception of plaintiffs' communications. The district court eventually dismissed the CIA-related claims as well on state secrets grounds and the case went up again to the court of appeals.

The District of Columbia Circuit stated that the state secrets inquiry "is not a balancing of ultimate interests at stake in the litigation," but rather "whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case." Halkin v Helms, 690 F2d 977, 990 (DC Cir 1982) (Halkin II). The court then affirmed dismissal of "the claims for injunctive and declaratory relief against the CIA defendants based upon their submission of plaintiffs' names on

'watchlists' to NSA." Id at 997 (emphasis omitted). The court found that plaintiffs lacked standing given the court's "ruling in Halkin I that evidence of the fact of acquisition of plaintiffs' communications by NSA cannot be obtained from the government, nor can such fact be presumed from the submission of watchlists to that Agency." Id at 999 (emphasis omitted).

In Ellsberg v Mitchell, 709 F2d 51 (DC Cir 1983), the District of Columbia Circuit addressed the state secrets privilege in another wiretapping case. Former defendants and attorneys in the "Pentagon Papers" criminal prosecution sued individuals who allegedly were responsible for conducting warrantless electronic surveillance. Id at 52-53. In response to plaintiffs' interrogatories, defendants admitted to two wiretaps but refused to answer other questions on the ground that the requested information was privileged. Id at 53. The district court sustained the government's formal assertion of the state secrets privilege and dismissed plaintiffs' claims pertaining to foreign communications surveillance. Id at 56.

On appeal, the District of Columbia Circuit noted that "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." Id at 57. The court generally affirmed the district court's decisions regarding the privilege, finding "a 'reasonable danger' that revelation of the information in question would either enable a sophisticated analyst to gain insights into the nation's intelligence-gathering methods and capabilities or would disrupt diplomatic relations with foreign governments." Id at 59. The court disagreed with the district court's decision that the

privilege precluded discovery of the names of the attorneys general that authorized the surveillance. Id at 60.

Additionally, responding to plaintiffs' argument that the district court should have required the government to disclose more fully its basis for asserting the privilege, the court recognized that "procedural innovation" was within the district court's discretion and noted that "[t]he government's public statement need be no more (and no less) specific than is practicable under the circumstances." Id at 64.

In considering the effect of the privilege, the court affirmed dismissal "with regard to those [individuals] whom the government ha[d] not admitted overhearing." Id at 65. But the court did not dismiss the claims relating to the wiretaps that the government had conceded, noting that there was no reason to "suspend the general rule that the burden is on those seeking an exemption from the Fourth Amendment warrant requirement to show the need for it." Id at 68.

In Kasza v Browner, 133 F3d 1159 (9th Cir 1998), the Ninth Circuit issued its definitive opinion on the state secrets privilege. Former employees at a classified United States Air Force facility brought a citizen suit under the Resource Conservation and Recovery Act (RCRA), 42 USC § 6972, alleging the Air Force violated that act. Id at 1162. The district court granted summary judgment against plaintiffs, finding discovery of information related to chemical inventories impossible due to the state secrets privilege. Id. On appeal, plaintiffs argued that an exemption in the RCRA preempted the state secrets privilege and even if not preempted, the privilege was improperly asserted and

too broadly applied. Id at 1167-69. After characterizing the state secrets privilege as a matter of federal common law, the Ninth Circuit recognized that "statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Id at 1167 (omissions in original) (citations omitted). Finding no such purpose, the court held that the statutory exemption did not preempt the state secrets privilege. Id at 1168.

Kasza also explained that the state secrets privilege can require dismissal of a case in three distinct ways. "First, by invoking the privilege over particular evidence, the evidence is completely removed from the case. The plaintiff's case then goes forward based on evidence not covered by the privilege. * * * If, after further proceedings, the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." Id at 1166. Second, "if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant." Id (internal quotation omitted) (emphasis in original). Finally, and most relevant here, "notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." Id (quoting Reynolds, 345 US at 11 n26). See also Reynolds, 345 US at 11 n26 (characterizing Totten as a case "where the very subject

matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege.").

According the "utmost deference" to the government's claim of privilege and noting that even "seemingly innocuous information" could be "part of a classified mosaic," id at 1166, Kasza concluded after *in camera* review of classified declarations "that release of such information would reasonably endanger national security interests." Id at 1170. Because "no protective procedure" could salvage plaintiffs' case, and "the very subject matter of [her] action [was] a state secret," the court affirmed dismissal. Id.

More recently, in Tenet v Doe, 544 US 1 (2005), the Supreme Court reaffirmed Totten, holding that an alleged former Cold War spy could not sue the government to enforce its obligations under a covert espionage agreement. Id at 3. Importantly, the Court held that Reynolds did not "replac[e] the categorical Totten bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships." Id at 9-10.

Even more recently, in El-Masri v Tenet, 2006 WL 1391390, 05-cv-01417 (ED Va May 12, 2006), plaintiff sued the former director of the CIA and private corporations involved in a program of "extraordinary rendition," pursuant to which plaintiff was allegedly beaten, tortured and imprisoned because the government mistakenly believed he was affiliated with the al Qaeda terrorist organization. Id at *1-2. The government intervened "to protect

its interests in preserving state secrets." Id at *3. The court sustained the government's assertion of the privilege:

> [T]he substance of El-Masri's publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. And, as the public declaration makes pellucidly clear, any admission or denial of these allegations by defendants * * * would present a grave risk of injury to national security.

Id at *5. The court also rejected plaintiff's argument "that government officials' public affirmation of the existence" of the rendition program somehow undercut the claim of privilege because the government's general admission provided "no details as to the [program's] means and methods," which were "validly claimed as state secrets." Id. Having validated the exercise of privilege, the court reasoned that dismissal was required because "any answer to the complaint by the defendants risk[ed] the disclosure of specific details [of the program]" and special discovery procedures would have been "plainly ineffective where, as here, the entire aim of the suit [was] to prove the existence of state secrets." Id at *6.

B

Relying on Kasza, the government advances three reasons why the state secrets privilege requires dismissing this action or granting summary judgment for AT&T: (1) the very subject matter of this case is a state secret; (2) plaintiffs cannot make a *prima facie* case for their claims without classified evidence and (3) the privilege effectively deprives AT&T of information necessary to raise valid defenses. Doc #245-1 (Gov Reply) at 3-5.

In support of its contention that the very subject matter of this action is a state secret, the government argues: "AT&T cannot even confirm or deny the key factual premise underlying [p]laintiffs' entire case —– that AT&T has provided any assistance whatsoever to NSA regarding foreign-intelligence surveillance. Indeed, in the formulation of Reynolds and Kasza, that allegation is 'the very subject of the action.'" Id at 4-5.

Additionally, the government claims that dismissal is appropriate because plaintiffs cannot establish a *prima facie* case for their claims. Contending that plaintiffs "persistently confuse speculative allegations and untested assertions for established facts," the government attacks the Klein and Marcus declarations and the various media reports that plaintiffs rely on to demonstrate standing. Id at 4. The government also argues that "[e]ven when alleged facts have been the 'subject of widespread media and public speculation' based on '[u]nofficial leaks and public surmise,' those alleged facts are not actually established in the public domain." Id at 8 (quoting Afshar v Dept of State, 702 F2d 1125, 1130-31 (DC Cir 1983)).

The government further contends that its "privilege assertion covers any information tending to confirm or deny (a) the alleged intelligence activities, (b) whether AT&T was involved with any such activity, and (c) whether a particular individual's communications were intercepted as a result of any such activity." Gov MTD at 17-18. The government reasons that "[w]ithout these facts * * * [p]laintiffs ultimately will not be able to prove injury-in-fact and causation," thereby justifying dismissal of this action for lack of standing. Id at 18.

The government also notes that plaintiffs do not fall within the scope of the publicly disclosed "terrorist surveillance program" (see *infra* I(C)(1)) because "[p]laintiffs do not claim to be, or to communicate with, members or affiliates of [the] al Qaeda [terrorist organization] –– indeed, [p]laintiffs expressly exclude from their purported class any foreign powers or agent of foreign powers * * *." Id at 18 n9 (citing FAC, ¶ 70). Hence, the government concludes the named plaintiffs "are in no different position from any other citizen or AT&T subscriber who falls outside the narrow scope of the [terrorist surveillance program] but nonetheless disagrees with the program." Id (emphasis in original).

Additionally, the government contends that plaintiffs' Fourth Amendment claim fails because no warrant is required for the alleged searches. In particular, the government contends that the executive has inherent constitutional authority to conduct warrantless searches for foreign intelligence purposes, id at 24 (citing In re Sealed Case, 310 F3d 717, 742 (For Intel Surv Ct of Rev 2002)), and that the warrant requirement does not apply here because this case involves "special needs" that go beyond a routine interest in law enforcement, id at 26. Accordingly, to make a *prima facie* case, the government asserts that plaintiffs would have to demonstrate that the alleged searches were unreasonable, which would require a fact-intensive inquiry that the government contends plaintiffs could not perform because of the asserted privilege. Id at 26-27.

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The government also argues that plaintiffs cannot establish a *prima facie* case for their statutory claims because plaintiffs must prove "that any alleged interception or disclosure was not authorized by the Government." The government maintains that "[p]laintiffs bear the burden of alleging and proving the lack of such authorization," id at 21-22, and that they cannot meet that burden because "information confirming or denying AT&T's involvement in alleged intelligence activities is covered by the state secrets assertion." Id at 23.

Because "the existence or non-existence of any certification or authorization by the Government relating to any AT&T activity would be information tending to confirm or deny AT&T's involvement in any alleged intelligence activity," Doc #145-1 (Gov 5/17/06 Br) at 17, the government contends that its state secrets assertion precludes AT&T from "present[ing] the facts that would constitute its defenses." Gov Reply at 1. Accordingly, the government also argues that the court could grant summary judgment in favor of AT&T on that basis.

C

The first step in determining whether a piece of information constitutes a "state secret" is determining whether that information actually is a "secret." Hence, before analyzing the application of the state secrets privilege to plaintiffs' claims, the court summarizes what has been publicly disclosed about NSA surveillance programs as well as the AT&T documents and accompanying Klein and Marcus declarations.

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Within the last year, public reports have surfaced on at least two different types of alleged NSA surveillance programs, neither of which relies on warrants. The New York Times disclosed the first such program on December 16, 2005. Doc #19 (Cohn Decl), Ex J (James Risen and Eric Lichtblau, ***Bush Lets US Spy on Callers Without Courts***, The New York Times (Dec 16, 2005)). The following day, President George W Bush confirmed the existence of a "terrorist surveillance program" in his weekly radio address:

> In the weeks following the [September 11, 2001] terrorist attacks on our Nation, I authorized the National Security Agency, consistent with US law and the Constitution, to intercept the international communications of people with known links to Al Qaeda and related terrorist organizations. Before we intercept these communications, the Government must have information that establishes a clear link to these terrorist networks.

Doc #20 (Pl Request for Judicial Notice), Ex 1 at 2, available at http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html (last visited July 19, 2006). The President also described the mechanism by which the program is authorized and reviewed:

> The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our Government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our Nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our Nation faces a continuing threat from Al Qaeda and related groups.

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> **The NSA's activities under this authorization are throughly reviewed by the Justice Department and NSA's top legal officials, including NSA's General Counsel and Inspector General. Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the authorization.**

Id.

Attorney General Alberto Gonzales subsequently confirmed that this program intercepts "contents of communications where * * * one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." Doc #87 (AT&T Request for Judicial Notice), Ex J at 1 (hereinafter "12/19/05 Press Briefing"), available at http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html (last visited July 19, 2005). The Attorney General also noted, "This [program] is not about wiretapping everyone. This is a very concentrated, very limited program focused at gaining information about our enemy." Id at 5. The President has also made a public statement, of which the court takes judicial notice, that the government's "international activities strictly target al Qaeda and their known affiliates," "the government does not listen to domestic phone calls without court approval" and the government is "not mining or trolling through the personal lives of millions of innocent Americans." The White House, *President Bush Discusses NSA Surveillance Program* (May 11, 2006) (hereinafter "5/11/06 Statement"), http://www.whitehouse.

gov/news/releases/2006/05/20060511-1.html (last visited July 19, 2005).

On May 11, 2006, USA Today reported the existence of a second NSA program in which BellSouth Corp, Verizon Communications Inc and AT&T were alleged to have provided telephone calling records of tens of millions of Americans to the NSA. Doc #182 (Markman Decl), Ex 5 at 1 (Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today (May 11, 2006)). The article did not allege that the NSA listens to or records conversations but rather that BellSouth, Verizon and AT&T gave the government access to a database of domestic communication records that the NSA uses "to analyze calling patterns in an effort to detect terrorist activity." Id. The report indicated a fourth telecommunications company, Qwest Communications International Inc, declined to participate in the program. Id at 2. An attorney for Qwest's former CEO, Joseph Nacchio, issued the following statement:

> In the Fall of 2001 * * * while Mr Nacchio was Chairman and CEO of Qwest and was serving pursuant to the President's appointment as the Chairman of the National Security Telecommunications Advisory Committee, Qwest was approached to permit the Government access to the private telephone records of Qwest customers.
>
> Mr Nacchio made inquiry as to whether a warrant or other legal process had been secured in support of that request. When he learned that no such authority had been granted and that there was a disinclination on the part of the authorities to use any legal process, including the Special Court which had been established to handle such matters, Mr Nacchio concluded that these requests violated the privacy requirements of the Telecommications [sic] Act. Accordingly, Mr Nacchio issued instructions to refuse to comply with these requests. These requests continued throughout Mr Nacchio's tenure and until his departure in June of 2002.

Markman Decl, Ex 6.

BellSouth and Verizon both issued statements, of which the court takes judicial notice, denying their involvement in the program described in USA Today. BellSouth stated in relevant part:

> As a result of media reports that BellSouth provided massive amounts of customer calling information under a contract with the NSA, the Company conducted an internal review to determine the facts. Based on our review to date, we have confirmed no such contract exists and we have not provided bulk customer calling records to the NSA.

News Release, BellSouth Statement on Governmental Data Collection (May 15, 2006), available at http://bellsouth.mediaroom.com/index.php?s=press_releases&item=2860 (last visited July 19, 2006). Although declining to confirm or deny whether it had any relationship to the NSA program acknowledged by the President, Verizon stated in relevant part:

> One of the most glaring and repeated falsehoods in the media reporting is the assertion that, in the aftermath of the 9/11 attacks, Verizon was approached by NSA and entered into an arrangement to provide the NSA with data from its customers' domestic calls.
>
> This is false. From the time of the 9/11 attacks until just four months ago, Verizon had three major businesses - its wireline phone business, its wireless company and its directory publishing business. It also had its own Internet Service Provider and long-distance businesses. Contrary to the media reports, Verizon was not asked by NSA to provide, nor did Verizon provide, customer phone records from any of these businesses, or any call data from those records. None of these companies –– wireless or wireline –– provided customer records or call data.

See News Release, Verizon Issues Statement on NSA Media Coverage (May 16, 2006), available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93450 (last visited July 19, 2006). BellSouth and Verizon's denials have been at least somewhat

substantiated in later reports. Doc #298 (DiMuzio Decl), Ex 1 (*Lawmakers: NSA Database Incomplete*, USA Today (June 30, 2006)). Neither AT&T nor the government has confirmed or denied the existence of a program of providing telephone calling records to the NSA. Id.

2

Although the government does not claim that the AT&T documents obtained by Mark Klein or the accompanying declarations contain classified information (Doc #284 (6/23/06 Transcript) at 76:9-20), those papers remain under seal because AT&T alleges that they contain proprietary and trade secret information. Nonetheless, much of the information in these papers has already been leaked to the public or has been revealed in redacted versions of the papers. The summary below is based on those already disclosed facts.

In a public statement, Klein explained that while working at an AT&T office in San Francisco in 2002, "the site manager told me to expect a visit from a National Security Agency agent, who was to interview a management-level technician for a special job." Doc #43 (Ericson Decl), Ex J at 1. While touring the Folsom Street AT&T facility in January 2003, Klein "saw a new room being built adjacent to the 4ESS switch room where the public's phone calls are routed" and "learned that the person whom the NSA interviewed for the secret job was the person working to install equipment in this room." Id. See also Doc #147 (Redact Klein Decl), ¶ 10 ("The NSA agent came and met with [Field Support Specialist (FSS)] #2. FSS #1 later confirmed to me that FSS #2 was working on the special

job."); id, ¶ 16 ("In the Fall of 2003, FSS #1 told me that another NSA agent would again visit our office * * * to talk to FSS #1 in order to get the latter's evaluation of FSS #3's suitability to perform the special job that FSS #2 had been doing. The NSA agent did come and speak to FSS #1.").

Klein then learned about the AT&T documents in October 2003, after being transferred to the Folsom Street facility to oversee the Worldnet Internet room. Ericson Decl, Ex J at 2. One document described how "fiber optic cables from the secret room were tapping into the Worldnet circuits by splitting off a portion of the light signal." Id. The other two documents "instructed technicians on connecting some of the already in-service circuits to [a] 'splitter' cabinet, which diverts some of the light signal to the secret room." Id. Klein noted the secret room contained "a Narus STA 6400" and that "Narus STA technology is known to be used particularly by government intelligence agencies because of its ability to sift through large amounts of data looking for preprogrammed targets." Id. Klein also "learned that other such 'splitter' cabinets were being installed in other cities, including Seattle, San Jose, Los Angeles and San Diego." Id.

D

Based on the foregoing, it might appear that none of the subject matter in this litigation could be considered a secret given that the alleged surveillance programs have been so widely reported in the media.

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The court recognizes, however, that simply because a factual statement has been publicly made does not necessarily mean that the facts it relates are true and are not a secret. The statement also must come from a reliable source. Indeed, given the sheer amount of statements that have been made in the public sphere about the alleged surveillance programs and the limited number of permutations that such programs could take, it would seem likely that the truth about these programs has already been publicly reported somewhere. But simply because such statements have been publicly made does not mean that the truth of those statements is a matter of general public knowledge and that verification of the statement is harmless.

In determining whether a factual statement is a secret for purposes of the state secrets privilege, the court should look only at publicly reported information that possesses substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security. That entails assessing the value of the information to an individual or group bent on threatening the security of the country, as well as the secrecy of the information.

For instance, if this litigation verifies that AT&T assists the government in monitoring communication records, a terrorist might well cease using AT&T and switch to other, less detectable forms of communication. Alternatively, if this litigation reveals that the communication records program does not exist, then a terrorist who had been avoiding AT&T might start using AT&T if it is a more efficient form of communication. In short, when deciding what communications channel to use, a

terrorist "balanc[es] the risk that a particular method of communication will be intercepted against the operational inefficiencies of having to use ever more elaborate ways to circumvent what he thinks may be intercepted." 6/23/06 Transcript at 48:14-17 (government attorney). A terrorist who operates with full information is able to communicate more securely and more efficiently than a terrorist who operates in an atmosphere of uncertainty.

It is, of course, an open question whether individuals inclined to commit acts threatening the national security engage in such calculations. But the court is hardly in a position to second-guess the government's assertions on this matter or to estimate the risk tolerances of terrorists in making their communications and hence at this point in the litigation eschews the attempt to weigh the value of the information.

Accordingly, in determining whether a factual statement is a secret, the court considers only public admissions or denials by the government, AT&T and other telecommunications companies, which are the parties indisputably situated to disclose whether and to what extent the alleged programs exist. In determining what is a secret, the court at present refrains from relying on the declaration of Mark Klein. Although AT&T does not dispute that Klein was a former AT&T technician and he has publicly declared under oath that he observed AT&T assisting the NSA in some capacity and his assertions would appear admissible in connection with the present motions, the inferences Klein draws have been disputed. To accept the Klein declaration at this juncture in connection with the state secrets issue would invite attempts to undermine the

privilege by mere assertions of knowledge by an interested party. Needless to say, this does not reflect that the court discounts Klein's credibility, but simply that what is or is not secret depends on what the government and its alleged operative AT&T and other telecommunications providers have either admitted or denied or is beyond reasonable dispute.

Likewise, the court does not rely on media reports about the alleged NSA programs because their reliability is unclear. To illustrate, after Verizon and BellSouth denied involvement in the program described in USA Today in which communication records are monitored, USA Today published a subsequent story somewhat backing down from its earlier statements and at least in some measure substantiating these companies' denials. See *supra* I(C)(1).

Finally, the court notes in determining whether the privilege applies, the court is not limited to considering strictly admissible evidence. FRE 104(a) ("Preliminary questions concerning * * * the existence of a privilege * * * shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."). This makes sense: the issue at bar is not proving a question of liability but rather determining whether information that the government contends is a secret is actually a secret. In making this determination, the court may rely upon reliable public evidence that might otherwise be inadmissible at trial because it does not comply with the technical requirements of the rules of evidence.

With these considerations in mind, the court at last determines whether the state secrets privilege applies here.

E

Because this case involves an alleged covert relationship between the government and AT&T, the court first determines whether to apply the categorical bar to suit established by the Supreme Court in Totten v United States, 92 US 105 (1875), acknowledged in United States v Reynolds, 345 US 1 (1953) and Kasza v Browner, 133 F3d 1159 (9th Cir 1998), and reaffirmed in Tenet v Doe, 544 US 1 (2005). See id at 6 ("[A]pplication of the Totten rule of dismissal * * * represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction."). The court then examines the closely related questions whether this action must be presently dismissed because "the very subject matter of the action" is a state secret or because the state secrets privilege necessarily blocks evidence essential to plaintiffs' *prima facie* case or AT&T's defense. See Kasza, 133 F3d at 1166-67.

1

Although the principles announced in Totten, Tenet, Reynolds and Kasza inform the court's decision here, those cases are not strictly analogous to the facts at bar.

First, the instant plaintiffs were not a party to the alleged covert arrangement at issue here between AT&T and the government. Hence, Totten and Tenet are not on point to the extent they hold that former spies cannot enforce agreements with the government because the parties implicitly agreed that such suits would be barred. The implicit notion in Totten was one of equitable estoppel: one who agrees to conduct covert operations impliedly agrees not to reveal the agreement even if the agreement

is breached. But AT&T, the alleged spy, is not the plaintiff here. In this case, plaintiffs made no agreement with the government and are not bound by any implied covenant of secrecy.

More importantly, unlike the clandestine spy arrangements in Tenet and Totten, AT&T and the government have for all practical purposes already disclosed that AT&T assists the government in monitoring communication content. As noted earlier, the government has publicly admitted the existence of a "terrorist surveillance program," which the government insists is completely legal. This program operates without warrants and targets "contents of communications where * * * one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." 12/19/05 Press Briefing at 1.

Given that the "terrorist surveillance program" tracks "calls into the United States or out of the United States," 5/11/06 Statement, it is inconceivable that this program could exist without the acquiescence and cooperation of some telecommunications provider. Although of record here only in plaintiffs' pleading, it is beyond reasonable dispute that "prior to its being acquired by SBC, AT&T Corp was the second largest Internet provider in the country," FAC, ¶ 26, and "AT&T Corp's bundled local and long distance service was available in 46 states, covering more than 73 million households," id, ¶ 25. AT&T's assistance would greatly help the government implement this program. See also id, ¶ 27 ("The new AT&T Inc constitutes the largest telecommunications

provider in the United States and one of the largest in the world."). Considering the ubiquity of AT&T telecommunications services, it is unclear whether this program could even exist without AT&T's acquiescence and cooperation.

Moreover, AT&T's history of cooperating with the government on such matters is well known. AT&T has recently disclosed that it "performs various classified contracts, and thousands of its employees hold government security clearances." FAC, ¶ 29. More recently, in response to reports on the alleged NSA programs, AT&T has disclosed in various statements, of which the court takes judicial notice, that it has "an obligation to assist law enforcement and other government agencies responsible for protecting the public welfare, whether it be an individual or the security interests of the entire nation. * * * If and when AT&T is asked to help, we do so strictly within the law and under the most stringent conditions." News Release, AT&T Statement on Privacy and Legal/Security Issues (May 11, 2006) (emphasis added), available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22285. See also Declan McCullagh, CNET News.com, *Legal Loophole Emerges in NSA Spy Program* (May 19, 2006) ("Mark Bien, a spokesman for AT&T, told CNET News.com on Wednesday: 'Without commenting on or confirming the existence of the program, we can say that when the government asks for our help in protecting national security, and the request is within the law, we will provide that assistance.'"), available at http://news.com.com/Legal+loophole+emerges+in+NSA+spy+program/2100-1028_3-6073600.html; Justin Scheck, *Plaintiffs Can Keep AT&T Papers in Domestic Spying Case*, The Recorder (May 18, 2006) ("Marc Bien, a spokesman for

AT&T, said he didn't see a settlement on the horizon. 'When the government asks for our help in protecting American security, and the request is within the law, we provide assistance,' he said."), available at http://www.law.com/jsp/article.jsp?id=1147856734796. And AT&T at least presently believes that any such assistance would be legal if AT&T were simply a passive agent of the government or if AT&T received a government certification authorizing the assistance. 6/23/06 Transcript at 15:11-21:19. Hence, it appears AT&T helps the government in classified matters when asked and AT&T at least currently believes, on the facts as alleged in plaintiffs' complaint, its assistance is legal.

In sum, the government has disclosed the general contours of the "terrorist surveillance program," which requires the assistance of a telecommunications provider, and AT&T claims that it lawfully and dutifully assists the government in classified matters when asked.

A remaining question is whether, in implementing the "terrorist surveillance program," the government ever requested the assistance of AT&T, described in these proceedings as the mother of telecommunications "that in a very literal way goes all the way back to Alexander Graham Bell summoning his assistant Watson into the room." Id at 102:11-13. AT&T's assistance in national security surveillance is hardly the kind of "secret" that the Totten bar and the state secrets privilege were intended to protect or that a potential terrorist would fail to anticipate.

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The court's conclusion here follows the path set in Halkin v Helms and Ellsberg v Mitchell, the two cases most factually similar to the present. The Halkin and Ellsberg courts did not preclude suit because of a Totten-based implied covenant of silence. Although the courts eventually terminated some or all of plaintiffs' claims because the privilege barred discovery of certain evidence (Halkin I, 598 F2d at 10; Halkin II, 690 F2d at 980, 987-88; Ellsberg, 709 F2d at 65), the courts did not dismiss the cases at the outset, as would have been required had the Totten bar applied. Accordingly, the court sees no reason to apply the Totten bar here.

For all of the above reasons, the court declines to dismiss this case based on the categorical Totten/Tenet bar.

2

The court must also dismiss this case if "the very subject matter of the action" is a state secret and therefore "any further proceeding * * * would jeopardize national security." Kasza, 133 F3d at 1170. As a preliminary matter, the court agrees that the government has satisfied the three threshold requirements for properly asserting the state secrets privilege: (1) the head of the relevant department, Director of National Intelligence John D Negroponte (2) has lodged a formal claim of privilege (Negroponte Decl, ¶¶ 9, 13) (3) after personally considering the matter (Id, ¶¶ 2, 9, 13). Moreover, the Director of the NSA, Lieutenant General Keith B Alexander, has filed a declaration supporting Director Negroponte's assertion of the privilege. Alexander Decl, ¶¶ 2, 9.

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The court does not "balanc[e the] ultimate interests at stake in the litigation." Halkin II, 690 F2d at 990. But no case dismissed because its "very subject matter" was a state secret involved ongoing, widespread violations of individual constitutional rights, as plaintiffs allege here. Indeed, most cases in which the "very subject matter" was a state secret involved classified details about either a highly technical invention or a covert espionage relationship. See, e g, Sterling v Tenet, 416 F3d 338, 348 (4th Cir 2005) (dismissing Title VII racial discrimination claim that "center[ed] around a covert agent's assignments, evaluations, and colleagues"); Kasza, 133 F3d at 1162-63, 1170 (dismissing RCRA claim regarding facility reporting and inventory requirements at a classified Air Force location near Groom Lake, Nevada); Zuckerbraun v General Dynamics Corp, 935 F2d 544, 547-48 (2d Cir 1991) (dismissing wrongful death claim implicating classified information about the "design, manufacture, performance, functional characteristics, and testing of [weapons] systems and the rules of engagement"); Fitzgerald v Penthouse Intl, 776 F2d 1236, 1242-43 (4th Cir 1985) (dismissing libel suit "charging the plaintiff with the unauthorized sale of a top secret marine mammal weapons system"); Halpern v United States, 258 F2d 36, 44 (2d Cir 1958) (rejecting government's motion to dismiss in a case involving a patent with military applications withheld under a secrecy order); Clift v United States, 808 F Supp 101, 111 (D Conn 1991) (dismissing patent dispute over a cryptographic encoding device).

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By contrast, the very subject matter of this action is hardly a secret. As described above, public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program. See *supra* I(E)(1).

For this reason, the present action is also different from El-Masri v Tenet, the recently dismissed case challenging the government's alleged "extraordinary rendition program." In El-Masri, only limited sketches of the alleged program had been disclosed and the whole object of the suit was to reveal classified details regarding "the means and methods the foreign intelligence services of this and other countries used to carry out the program." El-Masri, 2006 WL 1391390, *5. By contrast, this case focuses only on whether AT&T intercepted and disclosed communications or communication records to the government. And as described above, significant amounts of information about the government's monitoring of communication content and AT&T's intelligence relationship with the government are already non-classified or in the public record.

3

The court also declines to decide at this time whether this case should be dismissed on the ground that the government's state secrets assertion will preclude evidence necessary for plaintiffs to establish a *prima facie* case or for AT&T to raise a valid defense to the claims. Plaintiffs appear to be entitled to at least some discovery. See *infra* I(G)(3). It would be premature to decide these issues at the present time. In drawing this conclusion, the court is following the approach of the courts in

Halkin v Helms and Ellsberg v Mitchell; these courts did not dismiss those cases at the outset but allowed them to proceed to discovery sufficiently to assess the state secrets privilege in light of the facts. The government has not shown why that should not be the course of this litigation.

4

In sum, for much the same reasons that Totten does not preclude this suit, the very subject matter of this action is not a "secret" for purposes of the state secrets privilege and it would be premature to conclude that the privilege will bar evidence necessary for plaintiffs' *prima facie* case or AT&T's defense. Because of the public disclosures by the government and AT&T, the court cannot conclude that merely maintaining this action creates a "reasonable danger" of harming national security. Accordingly, based on the foregoing, the court DENIES the government's motion to dismiss.

F

The court hastens to add that its present ruling should not suggest that its *in camera*, *ex parte* review of the classified documents confirms the truth of the particular allegations in plaintiffs' complaint. Plaintiffs allege a surveillance program of far greater scope than the publicly disclosed "terrorist surveillance program." The existence of this alleged program and AT&T's involvement, if any, remain far from clear. And as in Halkin v Helms, it is certainly possible that AT&T might be entitled to summary judgment at some point if the court finds that

the state secrets privilege blocks certain items of evidence that are essential to plaintiffs' *prima facie* case or AT&T's defense. The court also recognizes that legislative or other developments might alter the course of this litigation.

But it is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. See Hamdi v Rumsfeld, 542 US 507, 536 (2004) (plurality opinion) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."). To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired. The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security.

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G

The government also contends the issue whether AT&T received a certification authorizing its assistance to the government is a state secret. Gov 5/17/06 Br at 17.

1

The procedural requirements and impact of a certification under Title III are addressed in 18 USC § 2511(2)(a)(ii):

> **Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, * * * are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of [FISA] * * * if such provider, its officers, employees, or agents, * * * has been provided with —— * * ***
>
> **(B) a certification in writing by a person specified in section 2518(7) of this title [18 USCS § 2518(7)] or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required * * *.**

Although it is doubtful whether plaintiffs' constitutional claim would be barred by a valid certification under section 2511(2)(a)(ii), this provision on its face makes clear that a valid certification would preclude the statutory claims asserted here. See 18 USC § 2511(2)(a)(ii) ("No cause of action shall lie in any court against any provider of wire or electronic communication service * * * for providing information, facilities, or assistance in accordance with the terms of a * * * certification under this chapter.").

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2

As noted above, it is not a secret for purposes of the state secrets privilege that AT&T and the government have some kind of intelligence relationship. See *supra* I(E)(1). Nonetheless, the court recognizes that uncovering whether and to what extent a certification exists might reveal information about AT&T's assistance to the government that has not been publicly disclosed. Accordingly, in applying the state secrets privilege to the certification question, the court must look deeper at what information has been publicly revealed about the alleged electronic surveillance programs. The following chart summarizes what the government has disclosed about the scope of these programs in terms of (1) the individuals whose communications are being monitored, (2) the locations of those individuals and (3) the types of information being monitored:

	Purely domestic communication content	Domestic-foreign communication content	Communication records
General public	Government DENIES	Government DENIES	Government NEITHER CONFIRMS NOR DENIES
al Qaeda or affiliate member/agent	Government DENIES	Government CONFIRMS	

As the chart relates, the government's public disclosures regarding monitoring of "communication content" (i e, wiretapping or listening in on a communication) differ significantly from its disclosures regarding "communication records" (i e, collecting ancillary data pertaining to a communication, such as the telephone

numbers dialed by an individual). See *supra* I(C)(1). Accordingly, the court separately addresses for each alleged program whether revealing the existence or scope of a certification would disclose a state secret.

3

Beginning with the warrantless monitoring of "communication content," the government has confirmed that it monitors "contents of communications where * * * one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." 12/19/05 Press Briefing at 1. The government denies listening in without a warrant on any purely domestic communications or communications in which neither party has a connection to al Qaeda or a related terrorist organization. In sum, regarding the government's monitoring of "communication content," the government has disclosed the universe of possibilities in terms of whose communications it monitors and where those communicating parties are located.

Based on these public disclosures, the court cannot conclude that the existence of a certification regarding the "communication content" program is a state secret. If the government's public disclosures have been truthful, revealing whether AT&T has received a certification to assist in monitoring communication content should not reveal any new information that would assist a terrorist and adversely affect national security.

And if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements. In short, the government has opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content.

Accordingly, the court concludes that the state secrets privilege will not prevent AT&T from asserting a certification-based defense, as appropriate, regarding allegations that it assisted the government in monitoring communication content. The court envisions that AT&T could confirm or deny the existence of a certification authorizing monitoring of communication content through a combination of responses to interrogatories and *in camera* review by the court. Under this approach, AT&T could reveal information at the level of generality at which the government has publicly confirmed or denied its monitoring of communication content. This approach would also enable AT&T to disclose the non-privileged information described here while withholding any incidental privileged information that a certification might contain.

4

Turning to the alleged monitoring of communication records, the court notes that despite many public reports on the matter, the government has neither confirmed nor denied whether it monitors communication records and has never publicly disclosed whether the NSA program reported by USA Today on May 11, 2006, actually exists. Although BellSouth, Verizon and Qwest have denied participating in this program, AT&T has neither confirmed nor

denied its involvement. Hence, unlike the program monitoring communication content, the general contours and even the existence of the alleged communication records program remain unclear.

Nonetheless, the court is hesitant to conclude that the existence or non-existence of the communication records program necessarily constitutes a state secret. Confirming or denying the existence of this program would only affect a terrorist who was insensitive to the publicly disclosed "terrorist surveillance program" but cared about the alleged program here. This would seem unlikely to occur in practice given that the alleged communication records program, which does not involve listening in on communications, seems less intrusive than the "terrorist surveillance program," which involves wiretapping. And in any event, it seems odd that a terrorist would continue using AT&T given that BellSouth, Verizon and Qwest have publicly denied participating in the alleged communication records program and would appear to be safer choices. Importantly, the public denials by these telecommunications companies undercut the government and AT&T's contention that revealing AT&T's involvement or lack thereof in the program would disclose a state secret.

Still, the court recognizes that it is not in a position to estimate a terrorist's risk preferences, which might depend on facts not before the court. For example, it may be that a terrorist is unable to avoid AT&T by choosing another provider or, for reasons outside his control, his communications might necessarily be routed through an AT&T facility. Revealing that a communication records program exists might encourage that terrorist to switch to less efficient but less detectable forms of

communication. And revealing that such a program does not exist might encourage a terrorist to use AT&T services when he would not have done so otherwise. Accordingly, for present purposes, the court does not require AT&T to disclose what relationship, if any, it has with this alleged program.

The court stresses that it does not presently conclude that the state secrets privilege will necessarily preclude AT&T from revealing later in this litigation information about the alleged communication records program. While this case has been pending, the government and telecommunications companies have made substantial public disclosures on the alleged NSA programs. It is conceivable that these entities might disclose, either deliberately or accidentally, other pertinent information about the communication records program as this litigation proceeds. The court recognizes such disclosures might make this program's existence or non-existence no longer a secret. Accordingly, while the court presently declines to permit any discovery regarding the alleged communication records program, if appropriate, plaintiffs can request that the court revisit this issue in the future.

5

Finally, the court notes plaintiffs contend that Congress, through various statutes, has limited the state secrets privilege in the context of electronic surveillance and has abrogated the privilege regarding the existence of a government certification. See Doc #192 (Pl Opp Gov MTD) at 16-26, 45-48. Because these arguments potentially implicate highly complicated separation of powers issues regarding Congress' ability to abrogate

what the government contends is a constitutionally protected privilege, the court declines to address these issues presently, particularly because the issues might very well be obviated by future public disclosures by the government and AT&T. If necessary, the court may revisit these arguments at a later stage of this litigation.

H

The government also asserts two statutory privileges in its motion to dismiss that it contends apply "to any intelligence-related information, sources and methods implicated by [p]laintiffs' claims and the information covered by these privilege claims are at least co-extensive with the assertion of the state secrets privilege by the DNI." Gov MTD at 14. First, the government relies on 50 USC § 402 *note*, which provides:

> [N]othing in this Act or any other law * * * shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

The government also relies on 50 USC § 403-1(i)(1), which states, "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."

Neither of these provisions by their terms requires the court to dismiss this action and it would be premature for the court to do so at this time. In opposing a subsequent summary judgment motion, plaintiffs could rely on many non-classified materials including present and future public disclosures of the government or AT&T on the alleged NSA programs, the AT&T documents

and the supporting Klein and Marcus declarations and information gathered during discovery. Hence, it is at least conceivable that some of plaintiffs' claims, particularly with respect to declaratory and injunctive relief, could survive summary judgment. After discovery begins, the court will determine step-by-step whether the privileges prevent plaintiffs from discovering particular evidence. But the mere existence of these privileges does not justify dismissing this case now.

Additionally, neither of these provisions block AT&T from producing any certification that it received to assist the government in monitoring communication content, see *supra* I(G)(3). Because information about this certification would be revealed only at the same level of generality as the government's public disclosures, permitting this discovery should not reveal any new information on the NSA's activities or its intelligence sources or methods, assuming that the government has been truthful.

Accordingly, the court DENIES the government's motion to dismiss based on the statutory privileges and DENIES the privileges with respect to any certification that AT&T might have received authorizing it to monitor communication content.

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II

AT&T moves to dismiss plaintiffs' complaint on multiple grounds, contending that (1) plaintiffs lack standing, (2) the amended complaint fails to plead affirmatively the absence of immunity from suit and (3) AT&T is entitled to statutory, common law and qualified immunity. Because standing is a threshold jurisdictional question, the court addresses that issue first. See Steel Company v Citizens for a Better Environment, 523 US 83, 94, 102 (1998).

A

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v Defenders of Wildlife, 504 US 555, 560 (1992). To establish standing under Article III, a plaintiff must satisfy three elements: (1) "the plaintiff must have suffered an injury in fact —– an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) "there must be a causal connection between the injury and the conduct complained of" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id at 560-61 (internal quotation marks, citations and footnote omitted). A party invoking federal jurisdiction has the burden of establishing its standing to sue. Id at 561.

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In the present case, AT&T contends plaintiffs have not sufficiently alleged injury-in-fact and their complaint relies on "wholly conclusory" allegations. AT&T MTD at 20-22. According to AT&T, "Absent some concrete allegation that the government monitored their communications or records, all plaintiffs really have is a suggestion that AT&T provided a means by which the government could have done so had it wished. This is anything but injury-in-fact." Id at 20 (emphasis in original). AT&T compares this case to United Presbyterian Church v Reagan, 738 F2d 1375 (DC Cir 1984) (written by then-Judge Scalia), in which the court found that plaintiffs' allegations of unlawful surveillance were "too generalized and nonspecific to support a complaint." Id at 1380.

As a preliminary matter, AT&T incorrectly focuses on whether plaintiffs have pled that the government "monitored [plaintiffs'] communications or records" or "targeted [plaintiffs] or their communications." Instead, the proper focus is on AT&T's actions. Plaintiffs' statutory claims stem from injuries caused solely by AT&T through its alleged interception, disclosure, use, divulgence and/or publication of plaintiffs' communications or communication records. FAC, ¶¶ 93-95, 102-05, 113-14, 121, 128, 135-41. Hence, plaintiffs need not allege any facts regarding the government's conduct to state these claims.

More importantly, for purposes of the present motion to dismiss, plaintiffs have stated sufficient facts to allege injury-in-fact for all their claims. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary

to support the claim.'" Lujan, 504 US at 561 (quoting Lujan v National Wildlife Federation, 497 US 871, 889 (1990)). Throughout the complaint, plaintiffs generally describe the injuries they have allegedly suffered because of AT&T's illegal conduct and its collaboration with the government. See, e g, FAC, ¶ 61 ("On information and belief, AT&T Corp has provided the government with direct access to the contents of the Hawkeye, Aurora and/or other databases that it manages using Daytona, including all information, records, [dialing, routing, addressing and/or signaling information] and [customer proprietary network information] pertaining to [p]laintiffs and class members, by providing the government with copies of the information in the databases and/or by giving the government access to Daytona's querying capabilities and/or some other technology enabling the government agents to search the databases' contents."); id, ¶ 6 ("On information and belief, AT&T Corp has opened its key telecommunications facilities and databases to direct access by the NSA and/or other government agencies, intercepting and disclosing to the government the contents of its customers' communications as well as detailed communications records about millions of its customers, including [p]laintiffs and class members.").

By contrast, plaintiffs in United Presbyterian Church alleged they "ha[d] been informed on numerous occasions" that mail that they had sent never reached its destination, "ha[d] reason to believe that, for a long time, [their] officers, employees, and persons associated with [them had] been subjected to government surveillance, infiltration and disruption" and "discern[ed] a long-term pattern of surveillance of [their] members, disruption of

their speaking engagements in this country, and attempts at character assassination." See 738 F2d at 1380 n2. Because these allegations were more attenuated and less concrete than the specific injuries alleged here, United Presbyterian Church does not support dismissing this action.

AT&T also contends "[p]laintiffs lack standing to assert their statutory claims (Counts II-VII) because the FAC alleges no facts suggesting that their statutory rights have been violated" and "the FAC alleges nothing to suggest that the named plaintiffs were themselves subject to surveillance." AT&T MTD at 24-25 (emphasis in original). But AT&T ignores that the gravamen of plaintiffs' complaint is that AT&T has created a dragnet that collects the content and records of its customers' communications. See, e g, FAC, ¶¶ 42-64. The court cannot see how any one plaintiff will have failed to demonstrate injury-in-fact if that plaintiff effectively demonstrates that all class members have so suffered. This case is plainly distinguishable from Halkin II, for in that case, showing that plaintiffs were on a watchlist was not tantamount to showing that any particular plaintiff suffered a surveillance-related injury-in-fact. See Halkin II, 690 F2d at 999-1001. As long as the named plaintiffs were, as they allege, AT&T customers during the relevant time period (FAC, ¶¶ 13-16), the alleged dragnet would have imparted a concrete injury on each of them.

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This conclusion is not altered simply because the alleged injury is widely shared among AT&T customers. In FEC v Akins, 524 US 11 (1998), the Supreme Court explained:

> **Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.**
>
> **[This] kind of judicial language * * * however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature.**

Id at 23. The Court continued:

> **[W]here a harm is concrete, though widely shared, the Court has found "injury in fact." Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an "injury in fact."**

Id at 24.

Here, the alleged injury is concrete even though it is widely shared. Despite AT&T's alleged creation of a dragnet to intercept all or substantially all of its customers' communications, this dragnet necessarily inflicts a concrete injury that affects each customer in a distinct way, depending on the content of that customer's communications and the time that customer spends using AT&T services. Indeed, the present situation resembles a scenario in which "large numbers of individuals suffer the same common-law injury (say, a widespread mass tort)." Id.

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AT&T also contends that the state secrets privilege bars plaintiffs from establishing standing. Doc #244 (AT&T Reply) at 16-18. See also Gov MTD 16-20. But as described above, the state secrets privilege will not prevent plaintiffs from receiving at least some evidence tending to establish the factual predicate for the injury-in-fact underlying their claims directed at AT&T's alleged involvement in the monitoring of communication content. See *supra* I(G)(3). And the court recognizes that additional facts might very well be revealed during, but not as a direct consequence of, this litigation that obviate many of the secrecy concerns currently at issue regarding the alleged communication records program. Hence, it is unclear whether the privilege would necessarily block AT&T from revealing information about its participation, if any, in that alleged program. See *supra* I(G)(4). The court further notes that the AT&T documents and the accompanying Klein and Marcus declarations provide at least some factual basis for plaintiffs' standing. Accordingly, the court does not conclude at this juncture that plaintiffs' claims would necessarily lack the factual support required to withstand a future jurisdictional challenge based on lack of standing.

Because plaintiffs have sufficiently alleged that they suffered an actual, concrete injury traceable to AT&T and redressable by this court, the court DENIES AT&T's motion to dismiss for lack of standing.

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B

AT&T also contends that telecommunications providers are immune from suit if they receive a government certification authorizing them to conduct electronic surveillance. AT&T MTD at 5. AT&T argues that plaintiffs have the burden to plead affirmatively that AT&T lacks such a certification and that plaintiffs have failed to do so here, thereby making dismissal appropriate. Id at 10-13.

As discussed above, the procedural requirements for a certification are addressed in 18 USC § 2511(2)(a)(ii)(B). See *supra* I(G)(1). Under section 2511(2)(a)(ii), "No cause of action shall lie in any court against any provider of wire or electronic communication service * * * for providing information, facilities, or assistance in accordance with the terms of a * * * certification under this chapter." This provision is referenced in 18 USC § 2520(a) (emphasis added), which creates a private right of action under Title III:

> **Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter [18 USCS §§ 2510 et seq] may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.**

A similar provision exists at 18 USC § 2703(e) (emphasis added):

> **No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.**

The court recognizes that the language emphasized above suggests that to state a claim under these statutes, a plaintiff must affirmatively allege that a telecommunications provider did not receive a government certification. And out of the many statutory exceptions in section 2511, only section 2511(2)(a)(ii) appears in section 2520(a), thereby suggesting that a lack of certification is an element of a Title III claim whereas the other exceptions are simply affirmative defenses. As AT&T notes, this interpretation is at least somewhat supported by the Senate report accompanying 18 USC § 2520, which states in relevant part:

> **A civil action will not lie [under 18 USC § 2520] where the requirements of sections 2511(2)(a)(ii) of title 18 are met. With regard to that exception, the Committee intends that the following procedural standards will apply:**
>
> > **(1) The complaint must allege that a wire or electronic communications service provider (or one of its employees) (a) disclosed the existence of a wiretap; (b) acted without a facially valid court order or certification; (c) acted beyond the scope of a court order or certification or (d) acted on bad faith. Acting in bad faith would include failing to read the order or collusion. If the complaint fails to make any of these allegations, the defendant can move to dismiss the complaint for failure to state a claim upon which relief can be granted.**

ECPA, S Rep No 99-541, 99th Cong, 2d Sess 26 (1986) (reprinted in 1986 USCCAN 3555, 3580) (emphasis added).

Nonetheless, the statutory text does not explicitly provide for a heightened pleading requirement, which is in essence what AT&T seeks to impose here. And the court is reluctant to infer a heightened pleading requirement into the statute given that in other contexts, Congress has been explicit when it intended to create such a requirement. See, e g, Private Securities Litigation

Reform Act of 1995, § 101, 15 USC § 78u-4(b)(1), (2) (prescribing heightened pleading standards for securities class actions).

In any event, the court need not decide whether plaintiffs must plead affirmatively the absence of a certification because the present complaint, liberally construed, alleges that AT&T acted outside the scope of any government certification it might have received. In particular, paragraphs 81 and 82, which are incorporated in all of plaintiffs' claims, state:

> 81. On information and belief, the above-described acts [by defendants] of interception, disclosure, divulgence and/or use of Plaintiffs' and class members' communications, contents of communications, and records pertaining to their communications occurred without judicial or other lawful authorization, probable cause, and/or individualized suspicion.
>
> 82. On information and belief, at all relevant times, the government instigated, directed and/or tacitly approved all of the above-described acts of AT&T Corp.

FAC, ¶¶ 81-82 (emphasis added).

Plaintiffs contend that the phrase "occurred without judicial or other lawful authorization" means that AT&T acted without a warrant or a certification. Doc #176 (Pl Opp AT&T MTD) at 13-15. At oral argument, AT&T took issue with this characterization of "lawful authorization":

> The emphasis there is on the word 'lawful[.'] When you read that paragraph in context, it's clear that what [plaintiffs are] saying is that any authorization [AT&T] receive[s] is, in [plaintiffs'] view, unlawful. And you can see that because of the other paragraphs in the complaint. The very next one, [p]aragraph 82, is the paragraph where [plaintiffs] allege that the United States government approved and instigated all of our actions. It wouldn't be reasonable to construe Paragraph 81 as saying that [AT&T was] not authorized by the government to do what [AT&T] allegedly did when the very next paragraph states the exact opposite.

6/23/06 Transcript at 10:21-11:6. Indeed, the court does not question that it would be extraordinary for a large, sophisticated entity like AT&T to assist the government in a warrantless surveillance program without receiving a certification to insulate its actions.

Nonetheless, paragraph 81 could be reasonably interpreted as alleging just that. Even if "the government instigated, directed and/or tacitly approved" AT&T's alleged actions, it does not inexorably follow that AT&T received an official certification blessing its actions. At the hearing, plaintiffs' counsel suggested that they had "information and belief based on the news reports that [the alleged activity] was done based on oral requests" not a written certification. Id at 24:21-22. Additionally, the phrase "judicial or other lawful authorization" in paragraph 81 parallels how "a court order" and "a certification" appear in 18 USC §§ 2511(2)(a)(ii)(A) and (B), respectively; this suggests that "lawful authorization" refers to a certification. Interpreted in this manner, plaintiffs are making a factual allegation that AT&T did not receive a certification.

In sum, even if plaintiffs were required to plead affirmatively that AT&T did not receive a certification authorizing its alleged actions, plaintiffs' complaint can fairly be interpreted as alleging just that. Whether and to what extent the government authorized AT&T's alleged conduct remain issues for further litigation. For now, however, the court DENIES AT&T's motion to dismiss on this ground.

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C

AT&T also contends that the complaint should be dismissed because it failed to plead the absence of an absolute common law immunity to which AT&T claims to be entitled. AT&T MTD at 13-15. AT&T asserts that this immunity "grew out of a recognition that telecommunications carriers should not be subject to civil liability for cooperating with government officials conducting surveillance activities. That is true whether or not the surveillance was lawful, so long as the government officials requesting cooperation assured the carrier that it was." Id at 13. AT&T also argues that the statutory immunities do not evince a "congressional purpose to displace, rather than supplement, the common law." Id.

AT&T overstates the case law when intimating that the immunity is long established and unequivocal. AT&T relies primarily on two cases: Halperin v Kissinger, 424 F Supp 838 (DDC 1976), revd on other grounds, 606 F2d 1192 (DC Cir 1979) and Smith v Nixon, 606 F2d 1183 (DC Cir 1979). In Halperin, plaintiffs alleged that the Chesapeake and Potomac Telephone Company (C&P) assisted federal officials in illegally wiretapping plaintiffs' home telephone, thereby violating plaintiffs' constitutional and Title III statutory rights. 424 F Supp at 840. In granting summary judgment for C&P, the district court noted:

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> Chesapeake and Potomac Telephone Company, argues persuasively that it played no part in selecting any wiretap suspects or in determining the length of time the surveillance should remain. It overheard none of plaintiffs' conversations and was not informed of the nature or outcome of the investigation. As in the past, C&P acted in reliance upon a request from the highest Executive officials and with assurances that the wiretap involved national security matters. Under these circumstances, C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation.

Id at 846.

Smith v Nixon involved an allegedly illegal wiretap that was part of the same surveillance program implicated in Halperin. In addressing C&P's potential liability, the Smith court noted:

> The District Court dismissed the action against C&P, which installed the wiretap, on the ground cited in the District Court's opinion in Halperin: 'C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation. * * *.' We think this was the proper disposition. The telephone company did not initiate the surveillance, and it was assured by the highest Executive officials in this nation that the action was legal.

606 F2d at 1191 (citation and footnote omitted) (omission in original).

The court first observes that Halperin, which formed the basis for the Smith decision, never indicated that C&P was "immune" from suit; rather, the court granted summary judgment after it determined that C&P played only a "limited technical role" in the surveillance. And although C&P was dismissed in Smith on a motion to dismiss, Smith never stated that C&P was immune from suit; the only discussion of "immunity" there related to other defendants who claimed entitlement to qualified and absolute immunity.

At best, the language in Halperin and Smith is equivocal: the phrase "C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation" could plausibly be interpreted as describing a good faith defense. And at least one court appears to have interpreted Smith in that manner. See Manufacturas Intl, Ltda v Manufacturers Hanover Trust Co, 792 F Supp 180, 192-93 (EDNY 1992) (referring to Smith while discussing good faith defenses).

Moreover, it is not clear at this point in the litigation whether AT&T played a "mere technical role" in the alleged NSA surveillance programs. The complaint alleges that "at all relevant times, the government instigated, directed and/or tacitly approved all of the above-described acts of AT&T Corp." FAC, ¶ 82. But given the massive scale of the programs alleged here and AT&T's longstanding history of assisting the government in classified matters, one could reasonably infer that AT&T's assistance here is necessarily more comprehensive than C&P's assistance in Halperin and Smith. Indeed, there is a world of difference between a single wiretap and an alleged dragnet that sweeps in the communication content and records of all or substantially all AT&T customers.

AT&T also relies on two Johnson-era cases: Fowler v Southern Bell Telephone & Telegraph Co, 343 F2d 150 (5th Cir 1965), and Craska v New York Telephone Co, 239 F Supp 932 (NDNY 1965). Fowler involved a Georgia state claim for invasion of right of privacy against a telephone company for assisting federal officers to intercept plaintiff's telephone conversations. Fowler noted that a "defense of privilege" would extend to the telephone company

only if the court determined that the federal officers acted within the scope of their duties:

> If it is established that [the federal officers] acted in the performance and scope of their official powers and within the outer perimeter of their duties as federal officers, then the defense of privilege would be established as to them. In this event the privilege may be extended to exonerate the Telephone Company also if it appears, in line with the allegations of the complaint, that the Telephone Company acted for and at the request of the federal officers and within the bounds of activity which would be privileged as to the federal officers.

343 F2d at 156-57 (emphasis added). Accordingly, Fowler does not absolve AT&T of any liability unless and until the court determines that the government acted legally in creating the NSA surveillance programs alleged in the complaint.

Craska also does not help AT&T. In that case, plaintiff sued a telephone company for violating her statutory rights by turning over telephone records to the government under compulsion of state law. Craska, 239 F Supp at 933-34, 936. The court declined to ascribe any liability to the telephone company because its assistance was required under state law: "[T]he conduct of the telephone company, acting under the compulsion of State law and process, cannot sensibly be said to have joined in a knowing venture of interception and divulgence of a telephone conversation, which it sought by affirmative action to make succeed." Id at 936. By contrast, it is not evident whether AT&T was required to help the government here; indeed, AT&T appears to have confirmed that it did not have any legal obligation to assist the government implement any surveillance program. 6/23/06 Transcript at 17:25-18:4 ("The Court: Well, AT&T could refuse, could it not, to

provide access to its facilities? [AT&T]: Yes, it could. Under [18 USC §] 2511, your Honor, AT&T would have the discretion to refuse, and certainly if it believed anything illegal was occurring, it would do so.").

Moreover, even if a common law immunity existed decades ago, applying it presently would undermine the carefully crafted scheme of claims and defenses that Congress established in subsequently enacted statutes. For example, all of the cases cited by AT&T as applying the common law "immunity" were filed before the certification provision of FISA went into effect. See § 301 of FISA. That provision protects a telecommunications provider from suit if it obtains from the Attorney General or other authorized government official a written certification "that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required." 18 USC § 2511(2)(a)(ii)(B). Because the common law "immunity" appears to overlap considerably with the protections afforded under the certification provision, the court would in essence be nullifying the procedural requirements of that statutory provision by applying the common law "immunity" here. And given the shallow doctrinal roots of immunity for communications carriers at the time Congress enacted the statutes in play here, there is simply no reason to presume that a common law immunity is available simply because Congress has not expressed a contrary intent. Cf Owen v City of Independence, 445 US 622, 638 (1980) ("[N]otwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and

was supported such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" (quoting Pierson v Ray, 386 US 547, 555 (1967))).

Accordingly, the court DENIES AT&T's motion to dismiss on the basis of a purported common law immunity.

D

AT&T also argues that it is entitled to qualified immunity. AT&T MTD at 16. Qualified immunity shields state actors from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v Fitzgerald, 457 US 800, 818 (1982). "Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." Wyatt v Cole, 504 US 158, 167 (1992). "[T]he qualified immunity recognized in Harlow acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." Wyatt v Cole, 504 US 158, 168 (1992). Compare AT&T MTD at 17 ("It would make little sense to protect the principal but not its agent."). The Supreme Court does not "draw a distinction for purposes of immunity law between suits brought against state officials under [42 USC] § 1983 and suits brought directly under the Constitution [via Bivens v Six Unknown Named Agents, 403 US 388 (1971)] against federal officials." Butz v Economou, 438 US 478, 504 (1978).

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At the pleadings stage, qualified immunity analysis entails three steps. First, the court must determine whether, taken in the light most favorable to the plaintiff, the facts alleged show a violation of the plaintiffs' statutory or constitutional rights. Saucier v Katz, 533 US 194, 201 (2001). If a violation has been alleged, the court next determines whether the right infringed was clearly established at the time of the alleged violation. Finally, the court assesses whether it would be clear to a reasonable person in the defendant's position that its conduct was unlawful in the situation it confronted. Id at 202, 205. See also Frederick v Morse, 439 F3d 1114, 1123 (9th Cir 2006) (characterizing this final inquiry as a discrete third step in the analysis). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Hope v Pelzer, 536 US 730, 739 (2002) (citation omitted).

1

When a private party seeks to invoke qualified immunity, the court must first decide whether qualified immunity is "categorically available," which "requires an evaluation of the appropriateness of qualified immunity given its historical availability and the policy considerations underpinning the doctrine." Jensen v Lane County, 222 F3d 570, 576 (9th Cir 2000). This inquiry is distinct from the question whether a nominally private party is a state actor for purposes of a section 1983 or Bivens claim.

In Wyatt v Cole, 504 US 158 (1992), the Supreme Court laid the foundation for determining whether a private actor is entitled to qualified immunity. The plaintiff there sued under section 1983 to recover property from a private party who had earlier obtained a writ of replevin against the plaintiff. See Lugar v Edmondson Oil Co, 457 US 922 (1982) (holding that a private party acted under color of law under similar circumstances). After determining that the common law did not recognize an immunity from analogous tort suits, the court "conclude[d] that the rationales mandating qualified immunity for public officials are not applicable to private parties." Wyatt, 504 US at 167. Although Wyatt purported to be limited to its facts, id at 168, the broad brush with which the Court painted suggested that private parties could rarely, if ever, don the cloak of qualified immunity. See also Ace Beverage Co v Lockheed Information Mgmt Servs, 144 F3d 1218, 1219 n3 (9th Cir 1998) (noting that "[i]n cases decided before [the Supreme Court's decision in Richardson v McKnight, 521 US 399 (1997)]," the Ninth Circuit had "adopted a general rule that private parties are not entitled to qualified immunity").

Applying Wyatt to a case involving section 1983 claims against privately employed prison guards, the Supreme Court in Richardson v McKnight, 521 US 399 (1997), stated that courts should "look both to history and to the purposes that underlie government employee immunity in order to" determine whether that immunity extends to private parties. Id at 404. Although this issue has been addressed by the Ninth Circuit in several cases, the court has yet to extend qualified immunity to a private party under McKnight. See, e g, Ace Beverage, 144 F3d at 1220; Jensen, 222 F3d at 576-80.

2

The court now determines whether the history of the alleged immunity and purposes of the qualified immunity doctrine support extending qualified immunity to AT&T.

As described in section II(C), *supra*, no firmly rooted common law immunity exists for telecommunications providers assisting the government. And presently applying whatever immunity might have previously existed would undermine the various statutory schemes created by Congress, including the certification defense under 18 USC § 2511(2)(a)(ii)(B).

Turning to the purposes of qualified immunity, they include: "(1) protecting the public from unwarranted timidity on the part of public officials and encouraging the vigorous exercise of official authority; (2) preventing lawsuits from distracting officials from their governmental duties; and (3) ensuring that talented candidates are not deterred by the threat of damages suits from entering public service." Jensen, 222 F3d at 577 (citations, quotations and alterations omitted). See also Harlow, 457 US at 816 (recognizing "the general costs of subjecting officials to the risks of trial –– distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"). AT&T contends that national security surveillance is "a traditional governmental function of the highest importance" requiring access to the "critical telecommunications infrastructure" that companies such as AT&T would be reluctant to furnish if they were exposed to civil liability. AT&T MTD at 17.

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AT&T's concerns, while relevant, do not warrant extending qualified immunity here because the purposes of that immunity are already well served by the certification provision of 18 USC § 2511(2)(a)(ii). As noted above, although it is unclear whether a valid certification would bar plaintiffs' constitutional claim, section 2511(2)(a)(ii) clearly states that a valid certification precludes the statutory claims asserted here. See *supra* I(G)(1). Hence, but for the government's assertion of the state secrets privilege, the certification provision would seem to facilitate prompt adjudication of damages claims such as those at bar. And because section 2511(2)(a)(ii)'s protection does not appear to depend on a fact-intensive showing of good faith, the provision could be successfully invoked without the burdens of full-blown litigation. Compare Tapley v Collins, 211 F3d 1210, 1215 (11th Cir 2000) (discussing the differences between qualified immunity and good faith defense under Title III, 18 USC § 2520(d)).

More fundamentally, "[w]hen Congress itself provides for a defense to its own cause of action, it is hardly open to the federal court to graft common law defenses on top of those Congress creates." Berry v Funk, 146 F3d 1003, 1013 (DC Cir 1998) (holding that qualified immunity could not be asserted against a claim under Title III). As plaintiffs suggest, the Ninth Circuit appears to have concluded that the only defense under Title III is that provided for by statute —– although, in fairness, the court did not explicitly address the availability of qualified immunity. See Jacobson v Rose, 592 F2d 515, 522-24 (9th Cir 1978) (joined by then-Judge Kennedy). But cf Doe v United States, 941 F2d 780, 797-99 (9th Cir 1991) (affirming grant of qualified immunity from

liability under section 504 of the Rehabilitation Act without analyzing whether qualified immunity could be asserted in the first place). Nonetheless, at least two appellate courts have concluded that statutory defenses available under Title III do not preclude a defendant from asserting qualified immunity. Blake v Wright, 179 F3d 1003, 1013 (6th Cir 1999) (The court "fail[ed] to see the logic of providing a defense of qualified immunity to protect public officials from personal liability when they violate constitutional rights that are not clearly established and deny them qualified immunity when they violate statutory rights that similarly are not clearly established."); accord Tapley, 211 F3d at 1216. But see Mitchell v Forsyth, 472 US 511, 557 (1985) (Brennan concurring in part and dissenting in part) ("The Court's argument seems to be that the trial court should have decided the legality of the wiretap under Title III before going on to the qualified immunity question, since that question arises only when considering the legality of the wiretap under the Constitution.").

With all due respect to the Sixth and Eleventh Circuits, those courts appear to have overlooked the relationship between the doctrine of qualified immunity and the schemes of state and federal official liability that are essentially creatures of the Supreme Court. Qualified immunity is a doctrinal outgrowth of expanded state actor liability under 42 USC § 1983 and Bivens. See Monroe v Pape, 365 US 167 (1961) (breathing new life into section 1983); Scheuer v Rhodes, 416 US 232, 247 (1974) (deploying the phrase "qualified immunity" for the first time in the Supreme Court's jurisprudence); Butz v Economou, 438 US 478 (1978) (extending qualified immunity to federal officers sued under Bivens for

federal constitutional violations); Maine v Thiboutot, 448 US 1 (1980) (holding that section 1983 could be used to vindicate non-constitutional statutory rights); Harlow, 457 US at 818 (making the unprecedented reference to "clearly established statutory" rights just two years after Thiboutot (emphasis added)). These causes of action "were devised by the Supreme Court without any legislative or constitutional (in the sense of positive law) guidance." Crawford-El v Britton, 93 F3d 813, 832 (DC Cir 1996) (en banc) (Silberman concurring), vacated on other grounds, 523 US 574 (1998). "It is understandable then, that the Court also developed the doctrine of qualified immunity to reduce the burden on public officials." Berry, 146 F3d at 1013.

In contrast, the statutes in this case set forth comprehensive, free-standing liability schemes, complete with statutory defenses, many of which specifically contemplate liability on the part of telecommunications providers such as AT&T. For example, the Stored Communications Act prohibits providers of "electronic communication service" and "remote computing service" from divulging contents of stored communications. See 18 USC § 2702(a)(1), (a)(2). Moreover, the Stored Communications Act specifically contemplates carrier liability for unauthorized disclosure of subscriber records "to any governmental entity." See id § 2702(a)(3). It can hardly be said that Congress did not contemplate that carriers might be liable for cooperating with the government when such cooperation did not conform to the requirements of the act.

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Similarly, Congress specifically contemplated that communications carriers could be liable for violations of Title III. See Jacobson, 592 F2d at 522. And in providing for a "good faith" defense in Title III, Congress specifically sought "'to protect telephone companies or other persons who cooperate * * * with law enforcement officials.'" Id at 522-23 (quoting Senate debates). See also id at 523 n 13. Cf 18 USC § 2511(2)(a)(ii) (providing a statutory defense to "providers of wire or electronic communication service").

In sum, neither the history of judicially created immunities for telecommunications carriers nor the purposes of qualified immunity justify allowing AT&T to claim the benefit of the doctrine in this case.

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The court also notes that based on the facts as alleged in plaintiffs' complaint, AT&T is not entitled to qualified immunity with respect to plaintiffs' constitutional claim, at least not at this stage of the proceedings. Plaintiffs' constitutional claim alleges that AT&T provides the government with direct and indiscriminate access to the domestic communications of AT&T customers. See, e g, FAC, ¶ 42 ("On information and belief, AT&T Corp has provided and continues to provide the government with direct access to all or a substantial number of the communications transmitted through its key domestic telecommunications facilities, including direct access to streams of domestic, international and foreign telephone and Internet communications."); id, ¶ 78 (incorporating paragraph 42 by reference into plaintiffs'

constitutional claim). In United States v United States District Court, 407 US 297 (1972) (Keith), the Supreme Court held that the Fourth Amendment does not permit warrantless wiretaps to track domestic threats to national security, id at 321, reaffirmed the "necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest," id at 308, and did not pass judgment "on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country," id. Because the alleged dragnet here encompasses the communications of "all or substantially all of the communications transmitted through [AT&T's] key domestic telecommunications facilities," it cannot reasonably be said that the program as alleged is limited to tracking foreign powers. Accordingly, AT&T's alleged actions here violate the constitutional rights clearly established in Keith. Moreover, because "the very action in question has previously been held unlawful," AT&T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal.

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Accordingly, the court DENIES AT&T's instant motion to dismiss on the basis of qualified immunity. The court does not preclude AT&T from raising the qualified immunity defense later in these proceedings, if further discovery indicates that such a defense is merited.

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III

As this case proceeds to discovery, the court flags a few procedural matters on which it seeks the parties' guidance. First, while the court has a duty to the extent possible to disentangle sensitive information from nonsensitive information, see Ellsberg, 709 F2d at 57, the court also must take special care to honor the extraordinary security concerns raised by the government here. To help perform these duties, the court proposes appointing an expert pursuant to FRE 706 to assist the court in determining whether disclosing particular evidence would create a "reasonable danger" of harming national security. See FRE 706(a) ("The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection."). Although other courts do not appear to have used FRE 706 experts in the manner proposed here, this procedural innovation seems appropriate given the complex and weighty issues the court will confront in navigating any future privilege assertions. See Ellsberg, 709 F2d at 64 (encouraging "procedural innovation" in addressing state secrets issues); Halpern, 258 F2d at 44 ("A trial *in camera* in which the privilege relating to state secrets may not be availed of by the United States is permissible, if, in the judgment of the district court, such a trial can be carried out without substantial risk that secret information will be publicly divulged").

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The court contemplates that the individual would be one who had a security clearance for receipt of the most highly sensitive information and had extensive experience in intelligence matters. This individual could perform a number of functions; among others, these might include advising the court on the risks associated with disclosure of certain information, the manner and extent of appropriate disclosures and the parties' respective contentions. While the court has at least one such individual in mind, it has taken no steps to contact or communicate with the individual to determine availability or other matters. This is an appropriate subject for discussion with the parties.

The court also notes that should it become necessary for the court to review additional classified material, it may be preferable for the court to travel to the location of those materials than for them to be hand-carried to San Francisco. Of course, a secure facility is available in San Francisco and was used to house classified documents for a few days while the court conducted its *in camera* review for purposes of the government's instant motion. The same procedures that were previously used could be employed again. But alternative procedures may also be used and may in some instances be more appropriate.

Finally, given that the state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance ultimate termination of the litigation, the court certifies this order for the parties to apply for an immediate appeal pursuant to 28 USC § 1292(b). The court notes that if such an appeal is taken, the present proceedings do

not necessarily have to be stayed. 28 USC § 1292(b) ("[A]pplication for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."). At the very least, it would seem prudent for the court to select the expert pursuant to FRE 706 prior to the Ninth Circuit's review of this matter.

Accordingly, the court ORDERS the parties to SHOW CAUSE in writing by July 31, 2006, why it should not appoint an expert pursuant to FRE 706 to assist in the manner stated above. The responses should propose nominees for the expert position and should also state the parties' views regarding the means by which the court should review any future classified submissions. Moreover, the parties should describe what portions of this case, if any, should be stayed if this order is appealed.

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IV

In sum, the court DENIES the government's motion to dismiss, or in the alternative, for summary judgment on the basis of state secrets and DENIES AT&T's motion to dismiss. As noted in section III, *supra*, the parties are ORDERED TO SHOW CAUSE in writing by July 31, 2006, why the court should not appoint an expert pursuant to FRE 706 to assist the court. The parties' briefs should also address whether this action should be stayed pending an appeal pursuant to 28 USC § 1292(b).

The parties are also instructed to appear on August 8, 2006, at 2 PM, for a further case management conference.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

Briefs and Other Related Documents

Hepting v. AT & T Corp.N.D.Cal.,2006.

United States District Court,N.D. California.

Tash HEPTING, et al, Plaintiffs,

v.

AT & T CORPORATION, et al, Defendants.

No C-06-672 VRW.

July 20, 2006.

Background: Customers brought action against telecommunications provider, alleging constitutional and statutory violations in connection with provider's alleged participation in government's alleged warrantless surveillance programs that tracked domestic and foreign communications and communications records. Provider moved to dismiss, and after moving to intervene as a defendant, government moved to dismiss or for summary judgment based on the state secrets privilege.

Holdings: After ruling that it could not proceed until it conducted in camera examination of classified documents, 2006 WL 1581965, the District Court, Walker, Chief Judge, held that:

(1) state secrets privilege did not categorically bar action;

(2) subject matter of action was not a state secret;

(3) state secrets privilege would not prevent provider from disclosing whether it received a certification authorizing its assistance to the government as defense;

(4) statutory privileges did not bar action;

(5) customers sufficiently alleged injury-in-fact to establish Article III standing;

(6) purported common law immunity accorded telecommunications providers for cooperating with government officials conducting surveillance activities did not bar action; and

(7) qualified immunity doctrine did not extend to provider.

Motions denied.

West Headnotes

[1] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases

“State secrets privilege” is a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security.

[2] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases

Where there is a strong showing of necessity, claim of state secrets privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

[3] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases

First step in determining whether a piece of information constitutes a “state secret” for purposes of the state secrets privilege is determining whether that information actually is a “secret.”

[4] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases
Simply because a factual statement has been publicly made does not necessarily mean that the facts it relates are true and are not a secret for purposes of the state secrets privilege.

[5] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases
In determining whether a factual statement is a secret for purposes of the state secrets privilege, the court should look only at publicly reported information that possesses substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security; that entails assessing the value of the information to an individual or group bent on threatening the security of the country, as well as the secrecy of the information.

[6] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases
In determining whether information that the government contends is a secret is actually a secret for purposes of the state secrets privilege, the court may rely upon reliable public evidence that might otherwise be inadmissible at trial because it does not comply with the technical requirements of the rules of evidence. Fed.Rules Evid.Rule 104(a), 28 U.S.C.A.

[7] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases
State secrets privilege did not categorically bar action against government and telecommunications provider based on alleged warrantless surveillance programs that tracked domestic and foreign communications and communications records; government had disclosed the general contours of a “terrorist surveillance program,” which required the assistance of a telecommunications provider, and provider claimed that it lawfully and dutifully assisted the government in classified matters when asked.

[8] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases
Subject matter of action against government and telecommunications provider, based on alleged warrantless surveillance program that tracked domestic and foreign communications and communications records, was not a state secret, as required for state secrets privilege to bar action; significant amounts of information about the government's monitoring of communication content and provider's intelligence relationship with the government were already nonclassified or in the public record.

[9] Witnesses 410 216(1)

410 Witnesses
410II Competency

410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases
Government's warrantless monitoring of contents of communications with parties outside the United States linked to terrorist organizations was not a state secret, and thus state secrets privilege would not prevent telecommunications provider from disclosing whether it received a certification authorizing its assistance to the government as defense in action based on its participation in alleged warrantless surveillance program; government has opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content. 18 U.S.C.A. § 2511(2)(a)(ii).

[10] Witnesses 410 ⚿216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases
Statutory privileges for information regarding the activities of the National Security Agency (NSA) and intelligence sources and methods did not bar action against government and telecommunications provider based on alleged warrantless surveillance programs that tracked domestic and foreign communications and communications records; plaintiffs could rely on many non-classified materials including present and future public disclosures of the government or provider on the alleged NSA programs. National Security Agency Act of 1959, § 6, 50 U.S.C.A. § 402 note; National Security Act of 1947, § 102A(i)(1), 50 U.S.C.A. § 403-1(i)(1).

[11] Federal Civil Procedure 170A ⚿103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

Federal Civil Procedure 170A ⚿103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; Redressability. Most Cited Cases
To establish standing under Article III, a plaintiff must satisfy three elements: (1) plaintiff must have suffered an injury in fact, an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical, (2) there must be a causal connection between the injury and the conduct complained of and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

[12] Federal Civil Procedure 170A ⚿103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases
Party invoking federal jurisdiction has the burden of establishing its standing to sue. U.S.C.A. Const. Art. 3, § 1 et seq.

[13] Telecommunications 372 ⚿1445

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1442 Actions
372k1445 k. Parties in General; Standing. Most Cited Cases
Telecommunications provider's customers sufficiently alleged injury-in-fact to establish Article III standing in their action against government and provider based on alleged warrantless surveillance programs that tracked domestic and foreign communications and communications records; customers generally described injuries they allegedly suffered because of provider's illegal conduct and its collaboration with the government, and alleged dragnet

that collected content and records of customers' communications would have imparted a concrete injury on each of them. U.S.C.A. Const. Art. 3, § 1 et seq.

[14] Federal Civil Procedure 170A 103.5

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.5 k. Pleading. Most Cited Cases
At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice to establish standing, for on a motion to dismiss courts presume that general allegations embrace those specific facts that are necessary to support the claim. U.S.C.A. Const. Art. 3, § 1 et seq.

[15] Telecommunications 372 1447

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1442 Actions
372k1447 k. Pleading. Most Cited Cases
Even if telecommunications provider's customers were required to plead affirmatively that provider did not receive a certification from government authorizing it to conduct electronic surveillance in support of their action based on provider's alleged participation in alleged warrantless surveillance programs, customers sufficiently alleged that provider acted outside scope of any government certification it might have received, where they alleged that communications were intercepted without judicial or other lawful authorization. 18 U.S.C.A. §§ 2511(2)(a)(ii)(B), 2520(a).

[16] Telecommunications 372 1441

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1441 k. Persons Liable; Immunity. Most Cited Cases
Purported common law immunity accorded telecommunications providers for cooperating with government officials conducting surveillance activities did not bar action against provider that allegedly participated in warrantless surveillance program; common law immunity appeared to overlap considerably with protections afforded under subsequently enacted statutory certification provision, and there was no reason to presume that such immunity was available simply because Congress has not expressed a contrary intent. 18 U.S.C.A. § 2511(2)(a)(ii)(B).

[17] Civil Rights 78 1376(2)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases
"Qualified immunity" shields state actors from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

[18] Officers and Public Employees 283 114

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k114 k. Liabilities for Official Acts. Most Cited Cases
Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions.

[19] Civil Rights 78 1376(1)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(1) k. In General. Most Cited Cases

Civil Rights 78 1376(2)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers
78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases
At the pleadings stage, qualified immunity analysis entails three steps: first, the court must determine whether, taken in the light most favorable to the plaintiff, the facts alleged show a violation of the plaintiffs' statutory or constitutional rights; if a violation has been alleged, the court next determines whether the right infringed was clearly established at the time of the alleged violation; finally, the court assesses whether it would be clear to a reasonable person in the defendant's position that its conduct was unlawful in the situation it confronted.

[20] Civil Rights 78 ⚿1373

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1373 k. In General. Most Cited Cases
When a private party seeks to invoke qualified immunity, the court must first decide whether qualified immunity is categorically available, which requires an evaluation of the appropriateness of qualified immunity given its historical availability and the policy considerations underpinning the doctrine; this inquiry is distinct from the question whether a nominally private party is a state actor for purposes of a § 1983 or *Bivens* claim. 42 U.S.C.A. § 1983.

[21] Telecommunications 372 ⚿1441

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1441 k. Persons Liable; Immunity. Most Cited Cases
Qualified immunity doctrine did not extend to telecommunications provider with regard to statutory claims based on its alleged participation in government's warrantless surveillance program; no firmly rooted common law immunity existed for telecommunications providers assisting the government, and purposes of immunity were already served by statutory certification program for providers that conduct electronic surveillance. 18 U.S.C.A. § 2511(2)(a)(ii).

[22] Officers and Public Employees 283 ⚿114

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k114 k. Liabilities for Official Acts. Most Cited Cases
Purposes of qualified immunity include: (1) protecting the public from unwarranted timidity on the part of public officials and encouraging the vigorous exercise of official authority; (2) preventing lawsuits from distracting officials from their governmental duties; and (3) ensuring that talented candidates are not deterred by the threat of damages suits from entering public service.

[23] Telecommunications 372 ⚿1441

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1441 k. Persons Liable; Immunity. Most Cited Cases
Telecommunications provider was not entitled to qualified immunity with respect to customers' constitutional claim, based on alleged Fourth Amendment violation arising when provider allegedly gave the government direct and indiscriminate access to domestic communications when participating in government's electronic surveillance program; alleged dragnet encompassed communications of all or substantially all of the communications transmitted through provider's key domestic telecommunications facilities, and thus was not limited to tracking foreign powers. U.S.C.A. Const.Amend. 4.

[24] Witnesses 410 ⚿223

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k223 k. Determination as to Admissibility. Most Cited Cases
National security concerns raised by government in action based on telecommunications provider's alleged participation in government's warrantless electronic surveillance program supported appointment of an expert to assist the court in determining whether disclosing particular evidence would create a “reasonable danger” of harming na-

tional security. Fed.Rules Evid.Rule 706(a), 28 U.S.C.A.

***978** Cindy Ann Cohn, Corynne McSherry, Kevin Stuart Bankston, Kurt Opsahl, Electronic Frontier Foundation, Jeff D. FriedmanElena Maria Dimuzio, Heller Ehrman LLP, Eric B. Fastiff, Lieff, Cabraser, Heimann & Bernstein, LLP, Eric A. Isaacson, Lerach Coughlin Stoia Geller Rudman & Robbins LLP, Maria V. Morris, Shana Eve Scarlett, Lerach Coughlin Stoia Geller Rudman & Robbins LLP, Barry R. Himmelstein, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA, Bert Voorhees, Traber & Voorhees, Pasadena, CA, James Samuel Tyre, Culver City, CA, Michael M. Markman, Heller, Ehrman, White & McAuliffe LLP, Menlo Park, CA, Robert D. Fram, Heller, Ehrman, White & McAuliffe LLP, Reed R. Kathrein, Lerach Coughlin Stoia Geller Rudman & Robbins LLP, Richard Roy Wiebe, Law Office of Richard R. Wiebe, San Francisco, CA, Theresa M. Traber, Esq., Traber & Voorhees, Pasadena, CA, Tze Lee Tien, Berkeley, CA, for Plaintiffs.
Bruce A. Ericson, David L. Anderson, Jacob R. Sorensen, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA, David W. Carpenter, Sidley Austin Brown & Wood LLP, Chicago, IL, David L. Lawson, Sidley Austin Brown & Wood, Edward Robert McNicholas, Bradford Allan Berenson, Sidley Austin LLP, Andrew H. Tannenbaum, Anthony Joseph Coppolino, Peter D. Keisler, United State Department of Justice, Civil Division, Federal Programs Branch, Renee Sharon Orleans, U.S. Department of Justice, Washington, DC, Marc Van Der Hout, Van Der Hout & Brigagliano, San Francisco, CA, James J. BrosnahanBrian Martinez Morrison & Foerster LLP San Francisco, CA, Jennifer Stisa Granick, Stanford Law School Crown Quadrangle, Stanford, CA, Susan A. FreiwaldUSF School of Law Terry Gross, Gross & Belsky LLP, Roger R. Myers, Holme Roberts & Owen LLPLaurence F. PulgramFenwick & West LLP San Francisco, CA, for Defendants.
Eric Schneider, Delray Beach, FL, pro se.

ORDER

WALKER, Chief Judge.
Plaintiffs allege that AT & T Corporation (AT & T) and its holding company, AT & T Inc, are collaborating with the National Security Agency (NSA) in a massive warrantless surveillance program that illegally tracks the domestic and foreign communications and communication records of millions of Americans. The first amended complaint (Doc # 8(FAC)), filed on February 22, 2006, claims that AT & T and AT & T Inc have committed violations of:
(1) The First and Fourth Amendments to the United States Constitution (acting as agents or instruments of the government) by illegally intercepting, disclosing, divulging and/or using plaintiffs' communications;
(2) Section 109 of Title I of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1809, by engaging in illegal electronic surveillance of plaintiffs' communications under color of law;
***979** (3) Section 802 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by section 101 of Title I of the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2511(1)(a), (1)(c), (1)(d) and (3)(a), by illegally intercepting, disclosing, using and/or divulging plaintiffs' communications;
(4) Section 705 of Title VII of the Communications Act of 1934, as amended, 47 U.S.C. § 605, by unauthorized divulgence and/or publication of plaintiffs' communications;
(5) Section 201 of Title II of the ECPA ("Stored Communications Act"), as amended, 18 U.S.C. §§ 2702(a)(1) and (a)(2), by illegally divulging the contents of plaintiffs' communications;
(6) Section 201 of the Stored Communications Act, as amended by section 212 of Title II of the USA PATRIOT Act, 18 U.S.C. § 2702(a)(3), by illegally divulging records concerning plaintiffs' communications to a governmental entity and
(7) California's Unfair Competition Law, Cal Bus & Prof Code §§ 17200 et seq, by engaging in unfair, unlawful and deceptive business practices.

The complaint seeks certification of a class action and redress through statutory damages, punitive damages, restitution, disgorgement and injunctive and declaratory relief.

On April 5, 2006, plaintiffs moved for a preliminary injunction seeking to enjoin defendants' allegedly illegal activity. Doc # 30(MPI). Plaintiffs supported their motion by filing under seal three documents, obtained by former AT & T technician Mark Klein, which allegedly demonstrate how AT & T has implemented a warrantless surveillance system on behalf of the NSA at a San Francisco AT & T facility. Doc # 31, Exs A-C (the "AT & T documents"). Plaintiffs also filed under seal supporting declarations from Klein (Doc # 31) and J Scott Marcus (Doc #

32), a putative expert who reviewed the AT & T documents and the Klein declaration.

On April 28, 2006, AT & T moved to dismiss this case. Doc # 86 (AT & T MTD). AT & T contends that plaintiffs lack standing and were required but failed to plead affirmatively that AT & T did not receive a government certification pursuant to 18 U.S.C. § 2511(2)(a)(ii)(B). AT & T also contends it is entitled to statutory, common law and qualified immunity.

On May 13, 2006, the United States moved to intervene as a defendant and moved for dismissal or, alternatively, for summary judgment based on the state secrets privilege. Doc # 124-1 (Gov MTD). The government supported its assertion of the state secrets privilege with public declarations from the Director of National Intelligence, John D Negroponte (Doc # 124-2 (Negroponte Decl)), and the Director of the NSA, Keith B Alexander (Doc # 124-3 (Alexander Decl)), and encouraged the court to review additional classified submissions *in camera* and *ex parte*. The government also asserted two statutory privileges under 50 U.S.C. § 402 *note* and 50 U.S.C. § 403-1(i)(1).

At a May 17, 2006, hearing, the court requested additional briefing from the parties addressing (1) whether this case could be decided without resolving the state secrets issue, thereby obviating any need for the court to review the government's classified submissions and (2) whether the state secrets issue is implicated by an FRCP 30(b)(6) deposition request for information about any certification that AT & T may have received from the government authorizing the alleged wiretapping activities. Based on the parties' submissions,***980** the court concluded in a June 6, 2006, order that this case could not proceed and discovery could not commence until the court examined *in camera* and *ex parte* the classified documents to assess whether and to what extent the state secrets privilege applies. Doc # 171.

After performing this review, the court heard oral argument on the motions to dismiss on June 23, 2006. For the reasons discussed herein, the court DENIES the government's motion to dismiss and DENIES AT & T's motion to dismiss.

I

The court first addresses the government's motion to dismiss or, alternatively, for judgment on state secrets grounds. After exploring the history and principles underlying the state secrets privilege and summarizing the government's arguments, the court turns to whether the state secrets privilege applies and requires dismissal of this action or immediate entry of judgment in favor of defendants. The court then takes up how the asserted privilege bears on plaintiffs' discovery request for any government certification that AT & T might have received authorizing the alleged surveillance activities. Finally, the court addresses the statutory privileges raised by the government.

A

[1] "The state secrets privilege is a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security. Although the exact origins of the privilege are not certain, the privilege in this country has its initial roots in Aaron Burr's trial for treason, and has its modern roots in *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953)." *In re United States*, 872 F.2d 472, 474-75 (D.C.Cir.1989) (citations omitted and altered). In his trial for treason, Burr moved for a *subpoena duces tecum* ordering President Jefferson to produce a letter by General James Wilkinson. *United States v. Burr*, 25 F.Cas. 30, 32 (C.C.D.Va.1807). Responding to the government's argument "that the letter contains material which ought not to be disclosed," Chief Justice Marshall riding circuit noted, "What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country." *Id.* at 37. Although the court issued the subpoena, *id.* at 37-38, it noted that if the letter "contain[s] any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed." *Id.* at 37.

The actions of another president were at issue in *Totten v. United States*, 92 U.S. 105, 23 L.Ed. 605 (1876), in which the Supreme Court established an important precursor to the modern-day state secrets privilege. In that case, the administrator of a former spy's estate sued the government based on a contract the spy allegedly made with President Lincoln to recover compensation for espionage services rendered during the Civil War. *Id.* at 105-06. The *Totten*

Court found the action to be barred:
The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied ***981** in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.

Id. at 106, quoted in *Tenet v. Doe*, 544 U.S. 1, 7-8, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005). Hence, given the secrecy implied in such a contract, the *Totten* Court "thought it entirely incompatible with the nature of such a contract that a former spy could bring suit to enforce it." *Tenet*, 544 U.S. at 8, 125 S.Ct. 1230. Additionally, the *Totten* Court observed:It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. * * * Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Totten, 92 U.S. at 107. Characterizing this aspect of *Totten*, the Supreme Court has noted, "No matter the clothing in which alleged spies dress their claims, *Totten* precludes judicial review in cases such as [plaintiffs'] where success depends upon the existence of their secret espionage relationship with the Government." *Tenet*, 544 U.S. at 8, 125 S.Ct. 1230. "*Totten's* core concern" is "preventing the existence of the [alleged spy's] relationship with the Government from being revealed." *Id.* at 10, 125 S.Ct. 1230.

In the Cold War era case of *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), the Supreme Court first articulated the state secrets privilege in its modern form. After a B-29 military aircraft crashed and killed three civilian observers, their widows sued the government under the Federal Tort Claims Act and sought discovery of the Air Force's official accident investigation. *Id.* at 2-3, 73 S.Ct. 528. The Secretary of the Air Force filed a formal "Claim of Privilege" and the government refused to produce the relevant documents to the court for *in camera* review. *Id.* at 4-5, 73 S.Ct. 528. The district court deemed as established facts regarding negligence and entered judgment for plaintiffs. *Id.* at 5, 73 S.Ct. 528. The Third Circuit affirmed and the Supreme Court granted certiorari to determine "whether there was a valid claim of privilege under [FRCP 34]." *Id.* at 6, 73 S.Ct. 528. Noting this country's theretofore limited judicial experience with "the privilege which protects military and state secrets," the court stated:
The privilege belongs to the Government and must be asserted by it * * *. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

Id. at 7-8, 73 S.Ct. 528 (footnotes omitted). The latter determination requires a "formula of compromise," as "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," yet a court may not "automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *Id.* at 9-10, 73 S.Ct. 528. Striking this balance, the Supreme Court held that the "occasion for the privilege is appropriate" when a court is satisfied ***982** "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10, 73 S.Ct. 528.

[2] The degree to which the court may "probe in satisfying itself that the occasion for invoking the privilege is appropriate" turns on "the showing of necessity which is made" by plaintiffs. *Id.* at 11, 73 S.Ct. 528. "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* Finding both a "reasonable danger that the accident investigation report would contain" state secrets

and a "dubious showing of necessity," the court reversed the Third Circuit's decision and sustained the claim of privilege. *Id.* at 10-12, 73 S.Ct. 528.

In *Halkin v. Helms*, 598 F.2d 1 (D.C.Cir.1978) (*Halkin I*), the District of Columbia Circuit applied the principles enunciated in *Reynolds* in an action alleging illegal NSA wiretapping. Former Vietnam War protestors contended that "the NSA conducted warrantless interceptions of their international wire, cable and telephone communications" at the request of various federal defendants and with the cooperation of telecommunications providers. *Id.* at 3. Plaintiffs challenged two separate NSA operations: operation MINARET, which was "part of [NSA's] regular signals intelligence activity in which foreign electronic signals were monitored," and operation SHAMROCK, which involved "processing of all telegraphic traffic leaving or entering the United States." *Id.* at 4.

The government moved to dismiss on state secrets grounds, arguing that civil discovery would impermissibly "(1) confirm the identity of individuals or organizations whose foreign communications were acquired by NSA, (2) disclose the dates and contents of such communications, or (3) divulge the methods and techniques by which the communications were acquired by NSA." Id. at 4-5. After plaintiffs "succeeded in obtaining a limited amount of discovery," the district court concluded that plaintiffs' claims challenging operation MINARET could not proceed because "the ultimate issue, the fact of acquisition, could neither be admitted nor denied." *Id.* at 5. The court denied the government's motion to dismiss on claims challenging operation SHAMROCK because the court "thought congressional committees investigating intelligence matters had revealed so much information about SHAMROCK that such a disclosure would pose no threat to the NSA mission." *Id.* at 10.

On certified appeal, the District of Columbia Circuit noted that even "seemingly innocuous" information is privileged if that information is part of a classified "mosaic" that "can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." *Id.* at 8. The court affirmed dismissal of the claims related to operation MINARET but reversed the district court's rejection of the privilege as to operation SHAMROCK, reasoning that "confirmation or denial that a particular plaintiff's communications have been acquired would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst." *Id.* at 10. On remand, the district court dismissed plaintiffs' claims against the NSA and individuals connected with the NSA's alleged monitoring. Plaintiffs were left with claims against the Central Intelligence Agency (CIA) and individuals who had allegedly submitted watchlists to the NSA on the presumption that the submission resulted in interception of plaintiffs'***983** communications. The district court eventually dismissed the CIA-related claims as well on state secrets grounds and the case went up again to the court of appeals.

The District of Columbia Circuit stated that the state secrets inquiry "is not a balancing of ultimate interests at stake in the litigation," but rather "whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case." *Halkin v. Helms*, 690 F.2d 977, 990 (D.C.Cir.1982) (*Halkin II*). The court then affirmed dismissal of "the claims for injunctive and declaratory relief against the CIA defendants based upon their submission of plaintiffs' names on 'watchlists' to NSA." *Id.* at 997 (emphasis omitted). The court found that plaintiffs lacked standing given the court's "ruling in *Halkin I* that evidence of the fact of acquisition of plaintiffs' communications by NSA cannot be obtained from the government, nor can such fact be presumed from the submission of watchlists to that Agency." *Id.* at 999 (emphasis omitted).

In *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C.Cir.1983), the District of Columbia Circuit addressed the state secrets privilege in another wiretapping case. Former defendants and attorneys in the "Pentagon Papers" criminal prosecution sued individuals who allegedly were responsible for conducting warrantless electronic surveillance. *Id.* at 52-53. In response to plaintiffs' interrogatories, defendants admitted to two wiretaps but refused to answer other questions on the ground that the requested information was privileged. *Id.* at 53. The district court sustained the government's formal assertion of the state secrets privilege and dismissed plaintiffs' claims pertaining to foreign communications surveillance. *Id.* at 56.

On appeal, the District of Columbia Circuit noted that "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the re-

lease of the latter." *Id.* at 57. The court generally affirmed the district court's decisions regarding the privilege, finding "a 'reasonable danger' that revelation of the information in question would either enable a sophisticated analyst to gain insights into the nation's intelligence-gathering methods and capabilities or would disrupt diplomatic relations with foreign governments." *Id.* at 59. The court disagreed with the district court's decision that the privilege precluded discovery of the names of the attorneys general that authorized the surveillance. *Id.* at 60.

Additionally, responding to plaintiffs' argument that the district court should have required the government to disclose more fully its basis for asserting the privilege, the court recognized that "procedural innovation" was within the district court's discretion and noted that "[t]he government's public statement need be no more (and no less) specific than is practicable under the circumstances." Id. at 64.

In considering the effect of the privilege, the court affirmed dismissal "with regard to those [individuals] whom the government ha[d] not admitted overhearing." *Id.* at 65. But the court did not dismiss the claims relating to the wiretaps that the government had conceded, noting that there was no reason to "suspend the general rule that the burden is on those seeking an exemption from the Fourth Amendment warrant requirement to show the need for it." *Id.* at 68.

In *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.1998), the Ninth Circuit issued its definitive opinion on the state secrets privilege. Former employees at a classified United States Air Force facility brought a ***984** citizen suit under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972, alleging the Air Force violated that act. *Id.* at 1162. The district court granted summary judgment against plaintiffs, finding discovery of information related to chemical inventories impossible due to the state secrets privilege. *Id.* On appeal, plaintiffs argued that an exemption in the RCRA preempted the state secrets privilege and even if not preempted, the privilege was improperly asserted and too broadly applied. *Id.* at 1167-69. After characterizing the state secrets privilege as a matter of federal common law, the Ninth Circuit recognized that "statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Id.* at 1167 (omissions in original) (citations omitted). Finding no such purpose, the court held that the statutory exemption did not preempt the state secrets privilege. *Id.* at 1168.

Kasza also explained that the state secrets privilege can require dismissal of a case in three distinct ways. "First, by invoking the privilege over particular evidence, the evidence is completely removed from the case. The plaintiff's case then goes forward based on evidence not covered by the privilege. * * * If, after further proceedings, the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." *Id.* at 1166. Second, "if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant." *Id.* (internal quotation omitted) (emphasis in original). Finally, and most relevant here, "notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." *Id.* (quoting *Reynolds*, 345 U.S. at 11 n. 26, 73 S.Ct. 528). See also *Reynolds*, 345 U.S. at 11 n. 26, 73 S.Ct. 528 (characterizing *Totten* as a case "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege.").

According the "utmost deference" to the government's claim of privilege and noting that even "seemingly innocuous information" could be "part of a classified mosaic," *id.* at 1166, *Kasza* concluded after *in camera* review of classified declarations "that release of such information would reasonably endanger national security interests." *Id.* at 1170. Because "no protective procedure" could salvage plaintiffs' case, and "the very subject matter of [her] action [was] a state secret," the court affirmed dismissal. *Id.*

More recently, in *Tenet v. Doe*, 544 U.S. 1, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005), the Supreme Court reaffirmed *Totten*, holding that an alleged former Cold War spy could not sue the government to enforce its obliga-

tions under a covert espionage agreement. *Id.* at 3, 125 S.Ct. 1230. Importantly, the Court held that *Reynolds* did not "replac[e] the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships." *Id.* at 9-10, 125 S.Ct. 1230.

Even more recently, in *El-Masri v. Tenet*, 2006 WL 1391390, 05-cv-01417 (ED Va May 12, 2006), plaintiff sued the former ***985** director of the CIA and private corporations involved in a program of "extraordinary rendition," pursuant to which plaintiff was allegedly beaten, tortured and imprisoned because the government mistakenly believed he was affiliated with the al Qaeda terrorist organization. *Id.* at *1-2. The government intervened "to protect its interests in preserving state secrets." *Id.* at *3. The court sustained the government's assertion of the privilege:

[T]he substance of El-Masri's publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. And, as the public declaration makes pellucidly clear, any admission or denial of these allegations by defendants * * * would present a grave risk of injury to national security.

Id. at *5. The court also rejected plaintiff's argument "that government officials' public affirmation of the existence" of the rendition program somehow undercut the claim of privilege because the government's general admission provided "no details as to the [program's] means and methods," which were "validly claimed as state secrets." *Id.* Having validated the exercise of privilege, the court reasoned that dismissal was required because "any answer to the complaint by the defendants risk[ed] the disclosure of specific details [of the program]" and special discovery procedures would have been "plainly ineffective where, as here, the entire aim of the suit [was] to prove the existence of state secrets." *Id.* at *6.

B

Relying on *Kasza*, the government advances three reasons why the state secrets privilege requires dismissing this action or granting summary judgment for AT & T: (1) the very subject matter of this case is a state secret; (2) plaintiffs cannot make a *prima facie* case for their claims without classified evidence and (3) the privilege effectively deprives AT & T of information necessary to raise valid defenses. Doc # 245-1 (Gov Reply) at 3-5.

In support of its contention that the very subject matter of this action is a state secret, the government argues: "AT & T cannot even confirm or deny the key factual premise underlying [p]laintiffs' entire case-that AT & T has provided any assistance whatsoever to NSA regarding foreign-intelligence surveillance. Indeed, in the formulation of *Reynolds* and *Kasza*, that allegation is 'the very subject of the action.' " *Id.* at 4-5.

Additionally, the government claims that dismissal is appropriate because plaintiffs cannot establish a *prima facie* case for their claims. Contending that plaintiffs "persistently confuse speculative allegations and untested assertions for established facts," the government attacks the Klein and Marcus declarations and the various media reports that plaintiffs rely on to demonstrate standing. *Id.* at 4. The government also argues that "[e]ven when alleged facts have been the 'subject of widespread media and public speculation' based on '[u]nofficial leaks and public surmise,' those alleged facts are not actually established in the public domain." *Id.* at 8 (quoting *Afshar v. Dept. of State*, 702 F.2d 1125, 1130-31 (D.C.Cir.1983)).

The government further contends that its "privilege assertion covers any information tending to confirm or deny (a) the alleged intelligence activities, (b) whether AT & T was involved with any such activity, and (c) whether a particular individual's communications were intercepted as a result of any such activity." Gov MTD at 17-18. The government reasons that "[w]ithout these facts * * * [p]laintiffs ultimately will not be able to prove injury-in-***986** fact and causation," thereby justifying dismissal of this action for lack of standing. *Id* at 18.

The government also notes that plaintiffs do not fall within the scope of the publicly disclosed "terrorist surveillance program" (see *infra I(C)(1))* because "[p]laintiffs do not claim to be, or to communicate with, members or affiliates of [the] al Qaeda [terrorist organization]-indeed, [p]laintiffs expressly exclude from their purported class any foreign powers or agent of foreign powers * * *." Id. at 18 n. 9 (citing FAC, ¶ 70). Hence, the government concludes the named plaintiffs "are in no different position from any other citizen or AT & T subscriber who falls *outside* the narrow scope of the [terrorist surveillance pro-

gram] but nonetheless disagrees with the program." Id. (emphasis in original).

Additionally, the government contends that plaintiffs' Fourth Amendment claim fails because no warrant is required for the alleged searches. In particular, the government contends that the executive has inherent constitutional authority to conduct warrantless searches for foreign intelligence purposes, id. at 24 (citing *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Int.Surv.Ct.Rev.2002)), and that the warrant requirement does not apply here because this case involves "special needs" that go beyond a routine interest in law enforcement, id. at 26. Accordingly, to make a *prima facie* case, the government asserts that plaintiffs would have to demonstrate that the alleged searches were unreasonable, which would require a fact-intensive inquiry that the government contends plaintiffs could not perform because of the asserted privilege. Id. at 26-27.

The government also argues that plaintiffs cannot establish a *prima facie* case for their statutory claims because plaintiffs must prove "that any alleged interception or disclosure was not authorized by the Government." The government maintains that "[p]laintiffs bear the burden of alleging and proving the lack of such authorization," id. at 21-22, and that they cannot meet that burden because "information confirming or denying AT & T's involvement in alleged intelligence activities is covered by the state secrets assertion." Id. at 23.

Because "the existence or non-existence of any certification or authorization by the Government relating to any AT & T activity would be information tending to confirm or deny AT & T's involvement in any alleged intelligence activity," Doc # 145-1 (Gov 5/17/06 Br) at 17, the government contends that its state secrets assertion precludes AT & T from "present[ing] the facts that would constitute its defenses." Gov Reply at 1. Accordingly, the government also argues that the court could grant summary judgment in favor of AT & T on that basis.

C

[3] The first step in determining whether a piece of information constitutes a "state secret" is determining whether that information actually is a "secret." Hence, before analyzing the application of the state secrets privilege to plaintiffs' claims, the court summarizes what has been publicly disclosed about NSA surveillance programs as well as the AT & T documents and accompanying Klein and Marcus declarations.

1

Within the last year, public reports have surfaced on at least two different types of alleged NSA surveillance programs, neither of which relies on warrants. *The New York Times* disclosed the first such program on December 16, 2005. Doc # 19 (Cohn Decl), Ex J (James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts, The New York Times* ***987** (Dec 16, 2005)). The following day, President George W Bush confirmed the existence of a "terrorist surveillance program" in his weekly radio address:

In the weeks following the [September 11, 2001] terrorist attacks on our Nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaeda and related terrorist organizations. Before we intercept these communications, the Government must have information that establishes a clear link to these terrorist networks.

Doc # 20 (Pl Request for Judicial Notice), Ex 1 at 2, available at http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html (last visited July 19, 2006). The President also described the mechanism by which the program is authorized and reviewed:The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our Government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our Nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our Nation faces a continuing threat from Al Qaeda and related groups.

The NSA's activities under this authorization are thoroughly reviewed by the Justice Department and NSA's top legal officials, including NSA's General Counsel and Inspector General. Leaders in Congress have been briefed more than a dozen times on this authorization and the

activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the authorization.

Id.

Attorney General Alberto Gonzales subsequently confirmed that this program intercepts "contents of communications where * * * one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." Doc # 87 (AT & T Request for Judicial Notice), Ex J at 1 (hereinafter "12/19/05 Press Briefing"), available at http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html (last visited July 19, 2005). The Attorney General also noted, "This [program] is not about wiretapping everyone. This is a very concentrated, very limited program focused at gaining information about our enemy." Id. at 5. The President has also made a public statement, of which the court takes judicial notice, that the government's "international activities strictly target al Qaeda and their known affiliates," "the government does not listen to domestic phone calls without court approval" and the government is "not mining or trolling through the personal lives of millions of innocent Americans." The White House, *President Bush Discusses NSA Surveillance Program* (May 11, 2006) (hereinafter "5/11/06 Statement"), http://www.whitehouse.gov/news/releases/2006/05/20060511-1.html (last visited July 19, 2005).

***988** On May 11, 2006, *USA Today* reported the existence of a second NSA program in which BellSouth Corp., Verizon Communications Inc and AT & T were alleged to have provided telephone calling records of tens of millions of Americans to the NSA. Doc # 182 (Markman Decl), Ex 5 at 1 (Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls, USA Today* (May 11, 2006)). The article did not allege that the NSA listens to or records conversations but rather that BellSouth, Verizon and AT & T gave the government access to a database of domestic communication records that the NSA uses "to analyze calling patterns in an effort to detect terrorist activity." *Id.* The report indicated a fourth telecommunications company, Qwest Communications International Inc, declined to participate in the program. Id. at 2. An attorney for Qwest's former CEO, Joseph Nacchio, issued the following statement:

In the Fall of 2001 * * * while Mr. Nacchio was Chairman and CEO of Qwest and was serving pursuant to the President's appointment as the Chairman of the National Security Telecommunications Advisory Committee, Qwest was approached to permit the Government access to the private telephone records of Qwest customers.

Mr Nacchio made inquiry as to whether a warrant or other legal process had been secured in support of that request. When he learned that no such authority had been granted and that there was a disinclination on the part of the authorities to use any legal process, including the Special Court which had been established to handle such matters, Mr. Nacchio concluded that these requests violated the privacy requirements of the Telecommications [sic] Act. Accordingly, Mr. Nacchio issued instructions to refuse to comply with these requests. These requests continued throughout Mr. Nacchio's tenure and until his departure in June of 2002.

Markman Decl, Ex 6.

BellSouth and Verizon both issued statements, of which the court takes judicial notice, denying their involvement in the program described in *USA Today*. BellSouth stated in relevant part:

As a result of media reports that BellSouth provided massive amounts of customer calling information under a contract with the NSA, the Company conducted an internal review to determine the facts. Based on our review to date, we have confirmed no such contract exists and we have not provided bulk customer calling records to the NSA.

News Release, *BellSouth Statement on Governmental Data Collection* (May 15, 2006), available at http://bellsouth.mediaroom.com/index.php?s=press-releases & item=2860 (last visited July 19, 2006). Although declining to confirm or deny whether it had any relationship to the NSA program acknowledged by the President, Verizon stated in relevant part:One of the most glaring and repeated falsehoods in the media reporting is the assertion that, in the aftermath of the 9/11 attacks, Verizon was approached by NSA and entered into

an arrangement to provide the NSA with data from its customers' domestic calls.
This is false. From the time of the 9/11 attacks until just four months ago, Verizon had three major businesses-its wireline phone business-its wireless company and its directory publishing business. It also had its own Internet Service Provider and long-distance businesses. Contrary to the media reports, Verizon was not asked by NSA to provide, nor did Verizon provide, customer phone records from any of these businesses, or ***989** any call data from those records. None of these companies-wireless or wireline-provided customer records or call data.

See News Release, *Verizon Issues Statement on NSA Media Coverage* (May 16, 2006), available at http://newscenter.verizon.com/ proactive/newsroom/release.vtml?id=93450 (last visited July 19, 2006). BellSouth and Verizon's denials have been at least somewhat substantiated in later reports. Doc # 298 (DiMuzio Decl), Ex 1 *(Lawmakers: NSA Database Incomplete, USA Today* (June 30, 2006)). Neither AT & T nor the government has confirmed or denied the existence of a program of providing telephone calling records to the NSA. *Id.*

2

Although the government does not claim that the AT & T documents obtained by Mark Klein or the accompanying declarations contain classified information (Doc # 284 (6/23/06 Transcript) at 76:9-20), those papers remain under seal because AT & T alleges that they contain proprietary and trade secret information. Nonetheless, much of the information in these papers has already been leaked to the public or has been revealed in redacted versions of the papers. The summary below is based on those already disclosed facts.

In a public statement, Klein explained that while working at an AT & T office in San Francisco in 2002, "the site manager told me to expect a visit from a National Security Agency agent, who was to interview a management-level technician for a special job." Doc # 43 (Ericson Decl), Ex J at 1. While touring the Folsom Street AT & T facility in January 2003, Klein "saw a new room being built adjacent to the 4ESS switch room where the public's phone calls are routed" and "learned that the person whom the NSA interviewed for the secret job was the person working to install equipment in this room." *Id.* See also Doc # 147 (Redact Klein Decl), ¶ 10 ("The NSA agent came and met with [Field Support Specialist (FSS)] # 2. FSS # 1 later confirmed to me that FSS # 2 was working on the special job."); id., ¶ 16 ("In the Fall of 2003, FSS # 1 told me that another NSA agent would again visit our office * * * to talk to FSS # 1 in order to get the latter's evaluation of FSS # 3's suitability to perform the special job that FSS # 2 had been doing. The NSA agent did come and speak to FSS # 1.").

Klein then learned about the AT & T documents in October 2003, after being transferred to the Folsom Street facility to oversee the Worldnet Internet room. Ericson Decl, Ex J at 2. One document described how "fiber optic cables from the secret room were tapping into the Worldnet circuits by splitting off a portion of the light signal." *Id.* The other two documents "instructed technicians on connecting some of the already in-service circuits to [a] 'splitter' cabinet, which diverts some of the light signal to the secret room." *Id.* Klein noted the secret room contained "a Narus STA 6400" and that "Narus STA technology is known to be used particularly by government intelligence agencies because of its ability to sift through large amounts of data looking for preprogrammed targets." *Id.* Klein also "learned that other such 'splitter' cabinets were being installed in other cities, including Seattle, San Jose, Los Angeles and San Diego." *Id.*

D

Based on the foregoing, it might appear that none of the subject matter in this litigation could be considered a secret given that the alleged surveillance programs have been so widely reported in the media.

***990** [4] The court recognizes, however, that simply because a factual statement has been publicly made does not necessarily mean that the facts it relates are true and are not a secret. The statement also must come from a reliable source. Indeed, given the sheer amount of statements that have been made in the public sphere about the alleged surveillance programs and the limited number of permutations that such programs could take, it would seem likely that the truth about these programs has already been publicly reported somewhere. But simply because such statements have been publicly made does not mean that the truth of those statements is a matter of general public knowledge and that verification of the statement is harm-

less.

[5] In determining whether a factual statement is a secret for purposes of the state secrets privilege, the court should look only at publicly reported information that possesses substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security. That entails assessing the value of the information to an individual or group bent on threatening the security of the country, as well as the secrecy of the information.

For instance, if this litigation verifies that AT & T assists the government in monitoring communication records, a terrorist might well cease using AT & T and switch to other, less detectable forms of communication. Alternatively, if this litigation reveals that the communication records program does not exist, then a terrorist who had been avoiding AT & T might start using AT & T if it is a more efficient form of communication. In short, when deciding what communications channel to use, a terrorist "balanc[es] the risk that a particular method of communication will be intercepted against the operational inefficiencies of having to use ever more elaborate ways to circumvent what he thinks may be intercepted." 6/23/06 Transcript at 48:14-17 (government attorney). A terrorist who operates with full information is able to communicate more securely and more efficiently than a terrorist who operates in an atmosphere of uncertainty.

It is, of course, an open question whether individuals inclined to commit acts threatening the national security engage in such calculations. But the court is hardly in a position to second-guess the government's assertions on this matter or to estimate the risk tolerances of terrorists in making their communications and hence at this point in the litigation eschews the attempt to weigh the value of the information.

Accordingly, in determining whether a factual statement is a secret, the court considers only public admissions or denials by the government, AT & T and other telecommunications companies, which are the parties indisputably situated to disclose whether and to what extent the alleged programs exist. In determining what is a secret, the court at present refrains from relying on the declaration of Mark Klein. Although AT & T does not dispute that Klein was a former AT & T technician and he has publicly declared under oath that he observed AT & T assisting the NSA in some capacity and his assertions would appear admissible in connection with the present motions, the inferences Klein draws have been disputed. To accept the Klein declaration at this juncture in connection with the state secrets issue would invite attempts to undermine the privilege by mere assertions of knowledge by an interested party. Needless to say, this does not reflect that the court discounts Klein's credibility, but simply that what is or is not secret depends on what the government and its alleged operative AT & T and other telecommunications***991** providers have either admitted or denied or is beyond reasonable dispute.

Likewise, the court does not rely on media reports about the alleged NSA programs because their reliability is unclear. To illustrate, after Verizon and BellSouth denied involvement in the program described in *USA Today* in which communication records are monitored, *USA Today* published a subsequent story somewhat backing down from its earlier statements and at least in some measure substantiating these companies' denials. See *supra I(C)(1).*

[6] Finally, the court notes in determining whether the privilege applies, the court is not limited to considering strictly admissible evidence. FRE 104(a) ("Preliminary questions concerning * * * the existence of a privilege * * * shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."). This makes sense: the issue at bar is not proving a question of liability but rather determining whether information that the government contends is a secret is actually a secret. In making this determination, the court may rely upon reliable public evidence that might otherwise be inadmissible at trial because it does not comply with the technical requirements of the rules of evidence.

With these considerations in mind, the court at last determines whether the state secrets privilege applies here.

E

Because this case involves an alleged covert relationship between the government and AT & T, the court first determines whether to apply the categorical bar to suit es-

tablished by the Supreme Court in *Totten v. United States*, 92 U.S. 105, 23 L.Ed. 605 (1876), acknowledged in *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953) and *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.1998), and reaffirmed in *Tenet v. Doe*, 544 U.S. 1, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005). *See id.* at 6, 125 S.Ct. 1230 ("[A]pplication of the *Totten* rule of dismissal * * * represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction."). The court then examines the closely related questions whether this action must be presently dismissed because "the very subject matter of the action" is a state secret or because the state secrets privilege necessarily blocks evidence essential to plaintiffs' *prima facie* case or AT & T's defense. See *Kasza*, 133 F.3d at 1166-67.

1

[7] Although the principles announced in *Totten*, *Tenet*, *Reynolds* and *Kasza* inform the court's decision here, those cases are not strictly analogous to the facts at bar.

First, the instant plaintiffs were not a party to the alleged covert arrangement at issue here between AT & T and the government. Hence, *Totten* and *Tenet* are not on point to the extent they hold that former spies cannot enforce agreements with the government because the parties implicitly agreed that such suits would be barred. The implicit notion in *Totten* was one of equitable estoppel: one who agrees to conduct covert operations impliedly agrees not to reveal the agreement even if the agreement is breached. But AT & T, the alleged spy, is not the plaintiff here. In this case, plaintiffs made no agreement with the government and are not bound by any implied covenant of secrecy.

More importantly, unlike the clandestine spy arrangements in *Tenet* and *Totten*, AT & T and the government have for all practical purposes already disclosed that AT & ***992** T assists the government in monitoring communication content. As noted earlier, the government has publicly admitted the existence of a "terrorist surveillance program," which the government insists is completely legal. This program operates without warrants and targets "contents of communications where * * * one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." 12/19/05 Press Briefing at 1.

Given that the "terrorist surveillance program" tracks "calls into the United States or out of the United States," 5/11/06 Statement, it is inconceivable that this program could exist without the acquiescence and cooperation of some telecommunications provider. Although of record here only in plaintiffs' pleading, it is beyond reasonable dispute that "prior to its being acquired by SBC, AT & T Corp was the second largest Internet provider in the country," FAC, ¶ 26, and "AT & T Corp's bundled local and long distance service was available in 46 states, covering more than 73 million households," id., ¶ 25. AT & T's assistance would greatly help the government implement this program. See also id., ¶ 27 ("The new AT & T Inc constitutes the largest telecommunications provider in the United States and one of the largest in the world."). Considering the ubiquity of AT & T telecommunications services, it is unclear whether this program could even exist without AT & T's acquiescence and cooperation.

Moreover, AT & T's history of cooperating with the government on such matters is well known. AT & T has recently disclosed that it "performs various classified contracts, and thousands of its employees hold government security clearances." FAC, ¶ 29. More recently, in response to reports on the alleged NSA programs, AT & T has disclosed in various statements, of which the court takes judicial notice, that it has "an obligation to assist law enforcement and other government agencies responsible for protecting the public welfare, whether it be an individual or the security interests of the entire nation. * * * If and *when AT & T is asked to help, we do so* strictly within the law and under the most stringent conditions." News Release, *AT & T Statement on Privacy and Legal/ Security Issues* (May 11, 2006) (emphasis added), available at http://www.sbc.com/gen/press-room?pid=4800 & cdvn=news & newsarticleid=22285. See also Declan McCullagh, *CNET News.com, Legal Loophole Emerges in NSA Spy Program* (May 19, 2006) ("Mark Bien, a spokesman for AT & T, told CNET News.com on Wednesday: 'Without commenting on or confirming the existence of the program, we can say that when the government asks for our help in protecting national security, and the request is within the law, we will provide that assistance.' "), available at http://news.com.com/ Leg-

al+loophole+emerges+in+NSA+spy+program/2100-1028-3-6073600.html; Justin Scheck, *Plaintiffs Can Keep AT & T Papers in Domestic Spying Case, The Recorder* (May 18, 2006) ("Marc Bien, a spokesman for AT & T, said he didn't see a settlement on the horizon. 'When the government asks for our help in protecting American security, and the request is within the law, we provide assistance,' he said."), available at http: / /www.law.com/jsp/article.jsp? id=1147856734796. And AT & T at least presently believes that any such assistance would be legal if AT & T were simply a passive agent of the government or if AT & T received a government certification authorizing the assistance. 6/23/06 ***993** Transcript at 15:11-21:19. Hence, it appears AT & T helps the government in classified matters when asked and AT & T at least currently believes, on the facts as alleged in plaintiffs' complaint, its assistance is legal.

In sum, the government has disclosed the general contours of the "terrorist surveillance program," which requires the assistance of a telecommunications provider, and AT & T claims that it lawfully and dutifully assists the government in classified matters when asked.

A remaining question is whether, in implementing the "terrorist surveillance program," the government ever requested the assistance of AT & T, described in these proceedings as the mother of telecommunications "that in a very literal way goes all the way back to Alexander Graham Bell summoning his assistant Watson into the room." Id. at 102:11-13. AT & T's assistance in national security surveillance is hardly the kind of "secret" that the *Totten* bar and the state secrets privilege were intended to protect or that a potential terrorist would fail to anticipate.

The court's conclusion here follows the path set in *Halkin v. Helms* and *Ellsberg v. Mitchell*, the two cases most factually similar to the present. The *Halkin* and *Ellsberg* courts did not preclude suit because of a *Totten*-based implied covenant of silence. Although the courts eventually terminated some or all of plaintiffs' claims because the privilege barred discovery of certain evidence (*Halkin I*, 598 F.2d at 10; *Halkin II*, 690 F.2d at 980, 987-88; *Ellsberg*, 709 F.2d at 65), the courts did not dismiss the cases at the outset, as would have been required had the *Totten* bar applied. Accordingly, the court sees no reason to apply the *Totten* bar here.

For all of the above reasons, the court declines to dismiss this case based on the categorical *Totten/Tenet* bar.

2

[8] The court must also dismiss this case if "the very subject matter of the action" is a state secret and therefore "any further proceeding * * * would jeopardize national security." *Kasza*, 133 F.3d at 1170. As a preliminary matter, the court agrees that the government has satisfied the three threshold requirements for properly asserting the state secrets privilege: (1) the head of the relevant department, Director of National Intelligence John D Negroponte (2) has lodged a formal claim of privilege (Negroponte Decl, ¶¶ 9, 13) (3) after personally considering the matter (Id., ¶¶ 2, 9, 13). Moreover, the Director of the NSA, Lieutenant General Keith B Alexander, has filed a declaration supporting Director Negroponte's assertion of the privilege. Alexander Decl, ¶¶ 2, 9.

The court does not "balanc[e the] ultimate interests at stake in the litigation." *Halkin II*, 690 F.2d at 990. But no case dismissed because its "very subject matter" was a state secret involved ongoing, widespread violations of individual constitutional rights, as plaintiffs allege here. Indeed, most cases in which the "very subject matter" was a state secret involved classified details about either a highly technical invention or a covert espionage relationship. See, e g, *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir.2005) (dismissing Title VII racial discrimination claim that "center[ed] around a covert agent's assignments, evaluations, and colleagues"); *Kasza*, 133 F.3d at 1162-63, 1170 (dismissing RCRA claim regarding facility reporting and inventory requirements at a classified Air Force location near Groom Lake, Nevada); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir.1991) (dismissing wrongful death claim implicating classified information about the "design, manufacture, performance, functional***994** characteristics, and testing of [weapons] systems and the rules of engagement"); *Fitzgerald v. Penthouse Intl.*, 776 F.2d 1236, 1242-43 (4th Cir.1985) (dismissing libel suit "charging the plaintiff with the unauthorized sale of a top secret marine mammal weapons system"); *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir.1958) (rejecting government's motion to dismiss in a case involving a patent with military applications withheld under a secrecy order); *Clift v. United States*, 808 F.Supp. 101, 111 (D.Conn.1991)

(dismissing patent dispute over a cryptographic encoding device).

By contrast, the very subject matter of this action is hardly a secret. As described above, public disclosures by the government and AT & T indicate that AT & T is assisting the government to implement some kind of surveillance program. See *supra I(E)(1).*

For this reason, the present action is also different from *El-Masri v. Tenet,* the recently dismissed case challenging the government's alleged "extraordinary rendition program." In *El-Masri,* only limited sketches of the alleged program had been disclosed and the whole object of the suit was to reveal classified details regarding "the means and methods the foreign intelligence services of this and other countries used to carry out the program." *El-Masri,* 2006 WL 1391390, *5. By contrast, this case focuses only on whether AT & T intercepted and disclosed communications or communication records to the government. And as described above, significant amounts of information about the government's monitoring of communication content and AT & T's intelligence relationship with the government are already nonclassified or in the public record.

3

The court also declines to decide at this time whether this case should be dismissed on the ground that the government's state secrets assertion will preclude evidence necessary for plaintiffs to establish a *prima facie* case or for AT & T to raise a valid defense to the claims. Plaintiffs appear to be entitled to at least some discovery. See *infra I(G)(3).* It would be premature to decide these issues at the present time. In drawing this conclusion, the court is following the approach of the courts in *Halkin v. Helms* and *Ellsberg v. Mitchell;* these courts did not dismiss those cases at the outset but allowed them to proceed to discovery sufficiently to assess the state secrets privilege in light of the facts. The government has not shown why that should not be the course of this litigation.

4

In sum, for much the same reasons that *Totten* does not preclude this suit, the very subject matter of this action is not a "secret" for purposes of the state secrets privilege and it would be premature to conclude that the privilege will bar evidence necessary for plaintiffs' *prima facie* case or AT & T's defense. Because of the public disclosures by the government and AT & T, the court cannot conclude that merely maintaining this action creates a "reasonable danger" of harming national security. Accordingly, based on the foregoing, the court DENIES the government's motion to dismiss.

F

The court hastens to add that its present ruling should not suggest that its *in camera, ex parte* review of the classified documents confirms the truth of the particular allegations in plaintiffs' complaint. Plaintiffs allege a surveillance program of far greater scope than the publicly disclosed "terrorist surveillance program." The existence of this alleged program and AT & ***995** T's involvement, if any, remain far from clear. And as in *Halkin v. Helms,* it is certainly possible that AT & T might be entitled to summary judgment at some point if the court finds that the state secrets privilege blocks certain items of evidence that are essential to plaintiffs' *prima facie* case or AT & T's defense. The court also recognizes that legislative or other developments might alter the course of this litigation.

But it is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. See *Hamdi v. Rumsfeld,* 542 U.S. 507, 536, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."). To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired. The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security.

G

The government also contends the issue whether AT & T

received a certification authorizing its assistance to the government is a state secret. Gov 5/17/06 Br at 17.

1

The procedural requirements and impact of a certification under Title III are addressed in 18 U.S.C. § 2511(2)(a)(ii): Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, * * * are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of [FISA] * * * if such provider, its officers, employees, or agents, * * * has been provided with-* * *
(B) a certification in writing by a person specified in section 2518(7) of this title [18 U.S.C.S. § 2518(7)] or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required * * *.

Although it is doubtful whether plaintiffs' *constitutional* claim would be barred by a valid certification under section 2511(2)(a)(ii), this provision on its face makes clear that a valid certification would preclude the *statutory* claims asserted here. See 18 U.S.C. § 2511(2)(a)(ii) ("No cause of action shall lie in any court against any provider of wire or electronic communication service * * * for providing information, facilities, or assistance in accordance with the terms of a * * * certification under this chapter.").

2

As noted above, it is not a secret for purposes of the state secrets privilege that AT & T and the government have some kind of intelligence relationship. See *supra I(E)(1).* Nonetheless, the court recognizes that uncovering whether and to what extent a certification exists might reveal information about AT & T's assistance to the government that has not been publicly disclosed. Accordingly, in applying***996** the state secrets privilege to the certification question, the court must look deeper at what information has been publicly revealed about the alleged electronic surveillance programs. The following chart summarizes what the government has disclosed about the scope of these programs in terms of (1) the individuals whose communications are being monitored, (2) the locations of those individuals and (3) the types of information being monitored:

	Purely domestic communication content	Domestic-foreign communication content	Communication records
General public	Government DENIES	Government DENIES	Government NEITHER
al Qaeda or affiliate-member/agent	Government DENIES	Government CONFIRMS	CONFIRMS NOR DENIES

As the chart relates, the government's public disclosures regarding monitoring of "communication content" (i e, wiretapping or listening in on a communication) differ significantly from its disclosures regarding "communication records" (i e, collecting ancillary data pertaining to a communication, such as the telephone numbers dialed by an individual). See *supra I(C)(1).* Accordingly, the court separately addresses for each alleged program whether revealing the existence or scope of a certification would disclose a state secret.

3

[9] Beginning with the warrantless monitoring of "communication content," the government has confirmed that it monitors "contents of communications where * * * one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." 12/19/05 Press Briefing at 1. The government denies listening in without a warrant on any purely domestic communications or communications in which neither party has a connection to al Qaeda or a related terrorist organization. In sum, regarding the government's monitoring of "communication content," the government has disclosed the universe of possibilities in terms of *whose* communications it monitors and *where* those communicating parties are located.

Based on these public disclosures, the court cannot conclude that the existence of a certification regarding the "communication content" program is a state secret. If the government's public disclosures have been truthful, revealing whether AT & T has received a certification to assist in monitoring communication content should not reveal any new information that would assist a terrorist and adversely affect national security. And if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements. In short, the government has opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content.

Accordingly, the court concludes that the state secrets privilege will not prevent AT & T from asserting a certification-based defense, as appropriate, regarding allegations that it assisted the government in monitoring communication content. The court envisions that AT & T could ***997** confirm or deny the existence of a certification authorizing monitoring of communication content through a combination of responses to interrogatories and *in camera* review by the court. Under this approach, AT & T could reveal information at the level of generality at which the government has publicly confirmed or denied its monitoring of communication content. This approach would also enable AT & T to disclose the non-privileged information described here while withholding any incidental privileged information that a certification might contain.

4

Turning to the alleged monitoring of communication records, the court notes that despite many public reports on the matter, the government has neither confirmed nor denied whether it monitors communication records and has never publicly disclosed whether the NSA program reported by *USA Today* on May 11, 2006, actually exists. Although BellSouth, Verizon and Qwest have denied participating in this program, AT & T has neither confirmed nor denied its involvement. Hence, unlike the program monitoring communication content, the general contours and even the existence of the alleged communication records program remain unclear.

Nonetheless, the court is hesitant to conclude that the existence or non-existence of the communication records program necessarily constitutes a state secret. Confirming or denying the existence of this program would only affect a terrorist who was insensitive to the publicly disclosed "terrorist surveillance program" but cared about the alleged program here. This would seem unlikely to occur in practice given that the alleged communication records program, which does not involve listening in on communications, seems less intrusive than the "terrorist surveillance program," which involves wiretapping. And in any event, it seems odd that a terrorist would continue using AT & T given that BellSouth, Verizon and Qwest have publicly denied participating in the alleged commu-

nication records program and would appear to be safer choices. Importantly, the public denials by these telecommunications companies undercut the government and AT & T's contention that revealing AT & T's involvement or lack thereof in the program would disclose a state secret.

Still, the court recognizes that it is not in a position to estimate a terrorist's risk preferences, which might depend on facts not before the court. For example, it may be that a terrorist is unable to avoid AT & T by choosing another provider or, for reasons outside his control, his communications might necessarily be routed through an AT & T facility. Revealing that a communication records program exists might encourage that terrorist to switch to less efficient but less detectable forms of communication. And revealing that such a program does not exist might encourage a terrorist to use AT & T services when he would not have done so otherwise. Accordingly, for present purposes, the court does not require AT & T to disclose what relationship, if any, it has with this alleged program.

The court stresses that it does not presently conclude that the state secrets privilege will necessarily preclude AT & T from revealing later in this litigation information about the alleged communication records program. While this case has been pending, the government and telecommunications companies have made substantial public disclosures on the alleged NSA programs. It is conceivable that these entities might disclose, either deliberately or accidentally, other pertinent information about the communication records program as this litigation proceeds. The court recognizes***998** such disclosures might make this program's existence or non-existence no longer a secret. Accordingly, while the court presently declines to permit any discovery regarding the alleged communication records program, if appropriate, plaintiffs can request that the court revisit this issue in the future.

5

Finally, the court notes plaintiffs contend that Congress, through various statutes, has limited the state secrets privilege in the context of electronic surveillance and has abrogated the privilege regarding the existence of a government certification. See Doc # 192 (Pl Opp Gov MTD) at 16-26, 45-48. Because these arguments potentially implicate highly complicated separation of powers issues regarding Congress' ability to abrogate what the government contends is a constitutionally protected privilege, the court declines to address these issues presently, particularly because the issues might very well be obviated by future public disclosures by the government and AT & T. If necessary, the court may revisit these arguments at a later stage of this litigation.

H

[10] The government also asserts two statutory privileges in its motion to dismiss that it contends apply "to any intelligence-related information, sources and methods implicated by [p]laintiffs' claims and the information covered by these privilege claims are at least co-extensive with the assertion of the state secrets privilege by the DNI." Gov MTD at 14. First, the government relies on 50 U.S.C. § 402 *note*, which provides:

[N]othing in this Act or any other law * * * shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

The government also relies on 50 U.S.C. § 403-1(i)(1), which states, "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."

Neither of these provisions by their terms requires the court to dismiss this action and it would be premature for the court to do so at this time. In opposing a subsequent summary judgment motion, plaintiffs could rely on many non-classified materials including present and future public disclosures of the government or AT & T on the alleged NSA programs, the AT & T documents and the supporting Klein and Marcus declarations and information gathered during discovery. Hence, it is at least conceivable that some of plaintiffs' claims, particularly with respect to declaratory and injunctive relief, could survive summary judgment. After discovery begins, the court will determine step-by-step whether the privileges prevent plaintiffs from discovering particular evidence. But the mere existence of these privileges does not justify dismissing this case now.

Additionally, neither of these provisions block AT & T from producing any certification that it received to assist

the government in monitoring communication content, see *supra I(G)(3).* Because information about this certification would be revealed only at the same level of generality as the government's public disclosures, permitting this discovery should not reveal any new information on the NSA's activities or its intelligence sources or methods, assuming that the government has been truthful.

Accordingly, the court DENIES the government's motion to dismiss based on the statutory privileges and DENIES the ***999** privileges with respect to any certification that AT & T might have received authorizing it to monitor communication content.

II

AT & T moves to dismiss plaintiffs' complaint on multiple grounds, contending that (1) plaintiffs lack standing, (2) the amended complaint fails to plead affirmatively the absence of immunity from suit and (3) AT & T is entitled to statutory, common law and qualified immunity. Because standing is a threshold jurisdictional question, the court addresses that issue first. See *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 94, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

A

[11][12] "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To establish standing under Article III, a plaintiff must satisfy three elements: (1) "the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) "there must be a causal connection between the injury and the conduct complained of" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61, 112 S.Ct. 2130 (internal quotation marks, citations and footnote omitted). A party invoking federal jurisdiction has the burden of establishing its standing to sue. *Id.* at 561, 112 S.Ct. 2130.

[13] In the present case, AT & T contends plaintiffs have not sufficiently alleged injury-in-fact and their complaint relies on "wholly conclusory" allegations. AT & T MTD at 20-22. According to AT & T, "Absent some concrete allegation that the government monitored their communications or records, all plaintiffs really have is a suggestion that AT & T provided a means by which the government *could have done so* had it wished. This is anything but injury-in-fact." Id. at 20 (emphasis in original). AT & T compares this case to *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C.Cir.1984) (written by then-Judge Scalia), in which the court found that plaintiffs' allegations of unlawful surveillance were "too generalized and nonspecific to support a complaint." *Id.* at 1380.

As a preliminary matter, AT & T incorrectly focuses on whether plaintiffs have pled that the *government* "monitored [plaintiffs'] communications or records" or "targeted [plaintiffs] or their communications." Instead, the proper focus is on *AT & T's* actions. Plaintiffs' statutory claims stem from injuries caused solely by AT & T through its alleged interception, disclosure, use, divulgence and/or publication of plaintiffs' communications or communication records. FAC, ¶¶ 93-95, 102-05, 113-14, 121, 128, 135-41. Hence, plaintiffs need not allege any facts regarding the government's conduct to state these claims.

[14] More importantly, for purposes of the present motion to dismiss, plaintiffs have stated sufficient facts to allege injury-in-fact for all their claims. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (quoting ***1000***Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)). Throughout the complaint, plaintiffs generally describe the injuries they have allegedly suffered because of AT & T's illegal conduct and its collaboration with the government. See, e g, FAC, ¶ 61 ("On information and belief, AT & T Corp has provided the government with direct access to the contents of the Hawkeye, Aurora and/or other databases that it manages using Daytona, including all information, records, [dialing, routing, addressing and/or signaling information] and [customer proprietary network information] pertaining to [p]laintiffs and class members, by providing the government with copies of the information in the databases and/or by giving the government access to Daytona's querying capabilities and/or some other tech-

nology enabling the government agents to search the databases' contents."); id., ¶ 6 ("On information and belief, AT & T Corp has opened its key telecommunications facilities and databases to direct access by the NSA and/or other government agencies, intercepting and disclosing to the government the contents of its customers' communications as well as detailed communications records about millions of its customers, including [p]laintiffs and class members.").

By contrast, plaintiffs in *United Presbyterian Church* alleged they "ha[d] been informed on numerous occasions" that mail that they had sent never reached its destination, "ha[d] reason to believe that, for a long time, [their] officers, employees, and persons associated with [them had] been subjected to government surveillance, infiltration and disruption" and "discern[ed] a long-term pattern of surveillance of [their] members, disruption of their speaking engagements in this country, and attempts at character assassination." See 738 F.2d at 1380 n. 2. Because these allegations were more attenuated and less concrete than the specific injuries alleged here, *United Presbyterian Church* does not support dismissing this action.

AT & T also contends "[p]laintiffs lack standing to assert their statutory claims (Counts II-VII) because the FAC alleges no *facts* suggesting that their statutory rights have been violated" and "the FAC alleges nothing to suggest that the *named plaintiffs* were themselves subject to surveillance." AT & T MTD at 24-25 (emphasis in original). But AT & T ignores that the gravamen of plaintiffs' complaint is that AT & T has created a dragnet that collects the content and records of its customers' communications. See, e g, FAC, ¶¶ 42-64. The court cannot see how any one plaintiff will have failed to demonstrate injury-in-fact if that plaintiff effectively demonstrates that all class members have so suffered. This case is plainly distinguishable from *Halkin II*, for in that case, showing that plaintiffs were on a watchlist was not tantamount to showing that any particular plaintiff suffered a surveillance-related injury-in-fact. See *Halkin II*, 690 F.2d at 999-1001. As long as the named plaintiffs were, as they allege, AT & T customers during the relevant time period (FAC, ¶¶ 13-16), the alleged dragnet would have imparted a concrete injury on each of them.

This conclusion is not altered simply because the alleged injury is widely shared among AT & T customers. In *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), the Supreme Court explained:

Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.

***1001** [This] kind of judicial language * * * however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature.

Id. at 23, 118 S.Ct. 1777. The Court continued:[W]here a harm is concrete, though widely shared, the Court has found "injury in fact." Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an "injury in fact."

Id. at 24, 118 S.Ct. 1777.

Here, the alleged injury is concrete even though it is widely shared. Despite AT & T's alleged creation of a dragnet to intercept all or substantially all of its customers' communications, this dragnet necessarily inflicts a concrete injury that affects each customer in a distinct way, depending on the content of that customer's communications and the time that customer spends using AT & T services. Indeed, the present situation resembles a scenario in which "large numbers of individuals suffer the same common-law injury (say, a widespread mass tort)." *Id.*

AT & T also contends that the state secrets privilege bars plaintiffs from establishing standing. Doc # 244 (AT & T Reply) at 16-18. See also Gov MTD 16-20. But as described above, the state secrets privilege will not prevent plaintiffs from receiving at least some evidence tending to establish the factual predicate for the injury-in-fact underlying their claims directed at AT & T's alleged involvement in the monitoring of communication content. See *supra I(G)(3).* And the court recognizes that additional facts might very well be revealed during, but not as a direct consequence of, this litigation that obviate many of the secrecy concerns currently at issue regarding the alleged

communication records program. Hence, it is unclear whether the privilege would necessarily block AT & T from revealing information about its participation, if any, in that alleged program. See *supra I(G)(4)*. The court further notes that the AT & T documents and the accompanying Klein and Marcus declarations provide at least some factual basis for plaintiffs' standing. Accordingly, the court does not conclude at this juncture that plaintiffs' claims would necessarily lack the factual support required to withstand a future jurisdictional challenge based on lack of standing.

Because plaintiffs have sufficiently alleged that they suffered an actual, concrete injury traceable to AT & T and redressable by this court, the court DENIES AT & T's motion to dismiss for lack of standing.

B

[15] AT & T also contends that telecommunications providers are immune from suit if they receive a government certification authorizing them to conduct electronic surveillance. AT & T MTD at 5. AT & T argues that plaintiffs have the burden to plead affirmatively that AT & T lacks such a certification and that plaintiffs have failed to do so here, thereby making dismissal appropriate. *Id.* at 10-13, 118 S.Ct. 1777.

As discussed above, the procedural requirements for a certification are addressed in 18 U.S.C. § 2511(2)(a)(ii)(B). See *supra* I(G)(1). Under section 2511(2)(a)(ii), "No cause of action shall lie in any court against any provider of wire or electronic communication service * * * for providing information, facilities, or assistance***1002** in accordance with the terms of a * * * certification under this chapter." This provision is referenced in 18 U.S.C. § 2520(a) (emphasis added), which creates a private right of action under Title III:
Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter [18 U.S.C.S. §§ 2510 et seq] may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

A similar provision exists at 18 U.S.C. § 2703(e) (emphasis added):*No cause of action shall lie* in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance *in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification* under this chapter.

The court recognizes that the language emphasized above suggests that to state a claim under these statutes, a plaintiff must affirmatively allege that a telecommunications provider did not receive a government certification. And out of the many statutory exceptions in section 2511, only section 2511(2)(a)(ii) appears in section 2520(a), thereby suggesting that a lack of certification is an element of a Title III claim whereas the other exceptions are simply affirmative defenses. As AT & T notes, this interpretation is at least somewhat supported by the Senate report accompanying 18 U.S.C. § 2520, which states in relevant part:A civil action will not lie [under 18 U.S.C. § 2520] where the requirements of sections 2511(2)(a)(ii) of title 18 are met. With regard to that exception, the Committee intends that the following procedural standards will apply:
(1) The complaint must allege that a wire or electronic communications service provider (or one of its employees) (a) disclosed the existence of a wiretap; (b) *acted without a facially valid court order or certification;* (c) acted beyond the scope of a court order or certification or (d) acted on bad faith. Acting in bad faith would include failing to read the order or collusion. If the complaint fails to make any of these allegations, the defendant can move to dismiss the complaint for failure to state a claim upon which relief can be granted.

ECPA, S. Rep. No. 99-541, 99th Cong., 2d Sess. 26 (1986) (reprinted in 1986 U.S.C.C.A.N. 3555, 3580) (emphasis added).

Nonetheless, the statutory text does not explicitly provide for a heightened pleading requirement, which is in essence what AT & T seeks to impose here. And the court is reluctant to infer a heightened pleading requirement into the statute given that in other contexts, Congress has been explicit when it intended to create such a requirement. See, e g, Private Securities Litigation Reform Act of 1995, § 101, 15 U.S.C. § 78u-4(b)(1), (2) (prescribing heightened pleading standards for securities class actions).

In any event, the court need not decide whether plaintiffs must plead affirmatively the absence of a certification because the present complaint, liberally construed, alleges that AT & T acted outside the scope of any government certification it might have received. In particular, paragraphs 81 and 82, which are incorporated in all of plaintiffs' claims, state:

81. On information and belief, the above-described acts [by defendants] of interception, disclosure, divulgence ***1003** and/or use of Plaintiffs' and class members' communications, contents of communications, and records pertaining to their communications *occurred without judicial or other lawful authorization,* probable cause, and/or individualized suspicion.

82. On information and belief, at all relevant times, the government instigated, directed and/or tacitly approved all of the above-described acts of AT & T Corp.

FAC, ¶¶ 81-82 (emphasis added).

Plaintiffs contend that the phrase "occurred without judicial or other lawful authorization" means that AT & T acted without a warrant or a certification. Doc # 176 (Pl Opp AT & T MTD) at 13-15. At oral argument, AT & T took issue with this characterization of "lawful authorization":

The emphasis there is on the word 'lawful[.'] When you read that paragraph in context, it's clear that what [plaintiffs are] saying is that any authorization [AT & T] receive[s] is, in [plaintiffs'] view, unlawful. And you can see that because of the other paragraphs in the complaint. The very next one, [p]aragraph 82, is the paragraph where [plaintiffs] allege that the United States government approved and instigated all of our actions. It wouldn't be reasonable to construe Paragraph 81 as saying that [AT & T was] not authorized by the government to do what [AT & T] allegedly did when the very next paragraph states the exact opposite.

6/23/06 Transcript at 10:21-11:6. Indeed, the court does not question that it would be extraordinary for a large, sophisticated entity like AT & T to assist the government in a warrantless surveillance program without receiving a certification to insulate its actions.

Nonetheless, paragraph 81 could be reasonably interpreted as alleging just that. Even if "the government instigated, directed and/or tacitly approved" AT & T's alleged actions, it does not inexorably follow that AT & T received an official certification blessing its actions. At the hearing, plaintiffs' counsel suggested that they had "information and belief based on the news reports that [the alleged activity] was done based on oral requests" not a written certification. Id. at 24:21-22. Additionally, the phrase "judicial or other lawful authorization" in paragraph 81 parallels how "a court order" and "a certification" appear in 18 U.S.C. §§ 2511(2)(a)(ii)(A) and (B), respectively; this suggests that "lawful authorization" refers to a certification. Interpreted in this manner, plaintiffs are making a factual allegation that AT & T did not receive a certification.

In sum, even if plaintiffs were required to plead affirmatively that AT & T did not receive a certification authorizing its alleged actions, plaintiffs' complaint can fairly be interpreted as alleging just that. Whether and to what extent the government authorized AT & T's alleged conduct remain issues for further litigation. For now, however, the court DENIES AT & T's motion to dismiss on this ground.

C

[16] AT & T also contends that the complaint should be dismissed because it failed to plead the absence of an absolute common law immunity to which AT & T claims to be entitled. AT & T MTD at 13-15. AT & T asserts that this immunity "grew out of a recognition that telecommunications carriers should not be subject to civil liability for cooperating with government officials conducting surveillance activities. That is true whether or not the surveillance was lawful, so long as the government officials requesting cooperation assured the carrier that it was." Id. at 13. AT & T also argues that the statutory***1004** immunities do not evince a "congressional purpose to displace, rather than supplement, the common law." *Id.*

AT & T overstates the case law when intimating that the immunity is long established and unequivocal. AT & T relies primarily on two cases: *Halperin v. Kissinger*, 424 F.Supp. 838 (D.D.C.1976), revd on other grounds, 606 F.2d 1192 (D.C.Cir.1979) and *Smith v. Nixon*, 606 F.2d 1183 (D.C.Cir.1979). In *Halperin,* plaintiffs alleged that the Chesapeake and Potomac Telephone Company (C & P) assisted federal officials in illegally wiretapping plaintiffs' home telephone, thereby violating plaintiffs'

constitutional and Title III statutory rights. 424 F.Supp. at 840. In granting summary judgment for C & P, the district court noted:

Chesapeake and Potomac Telephone Company, argues persuasively that it played no part in selecting any wiretap suspects or in determining the length of time the surveillance should remain. It overheard none of plaintiffs' conversations and was not informed of the nature or outcome of the investigation. As in the past, C & P acted in reliance upon a request from the highest Executive officials and with assurances that the wiretap involved national security matters. Under these circumstances, C & P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation.

Id. at 846.

Smith v. Nixon involved an allegedly illegal wiretap that was part of the same surveillance program implicated in *Halperin*. In addressing C & P's potential liability, the *Smith* court noted:

The District Court dismissed the action against C & P, which installed the wiretap, on the ground cited in the District Court's opinion in *Halperin:* 'C & P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation. * * *.' We think this was the proper disposition. The telephone company did not initiate the surveillance, and it was assured by the highest Executive officials in this nation that the action was legal.

606 F.2d at 1191 (citation and footnote omitted) (omission in original).

The court first observes that *Halperin,* which formed the basis for the *Smith* decision, never indicated that C & P was "immune" from suit; rather, the court granted summary judgment after it determined that C & P played only a "limited technical role" in the surveillance. And although C & P was dismissed in *Smith* on a motion to dismiss, *Smith* never stated that C & P was immune from suit; the only discussion of "immunity" there related to other defendants who claimed entitlement to qualified and absolute immunity.

At best, the language in *Halperin* and *Smith* is equivocal: the phrase "C & P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation" could plausibly be interpreted as describing a good faith defense. And at least one court appears to have interpreted *Smith* in that manner. See *Manufacturas Intl., Ltda v. Manufacturers Hanover Trust Co.,* 792 F.Supp. 180, 192-93 (E.D.N.Y.1992) (referring to *Smith* while discussing good faith defenses).

Moreover, it is not clear at this point in the litigation whether AT & T played a "mere technical role" in the alleged NSA surveillance programs. The complaint alleges that "at all relevant times, the government instigated, directed and/or tacitly ***1005** approved all of the above-described acts of AT & T Corp." FAC, ¶ 82. But given the massive scale of the programs alleged here and AT & T's longstanding history of assisting the government in classified matters, one could reasonably infer that AT & T's assistance here is necessarily more comprehensive than C & P's assistance in *Halperin* and *Smith.* Indeed, there is a world of difference between a single wiretap and an alleged dragnet that sweeps in the communication content and records of all or substantially all AT & T customers.

AT & T also relies on two Johnson-era cases: *Fowler v. Southern Bell Telephone & Telegraph Co.,* 343 F.2d 150 (5th Cir.1965), and *Craska v. New York Telephone Co.,* 239 F.Supp. 932 (N.D.N.Y.1965). *Fowler* involved a Georgia state claim for invasion of right of privacy against a telephone company for assisting federal officers to intercept plaintiff's telephone conversations. *Fowler* noted that a "defense of privilege" would extend to the telephone company only if the court determined that the federal officers acted within the scope of their duties:

If it is established that [the federal officers] acted in the performance and scope of their official powers and within the outer perimeter of their duties as federal officers, then the defense of privilege would be established as to them. *In this event* the privilege may be extended to exonerate the Telephone Company also if it appears, in line with the allegations of the complaint, that the Telephone Company acted for and at the request of the federal officers and within the bounds of activity which would be privileged as to the federal officers.

343 F.2d at 156-57 (emphasis added). Accordingly, *Fowl-*

er does not absolve AT & T of any liability unless and until the court determines that the government acted legally in creating the NSA surveillance programs alleged in the complaint.

Craska also does not help AT & T. In that case, plaintiff sued a telephone company for violating her statutory rights by turning over telephone records to the government under compulsion of state law. *Craska*, 239 F.Supp. at 933-34, 936. The court declined to ascribe any liability to the telephone company because its assistance was required under state law: "[T]he conduct of the telephone company, acting under the compulsion of State law and process, cannot sensibly be said to have joined in a knowing venture of interception and divulgence of a telephone conversation, which it sought by affirmative action to make succeed." *Id.* at 936. By contrast, it is not evident whether AT & T was required to help the government here; indeed, AT & T appears to have confirmed that it did not have any legal obligation to assist the government implement any surveillance program. 6/23/06 Transcript at 17:25-18:4 ("The Court: Well, AT & T could refuse, could it not, to provide access to its facilities? [AT & T]: Yes, it could. Under [18 U.S.C. §] 2511, your Honor, AT & T would have the discretion to refuse, and certainly if it believed anything illegal was occurring, it would do so.").

Moreover, even if a common law immunity existed decades ago, applying it presently would undermine the carefully crafted scheme of claims and defenses that Congress established in subsequently enacted statutes. For example, all of the cases cited by AT & T as applying the common law "immunity" were filed before the certification provision of FISA went into effect. See § 301 of FISA. That provision protects a telecommunications provider from suit if it obtains from the Attorney General or other authorized government official a written certification "that no warrant or court ***1006** order is required by law, that all statutory requirements have been met, and that the specified assistance is required." 18 U.S.C. § 2511(2)(a)(ii)(B). Because the common law "immunity" appears to overlap considerably with the protections afforded under the certification provision, the court would in essence be nullifying the procedural requirements of that statutory provision by applying the common law "immunity" here. And given the shallow doctrinal roots of immunity for communications carriers at the time Congress enacted the statutes in play here, there is simply no reason to presume that a common law immunity is available simply because Congress has not expressed a contrary intent. Cf. *Owen v. City of Independence*, 445 U.S. 622, 638, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) ("[N]otwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' " (quoting *Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967))).

Accordingly, the court DENIES AT & T's motion to dismiss on the basis of a purported common law immunity.

D

[17][18] AT & T also argues that it is entitled to qualified immunity. AT & T MTD at 16. Qualified immunity shields state actors from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). "[T]he qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt v. Cole*, 504 U.S. 158, 168, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). Compare AT & T MTD at 17 ("It would make little sense to protect the principal but not its agent."). The Supreme Court does not "draw a distinction for purposes of immunity law between suits brought against state officials under [42 U.S.C.] § 1983 and suits brought directly under the Constitution [via *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)] against federal officials." *Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

[19] At the pleadings stage, qualified immunity analysis entails three steps. First, the court must determine whether, taken in the light most favorable to the plaintiff, the

facts alleged show a violation of the plaintiffs' statutory or constitutional rights. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If a violation has been alleged, the court next determines whether the right infringed was clearly established at the time of the alleged violation. Finally, the court assesses whether it would be clear to a reasonable person in the defendant's position that its conduct was unlawful in the situation it confronted. *Id.* at 202, 205, 121 S.Ct. 2151. See also *Frederick v. Morse*, 439 F.3d 1114, 1123 (9th Cir.2006) (characterizing this final inquiry as a discrete third step in the analysis). "This is not to say that an official action is protected by ***1007** qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (citation omitted).

1

[20] When a *private party* seeks to invoke qualified immunity, the court must first decide whether qualified immunity is "categorically available," which "requires an evaluation of the appropriateness of qualified immunity given its historical availability and the policy considerations underpinning the doctrine." *Jensen v. Lane County*, 222 F.3d 570, 576 (9th Cir.2000). This inquiry is distinct from the question whether a nominally private party is a state actor for purposes of a section 1983 or *Bivens* claim.

In *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992), the Supreme Court laid the foundation for determining whether a private actor is entitled to qualified immunity. The plaintiff there sued under section 1983 to recover property from a private party who had earlier obtained a writ of replevin against the plaintiff. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) (holding that a private party acted under color of law under similar circumstances). After determining that the common law did not recognize an immunity from analogous tort suits, the court "conclude[d] that the rationales mandating qualified immunity for public officials are not applicable to private parties." *Wyatt*, 504 U.S. at 167, 112 S.Ct. 1827. Although Wyatt purported to be limited to its facts, *id.* at 168, 112 S.Ct. 1827, the broad brush with which the Court painted suggested that private parties could rarely, if ever, don the cloak of qualified immunity. See also *Ace Beverage Co. v. Lockheed Information Mgmt. Servs.*, 144 F.3d 1218, 1219 n. 3 (9th Cir.1998) (noting that "[i]n cases decided before [the Supreme Court's decision in *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997)]," the Ninth Circuit had "adopted a general rule that private parties are not entitled to qualified immunity").

Applying *Wyatt* to a case involving section 1983 claims against privately employed prison guards, the Supreme Court in *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997), stated that courts should "look both to history and to the purposes that underlie government employee immunity in order to" determine whether that immunity extends to private parties. *Id.* at 404, 117 S.Ct. 2100. Although this issue has been addressed by the Ninth Circuit in several cases, the court has yet to extend qualified immunity to a private party under *McKnight.* See, e.g., *Ace Beverage*, 144 F.3d at 1220; *Jensen*, 222 F.3d at 576-80.

2

[21] The court now determines whether the history of the alleged immunity and purposes of the qualified immunity doctrine support extending qualified immunity to AT & T.

As described in section II(C), *supra*, no firmly rooted common law immunity exists for telecommunications providers assisting the government. And presently applying whatever immunity might have previously existed would undermine the various statutory schemes created by Congress, including the certification defense under 18 U.S.C. § 2511(2)(a)(ii)(B).

[22] Turning to the purposes of qualified immunity, they include: "(1) protecting the public from unwarranted timidity on the part of public officials and encouraging the vigorous exercise of official authority;***1008** (2) preventing lawsuits from distracting officials from their governmental duties; and (3) ensuring that talented candidates are not deterred by the threat of damages suits from entering public service." *Jensen*, 222 F.3d at 577 (citations, quotations and alterations omitted). See also *Harlow*, 457 U.S. at 816, 102 S.Ct. 2727 (recognizing "the general costs of subjecting officials to the risks of trial-distraction

of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"). AT & T contends that national security surveillance is "a traditional governmental function of the highest importance" requiring access to the "critical telecommunications infrastructure" that companies such as AT & T would be reluctant to furnish if they were exposed to civil liability. AT & T MTD at 17.

AT & T's concerns, while relevant, do not warrant extending qualified immunity here because the purposes of that immunity are already well served by the certification provision of 18 U.S.C. § 2511(2)(a)(ii). As noted above, although it is unclear whether a valid certification would bar plaintiffs' constitutional claim, section 2511(2)(a)(ii) clearly states that a valid certification precludes the statutory claims asserted here. See *supra I(G)(1).* Hence, but for the government's assertion of the state secrets privilege, the certification provision would seem to facilitate prompt adjudication of damages claims such as those at bar. And because section 2511(2)(a)(ii)'s protection does not appear to depend on a fact-intensive showing of good faith, the provision could be successfully invoked without the burdens of full-blown litigation. Compare *Tapley v. Collins*, 211 F.3d 1210, 1215 (11th Cir.2000) (discussing the differences between qualified immunity and good faith defense under Title III, 18 U.S.C. § 2520(d)).

More fundamentally, "[w]hen Congress itself provides for a defense to its own cause of action, it is hardly open to the federal court to graft common law defenses on top of those Congress creates." *Berry v. Funk*, 146 F.3d 1003, 1013 (D.C.Cir.1998) (holding that qualified immunity could not be asserted against a claim under Title III). As plaintiffs suggest, the Ninth Circuit appears to have concluded that the only defense under Title III is that provided for by statute-although, in fairness, the court did not explicitly address the availability of qualified immunity. See *Jacobson v. Rose*, 592 F.2d 515, 522-24 (9th Cir.1978) (joined by then-Judge Kennedy). But cf. *Doe v. United States*, 941 F.2d 780, 797-99 (9th Cir.1991) (affirming grant of qualified immunity from liability under section 504 of the Rehabilitation Act without analyzing whether qualified immunity could be asserted in the first place). Nonetheless, at least two appellate courts have concluded that statutory defenses available under Title III do not preclude a defendant from asserting qualified immunity. *Blake v. Wright*, 179 F.3d 1003, 1013 (6th Cir.1999) (The court "fail[ed] to see the logic of providing a defense of qualified immunity to protect public officials from personal liability when they violate constitutional rights that are not clearly established and deny them qualified immunity when they violate statutory rights that similarly are not clearly established."); accord *Tapley*, 211 F.3d at 1216. But see *Mitchell v. Forsyth*, 472 U.S. 511, 557, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (Brennan concurring in part and dissenting in part) ("The Court's argument seems to be that the trial court should have decided the legality of the wiretap under Title III before going on to the qualified immunity question, since that question arises only when considering the legality of the wiretap under the Constitution.").

***1009** With all due respect to the Sixth and Eleventh Circuits, those courts appear to have overlooked the relationship between the doctrine of qualified immunity and the schemes of state and federal official liability that are essentially creatures of the Supreme Court. Qualified immunity is a doctrinal outgrowth of expanded state actor liability under 42 U.S.C. § 1983 and *Bivens.* See *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (breathing new life into section 1983); *Scheuer v. Rhodes*, 416 U.S. 232, 247, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (deploying the phrase "qualified immunity" for the first time in the Supreme Court's jurisprudence); *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (extending qualified immunity to federal officers sued under *Bivens* for federal constitutional violations); *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) (holding that section 1983 could be used to vindicate non-constitutional statutory rights); *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727 (making the unprecedented reference to "clearly established *statutory* " rights just two years after *Thiboutot* (emphasis added)). These causes of action "were devised by the Supreme Court without any legislative or constitutional (in the sense of positive law) guidance." *Crawford-El v. Britton*, 93 F.3d 813, 832 (D.C.Cir.1996) (en banc) (Silberman concurring), vacated on other grounds, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). "It is understandable then, that the Court also developed the doctrine of qualified immunity to reduce the burden on public officials." *Berry*, 146 F.3d at 1013.

In contrast, the statutes in this case set forth comprehensive, free-standing liability schemes, complete with stat-

utory defenses, many of which specifically contemplate liability on the part of telecommunications providers such as AT & T. For example, the Stored Communications Act prohibits providers of "electronic communication service" and "remote computing service" from divulging contents of stored communications. See 18 U.S.C. § 2702(a)(1), (a)(2). Moreover, the Stored Communications Act specifically contemplates carrier liability for unauthorized disclosure of subscriber records "to any governmental entity." See id.§ 2702(a)(3). It can hardly be said that Congress did not contemplate that carriers might be liable for cooperating with the government when such cooperation did not conform to the requirements of the act.

Similarly, Congress specifically contemplated that communications carriers could be liable for violations of Title III. See *Jacobson*, 592 F.2d at 522. And in providing for a "good faith" defense in Title III, Congress specifically sought " 'to protect telephone companies or other persons who cooperate * * * with law enforcement officials.' " *Id.* at 522-23 (quoting Senate debates). See also *id.* at 523 n. 13. Cf. 18 U.S.C. § 2511(2)(a)(ii) (providing a statutory defense to "providers of wire or electronic communication service").

In sum, neither the history of judicially created immunities for telecommunications carriers nor the purposes of qualified immunity justify allowing AT & T to claim the benefit of the doctrine in this case.

3

[23] The court also notes that based on the facts as alleged in plaintiffs' complaint, AT & T is not entitled to qualified immunity with respect to plaintiffs' constitutional claim, at least not at this stage of the proceedings. Plaintiffs' constitutional claim alleges that AT & T provides the government with direct and indiscriminate access to the domestic communications of AT & T customers. See, e g, FAC, ¶ 42 ("On information and belief, AT & T Corp ***1010** has provided and continues to provide the government with direct access to all or a substantial number of the communications transmitted through its key domestic telecommunications facilities, including direct access to streams of domestic, international and foreign telephone and Internet communications."); id., ¶ 78 (incorporating paragraph 42 by reference into plaintiffs' constitutional claim). In *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (*Keith*), the Supreme Court held that the Fourth Amendment does not permit warrantless wiretaps to track domestic threats to national security, *id.* at 321, 92 S.Ct. 2125, reaffirmed the "necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest," *id.* at 308, 92 S.Ct. 2125, and did not pass judgment "on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country," *id.* Because the alleged dragnet here encompasses the communications of "all or substantially all of the communications transmitted through [AT & T's] key domestic telecommunications facilities," it cannot reasonably be said that the program as alleged is limited to tracking foreign powers. Accordingly, AT & T's alleged actions here violate the constitutional rights clearly established in *Keith*. Moreover, because "the very action in question has previously been held unlawful," AT & T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal.

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Accordingly, the court DENIES AT & T's instant motion to dismiss on the basis of qualified immunity. The court does not preclude AT & T from raising the qualified immunity defense later in these proceedings, if further discovery indicates that such a defense is merited.

III

[24] As this case proceeds to discovery, the court flags a few procedural matters on which it seeks the parties' guidance. First, while the court has a duty to the extent possible to disentangle sensitive information from nonsensitive information, see *Ellsberg*, 709 F.2d at 57, the court also must take special care to honor the extraordinary security concerns raised by the government here. To help perform these duties, the court proposes appointing an expert pursuant to FRE 706 to assist the court in determining whether disclosing particular evidence would create a "reasonable danger" of harming national security. See FRE 706(a) ("The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may

appoint expert witnesses of its own selection."). Although other courts do not appear to have used FRE 706 experts in the manner proposed here, this procedural innovation seems appropriate given the complex and weighty issues the court will confront in navigating any future privilege assertions. See *Ellsberg*, 709 F.2d at 64 (encouraging "procedural innovation" in addressing state secrets issues); *Halpern*, 258 F.2d at 44 ("A trial *in camera* in which the privilege relating to state secrets may not be availed of by the United States is permissible, if, in the judgment of the district court, such a trial can be carried out without substantial risk that secret information will be publicly divulged").

The court contemplates that the individual would be one who had a security ***1011** clearance for receipt of the most highly sensitive information and had extensive experience in intelligence matters. This individual could perform a number of functions; among others, these might include advising the court on the risks associated with disclosure of certain information, the manner and extent of appropriate disclosures and the parties' respective contentions. While the court has at least one such individual in mind, it has taken no steps to contact or communicate with the individual to determine availability or other matters. This is an appropriate subject for discussion with the parties.

The court also notes that should it become necessary for the court to review additional classified material, it may be preferable for the court to travel to the location of those materials than for them to be hand-carried to San Francisco. Of course, a secure facility is available in San Francisco and was used to house classified documents for a few days while the court conducted its *in camera* review for purposes of the government's instant motion. The same procedures that were previously used could be employed again. But alternative procedures may also be used and may in some instances be more appropriate.

Finally, given that the state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance ultimate termination of the litigation, the court certifies this order for the parties to apply for an immediate appeal pursuant to 28 U.S.C. § 1292(b). The court notes that if such an appeal is taken, the present proceedings do not necessarily have to be stayed. 28 U.S.C. § 1292(b) ("[A]pplication for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."). At the very least, it would seem prudent for the court to select the expert pursuant to FRE 706 prior to the Ninth Circuit's review of this matter.

Accordingly, the court ORDERS the parties to SHOW CAUSE in writing by July 31, 2006, why it should not appoint an expert pursuant to FRE 706 to assist in the manner stated above. The responses should propose nominees for the expert position and should also state the parties' views regarding the means by which the court should review any future classified submissions. Moreover, the parties should describe what portions of this case, if any, should be stayed if this order is appealed.

IV

In sum, the court DENIES the government's motion to dismiss, or in the alternative, for summary judgment on the basis of state secrets and DENIES AT & T's motion to dismiss. As noted in section III, *supra*, the parties are ORDERED TO SHOW CAUSE in writing by July 31, 2006, why the court should not appoint an expert pursuant to FRE 706 to assist the court. The parties' briefs should also address whether this action should be stayed pending an appeal pursuant to 28 U.S.C. § 1292(b).

The parties are also instructed to appear on August 8, 2006, at 2 PM, for a further case management conference.

IT IS SO ORDERED.

N.D.Cal.,2006.
Hepting v. AT & T Corp.
439 F.Supp.2d 974

Briefs and Other Related Documents (Back to top)

• 2006 WL 2203558 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to AT&T's Administrative Motion for Interim Stay (Aug. 1, 2006) Original Image of this Document (PDF)
• 2006 WL 2203553 (Trial Motion, Memorandum and Affidavit) Response of the United States to the Order to Show Cause (Jul. 31, 2006) Original Image of this Document (PDF)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TASH HEPTING, et al., Plaintiffs - Respondents - Cross-Petitioners, v. UNITED STATES OF AMERICA, Intervenor - Petitioner - Cross-Respondent, AT&T CORP., et al., Defendants - Petitioners - Cross-Respondents.	Nos. 06-80109, 06-80110 D.C. No. CV-06-00672-VRW Northern District of California, San Francisco ORDER

Before: LEAVY and GOULD, Circuit Judges.

The petitions for permission to appeal pursuant to 28 U.S.C. § 1292(b) are granted. The cross-petition for permission to appeal is denied as unnecessary. Within 10 days of this order, petitioners shall perfect the appeals pursuant to Federal Rule of Appellate Procedure 5(d).

The Attorney General
Washington, D.C.

January 17, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

In the spring of 2005—well before the first press account disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring options for seeking such FISA Court approval. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the Terrorist Surveillance Program. These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

The President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of developments in the law. Although, as we have previously explained, the Terrorist Surveillance Program fully complies with the law, the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages. Accordingly, under these circumstances, the President has

determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.

The Intelligence Committees have been briefed on the highly classified details of these orders. In addition, I have directed Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, and Ken Wainstein, Assistant Attorney General for National Security, to provide a classified briefing to you on the details of these orders.

Sincerely,

/s/

Alberto R. Gonzales
Attorney General

cc: The Honorable John D. Rockefeller, IV
The Honorable Christopher Bond
The Honorable Sylvester Reyes
The Honorable Peter Hoekstra
The Honorable John Conyers, Jr.
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION This Document Relates To: ALL ACTIONS	**No. M:06-cv-01791-VRW** **NOTICE OF FILING BY THE UNITED STATES OF PUBLIC DECLARATION OF LT. GEN. KEITH B. ALEXANDER** Hon. Vaughn R. Walker

NOTICE OF FILING BY THE UNITED STATES OF PUBLIC DECLARATION OF LT. GEN. KEITH B. ALEXANDER

The United States hereby provides notice of the filing of the attached unclassified Declaration of Lieutenant General Keith B. Alexander, Director, National Security Agency, dated January 24, 2007 (Exhibit 1). As indicated by counsel for the United States at the February 9, 2007 hearing, this declaration was filed by the United States with the United States Court of Appeals for the Sixth Circuit in *ACLU v. NSA*, Nos. 06-2095, 06-2140, and is submitted in this proceeding to provide further public information regarding the orders of the Foreign Intelligence Surveillance Court issued on January 10, 2007, beyond the information provided in the notice filed by the United States on January 17, 2007. *See* Docket No. 127 (Notice by the United States of Attorney General's Letter to Congress). Also attached is an additional paragraph that was originally included in the classified version of the declaration filed in Sixth Circuit proceedings and was subsequently released as unclassified (Exhibit 2).

Dated: February 22, 2007

Respectfully submitted,

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Attorneys for Federal Defendants in their Official Capacities and Federal Intervenor-Defendants (United States of America, National Security Agency, President George W. Bush)

EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, ET AL.,	
Plaintiffs - Appellees/Cross-Appellants,	
v.	Nos. 06-2095, 06-2140
NATIONAL SECURITY AGENCY, ET AL.,	
Defendants - Appellants/Cross-Appellees.	

DECLARATION OF LIEUTENANT GENERAL KEITH B. ALEXANDER, DIRECTOR, NATIONAL SECURITY AGENCY

(U) I, Lieutenant General Keith B. Alexander, do hereby state and declare as follows:

(U) Introduction and Summary

1. **(U)** I am the Director of the National Security Agency ("NSA"), an intelligence agency within the Department of Defense. I am responsible for directing the NSA, overseeing the operations undertaken to carry out its mission and, by specific charge of the President and the Director of National Intelligence, protecting NSA activities and intelligence sources and methods. I have been designated an original TOP SECRET classification authority under Executive Order No. 12958, 60 Fed. Reg.

19825 (1995), as amended on March 25, 2003, and Department of Defense Directive No. 5200.1-R, Information Security Program Regulation, 32 C.F.R. § 159a.12 (2000).

2. **(U)** The purpose of this declaration is to provide some background about the new orders that the Foreign Intelligence Surveillance Court ("FISA Court") issued on January 10, 2007. I have also executed a separate classified declaration dated January 24, 2007, and lodged *in camera* and *ex parte* in this case. Text from the classified version of this declaration has been altered or redacted in this unclassified version, and the paragraphs in this version have been renumbered.

3. **(U)** The NSA and Department of Justice have been working together for some time to seek FISA Court approval for the electronic surveillance of international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. In particular, any court authorization not only would have to satisfy the statutory requirements for an order under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, but also would have to preserve the speed and agility that the NSA needs to help protect the Nation from another terrorist attack by al Qaeda—the very speed and agility that

was offered by the Terrorist Surveillance Program ("TSP"). The new FISA Court orders are innovative and complex and it took considerable time and work for the Government to develop the approach that was proposed to and ultimately accepted by the Court. As a result of the new orders, any electronic surveillance that was conducted as part of the TSP is now being conducted subject to the approval of the FISA Court.

4. **(U)** On January 17, 2007, the Attorney General made public the general facts that new FISA Court orders had been issued; that the orders authorized the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization; that, as a result of these orders, any electronic surveillance that was occurring as part of the TSP will now be conducted subject to the approval of the FISA Court; and that under these circumstances, the President has determined not to reauthorize the TSP. The contents of the new orders, however, remain highly classified.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 24 Jan 07

LT. GENERAL KEITH B. ALEXANDER
Director, National Security Agency

EXHIBIT 2

[U] Accordingly, for some time and since before either the public disclosure of the TSP or the filing of this litigation, the Government has been engaged in the process of exploring whether an alternative approach for FISA Court approval that would ameliorate the drawbacks of the traditional FISA procedures could be authorized to cover surveillance activities similar to those conducted under the TSP. On January 10,2007, as a culmination of that lengthy process, the FISA Court issued new classified orders. While the general existence of the new FISA Court orders, as publicly described by the Attorney General, is not classified, the number, nature, and contents of the specific orders described herein are highly classified.

ADRMOP, APPEAL, E-Filing, ProSe, STAYED

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:06-cv-00672-VRW

Hepting et al v. AT&T Corp. et al
Assigned to: Hon. Vaughn R. Walker
Lead case: M:06-cv-01791-VRW (View Member Cases)
Cause: 28:1331 Fed. Question

Date Filed: 01/30/2006
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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Date Filed	#	Docket Text
01/31/2006	1	COMPLAINT for Damages, Declaratory and Injunctive Relief; Demand for Jury Trial against AT&T Corp., AT&T Inc. (Filing fee $ 250.00, receipt number 3381033.). Filed byGregory Hicks, Erik Knutzen, Tash Hepting. (gba, COURT STAFF) (Filed on 1/31/2006) (Entered: 01/31/2006)
01/31/2006	2	ADR SCHEDULING ORDER: Case Management Statement due by 4/28/2006. Case Management Conference set for 5/5/2006 01:30 PM. (Attachments: # 1 CMC Standing Order# 2 Standing Order #2)(gba, COURT STAFF) (Filed on 1/31/2006) (Entered: 01/31/2006)
01/31/2006	3	Certificate of Interested Entities or Persons filed by Tash Hepting, Gregory Hicks and Erik Knutzen (gba, COURT STAFF) (Filed on 1/31/2006) (Entered: 01/31/2006)
01/31/2006		Summons Issued as to AT&T Corp., AT&T Inc.. (gba, COURT STAFF) (Filed

		on 1/31/2006) (Entered: 01/31/2006)
01/31/2006		CASE DESIGNATED for Electronic Filing. (gba, COURT STAFF) (Filed on 1/31/2006) (Entered: 01/31/2006)
01/31/2006	4	Declination to Proceed Before a U.S. Magistrate Judge by Gregory Hicks, Erik Knutzen, Tash Hepting. (gba, COURT STAFF) (Filed on 1/31/2006) (Entered: 01/31/2006)
01/31/2006	5	ORDER REASSIGNING CASE. Case reassigned to Judge Vaughn R. Walker for all further proceedings. Judge Joseph C. Spero no longer assigned to case.Signed by Executive Committee on 1/31/06. (as, COURT STAFF) (Filed on 1/31/2006) Additional attachment(s) added on 1/31/2006 (gba, COURT STAFF). (Entered: 01/31/2006)
02/03/2006	6	NOTICE of Appearance by Jeff D Friedman (Friedman, Jeff) (Filed on 2/3/2006) (Entered: 02/03/2006)
02/13/2006	7	CLERK'S NOTICE : Initial Case Management Conference set for 5/16/2006 09:00 AM. Case Management Statement due by 5/9/2006. (Attachments: # 1 # 2) (cgd, COURT STAFF) (Filed on 2/13/2006) (Entered: 02/13/2006)
02/22/2006	8	AMENDED COMPLAINT *FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF* against AT&T Corp., AT&T Inc.. Filed byGregory Hicks, Erik Knutzen, Tash Hepting. (Scarlett, Shana) (Filed on 2/22/2006) (Entered: 02/22/2006)
02/23/2006	9	NOTICE of Appearance by Maria V. Morris *NOTICE OF APPEARANCE* (Morris, Maria) (Filed on 2/23/2006) (Entered: 02/23/2006)
02/23/2006	10	Summons Returned Unexecuted by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel (gsa, COURT STAFF) (Filed on 2/23/2006) (Entered: 02/27/2006)
02/23/2006		Summons Issued as to AT&T Corp., AT&T Inc.. (gsa, COURT STAFF) (Filed on 2/23/2006) (Entered: 02/27/2006)
02/27/2006	11	NOTICE of Appearance by Eric A. Isaacson *NOTICE OF APPEARANCE OF ERIC A. ISAACSON* (Isaacson, Eric) (Filed on 2/27/2006) (Entered: 02/27/2006)
02/28/2006	12	SUMMONS Returned Executed by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. AT&T Corp. served on 2/24/2006, answer due 3/16/2006; AT&T Inc. served on 2/24/2006, answer due 3/16/2006. (Scarlett, Shana) (Filed on 2/28/2006) (Entered: 02/28/2006)
03/06/2006	13	STIPULATION *SETTING UNIFORM TIME FOR DEFENDANTS AND POSSIBLE INTERVENER TO RESPOND TO PLAINTIFFS' AMENDED COMPLAINT* by AT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 3/6/2006) (Entered: 03/06/2006)
03/06/2006	14	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 13 Stipulation *Setting Uniform Time For Defendants And Possible Intervener to Respond to Plaintiffs' Amended Complaint* (Ericson, Bruce) (Filed on 3/6/2006) (Entered: 03/06/2006)
03/30/2006	15	NOTICE of Appearance by Richard Roy Wiebe *as additional counsel for*

		plaintiffs and the plaintiff class (Wiebe, Richard) (Filed on 3/30/2006) (Entered: 03/30/2006)
03/31/2006	16	MOTION for Preliminary Injunction filed by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. Motion Hearing set for 6/8/2006 02:00 PM in Courtroom 6, 17th Floor, San Francisco. (Kathrein, Reed) (Filed on 3/31/2006) (Entered: 03/31/2006)
03/31/2006	17	Proposed Order re 16 MOTION for Preliminary Injunction by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Kathrein, Reed) (Filed on 3/31/2006) (Entered: 03/31/2006)
03/31/2006	18	Declaration of Carolyn Jewel in Support of 16 MOTION for Preliminary Injunction filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Related document(s)16) (Kathrein, Reed) (Filed on 3/31/2006) (Entered: 03/31/2006)
03/31/2006	19	Declaration of Cindy A. Cohn in Support of 16 MOTION for Preliminary Injunction filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit J)(Related document(s)16) (Kathrein, Reed) (Filed on 3/31/2006) (Entered: 03/31/2006)
03/31/2006	20	Request for Judicial Notice re 16 MOTION for Preliminary Injunction filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8)(Related document(s)16) (Kathrein, Reed) (Filed on 3/31/2006) (Entered: 03/31/2006)
03/31/2006	21	Proposed Order re 20 Request for Judicial Notice, by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Kathrein, Reed) (Filed on 3/31/2006) (Entered: 03/31/2006)
03/31/2006	22	Declaration of Lee Tien in Support of 16 MOTION for Preliminary Injunction filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Related document(s)16) (Kathrein, Reed) (Filed on 3/31/2006) (Entered: 03/31/2006)
04/04/2006	23	MOTION for leave to appear in Pro Hac Vice - David W. Carpenter filed by AT&T Corp., AT&T Inc. Fee paid - 3384002. (gsa, COURT STAFF) (Filed on 4/4/2006) (Entered: 04/05/2006)
04/04/2006	24	MOTION for leave to appear in Pro Hac Vice - Bradford A. Berenson filed by AT&T Corp., AT&T Inc. Fee paid 3384003. (gsa, COURT STAFF) (Filed on 4/4/2006) (Entered: 04/05/2006)
04/04/2006	25	MOTION for leave to appear in Pro Hac Vice - David L. Lawson filed by AT&T Corp., AT&T Inc. Fee paid - 3384005. (gsa, COURT STAFF) (Filed on 4/4/2006) (Entered: 04/05/2006)
04/04/2006	26	MOTION for leave to appear in Pro Hac Vice - Edward R. McNicholas filed by AT&T Corp., AT&T Inc. Fee paid - 3384004. (gsa, COURT STAFF) (Filed on 4/4/2006) (Entered: 04/05/2006)
04/04/2006		Proposed Order granting [23] MOTION for leave to appear in Pro Hac Vice, [24] MOTION for leave to appear in Pro Hac Vice, [25] MOTION for leave to appear in Pro Hac Vice, [26] MOTION for leave to appear in Pro Hac Vice by

		AT&T Corp., AT&T Inc.. (gsa, COURT STAFF) (Filed on 4/4/2006) (Entered: 04/05/2006)
04/04/2006	27	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re [23] MOTION for leave to appear in Pro Hac Vice, [24] MOTION for leave to appear in Pro Hac Vice, [25] MOTION for leave to appear in Pro Hac Vice, [26] MOTION for leave to appear in Pro Hac Vice, Proposed Order, (gsa, COURT STAFF) (Filed on 4/4/2006) (Entered: 04/05/2006)
04/05/2006	28	MOTION for Leave to File Excess Pages *FOR THE MOTION FOR PRELIMINARY INJUNCTION* filed by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Kathrein, Reed) (Filed on 4/5/2006) (Entered: 04/05/2006)
04/05/2006	29	Proposed Order *REGARDING THE MOTION TO EXTEND PAGE LIMITS* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Kathrein, Reed) (Filed on 4/5/2006) (Entered: 04/05/2006)
04/05/2006	30	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *OF MANUAL FILING OF MOTION FOR PRELIMINARY INJUNCTION* (Kathrein, Reed) (Filed on 4/5/2006) (Entered: 04/05/2006)
04/05/2006	31	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *OF MANUAL FILING OF DECLARATION OF MARK KLEIN* (Kathrein, Reed) (Filed on 4/5/2006) (Entered: 04/05/2006)
04/05/2006	32	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *OF MANUAL FILING OF DECLARATION OF J. SCOTT MARCUS* (Kathrein, Reed) (Filed on 4/5/2006) (Entered: 04/05/2006)
04/05/2006	33	MOTION to Seal Document *RE MOTION FOR PRELIMINARY INJUNCTION, DECLARATIONS OF MARK KLEIN AND J. SCOTT MARCUS* filed by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Kathrein, Reed) (Filed on 4/5/2006) (Entered: 04/05/2006)
04/05/2006	34	Proposed Order *REGARDING THE LODGING OF DOCUMENTS* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Kathrein, Reed) (Filed on 4/5/2006) (Entered: 04/05/2006)
04/05/2006	35	Declaration of LEE TIEN *IN SUPPORT OF MOTIONS TO LODGE AND TO EXTEND PAGE LIMITS* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C) (Kathrein, Reed) (Filed on 4/5/2006) (Entered: 04/05/2006)
04/05/2006	36	CERTIFICATE OF SERVICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel (Kathrein, Reed) (Filed on 4/5/2006) (Entered: 04/05/2006)
04/05/2006	229	AMENDED MOTION for Preliminary Injunction; Memorandum of Points and Authorities in Support filed by Gregory Hicks, Erik Knutzen, Tash Hepting, Benson B. Roe, Carolyn Jewel. **FILED UNDER SEAL** (gba, COURT STAFF) (Filed on 4/5/2006) (Entered: 06/15/2006)
04/05/2006	230	Declaration of Mark Klein in Support of [229] AMENDED MOTION for Preliminary Injunction filed byGregory Hicks, Erik Knutzen, Tash Hepting, Benson B. Roe, Carolyn Jewel. **FILED UNDER SEAL** (Related document(s) [229]) (gba, COURT STAFF) (Filed on 4/5/2006) (Entered: 06/15/2006)

04/05/2006	231	Declaration of J. Scott Marcus in Support of [229] AMENDED MOTION for Preliminary Injunction filed byGregory Hicks, Erik Knutzen, Tash Hepting, Benson B. Roe, Carolyn Jewel. **FILED UNDER SEAL** (Related document(s) [229]) (gba, COURT STAFF) (Filed on 4/5/2006) (Entered: 06/15/2006)
04/10/2006	37	ORDER by Chief Judge Vaughn R Walker granting 28 Motion for Leave to File Excess Pages. Plaintiffs shall be permitted to file a memorandum of points and authorities of 35 pages in support of their motion for preliminary injunction. (cgd, COURT STAFF) (Filed on 4/10/2006) (Entered: 04/10/2006)
04/10/2006	38	MOTION to Seal *Motion to Compel Return of Confidential Documents and Declaration of James W. Russell* filed by AT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 4/10/2006) (Entered: 04/10/2006)
04/10/2006	39	Declaration of Bruce A. Ericson in Support of 38 MOTION to Seal *Motion to Compel Return of Confidential Documents and Declaration of James W. Russell* filed byAT&T Corp., AT&T Inc.. (Related document(s)38) (Ericson, Bruce) (Filed on 4/10/2006) (Entered: 04/10/2006)
04/10/2006	40	Proposed Order re 38 MOTION to Seal *Motion to Compel Return of Confidential Documents and Declaration of James W. Russell*, 39 Declaration in Support, by AT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 4/10/2006) (Entered: 04/10/2006)
04/10/2006	41	NOTICE by AT&T Corp., AT&T Inc. *of Manual Filing of Motion of Defendant AT&T Corp. to Compel Return of Confidential Documents; Supporting Memorandum* (Ericson, Bruce) (Filed on 4/10/2006) (Entered: 04/10/2006)
04/10/2006	42	NOTICE by AT&T Corp., AT&T Inc. re 41 Notice (Other) *of Manual Filing of Declaration of James W. Russell in Support of Motion to Defendant AT&T Corp. to Compel Return of Confidential Documents* (Ericson, Bruce) (Filed on 4/10/2006) (Entered: 04/10/2006)
04/10/2006	43	Declaration of Bruce A. Ericson in Support of 41 Notice (Other), 42 Notice (Other) *of Motion of Defendant AT&T Corp. to Compel Return of Confidential Documents* filed byAT&T Corp., AT&T Inc.. (Attachments: # 1 Exhibit A-K) (Related document(s)41, 42) (Ericson, Bruce) (Filed on 4/10/2006) (Entered: 04/10/2006)
04/10/2006	44	Proposed Order re 43 Declaration in Support,, 41 Notice (Other), 42 Notice (Other) *Regarding AT&T Corp. Confidential Documents* by AT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 4/10/2006) (Entered: 04/10/2006)
04/10/2006	45	MOTION to Shorten Time *(Administrative) of Defendant AT&T Corp. for Order Shortening Time as to AT&T's Motion to Compel Return of Confidential Documents* filed by AT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 4/10/2006) (Entered: 04/10/2006)
04/10/2006	219	MOTION to Compel Return of Confidential Documents; Supporting Memorandum filed by AT&T Corp., AT&T Inc. **FILED UNDER SEAL** (gba, COURT STAFF) (Filed on 4/10/2006) (Entered: 06/15/2006)
04/10/2006	220	Declaration of James W. Russell in Support of [219] MOTION to Compel filed byAT&T Corp., AT&T Inc. **FILED UNDER SEAL** (Related document(s) [219]) (gba, COURT STAFF) (Filed on 4/10/2006) (Entered: 06/15/2006)

04/11/2006	46	Letter from Cindy A. Cohn *re Administrative Motion for an Order Shortening Time*. (Kathrein, Reed) (Filed on 4/11/2006) (Entered: 04/11/2006)
04/11/2006	47	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. *PROOF OF SERVICE VIA HAND DELIVERY* (Sorensen, Jacob) (Filed on 4/11/2006) (Entered: 04/11/2006)
04/12/2006	48	MOTION to Seal *Motion of Defendants AT&T Corp. to File Under Seal Defendant AT&T Corp.'s Memorandum in Support of Filing Documents Under Seal [Dkt. 30-32]* filed by AT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 4/12/2006) (Entered: 04/12/2006)
04/12/2006	49	Declaration of Bruce A. Ericson in Support of 48 MOTION to Seal *Motion of Defendants AT&T Corp. to File Under Seal Defendant AT&T Corp.'s Memorandum in Support of Filing Documents Under Seal [Dkt. 30-32]* filed byAT&T Corp., AT&T Inc.. (Related document(s)48) (Ericson, Bruce) (Filed on 4/12/2006) (Entered: 04/12/2006)
04/12/2006	50	Proposed Order re 48 MOTION to Seal *Motion of Defendants AT&T Corp. to File Under Seal Defendant AT&T Corp.'s Memorandum in Support of Filing Documents Under Seal [Dkt. 30-32]*, 49 Declaration in Support, by AT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 4/12/2006) (Entered: 04/12/2006)
04/12/2006	51	NOTICE by AT&T Corp., AT&T Inc. *of Manual Filing of Defendant AT&T Corp.'s Memorandum in Support of Filing Documents Under Seal [Dkt. 30-32]* (Ericson, Bruce) (Filed on 4/12/2006) (Entered: 04/12/2006)
04/12/2006	52	Declaration of Bruce A. Ericson in Support of 51 Notice (Other) *Sealing Documents [Dkt. 30-32]* filed byAT&T Corp., AT&T Inc.. (Related document(s) 51) (Ericson, Bruce) (Filed on 4/12/2006) (Entered: 04/12/2006)
04/12/2006	53	Proposed Order re 51 Notice (Other), 52 Declaration in Support *of Sealing Documents [Dkt. 30-32]* by AT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 4/12/2006) (Entered: 04/12/2006)
04/12/2006	54	ORDER by Chief Judge Vaughn R Walker granting [23] Motion Application for Admission Pro Hac Vice David W. Carpenter (cgd, COURT STAFF) (Filed on 4/12/2006) (Entered: 04/12/2006)
04/12/2006	55	ORDER by Chief Judge Vaughn R Walker granting [24] Motion for Admission of Attorney Pro Hac Vice Bradford A. Berenson, David L. Lawson and Edward R. McNicholas. granting [25], granting [26]. (cgd, COURT STAFF) (Filed on 4/12/2006) (Entered: 04/12/2006)
04/12/2006	221	MEMORANDUM in Support of Filing Documents Under Seal [30-32] filed byAT&T Corp., AT&T Inc. **FILED UNDER SEAL** (gba, COURT STAFF) (Filed on 4/12/2006) (Entered: 06/15/2006)
04/13/2006	56	***** FILED IN ERROR. PLEASE SEE DOCKET #57. ***** CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. *PROOF OF SERVICE VIA HAND DELIVERY* (Sorensen, Jacob) (Filed on 4/13/2006) Modified on 4/14/2006 (ewn, COURT STAFF). (Entered: 04/13/2006)
04/13/2006	57	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. *PROOF OF SERVICE VIA HAND DELIVERY* (Sorensen, Jacob) (Filed on 4/13/2006) (Entered: 04/13/2006)

04/13/2006	58	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *OF MANUAL FILING OF PLAINTIFFS' OPPOSITION TO ADMINISTRATIVE MOTION OF DEFENDANT AT&T CORP. FOR ORDER SHORTENING TIME AS TO AT&T'S MOTION TO COMPEL RETURN OF CONFIDENTIAL DOCUMENTS* (Kathrein, Reed) (Filed on 4/13/2006) (Entered: 04/13/2006)
04/13/2006	222	Opposition to Administrative Motion of Defendant AT&T Corp. for Order Shortening Time as to AT&T's Motion to Compel Return of Confidential Documents filed byGregory Hicks, Erik Knutzen, Tash Hepting, Benson B. Roe, Carolyn Jewel. **FILED UNDER SEAL** (gba, COURT STAFF) (Filed on 4/13/2006) (Entered: 06/15/2006)
04/14/2006	59	ORDER As in any case, the court has reviewed this matter for possible recusal. In this case, because of the circumstances and reasons discussed in this order, the court's review has been more extensive than in the usual instance. Although the court has reached the conclusion that recusal is not necessary here, the court has reached this conclusion without the benefit of guidance from the parties. Accordingly, the court invites the parties to submit on or before April 21, 2006, briefs no longer than 10 pages in length that address the matters stated above.Signed by Chief Judge Vaughn R Walker on April 14, 2006. (vrwlc2, COURT STAFF) (Filed on 4/14/2006). (Entered: 04/14/2006)
04/17/2006	60	CERTIFICATE OF SERVICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *AMENDED DECLARATION OF SERVICE* (Morris, Maria) (Filed on 4/17/2006) (Entered: 04/17/2006)
04/17/2006	61	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel re 30 Notice (Other), 31 Notice (Other), 32 Notice (Other) *NOTICE OF MANUAL FILING OF PLAINTIFFS' OPPOSITION TO DEFENDANT AT&T CORP.'S MEMORANDUM IN SUPPORT OF FILING DOCUMENTS UNDER SEAL [DKT. 30-32]* (Kathrein, Reed) (Filed on 4/17/2006) (Entered: 04/17/2006)
04/17/2006	62	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel re 30 Notice (Other), 31 Notice (Other), 32 Notice (Other) *NOTICE OF MANUAL FILING OF DECLARATION OF KEVIN S. BANKSTON IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT AT&T CORP.'S MEMORANDUM IN SUPPORT OF FILING DOCUMENTS UNDER SEAL [DKT. 30-32]* (Kathrein, Reed) (Filed on 4/17/2006) (Entered: 04/17/2006)
04/17/2006	63	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *NOTICE OF MANUAL FILING OF PLAINTIFFS' EVIDENTIARY OBJECTIONS TO DECLARATION OF JAMES W. RUSSELL IN SUPPORT OF MOTION OF DEFENDANT AT&T CORP. TO COMPEL RETURN OF CONFIDENTIAL DOCUMENTS* (Kathrein, Reed) (Filed on 4/17/2006) (Entered: 04/17/2006)
04/17/2006	64	Proposed Order re 63 Notice (Other), Notice (Other), 61 Notice (Other), Notice (Other), 62 Notice (Other), Notice (Other) *[PROPOSED] ORDER DENYING MOTION OF DEFENDANT AT&T CORP.'S TO FILE DOCUMENTS UNDER SEAL* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Kathrein, Reed) (Filed on 4/17/2006) (Entered: 04/17/2006)
04/17/2006	223	Opposition to Defendant AT&T Corp.'s Memorandum in Support of Filing Documents Under Seal [30-32] filed byGregory Hicks, Erik Knutzen, Tash

		Hepting, Benson B. Roe, Carolyn Jewel. **FILED UNDER SEAL** (gba, COURT STAFF) (Filed on 4/17/2006) (Entered: 06/15/2006)
04/17/2006	224	EVIDENTIAY OBJECTIONS to Declaration of James W. Russell in Support of Motion of Defendant AT&T Corp. to Compel Return of Confidential Documents by Gregory Hicks, Erik Knutzen, Tash Hepting, Benson B. Roe, Carolyn Jewel. **FILED UNDER SEAL** (gba, COURT STAFF) (Filed on 4/17/2006) (Entered: 06/15/2006)
04/17/2006	225	Declaration of Kevin S. Bankston in Support of [223] Opposition filed byGregory Hicks, Erik Knutzen, Tash Hepting, Benson B. Roe, Carolyn Jewel. **FILED UNDER SEAL** (Related document(s)[223]) (gba, COURT STAFF) (Filed on 4/17/2006) (Entered: 06/15/2006)
04/20/2006	65	ADR Clerks Notice re: Non-Compliance with Court Order. (tjs, COURT STAFF) (Filed on 4/20/2006) (Entered: 04/20/2006)
04/21/2006	66	NOTICE of need for ADR Phone Conference (ADR L.R. 3-5 d) (Ericson, Bruce) (Filed on 4/21/2006) (Entered: 04/21/2006)
04/21/2006	67	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 66 Notice of need of ADR Phone Conference (ADR L.R. 3-5 d) (Ericson, Bruce) (Filed on 4/21/2006) (Entered: 04/21/2006)
04/21/2006	68	Brief *re: Recusal* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 4/21/2006) (Entered: 04/21/2006)
04/21/2006	69	RESPONSE in Support *To Order Regarding Recusal (DKT. 59)* filed byAT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 4/21/2006) (Entered: 04/21/2006)
04/21/2006	70	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 69 Response in Support *To Order Regarding Recusal (DKT. 59)* (Ericson, Bruce) (Filed on 4/21/2006) (Entered: 04/21/2006)
04/21/2006	71	NOTICE by AT&T Corp., AT&T Inc. *of Manual Filing of Defendant AT&T Corp.'s Reply Memorandum in Support of Filing Documents Under Seal [DKT. 30-32]* (Ericson, Bruce) (Filed on 4/21/2006) (Entered: 04/21/2006)
04/21/2006	72	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 71 Notice (Other) *of Manual Filing of AT&T Corp.'s Reply Memorandum in Support of Filing Documents Under Seal [DKT. 30-32]* (Ericson, Bruce) (Filed on 4/21/2006) (Entered: 04/21/2006)
04/21/2006	226	Reply Memorandum in Support of Filing Documents Under Seal [30-32] filed byAT&T Corp., AT&T Inc. **FILED UNDER SEAL** (gba, COURT STAFF) (Filed on 4/21/2006) (Entered: 06/15/2006)
04/24/2006	73	STIPULATION *Re: Participation of Amici Curiae in Civil Local Rule 79-5 Proceedings; and [Proposed] Order* by AT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 4/24/2006) (Entered: 04/24/2006)
04/24/2006	74	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. *PROOF OF SERVICE VIA HAND DELIVERY* (Sorensen, Jacob) (Filed on 4/24/2006) (Entered: 04/24/2006)
04/24/2006	75	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 73 Stipulation

		Re: Participation of Amici Curiae in Civil Local Rule 79-5 Proceedings; and [Proposed] Order (Ericson, Bruce) (Filed on 4/24/2006) (Entered: 04/24/2006)
04/24/2006	76	MOTION for Leave to Appear Amicus filed by Center for Constitutional Rights. (Van Der Hout, Marc) (Filed on 4/24/2006) (Entered: 04/24/2006)
04/24/2006	77	Brief re 76 MOTION for Leave to Appear Amicus filed byCenter for Constitutional Rights. (Related document(s)76) (Van Der Hout, Marc) (Filed on 4/24/2006) (Entered: 04/24/2006)
04/26/2006	78	ORDER by Chief Judge Vaughn R Walker GRANTING IN PART 45 Motion to Shorten Time, GRANTING 76 Motion for Leave to File Amici Curiae Brief. The court GRANTS IN PART defendants' motion for shortened time and sets the following briefing schedule. Oral argument is specially set for May 17, 2006, at 10:00 AM, on defendants' motion to compel and the parties' motions regarding sealing. Plaintiffs' opposition to defendants' motion to compel is due on May 1, 2006, and defendants' reply is due on May 5, 2006. Plaintiffs' motion for a preliminary injunction is specially set for hearing on June 21, 2006, at 10:00 AM. Because plaintiffs were permitted additional pages to file their motion, defendants may file an opposition brief of up to 35 pages by May 18, 2006. Plaintiffs may file their reply brief by May 25, 2006. At the May 17 hearing, the parties may address case management and scheduling issues regarding other motions in this case. The court therefore vacates the initial case management conference currently set for May 16, 2006. Moreover, pursuant to a stipulation by the parties and Civ L R 7-11, the court accepts the brief filed by amici curiae Center for Constitutional Rights and the American Civil Liberties Union. Any response to this brief must be e-filed by April 28, 2006.(vrwlc2, COURT STAFF) (Filed on 4/26/2006). (Entered: 04/26/2006)
04/28/2006	79	MOTION to Dismiss *Motion of Defendant AT&T, Inc. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum* filed by AT&T Inc.. Motion Hearing set for 6/8/2006 02:00 PM in Courtroom 6, 17th Floor, San Francisco. (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	80	Declaration of Starlene Meyerkord in Support of 79 MOTION to Dismiss *Motion of Defendant AT&T, Inc. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum Declaration of Starlene Meyerkord in Support of Motion of Defendant AT&T, Inc. to Dismiss Plaintiffs' Amended Complaint* filed byAT&T Inc.. (Related document(s)79) (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	81	Proposed Order re 79 MOTION to Dismiss *Motion of Defendant AT&T, Inc. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum*, 80 Declaration in Support, *[Proposed] Order Granting Defendant AT&T, Inc.'s Motion to Dismiss Plaintiffs' Amended Complaint* by AT&T Inc.. (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	82	NOTICE by United States of America *of First Statement of Interest of the United States* (Coppolino, Anthony) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	83	NOTICE of Appearance by Anthony Joseph Coppolino *on behalf of the United States of America* (Coppolino, Anthony) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	84	RESPONSE in Support *Defendant AT&T Corp.'s Response to Brief of Amici*

		Curiae Center for Constitutional Rights and American Civil Libeties Union in Opposition to Filing Documents Under Seal [DKT. 30-32] filed byAT&T Corp.. (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	85	NOTICE of Appearance by Andrew H Tannenbaum *on Behalf of the United States of America* (Tannenbaum, Andrew) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	86	MOTION to Dismiss *Motion of Defendant AT&T Corp. To Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum* filed by AT&T Corp.. Motion Hearing set for 6/8/2006 02:00 PM in Courtroom 6, 17th Floor, San Francisco. (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	87	Request for Judicial Notice re 86 MOTION to Dismiss *Motion of Defendant AT&T Corp. To Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum Request for Judicial Notice in Support of Defendant AT&T Corp.'s Motion to Dismiss* filed byAT&T Corp.. (Attachments: # 1 Exhibit Exhibit A Part 1# 2 Exhibit Exhibit A Part 2# 3 Exhibit Exhibit B through D# 4 Exhibit Exhibit E through J)(Related document(s)86) (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	88	Proposed Order re 86 MOTION to Dismiss *Motion of Defendant AT&T Corp. To Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum*, 87 Request for Judicial Notice, *[Proposed] Order Granting AT&T Corp.'s Motion to Dismiss Plaintiffs' Amended Complaint* by AT&T Corp.. (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	89	MOTION to Dismiss *Administrative Motion to Set Hearing Dates for Defendants' Motions to Dismiss* filed by AT&T Corp.. (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	90	Declaration in Support of 89 MOTION to Dismiss *Administrative Motion to Set Hearing Dates for Defendants' Motions to Dismiss Declaration of Bruce A. Ericson in Support of Administrative Motion to Set Hearing Dates for Defendants' Motions to Dismiss* filed byAT&T Corp.. (Related document(s)89) (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	91	Proposed Order re 89 MOTION to Dismiss *Administrative Motion to Set Hearing Dates for Defendants' Motions to Dismiss*, 90 Declaration in Support, *[Proposed] Order Granting Administrative Motion of Defendants AT&T Corp. to Specially Set the Hearing on Defendants' Motion to Dismiss* by AT&T Corp.. (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
04/28/2006	92	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 86 MOTION to Dismiss *Motion of Defendant AT&T Corp. To Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum*, 79 MOTION to Dismiss *Motion of Defendant AT&T, Inc. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum*, 80 Declaration in Support,, 88 Proposed Order,, 87 Request for Judicial Notice,, 89 MOTION to Dismiss *Administrative Motion to Set Hearing Dates for Defendants' Motions to Dismiss*, 81 Proposed Order,, 90 Declaration in Support,, 84 Response in Support,, 91 Proposed Order, *Via U.S. Mail* (Ericson, Bruce) (Filed on 4/28/2006) (Entered: 04/28/2006)
05/01/2006	94	Letter from Plaintiffs *re Discovery*. (Cohn, Cindy) (Filed on 5/1/2006) (Entered: 05/01/2006)

05/01/2006	95	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *of Manual Filing of Notice of 30(b)(6) Deposition of AT&T Corp.* (Cohn, Cindy) (Filed on 5/1/2006) (Entered: 05/01/2006)
05/01/2006	96	MOTION to Remove Incorrectly Filed Document filed by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 5/1/2006) (Entered: 05/01/2006)
05/01/2006	97	Declaration of Cindy Cohn *in Support of Motion to Remove Incorrectly Filed Document* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 5/1/2006) (Entered: 05/01/2006)
05/01/2006	98	Proposed Order *Granting Motion to Remove Incorrectly Filed Document* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 5/1/2006) (Entered: 05/01/2006)
05/01/2006	99	Memorandum in Opposition *TO THE MOTION OF DEFENDANT AT&T CORP. TO COMPEL RETURN OF CONFIDENTIAL DOCUMENTS* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Morris, Maria) (Filed on 5/1/2006) (Entered: 05/01/2006)
05/01/2006	100	Declaration of KEVIN S. BANKSTON in Support of 99 Memorandum in Opposition *TO THE MOTION OF DEFENDANT AT&T CORP. TO COMPEL RETURN OF CONFIDENTIAL DOCUMENTS* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Related document(s)99) (Morris, Maria) (Filed on 5/1/2006) (Entered: 05/01/2006)
05/01/2006	101	Proposed Order re 99 Memorandum in Opposition *TO THE MOTION OF DEFENDANT AT&T CORP. TO COMPEL RETURN OF CONFIDENTIAL DOCUMENTS* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Morris, Maria) (Filed on 5/1/2006) (Entered: 05/01/2006)
05/01/2006	227	NOTICE of 30(b)(6) Deposition of AT&T Corp. by Gregory Hicks, Erik Knutzen, Tash Hepting, Benson B. Roe, Carolyn Jewel **FILED UNDER SEAL** (gba, COURT STAFF) (Filed on 5/1/2006) (Entered: 06/15/2006)
05/02/2006	102	ADR Clerks Notice Setting ADR Phone Conference on 5/11/06 at 9:30 a.m. Please take note that plaintiff's counsel initiates the call to all parties. (tjs, COURT STAFF) (Filed on 5/2/2006) (Entered: 05/02/2006)
05/02/2006	103	Letter from Defendant AT&T Corp. *in Opposition to Plaintiffs' Request for Leave to File Motion to Compel Discovery*. (Ericson, Bruce) (Filed on 5/2/2006) (Entered: 05/02/2006)
05/02/2006	104	CERTIFICATE OF SERVICE by AT&T Corp. re 103 Letter *Proof of Service Via US Mail* (Ericson, Bruce) (Filed on 5/2/2006) (Entered: 05/02/2006)
05/03/2006	105	ORDER. On May 2, 2006, the court received a letter from a producer at CNBC requesting permission to film inside the undersigned's courtroom at the May 17, 2006 hearing. The court DENIES this request for the May 17 hearing but the issue of filming/taping may be re-considered for future hearings after the parties have been given notice and an opportunity to be heard and to advise the court on this issue. The court DIRECTS the clerk to place this letter in the file. Signed by Chief Judge Vaughn R Walker on May 2, 2006. (vrwlc2, COURT STAFF) (Filed on 5/3/2006) (Entered: 05/03/2006)

05/03/2006	106	Memorandum in Opposition *to Administrative Motion for Order Shortening Time as to AT&T's Motion to Dismiss* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 5/3/2006) (Entered: 05/03/2006)
05/04/2006	107	Reply Memorandum *Defendants' Reply in Support of Administrative Motion to Set Hearing Dates for Motions to Dismiss* filed byAT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 5/4/2006) (Entered: 05/04/2006)
05/04/2006	108	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 107 Reply Memorandum *Defendants' Reply in Support of Administrative Motion to Set Hearing Dates for Motions to Dismiss* (Ericson, Bruce) (Filed on 5/4/2006) (Entered: 05/04/2006)
05/04/2006	109	CASE MANAGEMENT STATEMENT filed by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 5/4/2006) (Entered: 05/04/2006)
05/04/2006	110	ORDER by Chief Judge Vaughn R Walker granting 96 Motion to Remove Incorrectly Filed DocumentPlaintiffs' Administrative Motion to Remove Incorrectly Filed Document From Docket is hereby GRANTED. The Clerk will remove document #93 from the court's electronic filing system.(vrwlc2, COURT STAFF) (Filed on 5/4/2006) (Entered: 05/04/2006)
05/04/2006	111	MOTION to File Amicus Curiae Brief *Notice of Motion and Motion of Mark Klein for Leave to File Brief as Amicus Curiae* filed by Mark Klein. (Brosnahan, James) (Filed on 5/4/2006) (Entered: 05/04/2006)
05/04/2006	112	Declaration of James J. Brosnahan in Support of 111 MOTION to File Amicus Curiae Brief *Notice of Motion and Motion of Mark Klein for Leave to File Brief as Amicus Curiae Declaration of James J. Brosnahan in Support of Motion of Mark Klein for Leave to File Brief as Amicus Curiae* filed byMark Klein. (Attachments: # 1 Exhibit Exhibit A# 2 Exhibit Exhibit B)(Related document(s) 111) (Brosnahan, James) (Filed on 5/4/2006) (Entered: 05/04/2006)
05/04/2006	113	Proposed Order re 111 MOTION to File Amicus Curiae Brief *Notice of Motion and Motion of Mark Klein for Leave to File Brief as Amicus Curiae [Proposed] Order Granting Mark Klein's Motion for Leave to File Brief as Amicus Curiae* by Mark Klein. (Brosnahan, James) (Filed on 5/4/2006) (Entered: 05/04/2006)
05/04/2006	114	Brief re 111 MOTION to File Amicus Curiae Brief *Notice of Motion and Motion of Mark Klein for Leave to File Brief as Amicus Curiae Brief of Amicus Curiae Mark Klein* filed byMark Klein. (Attachments: # 1 Exhibit Exhibit A)(Related document(s)111) (Brosnahan, James) (Filed on 5/4/2006) (Entered: 05/04/2006)
05/04/2006	115	Appendix re 111 MOTION to File Amicus Curiae Brief *Notice of Motion and Motion of Mark Klein for Leave to File Brief as Amicus Curiae Amicus Curiae Mark Klein's Submission of Legal Authority Regarding State Secrets Privilege* filed byMark Klein. (Attachments: # 1 Exhibit Tab 1# 2 Exhibit Tab 2# 3 Exhibit Tab 3# 4 Exhibit Tab 4# 5 Exhibit Tab 5# 6 Exhibit Tab 6# 7 Exhibit Tab 7)(Related document(s)111) (Brosnahan, James) (Filed on 5/4/2006) (Entered: 05/04/2006)
05/05/2006	116	CERTIFICATE OF SERVICE by Mark Klein re 111 MOTION to File Amicus Curiae Brief *Notice of Motion and Motion of Mark Klein for Leave to File Brief*

		as Amicus Curiae Certificate of Service by Mail (Martinez, Brian) (Filed on 5/5/2006) (Entered: 05/05/2006)
05/05/2006	117	NOTICE by AT&T Corp. *Notice of Manual Filing of Defendant AT&T Corp.'s Reply Memorandum in Support of Motion to Compel Return of Confidential Documents [DKT. 41-44]* (Ericson, Bruce) (Filed on 5/5/2006) (Entered: 05/05/2006)
05/05/2006	118	CERTIFICATE OF SERVICE by AT&T Corp. re 117 Notice (Other) *Proof of Service Via U.S. Mail* (Ericson, Bruce) (Filed on 5/5/2006) (Entered: 05/05/2006)
05/05/2006	228	Reply Memorandum in Support of Motion to Compel Return of Confidential Documens [41-44] filed byAT&T Corp., AT&T Inc.**FILED UNDER SEAL** (gba, COURT STAFF) (Filed on 5/5/2006) (Entered: 06/15/2006)
05/08/2006	119	ORDER by Chief Judge Vaughn R Walker granting 111 Motion for Leave to File Amicus Curiae Brief(vrwlc2, COURT STAFF) (Filed on 5/8/2006) (Entered: 05/08/2006)
05/08/2006	120	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. *Defendant AT&T's Corp.'s Reply Memorandum in Support of Motion to Compel Return of Confidential Documents [Dkt. 41-44] (filed under seal)* (Sorensen, Jacob) (Filed on 5/8/2006) (Entered: 05/08/2006)
05/10/2006	121	Memorandum in Opposition *Defendants' Response to Plaintiffs' Case Management Statement [Dkt. 109]* filed byAT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 5/10/2006) (Entered: 05/10/2006)
05/11/2006		ADR Remark: ADR Phone Conference conducted on 5/11/06 by RWS. (tjs, COURT STAFF) (Filed on 5/11/2006) (Entered: 05/11/2006)
05/13/2006	122	MOTION to Intervene filed by United States of America. (Attachments: # 1) (Coppolino, Anthony) (Filed on 5/13/2006) (Entered: 05/13/2006)
05/13/2006	123	MOTION for Hearing re 122 MOTION to Intervene filed by United States of America. (Attachments: # 1 # 2)(Coppolino, Anthony) (Filed on 5/13/2006) (Entered: 05/13/2006)
05/13/2006	124	MOTION to Dismiss *or, in the Alternative, for Summary Judgment* filed by United States of America. (Attachments: # 1 # 2)(Coppolino, Anthony) (Filed on 5/13/2006) (Entered: 05/13/2006)
05/13/2006	125	NOTICE by United States of America re 124 MOTION to Dismiss *or, in the Alternative, for Summary Judgment Notice of Lodging of In Camera, Ex Parte Material* (Coppolino, Anthony) (Filed on 5/13/2006) (Entered: 05/13/2006)
05/13/2006	126	MOTION for Leave to File Excess Pages filed by United States of America. (Attachments: # 1)(Coppolino, Anthony) (Filed on 5/13/2006) (Entered: 05/13/2006)
05/16/2006	127	ORDER by Chief Judge Vaughn R Walker granting 126 Motion for Enlargement of Pages by the United States of America. (cgd, COURT STAFF) (Filed on 5/16/2006) (Entered: 05/16/2006)
05/16/2006	128	Memorandum in Opposition *to Administrative Motion of the USA to Set Hearing*

		Date for Government Motion to Dismiss and Motion to Intervene filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 5/16/2006) (Entered: 05/16/2006)
05/16/2006	166	Letter from David L. Anderson, Attorney for Defendants, to the Honorable Vaughn R. Walker dated 5/16/2006 requesting that the Court hold a brief telepone confeence this afternoon to discuss the logistics for tomorrow's hearing on AT&T's motion to compel return of its confidential and proprietary documents and plaintiffs' motion to unseal certain documents that were filed under seal. (gsa, COURT STAFF) (Filed on 5/16/2006) (Entered: 06/05/2006)
05/17/2006	129	Memorandum in Opposition *TO MOTION TO SEAL; OPPOSITION TO CLOSURE OF COURTROOM; MOTION TO INTERVENE* filed byAssociated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News. (Olson, Karl) (Filed on 5/17/2006) (Entered: 05/17/2006)
05/17/2006	130	Minute Entry: Motion Hearing held on 5/17/2006 before Chief Judge Vaughn R Walker (Date Filed: 5/17/2006) (Court Reporter Connie Kuhl) (vrwlc2, COURT STAFF). (Entered: 05/17/2006)
05/17/2006	305	MEMORANDUM in Support of Closure of Hearing filed byAT&T Corp., AT&T Inc.. (gsa, COURT STAFF) (Filed on 5/17/2006) (Entered: 07/12/2006)
05/18/2006	131	NOTICE of Appearance by Robert D. Fram *on behalf of Heller Ehrman LLP* (Fram, Robert) (Filed on 5/18/2006) (Entered: 05/18/2006)
05/18/2006	132	CERTIFICATE OF SERVICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel re 131 Notice of Appearance (Markman, Michael) (Filed on 5/18/2006) (Entered: 05/18/2006)
05/19/2006	133	MOTION to Intervene *Notice of Motion and Motion for Leave to Intervene; Notice of Motion and Motion to Unseal Documents* filed by USA Today, Associated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News. Motion Hearing set for 6/23/2006 09:30 AM in Courtroom 6, 17th Floor, San Francisco. (Attachments: # 1 Declaration of Karl Olson in Support of Motion for Leave to Intervene and Motion to Unseal Documents# 2 Proposed Order Granting Motions for Leave to Intervene and Unseal Records)(Olson, Karl) (Filed on 5/19/2006) (Entered: 05/19/2006)
05/22/2006	134	MEMORANDUM in Support re 130 Motion Hearing *PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO COURT'S MAY 17, 2006 MINUTE ORDER* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Related document(s)130) (Scarlett, Shana) (Filed on 5/22/2006) (Entered: 05/22/2006)
05/22/2006	135	Declaration in Support of 134 Memorandum in Support, *DECLARATION OF SHANA E. SCARLETT IN SUPPORT OF PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO COURT'S MAY 17, 2006 MINUTE ORDER* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit 1)(Related document(s)134) (Scarlett, Shana) (Filed on 5/22/2006) (Entered: 05/22/2006)
05/22/2006	136	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel re 134 Memorandum in Support, *MANUAL FILING NOTIFICATION REGARDING PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN*

		RESPONSE TO COURT'S MAY 17, 2006 MINUTE ORDER (Scarlett, Shana) (Filed on 5/22/2006) (Entered: 05/22/2006)
05/22/2006	137	Declaration *PROOF OF SERVICE* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Scarlett, Shana) (Filed on 5/22/2006) (Entered: 05/22/2006)
05/22/2006	138	TRANSCRIPT of Proceedings held on 5/17/2006 before Judge Vaughn R. Walker. Court Reporter: Connie Kuhl.. (gsa, COURT STAFF) (Filed on 5/22/2006) (Entered: 05/23/2006)
05/23/2006	139	MOTION to Intervene *and Unseal Documents* filed by Lycos, Inc., Wired News. Motion Hearing set for 6/29/2006 02:00 PM in Courtroom 6, 17th Floor, San Francisco. (Attachments: # 1 Proposed Order)(Alger, Timothy) (Filed on 5/23/2006) (Entered: 05/23/2006)
05/23/2006	140	MOTION to Shorten Time *on Motion to Intervene and Unseal Documents* filed by Lycos, Inc., Wired News. (Attachments: # 1 Proposed Order)(Alger, Timothy) (Filed on 5/23/2006) (Entered: 05/23/2006)
05/24/2006		***** FILED IN ERROR. DOCUMENT LOCKED. PLEASE SEE DOCKET #150. ***** Reply Memorandum *[Redacted] Reply Memorandum of Defendant AT&T Corp. in Response to Court's May 17, 2006 Minute Order* filed byAT&T Corp.. (Ericson, Bruce) (Filed on 5/24/2006) Modified on 5/26/2006 (ewn, COURT STAFF). Modified on 5/26/2006 (ewn, COURT STAFF). (Entered: 05/24/2006)
05/24/2006	142	NOTICE by AT&T Corp. *Notice of Manual Filing of Reply Memorandum of Defendant AT&T Corp. in Response to Court's May 17, 2006 Minute Order* (Ericson, Bruce) (Filed on 5/24/2006) (Entered: 05/24/2006)
05/24/2006	143	CERTIFICATE OF SERVICE by AT&T Corp. re [141] Reply Memorandum, 142 Notice (Other) *Proof of Service Via U.S. Mail* (Ericson, Bruce) (Filed on 5/24/2006) (Entered: 05/24/2006)
05/24/2006	144	CERTIFICATE OF SERVICE by Associated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News, USA Today re 133 MOTION to Intervene *Notice of Motion and Motion for Leave to Intervene; Notice of Motion and Motion to Unseal Documents* (Olson, Karl) (Filed on 5/24/2006) (Entered: 05/24/2006)
05/24/2006	145	RESPONSE in Support *United States' Response to Plaintiffs' Memorandum of Points and Authorities in Response to Court's May 17, 2006 Minute Order* filed byUnited States of America. (Attachments: # 1 Exhibit A -- El Masri Opinion (E.D.Va.))(Orleans, Renee) (Filed on 5/24/2006) (Entered: 05/24/2006)
05/24/2006	157	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 150 Reply Memorandum (gsa, COURT STAFF) (Filed on 5/24/2006) (Entered: 05/30/2006)
05/24/2006	163	MEMORANDUM in Response to Court's 5/17/2006 Minute Order re 130 Motion Hearing filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. FILED UNDER SEAL (Related document(s)130) (gsa, COURT STAFF) (Filed on 5/24/2006) (Entered: 06/05/2006)
05/24/2006	164	Reply Memorandum of defedant AT&T Corp. in Response to Court's May 17,

		2006 Minute Order to re 130 Motion Hearing by AT&T Corp., AT&T Inc. FILED UNDER SEAL. (gsa, COURT STAFF) (Filed on 5/24/2006) (Entered: 06/05/2006)
05/25/2006	146	Letter from Electronic Frontier Foundation *to Hon. Vaughn R. Walker*. (Tien, Tze) (Filed on 5/25/2006) (Entered: 05/25/2006)
05/25/2006	147	Declaration of Mark Klein *in Support of Plaintiffs' Motion for Preliminary Injunction [REDACTED]* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Tien, Tze) (Filed on 5/25/2006) (Entered: 05/25/2006)
05/25/2006	148	CERTIFICATE OF SERVICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel (Tien, Tze) (Filed on 5/25/2006) (Entered: 05/25/2006)
05/25/2006	149	MEMORANDUM in Support *Motion for Preliminary Injunction; Plaintiffs' Amended Notice of Motion and Motion for Preliminary Injunction [REDACTED]* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Supplement Document Part 2# 2 Supplement Document Part 3# 3 Supplement Document Part 4)(Tien, Tze) (Filed on 5/25/2006) (Entered: 05/25/2006)
05/26/2006	150	Reply Memorandum *[Redacted] Reply Memorandum of Defendant AT&T Corp. in Response to Court's May 17, 2006 Minute Order CORRECTION OF DOCKET #[141]* filed byAT&T Corp.. (Ericson, Bruce) (Filed on 5/26/2006) (Entered: 05/26/2006)
05/26/2006	151	Memorandum in Opposition *AT&T's Opposition to Motion for Order Shortening Time for Hearing on Motion of Lycos, Inc. and Wired News for Orders Permitting Intervention and Unsealing Documents* filed byAT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 5/26/2006) (Entered: 05/26/2006)
05/26/2006	152	Declaration of Bruce A. Ericson in Support of 151 Memorandum in Opposition, *AT&T's Opposition to Motion for Order Shortening Time for Hearing on Motion of Lycos, Inc. and Wired News for Orders Permitting Intervention and Unsealing Documents* filed byAT&T Corp., AT&T Inc.. (Related document(s)151) (Ericson, Bruce) (Filed on 5/26/2006) (Entered: 05/26/2006)
05/26/2006	153	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 151 Memorandum in Opposition,, 152 Declaration in Support, (Ericson, Bruce) (Filed on 5/26/2006) (Entered: 05/26/2006)
05/26/2006	154	MOTION to Remove Incorrectly Filed Document re [141] Reply Memorandum, filed by AT&T Corp.. (Ericson, Bruce) (Filed on 5/26/2006) (Entered: 05/26/2006)
05/26/2006	155	Declaration of Bruce A. Ericson in Support of 154 MOTION to Remove Incorrectly Filed Document re [141] Reply Memorandum, filed byAT&T Corp.. (Related document(s)154) (Ericson, Bruce) (Filed on 5/26/2006) (Entered: 05/26/2006)
05/26/2006	156	Proposed Order re 154 MOTION to Remove Incorrectly Filed Document re [141] Reply Memorandum, by AT&T Corp.. (Ericson, Bruce) (Filed on 5/26/2006) (Entered: 05/26/2006)
06/02/2006	158	ORDER by Chief Judge Vaughn R Walker granting 140 Lycos Inc and Wired News' Administrative Motion for an Order Shortening Time for hearing on their

		motion to intervene and motion to unseal documents. Hearing on the Motion by Lycos, Inc and Wired News to Intervene and Unseal Documents will be held on 6/23/2006 at 9:30 AM. Opposition due 6/12/2006. Reply due 6/19/2006. (cgd, COURT STAFF) (Filed on 6/2/2006) (Entered: 06/02/2006)
06/02/2006	159	ORDER by Chief Judge Vaughn R Walker granting 154 Motion to Remove Incorrectly Filed Document,doc. #141. (cgd, COURT STAFF) (Filed on 6/2/2006) (Entered: 06/02/2006)
06/02/2006	160	Memorandum in Opposition *DEFENDANT AT&T CORP.'S MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE AND MOTION TO UNSEAL DOCUMENTS* filed byAT&T Corp.. (Ericson, Bruce) (Filed on 6/2/2006) (Entered: 06/02/2006)
06/02/2006	161	RESPONSE in Support *of Motions of the San Francisco Chronicle et al. for Leave to Intervene and to Unseal Records* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Tien, Tze) (Filed on 6/2/2006) (Entered: 06/02/2006)
06/02/2006	162	DECLARATION of Bruce A. Ericson in Opposition to 160 Memorandum in Opposition *DECLARATION OF BRUCE A. ERICSON IN SUPPORT OF DEFENDANT AT&T CORP.'S MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE AND MOTION TO UNSEAL DOCUMENTS* filed byAT&T Corp.. (Attachments: # 1 Exhibit Exhibit A# 2 Exhibit Exhibit B# 3 Exhibit Exhibit C# 4 Exhibit Exhibit D# 5 Exhibit Exhibit E# 6 Exhibit Exhibit F# 7 Exhibit Exhibit G# 8 Exhibit Exhibit H)(Related document(s)160) (Ericson, Bruce) (Filed on 6/2/2006) (Entered: 06/02/2006)
06/05/2006	165	MOTION to Related Case *ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED* filed by Benson B. Roe. (Himmelstein, Barry) (Filed on 6/5/2006) (Entered: 06/05/2006)
06/06/2006	167	Declaration of ADAM L. RUBINGER *IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT AT&T INC.'S MOTION TO DISMISS AMENDED COMPLAINT* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A)(Morris, Maria) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	168	Declaration of DANIEL O'BRIEN *IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT AT&T INC.'S MOTION TO DISMISS AMENDED COMPLAINT* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D)(Morris, Maria) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	169	Declaration of JAMES S. TYRE *IN SUPPORT OF PLAINTIFFS' OPPOSITION TO AT&T INC.'S MOTION TO DISMISS AMENDED COMPLAINT* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit J# 11 Exhibit K# 12 Exhibit L# 13 Exhibit M# 14 Exhibit N# 15 Exhibit O# 16 Exhibit P# 17 Exhibit Q# 18 Exhibit R# 19 Exhibit S# 20 Exhibit T# 21 Exhibit U# 22 Exhibit V# 23 Exhibit W# 24 Exhibit X# 25 Exhibit Y# 26 Exhibit Z)(Morris, Maria) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	170	Proposed Order *DENYING AT&T INC.'S MOTION TO DISMISS AMENDED*

		COMPLAINT by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Morris, Maria) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	171	ORDER re 145 Response in Support filed by United States of America, 134 Memorandum in Support filed by Tash Hepting, Gregory Hicks, Erik Knutzen, Carolyn Jewel, 150 Reply Memorandum filed by AT&T Corp,Because review of the classified documents is necessary to determine whether and to what extent the state secrets privilege applies, the court ORDERS the government forthwith to provide in camera and no later than June 9, 2006, the classified memorandum and classified declarations of John D Negroponte and Keith B Alexander for review by the undersigned and by any chambers personnel that he so authorizes.Signed by Chief Judge Vaughn R Walker on 06/06/06. (vrwlc2, COURT STAFF) (Filed on 6/6/2006). (Entered: 06/06/2006)
06/06/2006	172	MOTION for Leave to File Excess Pages *for Plaintiff's Opposition to Motion to Dismiss Amended Complaint by Defendant AT&T, Corp.; Notice of Motion; Memorandum of Points and Authorities* filed by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	173	Declaration of Michael M. Markman *in Support of Plaintiffs' Motion to Extend Page Limit for Opposition to Motion to Dismiss Amended Complaint by Defendant AT&T, Corp.* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	174	Memorandum in Opposition *to Defendant AT&T Inc.'s Motion to Dismiss Amended Complaint* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Morris, Maria) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	175	Proposed Order *Granting Plaintiffs' Motion to Extend Page Limit* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	176	Memorandum in Opposition *to Motion to Dismiss Amended Complaint by Defendant AT&T, Corp.* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	177	Proposed Order *Denying AT&T Corp.'s Motion to Dismiss Plaintiffs' Amended Complaint* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	178	Declaration of Daniel O'Brien in Support of 174 Memorandum in Opposition *[CORRECTED] Declaration of Daniel O'Brien in Support of Plaintiffs' Opposition to Defendant AT&T Inc.'s Motion to Dismiss Amended Complaint* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A1# 2 Exhibit A2# 3 Exhibit A3# 4 Exhibit B# 5 Exhibit C# 6 Exhibit D)(Related document(s)174) (Morris, Maria) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	179	Declaration of James S. Tyre in Support of 174 Memorandum in Opposition *[CORRECTED] Declaration of James S. Tyre in Support of Plaintiffs' Opposition to Defendant AT&T Inc.'s Motion to Dismiss Amended Complaint* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit J# 11 Exhibit

		K# 12 Exhibit L# 13 Exhibit M# 14 Exhibit N# 15 Exhibit O# 16 Exhibit P# 17 Exhibit Q# 18 Exhibit R# 19 Exhibit S# 20 Exhibit T# 21 Exhibit U# 22 Exhibit V# 23 Exhibit W# 24 Exhibit X# 25 Exhibit Y# 26 Exhibit Z)(Related document (s)174) (Morris, Maria) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	180	Declaration of Adam L. Rubinger in Support of 174 Memorandum in Opposition *[CORRECTED] Declaration of Adam L. Rubinger in Support of Plaintiffs' Opposition to Defendant AT&T Inc.'s Motion to Dismiss Amended Complaint* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A)(Related document(s)174) (Morris, Maria) (Filed on 6/6/2006) (Entered: 06/06/2006)
06/06/2006	207	MOTION to Intervene and Consolidate similar and pending case number A-05-CA-682-LY in the Western District of Texas at Austin filed by Willie H. Ellis. (gba, COURT STAFF) (Filed on 6/6/2006) (Entered: 06/13/2006)
06/08/2006	181	Memorandum in Opposition *to motion to dismiss (notice of manual filing)* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Fram, Robert) (Filed on 6/8/2006) (Entered: 06/08/2006)
06/08/2006	182	DECLARATION of Michael M. Markman *in opposition to motion to dismiss (notice of manual filing - decl. only)* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8)(Fram, Robert) (Filed on 6/8/2006) (Entered: 06/08/2006)
06/08/2006	183	MOTION to Seal Document *opposition to motion to dismiss, and declaration in support of motion to dismiss*, First MOTION for Leave to File Excess Pages filed by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. Motion Hearing set for 6/23/2006 09:30 AM in Courtroom 6, 17th Floor, San Francisco. (Fram, Robert) (Filed on 6/8/2006) (Entered: 06/08/2006)
06/08/2006	184	Declaration of Michael M. Markman *in support of administrative motions to extend page limit for opposition to United States' motion to dismiss and to lodge documents with the Court (N.D. Cal. Civil Local Rules 7-11, 79-5)* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Fram, Robert) (Filed on 6/8/2006) (Entered: 06/08/2006)
06/08/2006	185	Proposed Order *Granting Plaintiffs' Motion to Extend Page Limit and File Documents Under Seal* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Fram, Robert) (Filed on 6/8/2006) (Entered: 06/08/2006)
06/08/2006	191	NOTICE of Manual Filing by Gregory Hicks, Tash Hepting, Carolyn Jewel (gsa, COURT STAFF) (Filed on 6/8/2006) (Entered: 06/12/2006)
06/08/2006	192	Memorandum in Opposition re 124 MOTION to Dismiss *or, in the Alternative, for Summary Judgment* filed byGregory Hicks, Tash Hepting, Carolyn Jewel. FILED UNDER SEAL (gsa, COURT STAFF) (Filed on 6/8/2006) (Entered: 06/12/2006)
06/08/2006	193	NOTICE OF MANUAL FILING by Gregory Hicks, Tash Hepting, Carolyn Jewel (gsa, COURT STAFF) (Filed on 6/8/2006) (Entered: 06/12/2006)
06/08/2006	194	DECLARATION of Michael M. Markman in Opposition to 124 MOTION to Dismiss *or, in the Alternative, for Summary Judgment* filed byGregory Hicks,

		Tash Hepting, Carolyn Jewel. (Related document(s)124) (gsa, COURT STAFF) (Filed on 6/8/2006) (Entered: 06/12/2006)
06/09/2006	186	Reply Memorandum re 133 MOTION to Intervene *Notice of Motion and Motion for Leave to Intervene; Notice of Motion and Motion to Unseal Documents* filed byAssociated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News, USA Today. (Olson, Karl) (Filed on 6/9/2006) (Entered: 06/09/2006)
06/09/2006	187	Declaration of Karl Olson in Support of 186 Reply Memorandum, *in Support of Press' Motion to Intervene and Unseal Records* filed byAssociated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News, USA Today. (Attachments: # 1 Exhibit A)(Related document(s) 186) (Olson, Karl) (Filed on 6/9/2006) (Entered: 06/09/2006)
06/09/2006	188	CERTIFICATE OF SERVICE by Associated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News, USA Today re 186 Reply Memorandum,, 187 Declaration in Support, (Olson, Karl) (Filed on 6/9/2006) (Entered: 06/09/2006)
06/09/2006	189	RELATED CASE ORDER by Chief Judge Vaughn R Walker granting 165 Motion to Relate Case. (cgd, COURT STAFF) (Filed on 6/9/2006) (Entered: 06/09/2006)
06/10/2006	190	RESPONSE in Support *Response of AT&T Corp. to Plaintiffs' Motion for Leave to File Excess Pages [Dkts. 172-73, 175]* filed byAT&T Corp.. (Ericson, Bruce) (Filed on 6/10/2006) (Entered: 06/10/2006)
06/12/2006	195	Memorandum in Opposition *of Defendant AT&T Corp. to Motion of Lycos, Inc. and Wired News for Orders Permitting Intervention and Unsealing Documents [DKT. 139]* filed byAT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 6/12/2006) (Entered: 06/12/2006)
06/12/2006	196	Declaration of Bruce A. Ericson in Support of 195 Memorandum in Opposition *of Defendant AT&T Corp. to Motion of Lycos, Inc. and Wired News for Orders Permitting Intervention and Unsealing Documents [DKT. 139]* filed byAT&T Corp., AT&T Inc.. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I, Part One# 10 Exhibit I, Part Two# 11 Exhibit J# 12 Exhibit K)(Related document(s) 195) (Ericson, Bruce) (Filed on 6/12/2006) (Entered: 06/12/2006)
06/12/2006	197	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *of Motion and Administrative Motion Pursuant to Civil Local Rules 7-11 and 79-5 to Seal Plaintiffs' Statement in Support of Motion by Lycos, Inc. and Wired News for Orders (1) Permitting Intervention and (2) Unsealing Documents* (Morris, Maria) (Filed on 6/12/2006) (Entered: 06/12/2006)
06/12/2006	198	Proposed Order *Regarding Notice of Motion and Administrative Motion Pursuant to Civil Local Rules 7-11 and 79-5 to Seal Plaintiffs' Statement in Support of Motion by Lycos, Inc. and Wired News for Orders (1) Permitting Intervention and (2) Unsealing Documents* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Morris, Maria) (Filed on 6/12/2006) (Entered: 06/12/2006)
06/12/2006	199	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *of*

		Manual Filing Regarding Plaintiffs' Statement in Support of Motion by Lycos, Inc. and Wired News for Orders (1) Permitting Intervention and (2) Unsealing Documents (Morris, Maria) (Filed on 6/12/2006) (Entered: 06/12/2006)
06/12/2006	200	Declaration of Maria V. Morris in Support of 199 Notice (Other), Notice (Other) *Plaintiffs' Statement in Support of Motion by Lycos, Inc. and Wired News for Orders (1) Permitting Intervention and (2) Unsealing Documents* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(Related document(s)199) (Morris, Maria) (Filed on 6/12/2006) (Entered: 06/12/2006)
06/12/2006	201	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 195 Memorandum in Opposition, 196 Declaration in Support,, *Opposition of Defendant AT&T Corp. to Motion of Lycos, Inc. and Wired News for Orders Permitting Intervention and Unsealing Documents [DKT. 139]* (Ericson, Bruce) (Filed on 6/12/2006) (Entered: 06/12/2006)
06/12/2006	218	Statement in Support re 212 Order, filed byGregory Hicks, Erik Knutzen, Tash Hepting, Benson B. Roe, Carolyn Jewel. (Related document(s)212) (gsa, COURT STAFF) (Filed on 6/12/2006) (Entered: 06/15/2006)
06/13/2006	202	Memorandum in Opposition *PRESS INTERVENORS' OPPOSITION TO ADMINISTRATIVE MOTION TO FILE OPPOSITION UNDER SEAL (Rule 7-11 (b))* filed byAssociated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News, USA Today. (Olson, Karl) (Filed on 6/13/2006) (Entered: 06/13/2006)
06/13/2006	203	Proposed Order re 202 Memorandum in Opposition, *DENYING ADMINISTRATIVE MOTION TO FILE OPPOSITION UNDER SEAL* by Associated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News, USA Today. (Olson, Karl) (Filed on 6/13/2006) (Entered: 06/13/2006)
06/13/2006	204	CERTIFICATE OF SERVICE by Associated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News, USA Today re 202 Memorandum in Opposition, (Olson, Karl) (Filed on 6/13/2006) (Entered: 06/13/2006)
06/13/2006	205	RESPONSE in Support *RESPONSE OF AT&T CORP. TO PLAINTIFFS' ADMINISTRATIVE MOTION TO FILE DOCUMENTS UNDER SEAL [DKTS. 183-85]* filed byAT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 6/13/2006) (Entered: 06/13/2006)
06/13/2006	206	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. *TO RESPONSE OF AT&T CORP. TO PLAINTIFFS' ADMINISTRATIVE MOTION TO FILE DOCUMENTS UNDER SEAL [DKTS. 183-85]* (Ericson, Bruce) (Filed on 6/13/2006) (Entered: 06/13/2006)
06/13/2006	208	MOTION to Related Case *Administrative Motion of Defendant AT&T Corp. to Consider Whether Cases Should Be Related (Nos. C-06-0672-VRW and C-06-3596-VRW)* filed by AT&T Corp.. (Ericson, Bruce) (Filed on 6/13/2006) (Entered: 06/13/2006)
06/13/2006	209	MOTION to Related Case *Proposed Order Deeming Cases Related* filed by AT&T Corp.. (Ericson, Bruce) (Filed on 6/13/2006) (Entered: 06/13/2006)

06/14/2006	210	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 208 MOTION to Related Case *Administrative Motion of Defendant AT&T Corp. to Consider Whether Cases Should Be Related (Nos. C-06-0672-VRW and C-06-3596-VRW) Proof of Service Via U.S. Mail* (Ericson, Bruce) (Filed on 6/14/2006) (Entered: 06/14/2006)
06/14/2006	211	ORDER by Chief Judge Vaughn R Walker granting 183 Motion to Seal Document, granting 183 Motion for Leave to File Excess Pages. The court hereby Orders that Plaintiffs may file a memorandum of points and authorities of 60 pages in support of their opposition to the United States' motion to dismiss, and may file this motion and the supporting declaration under seal. (cgd, COURT STAFF) (Filed on 6/14/2006) (Entered: 06/14/2006)
06/14/2006	212	ORDER granting request to file under seal Plaintiffs' Statement in support of motion by Lycos, Inc and Wired News for orders permitting intervention and unsealing documents re 197 Notice. Signed by Chief Judge Vaughn R Walker on 6/14/2006. (cgd, COURT STAFF) (Filed on 6/14/2006) (Entered: 06/14/2006)
06/14/2006	213	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *ADMINISTRATIVE MOTION FOR DESIGNATION OF INTERIM CLASS COUNSEL* (Scarlett, Shana) (Filed on 6/14/2006) (Entered: 06/14/2006)
06/14/2006	214	Declaration of Cindy A. Cohn in Support of 213 Notice (Other) *DECLARATION OF CINDY A. COHN IN SUPPORT OF ADMINISTRATIVE MOTION FOR DESIGNATION OF INTERIM CLASS COUNSEL* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E)(Related document(s)213) (Scarlett, Shana) (Filed on 6/14/2006) (Entered: 06/14/2006)
06/14/2006	215	Proposed Order re 213 Notice (Other) *[PROPOSED] CASE MANAGEMENT ORDER NUMBER 1* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Scarlett, Shana) (Filed on 6/14/2006) (Entered: 06/14/2006)
06/14/2006	216	NOTICE by AT&T Corp. re 208 MOTION to Related Case *Administrative Motion of Defendant AT&T Corp. to Consider Whether Cases Should Be Related (Nos. C-06-0672-VRW and C-06-3596-VRW) NOTICE OF REASSIGNMENT IN CONNECTION WITH ADMINISTRATIVE MOTION OF DEFENDANT AT&T CORP. TO CONSIDER WHETHER CASES SHOULD BE RELATED* (Ericson, Bruce) (Filed on 6/14/2006) (Entered: 06/14/2006)
06/15/2006	217	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. *Proof of Service Via U.S. Mail* (Ericson, Bruce) (Filed on 6/15/2006) (Entered: 06/15/2006)
06/15/2006	256	MOTION for leave to appear in Pro Hac Vice - Susan Freiwald filed by Susan Freiwald. (gsa, COURT STAFF) (Filed on 6/15/2006) (Entered: 06/20/2006)
06/15/2006		Proposed Order re [256] MOTION for leave to appear in Pro Hac Vice by Susan Freiwald. (gsa, COURT STAFF) (Filed on 6/15/2006) (Entered: 06/20/2006)
06/16/2006	232	Amicus Curiae APPEARANCE entered by Jennifer Stisa Granick on behalf of Amici Law Professors, Susan Freiwald. (Attachments: # 1 Proposed Order Proposed Order re: Participation# 2 Freiwald et. al. Law Professors Amici Brief) (Granick, Jennifer) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	233	MOTION for Leave to File *Brief as Amicus Curiae* filed by The Center for

		National Security Studies. (Attachments: # 1 Proposed Order)(Gross, Terry) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	234	Memorandum in Opposition re 208 MOTION to Related Case *Administrative Motion of Defendant AT&T Corp. to Consider Whether Cases Should Be Related (Nos. C-06-0672-VRW and C-06-3596-VRW) by Plaintiffs Tom Campbell, et al. and Dennis P. Riordan, et al.* filed byTom Campbell. (Pulgram, Laurence) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	235	Proposed Order re 234 Memorandum in Opposition, *Denying Administrative Motion to Consider Whether Cases Should Be Related* by Tom Campbell. (Pulgram, Laurence) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	236	Brief *of Amicus Curiae in Opposition to Motion by the United States Government to Dismiss or, in the Alternative, for Summary Judgment* filed byThe Center for National Security Studies. (Gross, Terry) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	237	CERTIFICATE OF SERVICE by Tom Campbell re 234 Memorandum in Opposition, *to AT&T Corp's Administrative Motion to Consider Whether Cases Should Be Related and Proposed Order* (Pulgram, Laurence) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	238	Reply Memorandum re 79 MOTION to Dismiss *Motion of Defendant AT&T, Inc. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum* filed byAT&T Inc.. (Sorensen, Jacob) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	239	Request for Judicial Notice re 79 MOTION to Dismiss *Motion of Defendant AT&T, Inc. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum*, 238 Reply Memorandum *in Support of Motion to Dismiss* filed byAT&T Inc.. (Attachments: # 1 Exhibit A)(Related document(s)79, 238) (Sorensen, Jacob) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	240	Declaration of Starlene Meyerkord in Support of 238 Reply Memorandum, 79 MOTION to Dismiss *Motion of Defendant AT&T, Inc. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum* filed byAT&T Inc.. (Related document(s)238, 79) (Sorensen, Jacob) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	241	Declaration of Joseph P. Tocco in Support of 238 Reply Memorandum, 79 MOTION to Dismiss *Motion of Defendant AT&T, Inc. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum* filed byAT&T Inc.. (Related document(s)238, 79) (Sorensen, Jacob) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	242	CERTIFICATE OF SERVICE by AT&T Inc. re 240 Declaration in Support,, 239 Request for Judicial Notice,, 241 Declaration in Support,, 238 Reply Memorandum (Sorensen, Jacob) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	243	STIPULATION *and [Proposed] Order Granting AT&T Corp. Leave to File Excess Pages* by AT&T Corp.. (Ericson, Bruce) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	244	Reply to Opposition *Reply Memorandum of Defendant AT&T Corp. in Support of Motion to Dismiss Plaintiffs' Amended Complaint* filed byAT&T Corp..

		(Ericson, Bruce) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	245	Reply Memorandum re 124 MOTION to Dismiss *or, in the Alternative, for Summary Judgment and in Support of the Assertion of the Military and State Secrets Privilege* filed byUnited States of America. (Tannenbaum, Andrew) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	246	NOTICE by United States of America *of Lodging of In Camera, Ex Parte Material* (Tannenbaum, Andrew) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/16/2006	247	Consent MOTION for Leave to File Excess Pages filed by United States of America. (Tannenbaum, Andrew) (Filed on 6/16/2006) (Entered: 06/16/2006)
06/19/2006	248	Reply to Opposition re 139 MOTION to Intervene *and Unseal Documents* filed byLycos, Inc., Wired News. (Alger, Timothy) (Filed on 6/19/2006) (Entered: 06/19/2006)
06/19/2006	249	Memorandum in Opposition re [207] MOTION to Intervene *PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE AND CONSOLIDATE SIMILAR AND PENDING CASE NUMBER A-05-CA-682-LY IN THE WESTERN DISTRICT OF TEXAS AT AUSTIN* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Scarlett, Shana) (Filed on 6/19/2006) (Entered: 06/19/2006)
06/19/2006	250	Declaration of Shana E. Scarlett in Support of 249 Memorandum in Opposition, *DECLARATION OF SHANA E. SCARLETT IN SUPPORT OF PLAINTFFS' OPPOSITION TO MOTION INTERVENE AND CONSOLIDATE SIMILAR AND PENDING CASE NUMBER A-05-CA-682-LY IN THE WESTERN DISTRICT OF TEXAS AT AUSTIN* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C PART 1# 4 Exhibit C PART 2# 5 Exhibit C PART 3# 6 Exhibit C PART 4)(Related document(s)249) (Scarlett, Shana) (Filed on 6/19/2006) (Entered: 06/19/2006)
06/19/2006	251	Proposed Order re 249 Memorandum in Opposition, *[PROPOSED] ORDER DENYING MOTION TO INTERVENE AND CONSOLIDATE SIMILAR AND PENDING CASE NUMBER A-05-CA-682-LY IN THE WESTERN DISTRICT OF TEXAS AT AUSTIN* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Scarlett, Shana) (Filed on 6/19/2006) (Entered: 06/19/2006)
06/19/2006	252	Memorandum in Opposition *of AT&T Corp. to Electronic Frontier Foundation's Administrative Motion for Designation of Interim Class Counsel* filed byAT&T Corp.. (Sorensen, Jacob) (Filed on 6/19/2006) (Entered: 06/19/2006)
06/19/2006	253	Memorandum in Opposition *ROE PLAINTIFFS' RESPONSE TO ADMINISTRATIVE MOTION FOR DESIGNATION OF INTERIM CLASS COUNSEL* filed byBenson B. Roe. (Himmelstein, Barry) (Filed on 6/19/2006) (Entered: 06/19/2006)
06/19/2006	254	Declaration of BARRY HIMMELSTEIN *IN SUPPORT OF ROE PLAINTIFFS' RESPONSE TO ADMINISTRATIVE MOTION FOR DESIGNATION OF INTERIM CLASS COUNSEL* filed byBenson B. Roe. (Attachments: # 1 Exhibit A)(Himmelstein, Barry) (Filed on 6/19/2006) (Entered: 06/19/2006)
06/19/2006	255	Proposed Order re 253 Memorandum in Opposition, 254 Declaration in Support *[PROPOSED] ORDER DESIGNATING INTERIM CLASS COUNSEL*

		PURSUANT TO FED. R. CIV. P. 23(g) by Benson B. Roe. (Himmelstein, Barry) (Filed on 6/19/2006) (Entered: 06/19/2006)
06/20/2006	257	CERTIFICATE OF SERVICE by AT&T Corp. re 252 Memorandum in Opposition *VIA HAND DELIVERY* (Sorensen, Jacob) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	258	CERTIFICATE OF SERVICE by AT&T Corp. re 252 Memorandum in Opposition *VIA OVERNIGHT COURIER* (Sorensen, Jacob) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	259	CERTIFICATE OF SERVICE by AT&T Corp. re 252 Memorandum in Opposition *VIA U.S. MAIL* (Sorensen, Jacob) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	260	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *Request For Permission To Bring Audio/Visual Equipment To Hearing On June 23, 2006; [Proposed] Order* (Markman, Michael) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	261	ORDERIn addition to all other matters pertinent to the hearing noticed for June 23, 2006, the parties should be prepared to address the questions provided in this order.Signed by Chief Judge Vaughn R Walker on 06/20/06. (vrwlc2, COURT STAFF) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	262	AFFIDAVIT in Opposition *[REDACTED] of Michael Markman to Motion to Dismiss, etc. by the United States Based on State Secrets Privilege* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	263	STIPULATION AND ORDER: Pursuant to the stipulation, AT&T may file a reply to docket 176 of not more than 18 pages. Signed by Chief Judge Vaughn R Walker on 6/20/2006. (cgd, COURT STAFF) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	264	Memorandum in Opposition *[REDACTED] to Motion to Dismiss, etc. by the United States Based on State Secrets Privilege* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Supplement Redacted Brief Part 2# 2 Supplement Redacted Brief Part 3# 3 Supplement Redacted Brief Part 4)(Cohn, Cindy) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	265	CERTIFICATE OF SERVICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel (Cohn, Cindy) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	266	ORDER by Chief Judge Vaughn R Walker granting 247 unopposed Motion for Leave to File Excess Pages by the United States of America. (cgd, COURT STAFF) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	267	ORDER by Chief Judge Vaughn R Walker granting 208 Motion to Relate Cases C06-0672 and C06-3596. (cgd, COURT STAFF) (Filed on 6/20/2006) (Entered: 06/20/2006)
06/20/2006	269	MOTION to File Amicus Curiae Brief filed by Eric Schneider. Motion Hearing set for 6/23/2006 09:30 AM in Courtroom 6, 17th Floor, San Francisco. (gsa, COURT STAFF) (Filed on 6/20/2006) (Entered: 06/21/2006)

06/20/2006	271	Declaration of Eric Schneider in Support of 133 MOTION to Intervene *Notice of Motion and Motion for Leave to Intervene; Notice of Motion and Motion to Unseal Documents* filed byEric Schneider. (Related document(s)133) (gsa, COURT STAFF) (Filed on 6/20/2006) (Entered: 06/21/2006)
06/20/2006		Proposed Order re [269] MOTION to File Amicus Curiae Brief by Eric Schneider. (gsa, COURT STAFF) (Filed on 6/20/2006) (Entered: 06/21/2006)
06/20/2006	272	CERTIFICATE OF SERVICE by Eric Schneider re Proposed Order, [269] MOTION to File Amicus Curiae Brief, [271] Declaration in Support, (gsa, COURT STAFF) (Filed on 6/20/2006) (Entered: 06/21/2006)
06/21/2006	268	MOTION to File Amicus Curiae Brief filed by California First Amendment Coalition, CNET News.com. Motion Hearing set for 6/23/2006 09:30 AM in Courtroom 6, 17th Floor, San Francisco. (Myers, Roger) (Filed on 6/21/2006) (Entered: 06/21/2006)
06/21/2006	270	Brief re 139 MOTION to Intervene *and Unseal Documents Amici Curiae Brief in Support of* filed byCalifornia First Amendment Coalition, CNET News.com. (Related document(s)139) (Myers, Roger) (Filed on 6/21/2006) (Entered: 06/21/2006)
06/21/2006	273	Declaration of Roger Myers in Support of 270 Brief *[Amici Curiae] in Support of Motion of Lycos and Wired News to Intervene and Unseal Documents* filed byCalifornia First Amendment Coalition, CNET News.com. (Related document (s)270) (Myers, Roger) (Filed on 6/21/2006) (Entered: 06/21/2006)
06/21/2006	274	Proposed Order re 268 MOTION to File Amicus Curiae Brief by California First Amendment Coalition, CNET News.com. (Myers, Roger) (Filed on 6/21/2006) (Entered: 06/21/2006)
06/22/2006	275	ORDER Granting request to bring audio-visual equipment to hearing on 6/23/2006, re 260 Notice. Signed by Chief Judge Vaughn R Walker on 6/22/2006. (cgd, COURT STAFF) (Filed on 6/22/2006) (Entered: 06/22/2006)
06/22/2006	276	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *of Manual Filing of Letter to Hon. Vaughn R. Walker and Proof of Service* (Cohn, Cindy) (Filed on 6/22/2006) (Entered: 06/22/2006)
06/22/2006	277	Declaration of J. Scott Marcus *[REDACTED] in Support of Plaintiffs' Motion for Preliminary Injunction* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Supplement Part 2# 2 Supplement Part 3# 3 Supplement Part 4# 4 Supplement Part 5# 5 Supplement Part 6# 6 Supplement Part 7)(Cohn, Cindy) (Filed on 6/22/2006) (Entered: 06/22/2006)
06/22/2006	278	Letter from Plaintiffs to Hon. Vaughn R. Walker dated 6/22/2006. FILED UNDER SEAL. (gsa, COURT STAFF) (Filed on 6/22/2006) Modified on 6/22/2006 (gsa, COURT STAFF). (Entered: 06/22/2006)
06/22/2006	279	CERTIFICATE OF SERVICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Benson B. Roe, Carolyn Jewel re [278] Letter (gsa, COURT STAFF) (Filed on 6/22/2006) (Entered: 06/22/2006)
06/23/2006	280	Declaration of James S. Tyre in Support of 174 Memorandum in Opposition *SUPPLEMENTAL DECLARATION OF JAMES S. TYRE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO AT&T INC.'S MOTION TO DISMISS*

		AMENDED COMPLAINT filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B)(Related document(s) 174) (Scarlett, Shana) (Filed on 6/23/2006) (Entered: 06/23/2006)
06/23/2006	281	Minute Entry: Motion Hearing held on 6/23/2006 before Chief Judge Vaughn R Walker re 12489 86 79 133 139; motion to intervene by the United States ; motion to dismiss or in the alternative for summary judgment based on the government's assertion of the state secrets doctrine; motion to dismiss by AT&T Corp for failing to plead the absence of immunity and for lack of standing; motion to dismiss by AT&T Inc for lack of personal jurisdiction; motion to intervene and to unseal documents by various media entities; motion to intervene and to unseal documents by Lycos, Inc and Wired News. The Court granted the govt's unopposed motion to intervene. The Court also heard arguments from counsel on the other motions and took those matters under submission. (Court Reporter Connie Kuhl.) (cgd, COURT STAFF) (Date Filed: 6/23/2006) (Entered: 06/26/2006)
06/26/2006	282	ORDER by Chief Judge Vaughn R Walker granting 122 the government's motion to intervene. At the June 23, 2006, hearing, the court granted the government's unopposed motion to intervene (Doc #122). The remaining motions addressed by the parties at the hearing remain under submission. (vrwlc2, COURT STAFF) (Filed on 6/26/2006) (Entered: 06/26/2006)
06/27/2006	283	ORDER by Chief Judge Vaughn R Walker granting [256] Application for Admission of Attorney Susan A. Freiwald Pro Hac Vice. (cgd, COURT STAFF) (Filed on 6/27/2006) (Entered: 06/27/2006)
06/27/2006	284	TRANSCRIPT of Proceedings held on 6/23/2006 before Judge Vaughn R. Walker. Court Reporter: Connie Kuhl.. (gsa, COURT STAFF) (Filed on 6/27/2006) (Entered: 06/28/2006)
06/28/2006	285	Response *to Question 8 (Summary)* byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 6/28/2006) (Entered: 06/28/2006)
06/28/2006	286	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *of Motion and Motion To File The Demonstrative Presentation Presented at The June 23, 2006 Hearing Under Seal* (DiMuzio, Elena) (Filed on 6/28/2006) (Entered: 06/28/2006)
06/28/2006	287	Declaration of Elena M. DiMuzio *in support of Administrative Motion To Lodge Documents With The Court (N.D. Cal. Civil Local Rules 7-11, 79-5)* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (DiMuzio, Elena) (Filed on 6/28/2006) (Entered: 06/28/2006)
06/28/2006	288	Proposed Order *Granting Plaintiffs' Motion To File Documents Under Seal* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (DiMuzio, Elena) (Filed on 6/28/2006) (Entered: 06/28/2006)
06/28/2006	289	NOTICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *of Manual Filing (Demonstrative Presentation Presented at The June 23, 2006 Hearing)* (DiMuzio, Elena) (Filed on 6/28/2006) (Entered: 06/28/2006)
06/30/2006	290	NOTICE by AT&T Corp., AT&T Inc. re [278] Letter *NOTICE OF MANUAL FILING OF LETTER OF BRUCE A. ERICSON IN RESPONSE TO LETTER OF*

		JASON SCHULTZ DATED JUNE 22, 2006 [DKT. 278] (Ericson, Bruce) (Filed on 6/30/2006) (Entered: 06/30/2006)
07/03/2006	291	RESPONSE in Support *Defendants' Response to Plaintiffs' Motion to File Their Demonstrative Presentation From the June 23, 2006 Hearing Under Seal* filed byAT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 7/3/2006) (Entered: 07/03/2006)
07/03/2006	292	Declaration of Jacob R. Sorensen *in Support of Defendants' Response to Plaintiffs' Administrative Motion to File Their Demonstrative Presentation From the June 23, 2006 Hearing Under Seal* filed byAT&T Corp., AT&T Inc.. (Ericson, Bruce) (Filed on 7/3/2006) (Entered: 07/03/2006)
07/04/2006	293	ORDER The court has reviewed an April 13, 2006, letter sent from a James B Fatchett and a June 25, 2006, letter sent from a Joseph M Gaffney. The clerk is DIRECTED to file these letters and to serve the letters on the parties. Signed by Chief Judge Vaughn R Walker on 7/4/2006.(vrwlc2, COURT STAFF) (Filed on 7/4/2006) (Entered: 07/04/2006)
07/05/2006	294	EXHIBITS *A-K, Q-T, and V-Y to Declaration of J. Scott Marcus in Support of Plaintiffs' Motion for Preliminary Injunction* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit Exhibits Q-R# 2 Exhibit Exhibit S, Part 1# 3 Exhibit Exhibit S, Part 2# 4 Exhibit Exhibit S, Part 3# 5 Exhibit Exhibits T, V-Y)(Cohn, Cindy) (Filed on 7/5/2006) (Entered: 07/05/2006)
07/05/2006	295	Letter from James B. Fatchett dated 4/13/2006 concerning knowledge of domestic listening activities conducted by the National Security Agency.. (gsa, COURT STAFF) (Filed on 7/5/2006) (Entered: 07/06/2006)
07/05/2006	296	Letter from Joseph M. Gaffney to Chief Judge Walker dated 6/25/2006 concerning the federal government's intrusion into this case.. (gsa, COURT STAFF) (Filed on 7/5/2006) (Entered: 07/06/2006)
07/06/2006	297	MOTION for Leave to File *Supplementary Material* filed by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. Motion Hearing set for 6/23/2006 09:30 AM in Courtroom 6, 17th Floor, San Francisco. (DiMuzio, Elena) (Filed on 7/6/2006) (Entered: 07/06/2006)
07/06/2006	298	Declaration of Elena M. DiMuzio *In Support of Motion To File Supplementary Material* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit 1)(DiMuzio, Elena) (Filed on 7/6/2006) (Entered: 07/06/2006)
07/06/2006	299	Proposed Order *Granting Plaintiffs' Motion To file Supplementary Material* by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (DiMuzio, Elena) (Filed on 7/6/2006) (Entered: 07/06/2006)
07/07/2006	300	MEMORANDUM in Opposition to Plaintiff's True and Correct Copy Declaration made on 6/19/2006 filed byWillie H. Ellis. (gsa, COURT STAFF) (Filed on 7/7/2006) (Entered: 07/11/2006)
07/11/2006	301	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. re 290 Notice (Other) (Ericson, Bruce) (Filed on 7/11/2006) (Entered: 07/11/2006)
07/11/2006	302	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Inc. *PROOF OF*

		SERVICE VIA HAND DELIVERY OF LETTER OF BRUCE A. ERICSON IN RESPONSE TO LETTER OF JASON SCHULTZ DATED JUNE 22, 2006 (Ericson, Bruce) (Filed on 7/11/2006) (Entered: 07/11/2006)
07/11/2006	303	MOTION to Related Case filed by Tash Hepting. (Fastiff, Eric) (Filed on 7/11/2006) (Entered: 07/11/2006)
07/11/2006	304	Memorandum in Opposition *United States' Opposition to Plaintiffs' Motion to File Supplementary Material* filed byUnited States of America. (Attachments: # 1 Proposed Order)(Orleans, Renee) (Filed on 7/11/2006) (Entered: 07/11/2006)
07/14/2006	306	Memorandum in Opposition *HEPTING PLAINTIFFS' OPPOSITION TO ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Scarlett, Shana) (Filed on 7/14/2006) (Entered: 07/14/2006)
07/17/2006	307	ORDER by Chief Judge Vaughn R Walker granting 303 Motion to Relate Case (C06-4221). (cgd, COURT STAFF) (Filed on 7/17/2006) (Entered: 07/17/2006)
07/20/2006	308	ORDER by Chief Judge Vaughn R Walker denying 86 Motion to Dismiss, denying 124 Motion to Dismiss. The court DENIES the government's motion to dismiss, or in the alternative, for summary judgment on the basis of state secrets and DENIES AT&T's motion to dismiss. The parties are ORDERED TO SHOW CAUSE in writing by July 31, 2006, why the court should not appoint an expert pursuant to FRE 706 to assist the court. The parties' briefs should also address whether this action should be stayed pending an appeal pursuant to 28 USC 1292 (b). The parties are also instructed to appear on August 8, 2006, at 2 PM, for a further case management conference.(vrwlc2, COURT STAFF) (Filed on 7/20/2006). (Entered: 07/20/2006)
07/20/2006		Set/Reset Hearings: Further Case Management Conference set for 8/8/2006 02:00 PM. (gsa, COURT STAFF) (Filed on 7/20/2006) (Entered: 07/25/2006)
07/24/2006	309	ORDER The court has reviewed a July 20, 2006, letter sent from a Daniel Gall. The clerk is DIRECTED to file this letter and to serve the letter on the parties.Signed by Chief Judge Vaughn R Walker on 7/24/06. (vrwlc2, COURT STAFF) (Filed on 7/24/2006) (Entered: 07/24/2006)
07/27/2006	310	MOTION to Stay *PENDING DETERMINATION OF AT&T CORP.'S MOTION TO STAY* filed by AT&T Corp.. (Ericson, Bruce) (Filed on 7/27/2006) (Entered: 07/27/2006)
07/27/2006	311	Declaration of Jacob R. Sorensen in Support of 310 MOTION to Stay *PENDING DETERMINATION OF AT&T CORP.'S MOTION TO STAY* filed byAT&T Corp.. (Related document(s)310) (Ericson, Bruce) (Filed on 7/27/2006) (Entered: 07/27/2006)
07/27/2006	312	Proposed Order re 310 MOTION to Stay *PENDING DETERMINATION OF AT&T CORP.'S MOTION TO STAY* by AT&T Corp.. (Ericson, Bruce) (Filed on 7/27/2006) (Entered: 07/27/2006)
07/27/2006	313	Letter from Daniel N. Gall dated 7/20/2006 to the Honorable Vaughn R. Walker regarding expert appointment for this case.. (gsa, COURT STAFF) (Filed on 7/27/2006) (Entered: 07/28/2006)
07/28/2006	314	CERTIFICATE OF SERVICE by AT&T Corp. re 311 Declaration in Support,

		310 MOTION to Stay *PENDING DETERMINATION OF AT&T CORP.'S MOTION TO STAY*, 312 Proposed Order *Proof of Service Via U.S. Mail* (Sorensen, Jacob) (Filed on 7/28/2006) (Entered: 07/28/2006)
07/31/2006	315	RESPONSE TO ORDER TO SHOW CAUSE by United States of America. (Coppolino, Anthony) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	316	NOTICE by United States of America re 315 Response to Order to Show Cause *United States' Notice of Lodging of In Camera, Ex Parte Material with Response to Order to Show Cause* (Coppolino, Anthony) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	317	RESPONSE in Support *PLAINTIFFS' BRIEF ON ORDER TO SHOW CAUSE ISSUED IN THE COURT'S JULY 20, 2006 ORDER* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(Scarlett, Shana) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	318	ORDER by Chief Judge Vaughn R Walker granting 172 Plaintiffs' Motion for Leave to extend page limit. (cgd, COURT STAFF) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	319	ORDER by Chief Judge Vaughn R Walker granting 233 Motion of The Center for National Security Studies for Leave to File as amicus curiea. (cgd, COURT STAFF) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	320	ORDER by Chief Judge Vaughn R Walker granting 297 Plaintiffs' Motion to File documents under seal. (cgd, COURT STAFF) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	321	ORDER re 297 granting MOTION for Leave to File Supplementary Material filed by Tash Hepting,, Gregory Hicks,, Erik Knutzen,, Carolyn Jewel, (cgd, COURT STAFF) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	322	ORDER re 232 Amicus Curiae Appearance, filed by Susan Freiwald,, Amici Law Professors, (cgd, COURT STAFF) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	323	ORDER by Chief Judge Vaughn R Walker granting 268 Motion of CNET News.com and California First Amendment Coalition for leave to File Amicus Curiae Brief. (cgd, COURT STAFF) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	324	MOTION to Stay *PROCEEDINGS PENDING APPEAL* filed by AT&T Corp.. Motion Hearing set for 9/14/2006 02:00 PM in Courtroom 6, 17th Floor, San Francisco. (Axelbaum, Marc) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	325	Proposed Order re 324 MOTION to Stay *PROCEEDINGS PENDING APPEAL* by AT&T Corp.. (Axelbaum, Marc) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	326	RESPONSE TO ORDER TO SHOW CAUSE by AT&T Corp.. (Axelbaum, Marc) (Filed on 7/31/2006) (Entered: 07/31/2006)
07/31/2006	327	Plaintiff's Demontrative Presentation Presented at the June 23, 2006 Hearing by Gregory Hicks, Tash Hepting, Carolyn Jewel. FILED UNDER SEAL (gsa, COURT STAFF) (Filed on 7/31/2006) (Entered: 08/01/2006)
08/01/2006	328	CERTIFICATE OF SERVICE by AT&T Corp. re 326 Response to Order to

		Show Cause, 325 Proposed Order, 324 MOTION to Stay *PROCEEDINGS PENDING APPEAL* (Axelbaum, Marc) (Filed on 8/1/2006) (Entered: 08/01/2006)
08/01/2006	329	Memorandum in Opposition *to AT&T Admin Motion for Interim Stay* filed byGregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel. (Cohn, Cindy) (Filed on 8/1/2006) (Entered: 08/01/2006)
08/02/2006	330	ORDER by Chief Judge Vaughn R. Walker GRANTING 310 motion for interim stay. All further proceedings are stayed until further order of the court. AT&T's and the government's motions for a stay of proceedings pending appeal will be heard on August 8, 2006, at 2:00 pm. (vrwlc2, COURT STAFF) (Filed on 8/2/2006) (Entered: 08/02/2006)
08/04/2006	331	STIPULATION *AND [PROPOSED] ORDER RE SUBSTITUTION OF PROPOSED INTERVENOR* by CondeNet Inc., Wired News. (Alger, Timothy) (Filed on 8/4/2006) (Entered: 08/04/2006)
08/07/2006	332	NOTICE by CondeNet Inc., Wired News *NOTICE OF MATTER UNDER SUBMISSION AND REQUEST TO BE HEARD AT CASE MANAGEMENT CONFERENCE* (Alger, Timothy) (Filed on 8/7/2006) (Entered: 08/07/2006)
08/08/2006	339	Minute Entry: Further Case Management Conference and hearing on Defendant AT&T and USA's motion to stay pending appeal held on 8/8/2006. The court determined that it would not, at this stage, appoint a technical advisor or expert witness and that it would issue a stay of limited duration. (Court Reporter Sahar McVickar.) (cgd, COURT STAFF) (Date Filed: 8/8/2006) (Entered: 08/15/2006)
08/10/2006	333	Letter from Cindy A. Cohn. (Cohn, Cindy) (Filed on 8/10/2006) (Entered: 08/10/2006)
08/10/2006	334	CERTIFICATE OF SERVICE by Gregory Hicks, Erik Knutzen, Tash Hepting, Carolyn Jewel *(Amended)* (Cohn, Cindy) (Filed on 8/10/2006) (Entered: 08/10/2006)
08/11/2006	335	Letter from Bruce A. Ericson. (Attachments: # 1 Exhibit A)(Ericson, Bruce) (Filed on 8/11/2006) (Entered: 08/11/2006)
08/14/2006	336	ORDER to stay all further proceedings until September 29, 2006. Signed by Chief Judge Walker on 8/14/2006. (vrwlc2, COURT STAFF) (Filed on 8/14/2006) (Entered: 08/14/2006)
08/14/2006	337	CERTIFICATE OF SERVICE by AT&T Corp. re 335 Letter *from Bruce A. Ericson to Judge Vaughn Walker* (Ericson, Bruce) (Filed on 8/14/2006) (Entered: 08/14/2006)
08/14/2006	338	STIPULATION AND ORDER that CondeNet Inc. shall be substituted for Lycos, Inc for all purposes in this matter. Signed by Chief Judge Vaughn R Walker on 8/14/2006. (cgd, COURT STAFF) (Filed on 8/14/2006) (Entered: 08/14/2006)
08/14/2006	340	TRANSCRIPT of Proceedings held on 8/8/2006 before Judge Vaughn R. Walker. Court Reporter: Sahar McVickar.. (gsa, COURT STAFF) (Filed on 8/14/2006) (Entered: 08/17/2006)
11/09/2006	341	NOTICE OF APPEAL/ORDER GRANTING PERMISSION TO APPEAL

		PURSUANT TO 28 U.S.C. Section 1292(b) by AT&T Corp.. Filing fee $ 455, receipt number 3392285. (gsa, COURT STAFF) (Filed on 11/9/2006) Modified on 11/13/2006 (gsa, COURT STAFF). (Entered: 11/13/2006)
11/13/2006		Copy of Notice of Appeal and Docket sheet mailed to all counsel (gsa, COURT STAFF) (Filed on 11/13/2006) (Entered: 11/13/2006)
11/13/2006		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re [341] Notice of Appeal (gsa, COURT STAFF) (Filed on 11/13/2006) (Entered: 11/13/2006)
11/15/2006	342	NOTICE OF APPEAL/ORDER GRANTING PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. Section 1292(b) by United States of America. (gsa, COURT STAFF) (Filed on 11/15/2006) (Entered: 11/20/2006)
11/15/2006		USCA Case Number 06-17137 for [342] Notice of Appeal filed by United States of America,. (gsa, COURT STAFF) (Filed on 11/15/2006) (Entered: 11/20/2006)
11/15/2006		USCA Case Number 06-17132 for [341] Notice of Appeal filed by AT&T Corp.,. (gsa, COURT STAFF) (Filed on 11/15/2006) (Entered: 11/20/2006)
11/17/2006	343	TRANSCRIPT DESIGNATION by AT&T Corp., AT&T Inc., for proceedings held on 5/17/2006, 6/23/2006, 8/8/2006 before Judge Vaughn R. Walker.. (gsa, COURT STAFF) (Filed on 11/17/2006) (Entered: 11/21/2006)
12/07/2006	344	NOTICE by United States of America *Regarding Transcript Orders* (Tannenbaum, Andrew) (Filed on 12/7/2006) (Entered: 12/07/2006)
12/22/2006	345	Certificate of Record Mailed to USCA re appeal [342] Notice of Appeal, [341] Notice of Appeal: (gsa, COURT STAFF) (Filed on 12/22/2006) (Entered: 12/22/2006)
02/20/2007	346	ORDER by Chief Judge Walker granting in part and denying in part 133 motion to intervene, granting in part and denying in part 139 motion to Intervene. (vrwlc2, COURT STAFF) (Filed on 2/20/2007) (Entered: 02/20/2007)
02/20/2007	347	ORDER by Chief Judge Walker granting in part and denying in part 324 motion to stay. (vrwlc2, COURT STAFF) (Filed on 2/20/2007) (Entered: 02/20/2007)

E-Filing, ProSe, STAYED

U.S. District Court
California Northern District (MDL)
CIVIL DOCKET FOR CASE #: M:06-cv-01791-VRW

In re National Security Agency Telecommunications Records Litigation
Assigned to: Hon. Vaughn R. Walker
Lead case: M:06-cv-01791-VRW
Member cases:

- 3:06-cv-00672-VRW
- 3:06-cv-03467-VRW
- 3:06-cv-03574-VRW
- 3:06-cv-03596-VRW
- 3:06-cv-04221-VRW
- 3:06-cv-05063-VRW
- 3:06-cv-05064-VRW
- 3:06-cv-05065-VRW
- 3:06-cv-05066-VRW
- 3:06-cv-05067-VRW
- 3:06-cv-05267-VRW
- 3:06-cv-05268-VRW
- 3:06-cv-05269-VRW
- 3:06-cv-05340-VRW
- 3:06-cv-05341-VRW
- 3:06-cv-05343-VRW
- 3:06-cv-05452-VRW
- 3:06-cv-05485-VRW
- 3:06-cv-05576-VRW
- 3:06-cv-06222-VRW
- 3:06-cv-06224-VRW
- 3:06-cv-06225-VRW
- 3:06-cv-06253-VRW
- 3:06-cv-06254-VRW
- 3:06-cv-06294-VRW
- 3:06-cv-06295-VRW
- 3:06-cv-06313-VRW
- 3:06-cv-06385-VRW
- 3:06-cv-06387-VRW
- 3:06-cv-06388-VRW
- 3:06-cv-06434-VRW
- 3:06-cv-06435-VRW
- 3:06-cv-06570-VRW
- 3:06-cv-06924-VRW
- 3:06-cv-07934-VRW
- 3:07-cv-00109-VRW
- 3:07-cv-00464-VRW
- 3:07-cv-00693-VRW
- 3:07-cv-01187-VRW

Date Filed: 08/14/2006
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

3:07-cv-01242-VRW
3:07-cv-01243-VRW
Cause: 28:1331 Fed. Question

Date Filed	#	Docket Text
08/14/2006	1	TRANSFER ORDER from Judicial Panel on Multi District Litigation, pursuant to 28 U.S.C. 1407, that the action is transferred to the Northern District of California creating MDL No. 06-1791. (gsa, COURT STAFF) (Filed on 8/14/2006) Additional attachment(s) added on 10/5/2006 (gsa, COURT STAFF). (Entered: 08/16/2006)
08/14/2006		CASE DESIGNATED for Electronic Filing. (gsa, COURT STAFF) (Filed on 8/14/2006) (Entered: 08/16/2006)
08/22/2006	2	NOTICE of Appearance by Anthony Joseph Coppolino , *United States Department of Justice, on behalf of Federal Defendants* (Coppolino, Anthony) (Filed on 8/22/2006) (Entered: 08/22/2006)
08/22/2006	3	NOTICE of Appearance by Andrew H Tannenbaum *on behalf of the United States of America* (Tannenbaum, Andrew) (Filed on 8/22/2006) (Entered: 08/22/2006)
08/22/2006	4	NOTICE of Appearance by Alexander Kenneth Haas *for the United States of America* (Haas, Alexander) (Filed on 8/22/2006) (Entered: 08/22/2006)
08/24/2006	11	ORDER Vacating Transfer Order signed by Wm. Terrell Hodges, Chairman, Judicial Panel on Multidistrict Litigation (gsa, COURT STAFF) (Filed on 8/24/2006) (Entered: 08/29/2006)
08/25/2006	5	MOTION to Vacate *Administrative Motion of AT&T and Verizon Defendants to Vacate Pending Filing Deadlines in Cases Transferred by the Judicial Panel on Multidistrict Litigation* filed by AT&T Communications of California, Inc., AT&T Operations, Inc., Cellco Partnership, Illinois Bell Telephone Company, MCI, LLC, New Cingular Wireless Services, Inc., Pacific Bell Telephone Company, SBC Long Distance, LLC, Verizon Global Networks, Inc., Verizon Northwest, Inc., Verizon Wireless LLC, American Telephone & Telegraph Co., AT&T Communications, Inc., AT&T Corp., AT&T Inc., Verizon Communications, Inc.. (Axelbaum, Marc) (Filed on 8/25/2006) (Entered: 08/25/2006)
08/25/2006	6	Declaration of Marc H. Axelbaum in Support of 5 MOTION to Vacate *Administrative Motion of AT&T and Verizon Defendants to Vacate Pending Filing Deadlines in Cases Transferred by the Judicial Panel on Multidistrict Litigation* filed byVerizon Global Networks, Inc., Verizon Northwest, Inc., Verizon Wireless LLC, American Telephone & Telegraph Co., AT&T Communications, Inc., AT&T Corp., AT&T Inc., AT&T Communications of California, Inc., AT&T Operations, Inc., Cellco Partnership, Illinois Bell Telephone Company, MCI, LLC, New Cingular Wireless Services, Inc., Pacific Bell Telephone Company, SBC Long Distance, LLC, Verizon Communications, Inc.. (Attachments: # 1 Exhibit A# 2 Exhibit B)(Related document(s)5) (Axelbaum, Marc) (Filed on 8/25/2006) (Entered: 08/25/2006)
08/25/2006	7	Declaration of Brian M. Boynton in Support of 5 MOTION to Vacate

		Administrative Motion of AT&T and Verizon Defendants to Vacate Pending Filing Deadlines in Cases Transferred by the Judicial Panel on Multidistrict Litigation filed byVerizon Global Networks, Inc., Verizon Northwest, Inc., Verizon Wireless LLC, American Telephone & Telegraph Co., AT&T Communications, Inc., AT&T Corp., AT&T Inc., AT&T Communications of California, Inc., AT&T Operations, Inc., Cellco Partnership, Illinois Bell Telephone Company, MCI, LLC, New Cingular Wireless Services, Inc., Pacific Bell Telephone Company, SBC Long Distance, LLC, Verizon Communications, Inc.. (Related document(s)5) (Axelbaum, Marc) (Filed on 8/25/2006) (Entered: 08/25/2006)
08/25/2006	8	Proposed Order re 5 MOTION to Vacate *Administrative Motion of AT&T and Verizon Defendants to Vacate Pending Filing Deadlines in Cases Transferred by the Judicial Panel on Multidistrict Litigation* by Verizon Global Networks, Inc., Verizon Northwest, Inc., Verizon Wireless LLC, American Telephone & Telegraph Co., AT&T Communications, Inc., AT&T Corp., AT&T Inc., AT&T Communications of California, Inc., AT&T Operations, Inc., Cellco Partnership, Illinois Bell Telephone Company, MCI, LLC, New Cingular Wireless Services, Inc., Pacific Bell Telephone Company, SBC Long Distance, LLC, Verizon Communications, Inc.. (Axelbaum, Marc) (Filed on 8/25/2006) (Entered: 08/25/2006)
08/25/2006	9	CERTIFICATE OF SERVICE by Verizon Global Networks, Inc., Verizon Northwest, Inc., Verizon Wireless LLC, American Telephone & Telegraph Co., AT&T Communications, Inc., AT&T Corp., AT&T Inc., AT&T Communications of California, Inc., AT&T Operations, Inc., Cellco Partnership, Illinois Bell Telephone Company, MCI, LLC, New Cingular Wireless Services, Inc., Pacific Bell Telephone Company, SBC Long Distance, LLC, Verizon Communications, Inc. re 5 MOTION to Vacate *Administrative Motion of AT&T and Verizon Defendants to Vacate Pending Filing Deadlines in Cases Transferred by the Judicial Panel on Multidistrict Litigation* (Axelbaum, Marc) (Filed on 8/25/2006) (Entered: 08/25/2006)
08/28/2006	10	CLERK'S NOTICE Advising Counsel of Receipt of cases from the Eastern District of New York; District of Rhode Island; and the Southern District of California. (Attachments: # 1 Marck, et al -v- Verizon communications, Inc., et al; #(2) Mahoney -v- Verizon Communications; #(3) Mahoney -v- AT&T Communications; # 4 Bissit, et al -v- Verizon Communications, inc., et al; # (5) Souder -v- AT&T corp., et al) (rcs, COURT STAFF) (Filed on 8/28/2006) (Entered: 08/28/2006)
08/30/2006	12	CLERK'S NOTICE Advising Counsel of Receipt of Cases from the District of Montana and the Southern District of Texas. (Attachments: #(1) Fuller -v- Verizon Communications Inc., et al; #(2) Trevino, et al -v- AT&T Corp., et al; # (3) Doberg -v- AT&T Corp.) (rcs, COURT STAFF) (Filed on 8/30/2006) (Entered: 08/30/2006)
08/30/2006	13	Memorandum in Opposition *to Administrative Motion of AT&T and Verizon Defendants to Vacate Pending Filing Deadlines* filed byTash Hepting, Gregory Hicks, Carolyn Jewel, Erik Knutzen. (Cohn, Cindy) (Filed on 8/30/2006) (Entered: 08/30/2006)
08/30/2006	14	Memorandum in Opposition re 5 MOTION to Vacate *Administrative Motion of AT&T and Verizon Defendants to Vacate Pending Filing Deadlines in Cases*

		Transferred by the Judicial Panel on Multidistrict Litigation filed byElaine Spielfogel-Landis. (Himmelstein, Barry) (Filed on 8/30/2006) (Entered: 08/30/2006)
08/31/2006	15	Practice and Procedure Order. Signed by Chief Judge Walker on 8/31/06. (vrwlc2, COURT STAFF) (Filed on 8/31/2006) (Entered: 08/31/2006)
08/31/2006	16	CLERK'S NOTICE Advising Counsel of Receipt of Cases from the Northern District of Illinois, District of Oregon, and Eastern District of Louisiana. (Attachments: #(1) Terkel, et al -v- AT&T Inc.; #(2) Hines, et al -v- Verizon Northwest, Inc., etal; #(3) Herron, et al -v- Verizon Global networks, Inc., et al) (rcs, COURT STAFF) (Filed on 8/31/2006) (Entered: 08/31/2006)
09/01/2006	17	NOTICE of Appearance by Samir Chandra Jain (Jain, Samir) (Filed on 9/1/2006) (Entered: 09/01/2006)
09/01/2006	18	MOTION for leave to appear in Pro Hac Vice *of Leondra R. Kruger* filed by Verizon Global Networks, Inc., Verizon Northwest, Inc., Verizon Wireless LLC, Cellco Partnership, MCI, LLC, Verizon Communications, Inc.(a corporation), Verizon Communications, Inc.. (Attachments: # 1 Signature Page (Declarations/Stipulations))(Rogers, Elizabeth) (Filed on 9/1/2006) (Entered: 09/01/2006)
09/01/2006	19	ORDER vacating pending filing deadlines by Chief Judge Walker granting 5 Motion to Vacate. (vrwlc2, COURT STAFF) (Filed on 9/1/2006) (Entered: 09/01/2006)
09/05/2006	20	NOTICE of Appearance by Reed R. Kathrein (Kathrein, Reed) (Filed on 9/5/2006) (Entered: 09/05/2006)
09/05/2006	21	NOTICE of Appearance by Shana Eve Scarlett (Scarlett, Shana) (Filed on 9/5/2006) (Entered: 09/05/2006)
09/05/2006	22	NOTICE of Appearance by Maria V. Morris (Morris, Maria) (Filed on 9/5/2006) (Entered: 09/05/2006)
09/05/2006	23	NOTICE of Appearance by Candace J. Morey *Mitchell Zimmerman, Jennifer L. Kelley and Saina Shamilov* (Morey, Candace) (Filed on 9/5/2006) (Entered: 09/05/2006)
09/05/2006	24	NOTICE of Appearance by Jeff D Friedman (Friedman, Jeff) (Filed on 9/5/2006) (Entered: 09/05/2006)
09/05/2006		MOTION for leave to appear in Pro Hac Vice - Leondra R. Kruger; Proposed Order filed by Verizon Global Networks, Inc., Verizon Northwest, Inc., Verizon Wireless LLC, Cellco Partnership, Verizon Communications, Inc.(a corporation), Verizon Communications, Inc., MCI, LLC. (gsa, COURT STAFF) (Filed on 9/5/2006) (Entered: 09/08/2006)
09/06/2006	25	NOTICE of Appearance by Eric A. Isaacson (Isaacson, Eric) (Filed on 9/6/2006) (Entered: 09/06/2006)
09/06/2006	26	CLERK'S NOTICE Advising Counsel of Receipt of the Action James C. Harrington, et al -v- AT&T Inc. from the Western District of Texas. (rcs, COURT STAFF) (Filed on 9/6/2006) (Entered: 09/06/2006)

09/07/2006	27	CLERK'S NOTICE Advising Counsel of Receipt of the Action Steven Schwarz, et al -v- AT&T Corp., et al from the Northern District of Illinois. (rcs, COURT STAFF) (Filed on 9/7/2006) (Entered: 09/07/2006)
09/07/2006	28	MOTION for leave to appear in Pro Hac Vice *of Benjamin C. Mizer* filed by Verizon Global Networks, Inc., Verizon Northwest, Inc., Verizon Wireless LLC, Cellco Partnership, Verizon Communications, Inc.(a corporation), Verizon Communications, Inc., MCI, LLC, Verizon Communications, Inc., Verizon Communications, Inc.. (Attachments: # 1 Signature Page (Declarations/Stipulations))(Rogers, Elizabeth) (Filed on 9/7/2006) (Entered: 09/07/2006)
09/08/2006	29	NOTICE of Appearance by Marc H. Axelbaum *Notice of Appearance on Behalf of the AT&T Defendants* (Axelbaum, Marc) (Filed on 9/8/2006) (Entered: 09/08/2006)
09/08/2006		Receipt for Application for Pro Hac Vice [#24] fee #3389813 from Benjamin C. Mizer in the amount of $210.00 (gsa, COURT STAFF) (Filed on 9/8/2006) (Entered: 09/12/2006)
09/13/2006	30	NOTICE of Appearance by Karl Olson (Olson, Karl) (Filed on 9/13/2006) (Entered: 09/13/2006)
09/13/2006	31	CERTIFICATE OF SERVICE by Associated Press, Bloomberg News, Los Angeles Times, San Francisco Chronicle, San Jose Mercury News, USA Today re 30 Notice of Appearance *BY MAIL* (Olson, Karl) (Filed on 9/13/2006) (Entered: 09/13/2006)
09/13/2006	32	CLERK'S NOTICE Advising Counsel of Receipt of the Case Greg Conner, et al -v- AT&T Corp., etal from the Eastern District of California. (Attachments: # 1 Prcatice and Procedure Order) (rcs, COURT STAFF) (Filed on 9/13/2006) (Entered: 09/13/2006)
09/14/2006	33	ORDER by Chief Judge Vaughn R Walker granting 18 Motion Application for Admission Pro Hac Vice of Leondra R. Kruger representing Verizon Communications et al. (cgd, COURT STAFF) (Filed on 9/14/2006) (Entered: 09/14/2006)
09/15/2006	34	RESPONSE to *AT&T's Response to August 14, 2006 Order in Hepting, Et al., v. AT&T Corp., et al. (Dkt. No. 366)* by AT&T Corp., AT&T, Inc., AT&T Communications, Inc., AT&T Corp., AT&T, Inc., AT&T Corp., American Telephone and Telegraph Company, Bellsouth Communication Systems, LLC, BellSouth Telecommunications, Inc., AT&T Corp., Illinois Bell Telephone Co., BellSouth Communications Systems, LLC, BellSouth Corp., BellSouth Telecomminications, Inc., American Telephone & Telegraph Co., AT&T Communications, Inc., AT&T Corp., AT&T Inc., AT&T Communications of California, Inc., AT&T Operations, Inc., Illinois Bell Telephone Company, New Cingular Wireless Services, Inc., Pacific Bell Telephone Company, SBC Long Distance, LLC, AT&T Corp., AT&T Communications of California, AT&T Corp., AT&T, Inc., AT&T Corp., AT&T Inc., AT&T, Inc., AT&T Corp., AT&T Operations Inc., New Cingular Wireless Services, Inc., AT&T Corp.(a New York corporation), AT&T Inc.(a Delaware corporation), SBC Long Distance, LLC(a Delaware limited liability company doing business as AT&T Long Distance), Pacific Bell Telephone Company(a California corporation doing

		business as AT&T California), AT&T Communications of California, Inc.(a California corporation). (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D)(Axelbaum, Marc) (Filed on 9/15/2006) (Entered: 09/15/2006)
09/15/2006	35	RESPONSE to *Status Report of United States in Response to August 14, 2006 Order in Hepting action (06-cv-676)* by George W. Bush, National Security Agency, United States Of America. (Coppolino, Anthony) (Filed on 9/15/2006) (Entered: 09/15/2006)
09/15/2006	36	STATUS REPORT *Pursuant to August 14, 2006 Order* by Tash Hepting, Carolyn Jewel, Gregory Hicks, Erik Knutzen. (Cohn, Cindy) (Filed on 9/15/2006) (Entered: 09/15/2006)
09/25/2006	37	Conditional Transfer Order signed by Jeffery N. Luthi, Clerk of the Panel (gsa, COURT STAFF) (Filed on 9/25/2006) (Entered: 09/27/2006)
10/03/2006	38	CLERK'S NOTICE Advising Counsel of Receipt of Cases from the Southern District of Indiana and the Northern District of Georgia. (Attachments: #(1) Cross, et al -v- AT&T Communications, Inc., etal; #(2) Cross, et al -v- AT&T Communications, Inc., etal; #(3) Guzzi -v- Bush, et al; #(4) Pretrial Order No. 1) (rcs, COURT STAFF) (Filed on 10/3/2006) (Entered: 10/03/2006)
10/03/2006	39	MOTION Scheduling Order filed by Tash Hepting. (Attachments: # 1 Exhibit AT&T's Answer)(Cohn, Cindy) (Filed on 10/3/2006) (Entered: 10/03/2006)
10/04/2006	41	Conditional Transfer ORDER signed by Jeffery N. Luthi, Clerk of the Panel. (gsa, COURT STAFF) (Filed on 10/4/2006) (Entered: 10/06/2006)
10/05/2006	40	CLERK'S NOTICE Advising Counsel of Receipt of Cases from the Western District of Washington and the District of Hawaii. (Attachments: #(1) Derosier -v- Cingular Wireless, et al; #(2) Crockett, et al -v- Verizon Wireless, et al) (rcs, COURT STAFF) (Filed on 10/5/2006) (Entered: 10/05/2006)
10/06/2006	42	Memorandum in Opposition 67*Response of the United States to Hepting Plaintiffs' Administrative Motion for Scheduling Order* filed byUnited States, Keith B. Alexander, George W. Bush, National Security Agency, United States of America, United States Of America. (Coppolino, Anthony) (Filed on 10/6/2006) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 10/06/2006)
10/06/2006	43	***** FILED IN ERROR. PLEASE SEE DOCKET #44. ***** REPLY to Response to Motion *AT&T's Response to Hepting Plaintiffs' Administrative Motion for Scheduling Order (Dkt. 39)* filed byAT&T Corp., AT&T, Inc., AT&T Corp., AT&T, Inc., AT&T Corp., AT&T Corp., AT&T Corp., AT&T Inc., AT&T Corp., AT&T, Inc., AT&T Corp., AT&T Inc., AT&T, Inc., AT&T Corp., AT&T Corp.(a New York corporation), AT&T Inc.(a Delaware corporation). (Attachments: # 1 Exhibit A, B and C)(Sorensen, Jacob) (Filed on 10/6/2006) Modified on 10/10/2006 (ewn, COURT STAFF). (Entered: 10/06/2006)
10/06/2006	44	Memorandum in Opposition re 39 MOTION Scheduling Order *AT&Ts Response to Hepting Plaintiffs' Administrative Motion for Scheduling Order (Dkt. 39)* filed byAT&T Corp., AT&T, Inc., AT&T Corp., AT&T, Inc., AT&T Corp., AT&T Corp., AT&T Corp., AT&T Inc., AT&T Corp., AT&T, Inc., AT&T Corp., AT&T Inc., AT&T, Inc., AT&T Corp., AT&T Corp.(a New York corporation),

		AT&T Inc.(a Delaware corporation). (Attachments: # 1 Exhibit A, B, C) (Sorensen, Jacob) (Filed on 10/6/2006) (Entered: 10/06/2006)
10/06/2006	45	CERTIFICATE OF SERVICE by AT&T Corp., AT&T, Inc., AT&T Corp., AT&T, Inc., AT&T Corp., AT&T Corp., AT&T Corp., AT&T Inc., AT&T Corp., AT&T, Inc., AT&T Corp., AT&T Inc., AT&T, Inc., AT&T Corp., AT&T Corp.(a New York corporation), AT&T Inc.(a Delaware corporation) re 44 Memorandum in Opposition, *AT&T's Response to Hepting Plaintiffs' Administrative Motion for Scheduling Order (Dkt. 39)* (Ericson, Bruce) (Filed on 10/6/2006) (Entered: 10/06/2006)
10/10/2006	46	CLERK'S NOTICE Advising Counsel of Receipt of Cases from the Northern District of Illinois and Western District of Kentucky. (Attachments: #(1) Waxman -v- AT&T Corp.; #(2) Suchanek -v- Sprint Nextel Corp.) (rcs, COURT STAFF) (Filed on 10/10/2006) (Entered: 10/10/2006)
10/10/2006	47	CLERK'S NOTICE Advising Counsel of Receipt of the Action Bready, et al -v- Verizon Maryland, Inc. from the District of Maryland. (rcs, COURT STAFF) (Filed on 10/10/2006) (Entered: 10/10/2006)
10/13/2006	48	CLERK'S NOTICE Advising Counsel of Receipt of Cases from the Southern District of Florida, Western District of Michigan, and the Eastern District of Pennsylvania. (Attachments: #(1) Fortnash -v- AT&T Corp.; #(2) Dubois, et al -v- AT&T Corp., et al; #(3) Solomon -v- Verizon Communications, Inc.) (rcs, COURT STAFF) (Filed on 10/13/2006) (Entered: 10/13/2006)
10/16/2006	49	ORDER by Chief Judge Walker setting initial case management conference for November 14, 2006, at 2:30pm (vrwlc2, COURT STAFF) (Filed on 10/16/2006). (Entered: 10/16/2006)
10/16/2006		Set Deadlines/Hearings: Case Management Statement due by 11/7/2006. Initial Case Management Conference set for 11/14/2006 02:30 PM. Location: Courtroom no. 6, 17th floor, 450 Golden Gate Ave., San Francisco, California. (cgd, COURT STAFF) (Filed on 10/16/2006) (Entered: 10/16/2006)
10/16/2006		Set Deadlines/Hearings: Initial Case Management Conference set for 11/14/2006 02:30 PM. (gsa, COURT STAFF) (Filed on 10/16/2006) (Entered: 10/17/2006)
10/20/2006	50	NOTICE of Voluntary Dismissal *of McLeod USA Telecommunications Seervices, Inc.* by Travis Cross (Attachments: # 1 Proposed Order Notice of Dismissal of McLeod USA Telecommunications Services, Inc.)(Sipes, W.) (Filed on 10/20/2006) (Entered: 10/20/2006)
10/25/2006	51	Mail Returned as Undeliverable. Mail sent to John Beisner. (gsa, COURT STAFF) (Filed on 10/25/2006) (Entered: 10/25/2006)
10/31/2006	52	CLERK'S NOTICE : YOU ARE NOTIFIED THAT the Initial Case Management Conference currently scheduled for November 14, 2006 has been continued to Friday, November 17, 2006 at 10:30 a.m. and shall follow the conditions set forth in the court's October 16, 2006 order (Doc #49). Please report to Courtroom #6, on the 17th floor at 450 Golden Gate Avenue, San Francisco, California. Case Management Conference set for 11/17/2006 10:30 AM. (cgd, COURT STAFF) (Filed on 10/31/2006) (Entered: 10/31/2006)
10/31/2006	53	Mail Returned as Undeliverable. Mail sent to Donald A. Statland (order filed

		10/16/06). (far, COURT STAFF) (Filed on 10/31/2006) (Entered: 11/01/2006)
11/03/2006	54	MOTION to Substitute Attorney filed by Charter Communications, LLC. (Burke, Thomas) (Filed on 11/3/2006) (Entered: 11/03/2006)
11/03/2006	55	First MOTION to Substitute Attorney filed by Bright House Networks, LLC. (Burke, Thomas) (Filed on 11/3/2006) (Entered: 11/03/2006)
11/03/2006	56	Second MOTION to Substitute Attorney filed by Bright House Networks, LLC. (Burke, Thomas) (Filed on 11/3/2006) (Entered: 11/03/2006)
11/07/2006	57	Letter from Jon B. Eisenberg Re: Potential Tag-Along Action Al-Haramain Islamic Foundation, Inc. v. Bush, No. CV-06-274-KI (District of Oregon). (Eisenberg, Jon) (Filed on 11/7/2006) (Entered: 11/07/2006)
11/07/2006	58	CASE MANAGEMENT STATEMENT *PLAINTIFFS' JOINT AND AGREED ORGANIZATION PLAN* filed by Tash Hepting. (Attachments: # 1 Attachment A# 2 Attachment B# 3 Attachment B, Ex. A# 4 Attachment B, Ex. B# 5 Attachment B, Ex. C# 6 Attachment B, Ex. D# 7 Attachment B, Ex. E# 8 Attachment B, Ex. F# 9 Attachment B, Ex. G Part 1# 10 Attachment B, Ex. G Part 2# 11 Attachment B, Ex. H# 12 Attachment B, Ex. I# 13 Attachment B, Ex. J# 14 Attachment B, Ex. K# 15 Attachment B, Ex. L# 16 Attachment B, Ex. M) (Scarlett, Shana) (Filed on 11/7/2006) (Entered: 11/07/2006)
11/07/2006	59	MOTION to Substitute Attorney filed by TDS Communications Solutions, Inc.. (Wadia, Cyrus) (Filed on 11/7/2006) (Entered: 11/07/2006)
11/07/2006	60	CERTIFICATE OF SERVICE by TDS Communications Solutions, Inc. re 59 MOTION to Substitute Attorney (Wadia, Cyrus) (Filed on 11/7/2006) (Entered: 11/07/2006)
11/07/2006	61	JOINT CASE MANAGEMENT STATEMENT filed by AT&T Communications, AT&T Teleholdings, Cingular Wireless Corporation, Cingular Wireless LLC, Illinois Bell, Indiana Bell, New Cingular Wireless Services, Inc., Pac Bell Telephone Co., SBC Communications, AT&T Inc., AT&T Communications of California, AT&T Corp., AT&T Operations Inc., SBC Long Distance, LLC(a Delaware limited liability company doing business as AT&T Long Distance). (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C) (Axelbaum, Marc) (Filed on 11/7/2006) (Entered: 11/07/2006)
11/08/2006	62	***** FILED IN ERROR. PLEASE SEE DOCKET #63. ***** CERTIFICATE OF SERVICE by AT&T Communications, AT&T Teleholdings, Cingular Wireless Corporation, Cingular Wireless LLC, Illinois Bell, Indiana Bell, Pac Bell Telephone Co., SBC Communications, New Cingular Wireless Services, Inc., AT&T Communications of California, AT&T Corp., AT&T Operations Inc., AT&T Inc.(a Delaware corporation), SBC Long Distance, LLC(a Delaware limited liability company doing business as AT&T Long Distance) re 61 Case Management Statement (Joint), Case Management Statement (Joint), Case Management Statement (Joint) (Ericson, Bruce) (Filed on 11/8/2006) Modified on 11/9/2006 (ewn, COURT STAFF). (Entered: 11/08/2006)
11/08/2006	63	CERTIFICATE OF SERVICE by AT&T Corp., AT&T Teleholdings, Cingular Wireless Corporation, Cingular Wireless LLC, Illinois Bell, Indiana Bell, Pac Bell Telephone Co., SBC Communications, AT&T Communications, Inc.,

		AT&T Inc., AT&T Operations, Inc., New Cingular Wireless Services, Inc., AT&T Communications of California, SBC Long Distance, LLC(a Delaware limited liability company doing business as AT&T Long Distance) re 61 Case Management Statement (Joint), Case Management Statement (Joint), Case Management Statement (Joint) (Ericson, Bruce) (Filed on 11/8/2006) (Entered: 11/08/2006)
11/08/2006	64	CLERK'S NOTICE Advising Counsel of Receipt of the Case D. Clive Hardy -v- AT&T Corp. from the Eastern District of Louisiana. (rcs, COURT STAFF) (Filed on 11/8/2006) (Entered: 11/08/2006)
11/08/2006	65	Proposed Order re 59 MOTION to Substitute Attorney by TDS Communications Solutions, Inc.. (Black, E.) (Filed on 11/8/2006) (Entered: 11/08/2006)
11/08/2006	66	CERTIFICATE OF SERVICE by TDS Communications Solutions, Inc. re 65 Proposed Order, 59 MOTION to Substitute Attorney (Black, E.) (Filed on 11/8/2006) (Entered: 11/08/2006)
11/08/2006	67	MOTION to Stay *MDL Proceedings* filed by Keith B. Alexander, George W. Bush, National Security Agency, United States Of America. Motion Hearing set for 1/11/2007 02:00 PM in Courtroom 6, 17th Floor, San Francisco. (Attachments: # 1 Exhibit A (Order granting interlocutory appeal in Hepting v. AT&T (Nov. 7, 2006)))(Tannenbaum, Andrew) (Filed on 11/8/2006) (Entered: 11/08/2006)
11/09/2006	68	ERRATA re 67 MOTION to Stay *MDL Proceedings* by Keith B. Alexander, George W. Bush, National Security Agency, United States Of America. (Tannenbaum, Andrew) (Filed on 11/9/2006) (Entered: 11/09/2006)
11/09/2006	69	CERTIFICATE OF SERVICE by Keith B. Alexander, George W. Bush, National Security Agency, United States Of America re 67 MOTION to Stay *MDL Proceedings* (Tannenbaum, Andrew) (Filed on 11/9/2006) (Entered: 11/09/2006)
11/10/2006	70	NOTICE of Appearance by John G. Kester (Kester, John) (Filed on 11/10/2006) (Entered: 11/10/2006)
11/10/2006	71	CERTIFICATE OF SERVICE by Sprint Communications Company L.P., Sprint Spectrum L.P., Sprint Nextel Corporation re 70 Notice of Appearance (Kester, John) (Filed on 11/10/2006) (Entered: 11/10/2006)
11/16/2006	72	ORDER granting application of Adam S. Caldwell to appear and participate as counsel pro hac vice representing Charter Communications Inc. Signed by Chief Judge Vaughn R Walker on 11/15/2006. (cgd, COURT STAFF) (Filed on 11/16/2006) (Entered: 11/16/2006)
11/16/2006	73	ORDER granting application of Elizabeth A. Drogula to appear and participate as counsel pro hac vice representing Charter Communications Inc. Signed by Chief Judge Vaughn R Walker on 11/15/2006. (cgd, COURT STAFF) (Filed on 11/16/2006) (Entered: 11/16/2006)
11/16/2006	74	ORDER granting application of John D. Seiver to appear and participate as counsel pro hac vice representing Charter Communications Inc. Signed by Chief Judge Vaughn R Walker on 11/15/2006. (cgd, COURT STAFF) (Filed on 11/16/2006) (Entered: 11/16/2006)

11/17/2006	76	Minute Entry: Initial Case Management Conference held on 11/17/2006 before Chief Judge Vaughn R Walker and set the following schedule: All parties to show cause in writing why the Hepting order should not apply to all cases and claims to which the government asserts the state secrets privilege: 12/14/2006. Hearing on motions to remand brought by plaintiffs in Riordan (06-3574), Campbell (06-3596), Chulsky (06-2530) and Bready (06-6313): 12/21/2006 at 2:00 PM. Hearing on media intervenors' motions to unseal documents in Hepting (06-0672): 12/21/2006 at 2:00 PM. Master Complaints to be served and filed by Plaintiffs: 1/8/2007. Hearing on the government's motion for a stay pending disposition of interlocutory appeal in Hepting: 2/1/2007 at 2:00 PM. Hearing on the court's Order to Show Cause: 2/1/2007 at 2:00 PM. (Court Reporter Connie Kuhl.) (cgd, COURT STAFF) (Date Filed: 11/17/2006) (Entered: 11/21/2006)
11/17/2006		Set/Reset Hearings: Motions Hearing set for 12/21/2006 02:00 PM. Order to Show Cause Hearing set for 2/1/2007 02:00 PM. in Courtroom 6, 17th Floor, San Francisco. (cgd, COURT STAFF) (Filed on 11/17/2006) (Entered: 11/21/2006)
11/17/2006	78	AMENDED Minute Entry: Initial Case Management Conference held on 11/17/2006 before Chief Judge Vaughn R Walker. (Court Reporter Connie Kuhl.) (cgd, COURT STAFF) (Date Filed: 11/17/2006) (Entered: 11/22/2006)
11/20/2006	75	Mail Returned as Undeliverable. Mail sent to Daniel J. Becka. (gsa, COURT STAFF) (Filed on 11/20/2006) (Entered: 11/21/2006)
11/21/2006	77	TRANSCRIPT of Proceedings held on 11/17/2006 before Judge Vaughn R. Walker. Court Reporter: Connie Kuhl.. (gsa, COURT STAFF) (Filed on 11/21/2006) (Entered: 11/22/2006)
11/22/2006	79	ORDER on case management conference. Signed by Chief Judge Walker on 11/22/06. (vrwlc2, COURT STAFF) (Filed on 11/22/2006) (Entered: 11/22/2006)
11/27/2006	81	Conditional Transfer ORDER (CTO-5). Signed by Jeffery N. Luthi, Clerk of the Panel. (gsa, COURT STAFF) (Filed on 11/27/2006) (Entered: 11/30/2006)
11/29/2006	80	NOTICE of Voluntary Dismissal *of Sprint Nextel Corporation from Electron Tubes v. Verizon* by Anthony Bartelemy (Cohn, Cindy) (Filed on 11/29/2006) (Entered: 11/29/2006)
12/01/2006	82	STIPULATION *Re: Briefing Schedule for Motion to Stay [Dkt. 67-69]; and [Proposed] Order* by American Telephone and Telegraph Company, AT&T Teleholdings, Inc., Cingular Wireless, LLC, AT&T Communications, AT&T Teleholdings, Cingular Wireless Corporation, Cingular Wireless LLC, New Cingular Wireless Services, Inc., Pac Bell Telephone Co., SBC Communications, American Telephone & Telegraph Co., AT&T Communications, Inc., New Cingular Wireless Services, Inc., Pacific Bell Telephone Company, SBC Long Distance, LLC, AT&T Communications of California, AT&T Corp., AT&T, Inc., AT&T Inc., AT&T Operations Inc., New Cingular Wireless Services, Inc., SBC Long Distance, LLC(a Delaware limited liability company doing business as AT&T Long Distance), Pacific Bell Telephone Company(a California corporation doing business as AT&T California), AT&T Communications of California, Inc.(a California corporation). (Ericson, Bruce) (Filed on 12/1/2006) (Entered: 12/01/2006)

12/01/2006	83	CERTIFICATE OF SERVICE by American Telephone and Telegraph Company, AT&T Teleholdings, Inc., Cingular Wireless, LLC, AT&T Communications, AT&T Teleholdings, Cingular Wireless Corporation, New Cingular Wireless Services, Inc., Pac Bell Telephone Co., SBC Communications, American Telephone & Telegraph Co., AT&T Communications, Inc., AT&T Operations, Inc., New Cingular Wireless Services, Inc., SBC Long Distance, LLC, AT&T Communications of California, AT&T Corp., AT&T, Inc., AT&T Inc., New Cingular Wireless Services, Inc., SBC Long Distance, LLC(a Delaware limited liability company doing business as AT&T Long Distance), Pacific Bell Telephone Company(a California corporation doing business as AT&T California), AT&T Communications of California, Inc.(a California corporation) re 82 Stipulation,,, *Re: Briefing Schedule for Motion to Stay [Dkt. 67-69]; and [Proposed] Order* (Ericson, Bruce) (Filed on 12/1/2006) (Entered: 12/01/2006)
12/04/2006	84	STATEMENT OF RECENT DECISION pursuant to Civil Local Rule 7-3.d *in Support of Defendants' Opposition to Plaintiffs' Motion for Remand* filed byAT&T Communications of California, AT&T Corp., AT&T Inc.. (Attachments: # 1 Exhibit 1# 2 Exhibit 2)(Ericson, Bruce) (Filed on 12/4/2006) (Entered: 12/04/2006)
12/14/2006	85	STIPULATION of Dismissal *re 3:06-cv-06222-VRW* by TDS Communications Solutions, Inc.. (Attachments: # 1 Proposed Order)(Wadia, Cyrus) (Filed on 12/14/2006) (Entered: 12/14/2006)
12/14/2006	86	STIPULATION of Dismissal *re 3:06-cv-06224-VRW* by TDS Communications Solutions, Inc.. (Attachments: # 1 Proposed Order)(Wadia, Cyrus) (Filed on 12/14/2006) (Entered: 12/14/2006)
12/14/2006	87	CERTIFICATE OF SERVICE by TDS Communications Solutions, Inc. re 85 Stipulation of Dismissal, 86 Stipulation of Dismissal (Black, E.) (Filed on 12/14/2006) (Entered: 12/14/2006)
12/15/2006	88	STATUS REPORT *re Plaintiffs' List of Interim Class Counsel for Each Defendant Category* by Tash Hepting. (Cohn, Cindy) (Filed on 12/15/2006) (Entered: 12/15/2006)
12/18/2006	89	STIPULATION AND ORDER (Relates to C06-6222 Cross v AT&T). Pursuant to Rule 41(a)(1) of the FRCP, the parties stipulate to dismissal as to only of defendant TDS Communications Solutions Inc, without prejudice, each party will bear its own costs and attorneys' fees. Signed by Chief Judge Vaughn R Walker on 12/18/2006. (cgd, COURT STAFF) (Filed on 12/18/2006) (Entered: 12/18/2006)
12/18/2006	90	STIPULATION AND ORDER (Relates to C06-6224 Cross v AT&T). Pursuant to Rule 41(a)(1), the parties stipulate to dismissal without prejudice as to only defendant TDS Communications Solutions Inc, each party will bear its own attorneys' fees. Signed by Chief Judge Vaughn R Walker on 12/18/2006. (cgd, COURT STAFF) (Filed on 12/18/2006) (Entered: 12/18/2006)
12/18/2006	91	STATEMENT OF RECENT DECISION pursuant to Civil Local Rule 7-3.d *Plaintiffs' Joint Statement of Recent Decisions in Support of Motions for Remand* filed byDennis P. Riordan, Tom Campbell. (Attachments: # 1 Exhibit 1# 2 Exhibit 2)(Pulgram, Laurence) (Filed on 12/18/2006) (Entered: 12/18/2006)

12/19/2006	92	ORDER by Chief Judge Vaughn R Walker granting 28 Application for Admission Pro Hac Vice of BENJAMIN C. MIZER. (cgd, COURT STAFF) (Filed on 12/19/2006) (Entered: 12/19/2006)
12/19/2006	93	ORDER by Chief Judge Vaughn R Walker granting Application for Admission Pro Hac Vice of LEONDRA R. KRUGER. (cgd, COURT STAFF) (Filed on 12/19/2006) (Entered: 12/19/2006)
12/19/2006	94	MOTION for Administrative Relief filed by Christopher Bready. Motion Hearing set for 1/25/2007 02:00 PM in Courtroom 6, 17th Floor, San Francisco. (Attachments: # 1 Proposed Order)(Whitaker, Joshua) (Filed on 12/19/2006) (Entered: 12/19/2006)
12/19/2006	95	CERTIFICATE OF SERVICE by Christopher Bready re 94 MOTION for Administrative Relief (Whitaker, Joshua) (Filed on 12/19/2006) (Entered: 12/19/2006)
12/19/2006	97	Transfer Order signed by William Terrell Hodges, Chairman, Judicial Panel on Multidistrict Litigation. (gsa, COURT STAFF) (Filed on 12/19/2006) (Entered: 12/21/2006)
12/20/2006	96	Proposed Order *in the Hepting action* by Keith B. Alexander, George W. Bush, National Security Agency, United States of America, United States Of America. (Coppolino, Anthony) (Filed on 12/20/2006) (Entered: 12/20/2006)
12/21/2006	108	Minute Entry: Motions Hearing held on 12/21/2006 before Chief Judge Vaughn R Walker (Date Filed: 12/21/2006). (Court Reporter Connie Kuhl.) (cgd, COURT STAFF) (Date Filed: 12/21/2006) (Entered: 12/29/2006)
12/22/2006	98	RESPONSE in Support re 67 MOTION to Stay *MDL Proceedings* filed bySprint Nextel Corporation. (Kester, John) (Filed on 12/22/2006) (Entered: 12/22/2006)
12/22/2006	99	RESPONSE in Support re 67 MOTION to Stay *MDL Proceedings* filed byComcast Telecommunications, Inc.. (Soriano, Christopher) (Filed on 12/22/2006) (Entered: 12/22/2006)
12/22/2006	100	MOTION for Joinder *in United States' Motion to Stay Proceedings Pending Disposition of Interlocutory Appeals In Hepting v. AT&T Corp.; Memorandum of Law* filed by AT&T Corp.. Motion Hearing set for 2/9/2007 02:00 PM in Courtroom 6, 17th Floor, San Francisco. (Attachments: # 1 Exhibit Exhibits A and B)(Ericson, Bruce) (Filed on 12/22/2006) (Entered: 12/22/2006)
12/22/2006	101	Joinder re 67 MOTION to Stay *MDL Proceedings* by Verizon Communications Inc, Verizon Global Networks, Inc., Verizon Northwest, Inc., MCI Communications Services, Inc., Verizon Wireless Services, Inc., Verizon Maryland, Inc., Cellco Partnership, MCI, LLC. (Boynton, Brian) (Filed on 12/22/2006) (Entered: 12/22/2006)
12/22/2006	102	Memorandum in Opposition re 94 MOTION for Administrative Relief filed byVerizon Maryland, Inc.. (Attachments: # 1 Proposed Order)(Boynton, Brian) (Filed on 12/22/2006) (Entered: 12/22/2006)
12/22/2006	103	ORDER by Judge Vaughn R Walker granting 54 Motion to Substitute Attorney. Attorney Richard Radke, Jr terminated. James P. Walsh substituting. (cgd, COURT STAFF) (Filed on 12/22/2006) (Entered: 12/22/2006)

12/22/2006	104	Proposed Order *Resetting Deadlines* by All Plaintiffs. (Cohn, Cindy) (Filed on 12/22/2006) (Entered: 12/22/2006)
12/22/2006	105	ORDER by Judge Vaughn R Walker granting 55 Motion to Substitute Attorney. Attorney David K. Herzog terminated. Thomas Burke substituting. (cgd, COURT STAFF) (Filed on 12/22/2006) (Entered: 12/22/2006)
12/22/2006	106	ORDER by Judge Vaughn R Walker granting 56 Motion to Substitute Attorney. Added attorney Thomas R. Burke for Bright House Networks, LLC. (cgd, COURT STAFF) (Filed on 12/22/2006) (Entered: 12/22/2006)
12/22/2006	107	Letter to Chief Judge Vaughn Walker from Shayana Kadidal, Esq. dated 12/21/2006 regarding a case that has not yet arrived in San Francisco - CCR v. Bush (06-383) (SDNY), but that has recently transferred to this Court by the Judicial Panel on Multidistrict Litigation pursuant to an order dated 12/15/2006. Lead counsel and co-counsel will be absent until 1/19/2006. Counsel requests that any inquires be directed to William Goodman, Esq. at 212-614-6427 until lead and co-counsel returns. (gsa, COURT STAFF) (Filed on 12/22/2006) (Entered: 12/27/2006)
01/05/2007	109	NOTICE by Charter Communications, LLC *of Change of Affiliation of Counsel Relating to Case No. 5:06-CV-0085* (Burke, Thomas) (Filed on 1/5/2007) (Entered: 01/05/2007)
01/05/2007	110	NOTICE by Bright House Networks, LLC *of Change of Affiliation of Counsel Relating to Case No. 3:06-CV-06224VRW* (Burke, Thomas) (Filed on 1/5/2007) (Entered: 01/05/2007)
01/05/2007	111	NOTICE by Bright House Networks, LLC *of Change of Affiliation of Counsel Relating to Case No. 3:06-CV-06222VRW* (Burke, Thomas) (Filed on 1/5/2007) (Entered: 01/05/2007)
01/05/2007	112	ORDER re 104 filed by All Plaintiffs. Upon the oral stipulation of counsel and agreement of the Court reached during the hearing in this case on 12/21/2006, the Court sets the following schedule, superseding the one contained in its pretrial order, docket #79. Master Complaints to be served and filed by Plaintiffs: 1/16/2007. Opposition to Motion for Stay filed and served: 1/17/2007. Reply to Motion for Stay: 1/30/2007. All parties to Show Cause in writing why the Hepting order should not apply to all cases and claims to which the government asserts the state secrets privilege: 2/1/2007. Hearing on Stay Motion and on the Court's OSC: 2/9/2007 at 2:00 PM. Signed by Chief Judge Vaughn R Walker on 1/5/2007. (cgd, COURT STAFF) (Filed on 1/5/2007) (Entered: 01/05/2007)
01/09/2007	113	Letter from Jon Eisenberg *to Judge Walker re: pending motions and discovery conference*. (Eisenberg, Jon) (Filed on 1/9/2007) (Entered: 01/09/2007)
01/10/2007	114	CLERK'S NOTICE Advising Counsel of Receipt of the Case Al Haramain Islamic Foundation, Inc., et al -v- George W. Bush, et al from the District of Oregon. (rcs, COURT STAFF) (Filed on 1/10/2007) (Entered: 01/10/2007)
01/11/2007	115	NOTICE of Appearance by Sam Jonathan Alton (Alton, Sam) (Filed on 1/11/2007) (Entered: 01/11/2007)
01/11/2007	119	TRANSCRIPT of Proceedings held on 12/21/2006 before Judge Vaughn R.

		Walker. Court Reporter: Connie Kuhl.. (gsa, COURT STAFF) (Filed on 1/11/2007) (Entered: 01/12/2007)
01/12/2007	116	STIPULATION of Dismissal *filed* by Bright House Networks, LLC. (Caldwell, Adam) (Filed on 1/12/2007) (Entered: 01/12/2007)
01/12/2007	117	STIPULATION of Dismissal *related to case number 3:06-cv-06224 filed* by Bright House Networks, LLC. (Caldwell, Adam) (Filed on 1/12/2007) (Entered: 01/12/2007)
01/12/2007	118	STIPULATION of Dismissal *filed* by Charter Communications, LLC. (Caldwell, Adam) (Filed on 1/12/2007) (Entered: 01/12/2007)
01/13/2007	120	NOTICE by United States Of America *of Lodging* (Tannenbaum, Andrew) (Filed on 1/13/2007) (Entered: 01/13/2007)
01/16/2007	121	AMENDED COMPLAINT *MASTER COMPLAINT AGAINST CINGULAR WIRELESS* against AT&T Mobility LLC, Cingular Wireless Corporation, Cingular Wireless LLC, New Cingular Wireless Services, Inc.. Filed byBrian Bradley, Cathy Bruning, Steven Bruning, Kim Coco Iwamoto, Anakalia Kaluna, Steven Lebow, Alan Toly Sapoznik, Sam Goldstein Insurance Agency, Inc., Heather Derosier, Paul Robilotti, Louis Black, Richard A. Grigg, James C. Harrington, Michael Kentor, The Austin Chronicle. (George, R.) (Filed on 1/16/2007) (Entered: 01/16/2007)
01/16/2007	122	NOTICE by Benson B. Roe(individually and on behalf of all others similarly situated) *NOTICE OF WITHDRAWAL OF COUNSEL* (Finberg, James) (Filed on 1/16/2007) (Entered: 01/16/2007)
01/16/2007	123	AMENDED COMPLAINT *MASTER CONSOLIDATED COMPLAINT* against T-Mobile USA, Inc., Comcast Telecommunications, Inc., McLeodusa Telecommunications Services, Inc., Transworld Network Corp.. Filed byTravis Cross, Sam Goldstein, Libertarian party of Indiana, Carolyn W. Rader, Sam Goldstein Insurance Agency, Inc., Sean Shepherd, Christopher Yowtz, Rebecca Yowtz. (Scarlett, Shana) (Filed on 1/16/2007) (Entered: 01/16/2007)
01/16/2007	124	AMENDED COMPLAINT *Consolidated* against Sprint Communications Company L.P., Sprint Nextel Corporation. Filed byRichard D. Suchanek, III. (Mason, Gary) (Filed on 1/16/2007) (Entered: 01/16/2007)
01/16/2007	125	AMENDED COMPLAINT *MASTER CONSOLIDATED COMPLAINT AGAINST MCI DEFENDANTS AND VERIZON DEFENDANTS* against Verizon Northwest, Inc.(an active Washington Corporation), Verizon Communications, Inc.(an active Delaware corporation), Verizon Communications Inc, Verizon Communications, Inc., Verizon Wireless, LLC, Verizon, Verizon Northwest, Inc., MCI Communications Services, Inc., Verizon Wireless Services, Inc., Verizon Wireless LLC, Verizon Maryland, Inc., MCI, LLC, Verizon Communications, Inc.(a corporation), Verizon Communications, Inc., MCI, LLC, Verizon Communications, Inc., Verizon Communications, Inc.. Filed byElaine Spielfogel-Landis. (Himmelstein, Barry) (Filed on 1/16/2007) (Entered: 01/16/2007)
01/16/2007	126	AMENDED COMPLAINT *MASTER CONSOLIDATED COMPLAINT AGAINST BELLSOUTH DEFENDANTS* against Bellsouth Communication Systems, LLC, BellSouth Telecommunications, Inc., BellSouth Communications

		Systems, LLC, BellSouth Corp., BellSouth Telecommunications, Inc.. Filed byLinda Gettier, Melissa Scroggins, James Nurkiewicz, Carolyn R. Hensley, Douglas S. Hensley, Heather Derosier, Lisa Lockwood, Joe McMurray, Cathy Bruning, Steven Bruning, Steven Lebow, Clyde Michael Morgan, Ilene Pruett, Anthony Bartelemy, Stephen M. Kampmann, Tina Herron, Brandy Sergi, John Clark, Thomas Michael Fain, John Fitzpatrick. (Schwarz, Steven) (Filed on 1/16/2007) (Entered: 01/16/2007)
01/17/2007	127	NOTICE by United States Of America *of Attorney General's Letter to Congress* (Attachments: # 1 Letter from the Attorney General to Senators Leahy and Specter (Jan. 17, 2007))(Tannenbaum, Andrew) (Filed on 1/17/2007) (Entered: 01/17/2007)
01/17/2007	128	Memorandum in Opposition *to Gov't Motion to Stay* filed byTash Hepting. (Cohn, Cindy) (Filed on 1/17/2007) (Entered: 01/17/2007)
01/17/2007	129	AFFIDAVIT in Opposition *to Gov't Motion to Stay* filed byTash Hepting. (Attachments: # 1 Exhibit Ex. 1 - Salon Article# 2 Exhibit Ex 2 - CNET article) (Cohn, Cindy) (Filed on 1/17/2007) (Entered: 01/17/2007)
01/18/2007	130	ORDER denying motion to remand brought by plaintiffs in Riordan (06-3574) and Campbell (06-3596). Signed by Chief Judge Walker on 1/18/07. (vrwlc2, COURT STAFF) (Filed on 1/18/2007) (Entered: 01/18/2007)
01/22/2007	131	NOTICE by Keith B. Alexander, Office of Foreign Assets Control, Robert W. Werner, Federal Bureau of Investigation, George W. Bush, National Security Agency *Regarding Transcript Orders in Case No. C-07-0109-VRW* (Tannenbaum, Andrew) (Filed on 1/22/2007) (Entered: 01/22/2007)
01/24/2007	132	NOTICE by Verizon Communications Inc, Verizon Global Networks, Inc., Verizon Northwest, Inc., MCI Communications Services, Inc., Verizon Maryland, Inc., Cellco Partnership, MCI, LLC *of Attorney No Longer Associated with this Case* (Boynton, Brian) (Filed on 1/24/2007) (Entered: 01/24/2007)
01/25/2007	133	CLERK'S NOTICE Advising Counsel of Receipt of the Case Lebow, et al -v- BellSouth Corp., et al from the Northern District of Georgia. (rcs, COURT STAFF) (Filed on 1/25/2007) (Entered: 01/25/2007)
01/25/2007	134	NOTICE of Change of Address by Justin Isreal Woods *Notice of Change of Address by Sidney Bach* (Woods, Justin) (Filed on 1/25/2007) (Entered: 01/25/2007)
01/29/2007	135	NOTICE of Appearance by Nicholas A Migliaccio *on behalf of Richard D. Suchanek, III* (Migliaccio, Nicholas) (Filed on 1/29/2007) (Entered: 01/29/2007)
01/29/2007	136	STIPULATION *to Extend Deadline for Replies for Motion to Stay* by United States, George W. Bush(President of the United States), National Security Agency, George W. Bush, National Security Agency, United States Of America, United States of America, United States of America. (Haas, Alexander) (Filed on 1/29/2007) (Entered: 01/29/2007)
01/29/2007	137	NOTICE of Appearance by R. James George, Jr *for Gary L. Lewis* (George, R.) (Filed on 1/29/2007) (Entered: 01/29/2007)
01/30/2007	138	STIPULATION AND ORDER AS MODIFIED. The Government and the Major Carriers shall e-file their replies on the motion to stay no later than 2:00 p.m.

		PST (5:00 p.m. EST) on 2/1/2007. The Plaintiffs shall e-file their single sur-reply, limited to responding to arguments, if any, in the replies that are based on the Notice of the Foreign Intelligence Surveillance Act Orders, which was filed on 1/17/2007 no later than 2:00 p.m. PST (5:00 p.m. EST) on 2/5/2007. Signed by Judge Vaughn R Walker on 1/30/2007. (cgd, COURT STAFF) (Filed on 1/30/2007) (Entered: 01/30/2007)
01/30/2007	139	STIPULATION *AND [PROPOSED] ORDER DEFERRING RESPONSES TO CONSOLIDATED COMPLAINTS* by AT&T Corp.. (Axelbaum, Marc) (Filed on 1/30/2007) (Entered: 01/30/2007)
01/31/2007	140	NOTICE of Substitution of Counsel by Marc H. Axelbaum *for the BellSouth Defendants* (Axelbaum, Marc) (Filed on 1/31/2007) (Entered: 01/31/2007)
02/01/2007	141	Reply to Opposition 67*in Support of Motion for Stay* filed bySprint Nextel Corporation. (Attachments: # 1)(Kester, John) (Filed on 2/1/2007) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 02/01/2007)
02/01/2007	142	Reply Memorandum re 100 MOTION for Joinder *in United States' Motion to Stay Proceedings Pending Disposition of Interlocutory Appeals In Hepting v. AT&T Corp.; Memorandum of Law* filed byAT&T Corp.. (Axelbaum, Marc) (Filed on 2/1/2007) (Entered: 02/01/2007)
02/01/2007	143	STIPULATION *to Stay Cases Against Cingular* by AT&T Mobility Corporation, Cingular Wireless Corporation, Cingular Wireless LLC, New Cingular Wireless Services, Inc., AT&T Mobility LLC. (Axelbaum, Marc) (Filed on 2/1/2007) (Entered: 02/01/2007)
02/01/2007	144	Declaration of Bruce A. Ericson in Support of 143 Stipulation *to Stay Cases Against Cingular* filed byCingular Wireless Corporation, Cingular Wireless LLC, AT&T Mobility LLC, AT&T Mobility Corporation, New Cingular Wireless Services, Inc.. (Related document(s)143) (Axelbaum, Marc) (Filed on 2/1/2007) (Entered: 02/01/2007)
02/01/2007	145	Reply Memorandum 67*in Support of United States' Motion for a Stay Pending Disposition of Interlocutory Appeal in Hepting v. AT&T* filed byVerizon Communications Inc, Verizon Global Networks, Inc., Verizon Northwest, Inc., MCI Communications Services, Inc., Verizon Wireless Services, Inc., Verizon Wireless LLC, Verizon Maryland, Inc., Cellco Partnership, MCI, LLC. (Boynton, Brian) (Filed on 2/1/2007) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 02/01/2007)
02/01/2007	146	Joinder re 141 Reply to Opposition *Joinder of Cingular and BellSouth Defendants in Sprint's Reply in Support of Motion for Stay* by Bellsouth Communication Systems, LLC, Cingular Wireless Corporation, Cingular Wireless LLC, New Cingular Wireless Services, Inc., BellSouth Corp., BellSouth Telecommunications, Inc.. (Axelbaum, Marc) (Filed on 2/1/2007) (Entered: 02/01/2007)
02/01/2007	147	Reply to Opposition 67*Reply in Support of United States' Motion for a Stay Pending Appeal* filed byUnited States, Keith B. Alexander, Office of Foreign Assets Control, George W. Bush, National Security Agency, United States Of America. (Coppolino, Anthony) (Filed on 2/1/2007) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 02/01/2007)

02/01/2007	148	RESPONSE TO 112 ORDER TO SHOW CAUSE by Pacific Bell Telephone Co., SBC Long Distance LLC, AT&T Communications, AT&T Teleholdings, Illinois Bell, Indiana Bell, SBC Communications, AT&T Operations, Inc., AT&T Communications of California, AT&T Inc.. (Axelbaum, Marc) (Filed on 2/1/2007) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 02/01/2007)
02/01/2007	149	RESPONSE TO 112ORDER TO SHOW CAUSE by Sprint Nextel Corporation. (Kester, John) (Filed on 2/1/2007) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 02/01/2007)
02/01/2007	150	Response to 112 Order to Show Cause byComcast Telecommunications, Inc.. (Soriano, Christopher) (Filed on 2/1/2007) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 02/01/2007)
02/01/2007	151	RESPONSE TO 112ORDER TO SHOW CAUSE by Verizon Communications Inc, Verizon Global Networks, Inc., Verizon Northwest, Inc., MCI Communications Services, Inc., Verizon Wireless Services, Inc., Verizon Wireless LLC, Verizon Maryland, Inc., Cellco Partnership, MCI, LLC. (Boynton, Brian) (Filed on 2/1/2007) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 02/01/2007)
02/01/2007	152	STIPULATION AND ORDER DEFERRING RESPONSES TO CONSOLIDATED COMPLAINTS. Pursuant to the foregoing Stipulation, and good cause appearing, the Court orders the following: 1. At the hearing on the United States' motion for stay, currently scheduled for 2/9/2007, the Court will address when Defendants must respond to the complaints filed against them. 2. No Defendants need respond to any complaints until the Court sets a date for such a response. Signed by Chief Judge Vaughn R Walker on 2/1/2007. (cgd, COURT STAFF) (Filed on 2/1/2007) (Entered: 02/01/2007)
02/01/2007	153	RESPONSE TO 112ORDER TO SHOW CAUSE by BellSouth Communications Systems, LLC, BellSouth Telecommunications, Inc., Cingular Wireless Corporation, Cingular Wireless LLC, AT&T Mobility LLC, AT&T Mobility Corporation, BellSouth Corp., New Cingular Wireless Services, Inc.. (Axelbaum, Marc) (Filed on 2/1/2007) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 02/01/2007)
02/01/2007	154	RESPONSE TO 112 ORDER TO SHOW CAUSE by United States Of America. (Tannenbaum, Andrew) (Filed on 2/1/2007) Modified on 2/12/2007 (gsa, COURT STAFF). (Entered: 02/01/2007)
02/01/2007	155	Response to Order to Show Cause 112 Order,,,, 79 Order *CLASS PLAINTIFFS' CONSOLIDATED RESPONSE TO ORDER TO SHOW CAUSE WHY RULINGS ON HEPTING MOTIONS TO DISMISS SHOULD NOT APPLY* byAll Plaintiffs. (Himmelstein, Barry) (Filed on 2/1/2007) (Entered: 02/01/2007)
02/01/2007	156	Declaration of BARRY HIMMELSTEIN in Support of 155 Response to Order to Show Cause, *AND REQUEST FOR JUDICIAL NOTICE* filed byAll Plaintiffs. (Attachments: # 1 Exhibit EXHIBITS P-Z)(Related document(s)155) (Himmelstein, Barry) (Filed on 2/1/2007) (Entered: 02/01/2007)
02/05/2007	157	RESPONSE in Support *Surreply in Opposition to Motion to Stay* filed byAll Plaintiffs. (Cohn, Cindy) (Filed on 2/5/2007) (Entered: 02/05/2007)
02/07/2007	158	NOTICE of Voluntary Dismissal *of McLeodUSA Telecommunications Services,*

		Inc. by All Plaintiffs (Attachments: # 1 Proposed Order)(Parrett, Vincent) (Filed on 2/7/2007) (Entered: 02/07/2007)
02/07/2007	159	NOTICE of Voluntary Dismissal *of T-Mobile USA, Inc.* by All Plaintiffs (Attachments: # 1 Proposed Order)(Parrett, Vincent) (Filed on 2/7/2007) (Entered: 02/07/2007)
02/08/2007	160	STIPULATION *and [Proposed] Order to Stay Cases Against Sprint* by Sprint Nextel Corporation. (Kester, John) (Filed on 2/8/2007) (Entered: 02/08/2007)
02/09/2007	161	Minute Entry: Order to Show Cause and Motion Hearing held on 2/9/2007 before Chief Judge Vaughn R Walker re 100 MOTION for Joinder in United States' Motion to Stay Proceedings Pending Disposition of Interlocutory Appeals In Hepting v. AT&T Corp.; Memorandum of Law filed by AT&T Corp.,, 67 MOTION to Stay MDL Proceedings filed by National Security Agency,, George W. Bush,, United States Of America,, Keith B. Alexander. The Court heard argument from counsel. The Court took the matter(s) under-submission. Court to issue written ruling. (Court Reporter Connie Kuhl.) (cgk, COURT STAFF) (Date Filed: 2/9/2007) (Entered: 02/12/2007)
02/14/2007	162	ORDER granting re 158 Voluntary Dismissal of McLeod USA Telecommunications Services, Inc. filed by All Plaintiffs. Signed by Chief Judge Vaughn R Walker on 2/14/2007. (cgk, COURT STAFF) (Filed on 2/14/2007) (Entered: 02/14/2007)
02/14/2007	163	STIPULATION AND ORDER GRANTING TO STAY CASES AGAINST SPRINT. Cases C06-6222, C06-6224, C06-6254, C06-6295, C07-0464 stayed. Signed by Chief Judge Vaughn R Walker on 2/14/2007. (cgk, COURT STAFF) (Filed on 2/14/2007) (Entered: 02/14/2007)
02/14/2007	164	ORDER Granting re 159 Voluntary Dismissal of T-Mobile USA, Inc. filed by All Plaintiffs. Signed by Chief Judge Vaughn R Walker on 2/14/2007. (cgk, COURT STAFF) (Filed on 2/14/2007) (Entered: 02/14/2007)
02/16/2007	165	NOTICE by Keith B. Alexander, George W. Bush, National Security Agency, United States of America, United States Of America *of Decision by Judicial Panel on Transfer of State Cases* (Attachments: # 1 Exhibit Exh A -- JPML 021507 Transfer Order)(Haas, Alexander) (Filed on 2/16/2007) (Entered: 02/16/2007)
02/16/2007	166	NOTICE of Voluntary Dismissal by Electron Tubes, Inc. (Attachments: # 1 Proposed Order)(Parrett, Vincent) (Filed on 2/16/2007) (Entered: 02/16/2007)
02/16/2007	167	NOTICE by Carolyn Jewel, Erik Knutzen, Tash Hepting, Gregory Hicks *NOTICE OF CHANGE OF ATTORNEY AFFILIATION* (Kathrein, Reed) (Filed on 2/16/2007) (Entered: 02/16/2007)
02/16/2007	168	STIPULATION AND ORDER : Pursuant to the Stipulation of Dismissal filed by the parties, and good cause appearing, Bright House Networks LLC is hereby dismissed without prejudice from this action. Each party will bear its own costs and attorneys' fees. Signed by Chief Judge Vaughn R Walker on February 16, 2007. (cgk, COURT STAFF) (Filed on 2/16/2007) (Entered: 02/16/2007)
02/16/2007	169	STIPULATION AND ORDER : Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties stipulate to the dismissal of defendant Bright

		House Networks, LLC without prejudice, in the action. Each party will bear its own costs and attorney's fees. Signed by Chief Judge Vaughn R Walker on 2/16/2007. (cgk, COURT STAFF) (Filed on 2/16/2007) (Entered: 02/16/2007)
02/16/2007	170	STIPULATION AND ORDER : Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties stipulate to the dismissal of Defendant Charter Communications, LLC without prejudice in this action. Each party will bear its own costs and attorney's fees. Signed by Chief Judge Vaughn R Walker on 2/16/2007. (cgk, COURT STAFF) (Filed on 2/16/2007) (Entered: 02/16/2007)
02/20/2007	171	ORDER granting in part and denying in part motions to intervene and unseal. Doc ##133, 139, CV-06-672-VRW. Signed by Chief Judge Walker on 2/20/2007. (vrwlc2, COURT STAFF) (Filed on 2/20/2007) (Entered: 02/20/2007)
02/20/2007	172	ORDER by Chief Judge Walker granting in part and denying in part 67 motion to stay. (vrwlc2, COURT STAFF) (Filed on 2/20/2007) (Entered: 02/20/2007)
02/21/2007	173	TRANSFER ORDER. Signed by William Terrell Hodges, Chairman, Multidistrict Litigation on 2/21/2007. (gsa, COURT STAFF) (Filed on 2/21/2007) (Entered: 02/21/2007)
02/21/2007	174	TRANSCRIPT of Proceedings held on 2/9/2007 before Judge Vaughn R. Walker. Court Reporter: Connie Kuhl.. (gsa, COURT STAFF) (Filed on 2/21/2007) (Entered: 02/21/2007)
02/22/2007	175	NOTICE by Keith B. Alexander, George W. Bush, National Security Agency, United States of America, United States of America *Notice of Filing of Public Declaration of Lt. Gen. Keith B. Alexander* (Coppolino, Anthony) (Filed on 2/22/2007) (Entered: 02/22/2007)
02/22/2007	176	NOTICE by Keith B. Alexander(its Director), George W. Bush, National Security Agency, United States of America, United States Of America *Notice of Loding of Classified Declaration of Lt. Gen. Keith B. Alexander* (Coppolino, Anthony) (Filed on 2/22/2007) (Entered: 02/22/2007)
02/22/2007	177	STIPULATION AND ORDER TO STAY CASES AGAINST CINGULAR et al., pending the final appellate ruling on this Court's 7/20/2006 ruling in Hepting et al v AT&T Corp et al. Signed by Chief Judge Vaughn R Walker on 2/22/2007. (cgk, COURT STAFF) (Filed on 2/22/2007) (Entered: 02/22/2007)
02/22/2007	178	ORDER re 166 Notice of Voluntary Dismissal filed by Electron Tubes, Inc. (C06-6433). Plaintiff, by counsel, pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure, hereby files this notice of dismissal without prejudice of Defendants Verizon Communications, Cellco Partnership and the National Security Agency. As there are no other active defendants in this case, this case is hereby dismissed. Signed by Chief Judge Vaughn R Walker on 2/22/2007. (cgk, COURT STAFF) (Filed on 2/22/2007) (Entered: 02/22/2007)
02/26/2007	179	CLERK'S NOTICE Advising Counsel of Receipt of the Case Center for Constitutional Rights, et al -v- Bush, et al from the Southern District of New York. (rcs, COURT STAFF) (Filed on 2/26/2007) (Entered: 02/26/2007)
02/28/2007	180	NOTICE of Voluntary Dismissal *of Comcast Telecommunications, Inc.* by All Plaintiffs (Attachments: # 1 Proposed Order)(Parrett, Vincent) (Filed on

		2/28/2007) (Entered: 02/28/2007)
02/28/2007	181	NOTICE of Voluntary Dismissal *of Transworld Network Corp.* by All Plaintiffs (Attachments: # 1 Proposed Order)(Parrett, Vincent) (Filed on 2/28/2007) (Entered: 02/28/2007)
03/01/2007	182	CLERK'S NOTICE Advising Counsel of Receipt of the Case Robert Clayton, et al -v- AT&T Communications, et al from the Western District of Missouri. (rcs, COURT STAFF) (Filed on 3/1/2007) (Entered: 03/01/2007)
03/02/2007	183	CLERK'S NOTICE Advising Counsel of Receipt of cases from the Eastern District of Missouri and the District of Minnesota. (Attachments: #(1) U.S. -v- Gaw, et al; #(2) Roche -v- AT&T Corp) (rcs, COURT STAFF) (Filed on 3/2/2007) (Entered: 03/02/2007)
03/05/2007	184	ORDER Granting 180 Notice of Dismissal of Comcast Telecommunications, inc. filed by All Plaintiffs. Pursuant to FRCP 41(a)(1) defendant Comcast Telecommunications, Inc is hereby dismissed without prejudice. Signed by Chief Judge Vaughn R Walker on 3/5/2007. (cgk, COURT STAFF) (Filed on 3/5/2007) (Entered: 03/05/2007)
03/05/2007	185	ORDER Granting 181 Notice of Dismissal of Transworld Netowrk Corp. filed by All Plaintiffs. Pursuant to FRCP 41(a)(1) Defendant Transworld Network Corp is hereby dismissed without prejudice. Signed by Chief Judge Vaughn R Walker on 3/5/2007. (cgk, COURT STAFF) (Filed on 3/5/2007) (Entered: 03/05/2007)

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CERTIFICATE OF SERVICE

I certify that on this 9th day of March, 2007, I caused to be served via Federal Express one true and correct copy of the foregoing Excerpts of Record properly addressed to the following:

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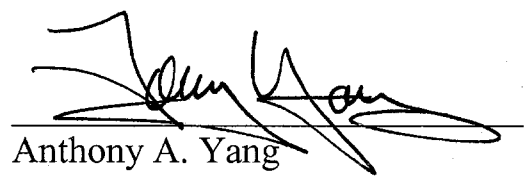

Anthony A. Yang