IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, ET AL.,	)	
	)	
Plaintiffs/Appellees,	)	
	)	
v.	)	Nos. 06-17132/17137
	)	
AT&T CORP., ET AL.,	)	(consolidated with
	)	No. 06-36083)
Defendants/Appellants,	)	
	)	
and	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Intervenor/Appellant.	)	
	)	

GOVERNMENT'S RESPONSE TO PLAINTIFFS' AUGUST 27, 2007 REQUEST FOR JUDICIAL NOTICE

The United States respectfully responds to plaintiffs' August 27, 2007 request for judicial notice of remarks by the Director of National Intelligence published in the El Paso Times on August 22, 2007. The Government has no objection to judicial notice of the remarks. However, as in the case of plaintiffs' prior requests for judicial notice, the Government objects to plaintiffs' characterization of the remarks and their impact on this case.

The statements of the Director of National Intelligence that plaintiffs cite do not detract from the Government's arguments that the very subject matter of this

action—*viz.*, whether AT&T has entered into a secret espionage relationship with the Government as to any of the surveillance activities alleged in this case—is a state secret, and that neither plaintiffs' standing nor the merits of their claims can be litigated without disclosing state secrets. See *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

Plaintiffs argue that the Director of National Intelligence has admitted that "the telecommunications companies sued in this litigation and in [the related Multidistrict Litigation in district court] with respect to the National Security Agency ('NSA')'s surveillance program 'had assisted' the Government." See Request at 3. In plaintiffs' view, the Director's statements, when "[t]aken in context" indicate that AT&T, as well as the other telecommunications companies sued in the MDL, "'had assisted' in the Government's warrantless surveillance and interception activities." *Id.* at 7.

The statements cited by plaintiffs, however, are far too general and ambiguous to have the impact on this case that plaintiffs suggest.[1/] In fact, the statements do not

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[1/] The DNI's statement upon which plaintiffs rely reads:

> [U]nder the president's program, the terrorist surveillance program, the private sector had assisted us. Because if you're going to get access, you've got to have a partner and they were being sued. Now if you play out the suits at the value they're claimed, it would bankrupt these companies.

(continued...)

reveal any information relevant to plaintiffs' claims in this case. At most, the DNI stated that one ("a partner") or some unnamed private companies had assisted with the Terrorist Surveillance Program (*i.e.*, the interception of one-end foreign communications involving a member or agent of al Qaeda or an affiliated terrorist organization) and "were being sued." The DNI did not confirm any specific intelligence-gathering relationship between the Government and any specific company, and he did not state that all companies "being sued" had assisted the Government as to the TSP. Whether or to what extent any particular company (including AT&T) entered into an intelligence gathering relationship with the Government therefore remains a state secret.

Moreover, because the DNI's statement was explicitly limited to the TSP, it is of no assistance to plaintiffs in any event. Plaintiffs have explicitly emphasized that the TSP is "not at issue in this case." Appellees' Br. 82. Instead, plaintiffs challenge an alleged content surveillance "dragnet" both distinct from and far broader than the TSP. See, *e.g.*, Appellees's Br. at 62 n.11, 82; see also July 27, 2007 Letter from Counsel for Appellees to Clerk of Court re *ACLU v. NSA*, at 1. The cited DNI statement does not address those types of allegations, let alone confirm that such

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[1/] (...continued)
See Request for Judicial Notice at 5.

activities existed or that they were conducted with the assistance of AT&T. Indeed, the Government has denied the existence of the content dragnet alleged by plaintiffs and has never confirmed or denied the existence of a telephone records program. And even with respect to the TSP, as discussed, the DNI did not confirm any intelligence gathering relationship between the Government and any specific company and did not point to any specific company among those that have been sued.

While some might speculate based on publicly available statements or media reports (much of which offer varying or inconsistent accounts of alleged activities) as to whether any specific company assisted the Government with respect to a particular alleged activity, that would be just that—speculation. The Government has not confirmed or denied the existence of any intelligence gathering relationship with any specific company. Disclosing such information—which is quite different in kind and degree than general statements concerning assistance by other entities—not only could compromise the sources and methods of the Government's intelligence gathering efforts, but discourage cooperation with the Government in vital national security matters and potentially subject sources of intelligence (especially any entities or individuals with a foreign presence) to heightened risks of harm, including by foreign adversaries who seek to disrupt this Nation's intelligence gathering activities. Likewise, denying the existence of alleged espionage relationships with particular

entities could expose possible gaps in intelligence sources or methods that could be exploited by foreign adversaries.

In any event, while the alleged carrier relationship presents a significant threshold issue in this litigation, there are other reasons why plaintiffs' claims cannot be fully and fairly adjudicated without state secrets. As our briefs explain, wholly apart from the relationship issue, privileged information would be needed to adjudicate plaintiffs' standing and the merits of their claims. Indeed, among other things, the accuracy of the Government's denial of the content surveillance dragnet alleged by plaintiffs could not be adjudicated without establishing the nature and scope of any actual NSA operations. Cf. *Elkins v. United States*, 364 U.S. 206, 218 (1960) ("as a practical matter it is never easy to prove a negative"). All such facts, however, are covered by the state secrets privilege assertion in this case, have not been disclosed, and are clearly outside the scope of the statements that plaintiffs cite.

For the foregoing reasons, the United States has no objection to plaintiffs' request for judicial notice, but does object to plaintiffs' characterization of the DNI's statements and their impact on this litigation. Those statements—which are limited to the TSP, and do not confirm any intelligence-gathering relationship between the Government and any specific company—shed absolutely no light on the subject matter of this case: whether AT&T has entered into a secret espionage relationship

with the Government as to any of the particular surveillance activities alleged in this case, and whether plaintiffs have standing to litigate their claims.

Respectfully submitted,

PAUL D. CLEMENT
Solicitor General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
THOMAS M. BONDY
ANTHONY A. YANG
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 514-3602

AUGUST 2007

CERTIFICATE OF SERVICE

I certify that on this 31st day of August, 2007, I caused to be served via Federal Express one true and correct copy of the foregoing response properly addressed to the following:

Robert D. Fram, Esq.
Michael M. Markman, Esq.
Heller Ehrman, LLP
333 Bush Street
San Francisco, CA 94104-2878
415-772-6000
Counsel for Plaintiffs-Appellees

Michael K. Kellogg, Esq.
Sean A. Lev, Esq.
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M Street, N.W. Suite 400
Washington, DC 20036
202-326-7900
Counsel for Defendants

Anthony A. Yang