IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

**GOVERNMENT'S RESPONSE TO PLAINTIFFS' AUGUST 7, 2007, REQUEST FOR JUDICIAL NOTICE**

The United States respectfully responds to plaintiffs' August 7, 2007, request for judicial notice of letters sent by the Director of National Intelligence and the Attorney General to Members of Congress. The Government has no objection to judicial notice of those letters — indeed, the Government attached one of the letters to its response to plaintiffs' previous request for judicial notice. But, as in the case of plaintiffs' prior request for judicial notice, the Government must object to plaintiffs' characterization of the letters and their impact on this case.

The letters that are the subject of plaintiffs' request do not in any way 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 suggest that the letters show that "the 'very subject matter' of this case is no longer a state secret" to the extent they state that NSA conducts intelligence-gathering programs *other than* the Terrorist Surveillance Program (TSP). Mot. 8. The subject matter of this action, however, is not whether NSA engages in unspecified intelligence-gathering activities *other than* the TSP. Rather, as plaintiffs themselves have acknowledged (see Pl. Br. 24), the subject matter of this action is whether AT&T participated in the particular secret activities alleged in this case, *i.e.*, the alleged surveillance "dragnet" and communications records program.

Neither of the letters discloses whether AT&T (or anyone else) has entered into a secret espionage relationship with the Government as to *any* NSA activities. Nor do the letters disclose whether the particular programs alleged by plaintiffs in this case — the alleged surveillance "dragnet" and communications records program —

exist, much less the details of any such programs that would be needed to assess their legality or plaintiffs' standing to challenge their legality.

To the contrary, the Director of National Intelligence's letter emphasizes that only "[o]ne particular aspect of [the NSA's] activities, and *nothing more*, was publicly acknowledged by the President and described in December 2005, following an unauthorized disclosure," *i.e.*, the TSP. (Emphasis added). The Director further explained that the TSP is "the *only* aspect of the NSA activities that can be discussed publicly because it is the *only* aspect of those various activities whose existence has been officially acknowledged." (Emphasis added). Significantly, plaintiffs here have explicitly disclaimed any challenge to the TSP. Pl. Br. 82.

Contrary to plaintiffs' contention, the recent letters do not undermine the statement in the Government's opening brief that it has never disclosed "whether any *alleged secret activities* beyond the TSP ever existed." Mot. 6 (quoting Gov't Br. 12 (emphasis added)). The "alleged secret activities" the Government referred to are the secret activities alleged by plaintiffs, and, as discussed, the recent letters do not in any way disclose the existence of any such activities. Similarly, plaintiffs' attempt to make something out of the Government's reference to a "broader program" is unavailing, see Mot. 7, 8, because the "broader program" referred to by the

Government was the "dragnet" surveillance alleged by plaintiffs (an activity that, as alleged by plaintiffs, is much broader than the TSP). See Gov't Br. 33-34.

Plaintiffs' renewed reliance (Mot. 8) on the Klein declaration is likewise insufficient to defeat the state secrets privilege, as even the district court recognized. See ER 322. As the Government has explained (Gov't Reply Br. 10-12), the Klein declaration is based entirely on speculation and hearsay. Klein has no knowledge of what took place in the alleged "secret" room. Moreover, his declaration provides no basis for concluding that the activities claimed by Klein relate to the alleged programs at issue here, as opposed to other, unspecified activities. Gov't Reply Br. 11-13. Indeed, even plaintiffs' own witness, Scott Marcus, acknowledged that it is possible that the room was used for any number of other purposes, including network security. AER 107-108.

Plaintiffs' reliance (Mot. 8) on statements by various members of Congress allegedly referring to a communications records program is also unavailing (which is presumably why plaintiffs devote only two pages of their 86-page brief to the communications records claim). As the district court recognized, the existence (or non-existence) of the communications records program is a secret. See ER 328-329. Far from in any way undermining that state secret, the letters submitted by plaintiffs underscore its secrecy by emphasizing that the TSP is the "*only* aspect of the NSA

activities that can be discussed publicly," and stressing that "nothing more" than the existence of the TSP — a program that plaintiffs here do *not* challenge, Pl. Br. 82 — has been publicly acknowledged. (Emphasis added).

More generally, plaintiffs' repeated efforts to cobble together information that they claim suggests that the alleged activities are public is out of step with existing precedent. In cases like *Tenet* v. *Doe*, 544 U.S. 1 (2005), and *Kasza* v. *Browner*, 133 F.3d 1159 (9th Cir. 1998), the Government generally acknowledged that an underlying activity existed (a CIA spy program in *Tenet* and an Air Force hazardous-waste facility in *Kasza*), but the courts dismissed those cases because their very subject matter was a state secret. *Tenet*, 544 U.S. at 4, 9; *Kasza*, 133 F.3d at 1162-1163, 1170. Here, the very existence of the alleged secret programs at issue — in addition to the existence of any secret espionage relationship between AT&T and the Government — remains a state secret. The case for dismissal of this action is therefore even stronger under the state secrets doctrine than in *Tenet* or *Kasza*.[1]

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[1] In *Tenet*, the panel majority of this Court reasoned that the espionage relationship and activity at issue was not a protected secret because "[i]t is widely known that the CIA contracts for spy services, and in particular that the CIA recruits foreign spies," and "[i]t is also public knowledge that many of these foreign recruits are provided permanent residency in the United States along with other compensation for their services." *Doe v. Tenet*, 329 F.3d 1135, 1154 (9th Cir. 2003) (citing congressional sources). In addition, the panel majority pointed to the fact that "the complaint alleges that the CIA sent a letter to the Does admitting a relationship and stating that (continued...)

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Ultimately, in deciding whether the state secrets privilege has been properly asserted, the Court, according the "utmost deference" to the government's claim of privilege, must determine where there is a "reasonable danger" that litigating the matter would divulge matters "which, in the interest of national security, should not be divulged." *Kasza*, 133 F.3d at 1166. In this case, notwithstanding plaintiffs' unsuccessful efforts to piece together some public acknowledgment of some activity, the following matters (at a minimum) remain a secret: (1) whether or to what extent any of the particular alleged surveillance activities exist; (2) whether or to what extent AT&T was involved in any such activities; and (3) whether or to what extent plaintiffs' own communications were intercepted as a result of AT&T's involvement

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[1](...continued)
the Agency was unable to continue supporting the Does because of 'budget constraints.'" *Ibid.* In dissent, Judge Tallman explained that the alleged widespread knowledge of the activity at issue, and even the letter in which the CIA purportedly admitted the existence of the particular espionage relationship at issue, provided no basis for second-guessing the Executive's assertion of the state secrets privilege. *Id.* at 1162-63. While it acknowledged both the public knowledge of the existence of the espionage program at issue (544 U.S. 1, 4 n.2) and the CIA letter purportedly confirming the particular relationship at issue (*id.* at 5 n.3), the Supreme Court agreed with Judge Tallman and unanimously held that the state secrets doctrine barred litigation over the existence of the particular alleged espionage relationship and activity at issue. See *id.* at 10-11. That conclusion follows *a fortiori* in this case, where plaintiffs have not come close to presenting (or proffering) the amount of purported "evidence" or public acknowledgment of the alleged secret activity and relationship at issue that was presented by the plaintiffs in *Tenet*.

in any such activities. Those are the central facts underlying plaintiffs' claims and necessary predicates for this action. And there is no basis for the Court, according the "utmost deference" that it is required, to override the assessment of the Nation's top intelligence officials that litigating those issues could reveal sources and methods of intelligence that would, at a minimum, present a "reasonable danger" of divulging matters "which, in the interest of national security, should not be divulged."

## CONCLUSION

For the foregoing reasons, the United States has no objection to plaintiffs' request for judicial notice, but does object to plaintiffs' characterization of the cited letters and their impact on this litigation. The letters state only that the President authorized NSA to engage in intelligence activities other than the TSP, and make clear that the existence and details of any particular activities other than the TSP remain a secret. The letters 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.

Respectfully submitted,

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AUGUST 2007

## CERTIFICATE OF SERVICE

I certify that on this 9th 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:

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