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13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

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IN RE:
NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS
RECORDS LITIGATION
This Document Relates To:
06-3574, 06-6313, and 06-6570

MDL NO. 06-1791 VRW

**MEMORANDUM IN SUPPORT OF
VERIZON'S MOTION TO DISMISS THE
CHULSKY, RIORDAN, AND BREADY
COMPLAINTS**

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1. Are the *Chulsky, Riordan, and Bready* Plaintiffs’ state law claims, which seek to regulate the federal government’s ability to conduct foreign intelligence surveillance in defense of the nation, preempted by federal law?

2. Are the *Chulsky* Plaintiffs’ vague allegations that Verizon made fraudulent misrepresentations in unidentified statements sufficient to state a claim under the heightened pleading standard of Federal Rule of Civil Procedure 9(b)?

3. Have the *Chulsky* Plaintiffs adequately stated claims arising from alleged Verizon contracts and policies, where Plaintiffs have failed to identify the contracts and policies at issue?

INTRODUCTION

1
2 Like the complaints consolidated in the Master Consolidated Complaint against the Verizon
3 and MCI defendants, the complaints in the *Chulsky*, *Riordan*, and *Bready* cases allege that following
4 the terrorist attacks of September 11, 2001, Verizon began cooperating with an arm of the
5 Department of Defense, the National Security Agency (“NSA”), in its efforts to conduct foreign
6 intelligence surveillance in order to thwart further terrorist strikes on our nation. Unlike most of the
7 cases against Verizon, however, the complaints at issue in this motion were filed in *state* court and
8 allege a host of claims solely under *state* law, seeking to employ state law to regulate an alleged
9 federal program to protect our nation against foreign attack. Plaintiffs’ attempt to regulate the
10 federal government’s alleged national defense and foreign intelligence activities under the laws of
11 California, New Jersey, and Maryland is wholly antithetical to the federal structure embodied in the
12 Constitution and must be rejected.¹

13 Two separate doctrines leave state law with no room to operate in this uniquely federal
14 context: First, the Constitution reserves the field of national security and military intelligence
15 gathering exclusively to the federal government. Second, the Supremacy Clause bars state laws
16 from regulating the federal government and federal programs. Because the Constitution wholly
17 preempts the application of state law in these exclusively federal zones, it is unnecessary to assess
18 whether the state law claims that Plaintiffs allege conflict with any federal law or policy. Rather, the
19 states are categorically without power to act. As this Court has recognized in a closely related
20 context, “‘all state action, whether or not consistent with current foreign policy, that distorts the
21 allocation of responsibility to the national government for the conduct of American diplomacy is
22 void as an unconstitutional infringement on an exclusively federal sphere of responsibility.’” *In re*
23 *World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1165 (N.D. Cal. 2001), *aff’d*
24 *sub nom. Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) (citation omitted).

25
26
27 ¹ Nothing in this motion should be construed as an admission or denial regarding the existence
28 of the programs alleged in the Complaints or that defendants participated in any such alleged
activities.

1 The *Chulsky* Plaintiffs' state law claims for breach of contract and various forms of
2 misrepresentation also must be rejected on independent grounds. To the extent the claims rest on
3 allegations of fraud, they must be dismissed under Federal Rule of Civil Procedure 9(b) because
4 Plaintiffs have failed to plead the circumstances of the alleged fraud with particularity. Similarly,
5 Plaintiffs' claims based on alleged contractual or other undertakings by Verizon must be dismissed
6 under Rule 8 in light of Plaintiffs' failure even to identify the contracts and statements at issue.

7 BACKGROUND

8 I. PROCEDURAL POSTURE

9 The three cases at issue in this motion—*Chulsky*, *Riordan*, and *Bready*—were initially filed
10 in state court and then removed to federal court by Verizon. Plaintiffs in each case filed a motion to
11 remand the cases to state court, but the cases were consolidated in this proceeding before those
12 motions were heard and, in the case of *Chulsky* and *Bready*, fully briefed. On November 22, 2006,
13 this Court set a hearing for motions to remand in *Riordan* and *Campbell v. AT&T Communications*
14 *of California*, a case against AT&T that had also been removed and consolidated in the MDL. In the
15 same Order, the Court required the Plaintiffs to file Master Consolidated Complaints. At the request
16 of the Plaintiffs in the removed cases, *see* 11-17-06 Hr'g Tr. at 83, 11-7-06 Joint Case Management
17 Statement at 17, 27 n.18, the Master Consolidated Complaint filed against the Verizon and MCI
18 defendants did not include the *Chulsky*, *Riordan*, and *Bready* cases.

19 On January 18, 2007, after the Master Consolidated Complaint was filed, the Court issued an
20 order denying the motions to remand in *Riordan* and *Campbell*. The Court concluded, *inter alia*,
21 that the impact of the state-secrets privilege was a substantial, disputed issue of federal law sufficient
22 to give rise to federal jurisdiction in the cases. Order (Dkt. # 130) at 12-14. Notwithstanding this
23 decision, the Master Consolidated Complaint has not been amended to include the *Chulsky*, *Riordan*,
24 and *Bready* cases. As a result, this motion addresses the original complaints filed in these actions.

25 II. THE *CHULSKY* COMPLAINT

26 The *Chulsky* complaint alleges that “[f]ollowing the events of September 11, 2001, President
27 Bush indic[a]ted his desire to create an ‘early warning system’ that would detect intelligence from
28 electronic communications within the United States to help warn appropriate officials of potential

1 terrorist activities.” Am. Compl. ¶ 18. It contends that “President Bush issued a classified executive
2 order authorizing the NSA to intercept electronic communications” and that “the NSA accomplishes
3 these surveillance activities through the installation, maintenance and operation of various electronic
4 routing and trapping equipment placed on the premises or attached to the property, of the Defendants
5 to gain access to Defendants’ stored databases of customer records and live electronic
6 communication pathways.” *Id.* ¶¶ 19, 21. Plaintiffs allege that the NSA identifies targets “through a
7 software data mining process that NSA runs against vast databases of Defendants’ stored electronic
8 records of their customers’ domestic and international telephone and Internet communications.” *Id.*
9 ¶ 22.

10 Plaintiffs further contend that Verizon assisted the NSA with the installation of the
11 equipment needed “to gain direct access to electronic communications” and that the company
12 provided its “customer records directly to NSA or permit[s] the NSA to access the records
13 maintained” by it. *Id.* ¶ 23. Plaintiffs assert that the equipment used by the Government in
14 connection with its classified program “could not have been installed, operated and/or maintained by
15 the NSA without the authorization of Defendants.” *Id.* ¶ 21.

16 From these factual allegations, the *Chulsky* Plaintiffs assert claims for: (1) violation of the
17 New Jersey Wiretap Act; (2) violations of the New Jersey Constitution (claiming violations of their
18 rights to property, to be secure from unreasonable searches, and to privacy); (3) breach of contract;
19 (4) malicious misrepresentation; (5) invasion of privacy; (6) violation of the New Jersey Consumer
20 Fraud Act; (7) violation of the Truth-in-Consumer Contract, Warranty and Notice Act; (8) violation
21 of statutes prohibiting unfair business practices and fraudulent use or distribution of personal
22 information; and (9) violation of New Jersey’s civil RICO provision. *Id.* ¶¶ 65-132. Plaintiffs seek
23 (among other things) statutory, compensatory, and punitive damages. *Id.* at 31-32.

24 **III. THE RIORDAN COMPLAINT**

25 Similarly, the *Riordan* complaint alleges that “[b]eginning sometime after September 11,
26 2001, Verizon began providing the NSA on an ongoing basis with residential customer telephone
27 calling records and access to other information about Verizon’s customers and subscribers.” Compl.
28 ¶ 14. The complaint further alleges that the NSA “has used and continues to use this sensitive

1 information to create a massive database to search for patterns of social interaction that might
2 warrant further investigation.” *Id.* Plaintiffs allege that Verizon provided the telephone records to
3 the NSA “on a voluntary basis . . . [without] its customers’ permission.” *Id.* ¶ 18. The complaint
4 further alleges that the information was provided notwithstanding a Verizon “privacy policy that
5 prohibits the disclosure of private call information . . . to outside parties without legal process.” *Id.*
6 ¶ 19.

7 The *Riordan* Plaintiffs assert two claims based on these factual allegations: (1) for violation
8 of the right to privacy under the California Constitution, and (2) for breach of a California Public
9 Utilities Code section addressing when a telephone company may “make available” a subscriber’s
10 calling information. *Id.* ¶¶ 24-29, 30-39. Plaintiffs seek declaratory relief as well as to enjoin
11 Verizon “from providing any customer calling records to the NSA or to any other person unless the
12 customer to whom those records pertain has provided written consent for their disclosure or unless
13 the records are disclosed pursuant to legal process.” *Id.* at 10.

14 **IV. THE *BREADY* COMPLAINT**

15 Like the *Chulsky* complaint, the *Bready* complaint alleges that “following the September
16 11th, 2001 attacks, the United States Government requested that all major telephone and internet
17 service providers, including [Verizon], participate in a program to monitor and or intercept the
18 telephone and or internet communications, and or records of those communications, of all
19 subscribers in order to search for terrorist activity through ‘data mining,’ a process used to analyze
20 data for patterns or connections among disparate records.” Compl. ¶ 13. Plaintiffs further allege
21 that Verizon “provided the requested assistance” by giving “the United States Government . . . direct
22 access to all or a substantial number of the telephone and internet communications, and the records
23 thereof, through its domestic telecommunications facilities, including direct access to
24 communication infrastructure, communication records, subscriber identity information, and other
25 information.” *Id.* ¶¶ 14, 16. Plaintiffs contend that Verizon provided this assistance “without
26 notifying subscribers that it was participating in the ‘data mining’ program, and did so “without
27 authorization, either from Defendant’s subscribers, the courts of the State of Maryland, or any act of
28 the legislature of the State of Maryland.” *Id.* ¶¶ 17, 23.

1 Based on these factual allegations, Plaintiffs assert six different statutory claims under
2 Maryland law on behalf of a purported class of Maryland Verizon subscribers. *Id.* ¶¶ 26, 35-79.
3 The claims are for alleged violations of Maryland statutes generally governing (1) intercepts of wire,
4 oral, or electronic communications; (2) disclosures of the contents of unlawfully intercepted
5 communications; (3) divulging the contents of communications while in transmission; (4) divulging
6 the contents of stored communications, (5) disclosing subscriber records to “investigative or law
7 enforcement officer[s]”; and (6) use of “pen registers” and “trap and trace” devices. *Id.* ¶¶ 35-79.
8 The *Bready* Plaintiffs seek, among other things, recovery of statutory damages equal to \$1,000 per
9 violation per class member and \$100 per day of violation for each class member. *Id.* at 16-17
10 (Prayer for Relief).

11 ARGUMENT

12 For the reasons explained in the Memorandum of the United States in Support of the Military
13 and State Secrets Privilege and Motion To Dismiss or for Summary Judgment (Dkt. # 254), all of the
14 claims raised in the *Chulsky*, *Riordan*, and *Bready* complaints must be dismissed in light of the
15 government’s invocation of the state-secrets privilege. As explained below, moreover, the claims
16 are also subject to dismissal on a number of other independent grounds.

17 I. ALL OF PLAINTIFFS’ STATE LAW CLAIMS ARE PREEMPTED

18 All of Plaintiffs’ claims seek to regulate the alleged activity of the military and its alleged
19 agents in gathering intelligence in a time of active hostilities to protect the nation from terrorist
20 attack. The Constitution simply does not permit such claims to sound in state law.

21 A. The Constitution Preempts the Field of Matters Pertaining to National Security 22 and Military Intelligence Gathering

23 The object of Plaintiffs’ state law claims is to regulate directly the manner in which the
24 NSA—a component of the Department of Defense and one of the military’s intelligence agencies²—
25 allegedly gathers intelligence for national security purposes. The text and structure of the
26 Constitution leave no room for state law to be applied to such activities. The federal government

27 ² See Public Decl. of Lt. Gen. Keith B. Alexander, Director, NSA, ¶ 1, attached as Ex. 2 to
28 Mem. of United States in Support of the Military and State Secrets Privilege and Motion To Dismiss
or for Summary Judgment, MDL Dkt. #254.

1 and its alleged agents are not required to consider the applicability of a host of laws in each of the 50
 2 states before undertaking a federal military intelligence activity. Rather, the Constitution vests
 3 “plenary and *exclusive*” control over national security and foreign policy in the federal government.
 4 *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 408 (1871) (emphasis added).

5 Two well-settled principles establish that the Constitution bars state law from regulating the
 6 federal government’s intelligence-collection activities, including any actions the federal government
 7 may undertake to collect such intelligence from private parties. *First*, “several constitutional
 8 provisions commit matters of foreign policy and military affairs to the *exclusive* control of the
 9 National Government,” *Perpich v. Dep’t of Def.*, 496 U.S. 334, 353 (1990) (emphasis added); *In re*
 10 *World War II*, 164 F. Supp. 2d at 1168-70.³ The Founders recognized that among the “principal
 11 purposes to be answered by [the] union” are “[t]he common defence of the members.” The
 12 *Federalist* No. 23, at 126 (Alexander Hamilton) (E.H. Scott ed. 1898). They accordingly determined
 13 not to leave “the peace of the *whole* . . . at the disposal of a *part*.” The *Federalist* No. 80, at 435
 14 (Alexander Hamilton) (E.H. Scott ed. 1898).

15 Given the primacy of the federal government in foreign affairs, the Supreme Court has
 16 explained that the states are powerless to act in this field, regardless of whether their actions conflict
 17 with federal policy. *Zschernig v. Miller*, 389 U.S. 429 (1968). This limitation follows from “both
 18 the text and structure of the Constitution,” *In re World War II*, 164 F. Supp. 2d at 1168, which
 19 “entrusts [matters of foreign affairs] *solely* to the Federal Government,” *Zschernig*, 389 U.S. at 436
 20 (emphasis added), and it thus applies “‘even in [the] absence of a treaty’ or federal statute,” *Deutsch*
 21 *v. Turner Corp.*, 324 F.3d 692, 709 (9th Cir. 2003) (quoting *Zschernig*, 389 U.S. at 441); *see also In*
 22 *re World War II*, 164 F. Supp. 2d at 1168-70 (state action preempted “‘whether or not consistent
 23 with foreign policy’” (citation omitted)); Jeffrey M. Hirsch, *Can Congress Use Its War Powers To*

24
 25 ³ The Constitution grants Congress the power, *inter alia*, to “provide for the common
 26 Defence,” U.S. Const. art. I, § 8, cl. 1; to “declare War,” *id.* cl. 11; to “raise and support Armies,” *id.*
 27 cl. 12; to “provide and maintain a Navy,” *id.* cl. 13; and to “provide for calling forth the Militia to
 28 . . . suppress Insurrections and repel Invasions,” *id.* cl. 15. The President “shall be Commander in
 Chief,” *id.* art. II, § 2, cl. 1, and Chief Executive, *id.* art. II, § 1, cl. 1, with the “unique
 responsibility” for the conduct of “foreign and military affairs,” *Sale v. Haitian Ctrs. Council*, 509
 U.S. 155, 188 (1993). Meanwhile, Article I expressly limits the role of the states in the realm of
 war. U.S. Const. art. I, § 10.

1 *Protect Military Employees from State Sovereign Immunity?* 34 Seton Hall L. Rev. 999, 1026-27
2 (2004) (“It appears beyond dispute that, in ratifying the Constitution, the states transferred whatever
3 war powers they may have possessed to the federal government.”).

4 The concentration of power in the federal government, to the exclusion of the states, is
5 particularly clear in the context of military activities. As the Ninth Circuit noted in *Deutsch v.*
6 *Turner Corp.*, the limits on state sovereignty apply most clearly in the “subset” of foreign affairs
7 cases that concern “the power of the federal government to make and to resolve war.” 324 F.3d at
8 711. The Court observed: “While neither the Constitution nor the courts have defined the precise
9 scope of the foreign relations power that is denied to the states, *it is clear that matters concerning*
10 *war are part of the inner core of this power.*” *Id.* (emphasis added). As in *Zschernig*, moreover, the
11 Ninth Circuit concluded that the absence of federal law prohibiting the state action was irrelevant.
12 *Id.* at 712-13. All that mattered was that the state was acting in an area “exclusively” committed to
13 the federal government. *Id.* at 713-14. On this basis alone, the court struck down the California
14 statute at issue in *Deutsch*. *Id.* at 712-14.

15 *Second*, an indispensable component of the federal government’s military power is its
16 “compelling interest” in gathering and protecting “information important to our national security.”
17 *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). “Gathering intelligence
18 information” is “within the President’s constitutional responsibility for the security of the Nation as
19 the Chief Executive and as Commander in Chief of our Armed forces,” *United States v. Marchetti*,
20 466 F.2d 1309, 1315 (4th Cir. 1972), and the President’s authority extends to deploying agents,
21 including private parties, to that end, *see Totten v. United States*, 92 U.S. 105, 106 (1875) (President
22 “was undoubtedly authorized during the war, as commander-in-chief . . . to employ secret agents to
23 enter the rebel lines and obtain information respecting the strength, resources, and movements of the
24 enemy”); *see also* Exec. Order No. 12,333, at ¶ 2.7, 46 Fed. Reg. 59,941, 59,951 (Dec. 4, 1981). It
25 follows that the NSA’s purported activities as an agency of the Defense Department in gathering
26 foreign intelligence in a time of armed conflict are “[m]atters related to war” and the military that
27 are “for the federal government alone to address.” *Deutsch*, 324 F.3d at 712. As such, state law
28 may not place limits on how and whether the NSA may collect intelligence information, including

1 the ways in which the NSA may choose to use private parties.

2 Plaintiffs' state law claims are preempted without regard to the existence of any conflict with
3 a federal statute. This is not a conflict preemption case; it is a *constitutional field preemption* case.⁴

4 Because the Constitution preempts the application of state law in the entire field of the collection of
5 intelligence for national defense, state law simply may not operate. Conflict is inherent in the state
6 laws' very effort to reach into the sphere of national security. *See Deutsch*, 324 F.3d at 711.

7 Moreover, the consistency of the alleged NSA programs with federal statutes is irrelevant to the
8 *incapacity* of the states to operate in a realm that the Constitution allocates *exclusively* to the federal
9 government. The Supreme Court made that much clear long ago in *Tarble's Case*, where a state
10 court judge attempted to issue a writ of habeas corpus to inquire into the military's custody over an
11 underage soldier whose enlistment, the state court determined, had "not been made in conformity
12 with the laws of the United States." 80 U.S. at 402. The state court lacked the power to issue the
13 writ, the Supreme Court held, because validity of the federal government's authority was "to be
14 determined by the Constitution and laws of the United States," not by the "officers or tribunals" of
15 the state. *Id.* at 409-11.

16 Within the field of exclusive federal power, state laws cannot be applied, even if those laws
17 are generally applicable and perfectly valid as applied in other situations. What matters is not the
18 face of the state law but the effect of its operation. Indeed, *Zschernig* itself did not turn on "the
19 words of a statute on its face," but on "the manner of its application." 389 U.S. at 433. And the
20 outcome in *Tarble's Case*, too, depended on the application of a general state law authority—the
21 jurisdiction to issue a habeas writ—to the United States military. 80 U.S. at 402.

22 For these reasons, Plaintiffs may not apply state law to the military intelligence activities

23 _____
24 ⁴ In considering motions to remand in this MDL, this Court held that federal common law did
25 not completely preempt California state law privacy claims because the privacy laws at issue created
26 "an affirmative defense" for reliance on "a legal federal process," and thus there existed no
27 "significant conflict." *In re NSA Telecomms. Records Litig.*, MDL No. 06-1791, 2007 WL 163106,
28 at *5 (N.D. Cal. Jan. 18, 2007) ("*Riordan*"). That holding related to complete preemption (which
relates to Article III jurisdiction) rather than the analytically distinct category of ordinary preemption
(which relates to legislative jurisdiction), as well as to the strictures of federal common law, which
requires a finding of substantial conflict. *See Boyle v. United Tech. Corp.*, 487 U.S. 500, 504-08
(1988). In the context of *field* preemption, by contrast, *Zschernig* and *Deutsch* make clear that no
such conflict is required.

1 alleged, including the alleged involvement of defendants in those activities. “States and localities
2 may not enact legislation that impedes or hinders the national defense, regardless of whether the
3 defense activities are carried out directly by agencies of the federal government, or by private
4 contractors.” *United States v. City of Oakland*, No. C-89-3305 JPV, slip op. at 7 (N.D. Cal. Aug. 23,
5 1990) (attached as Ex. 1). *Zschernig* involved the application of a state statute to the disposition of a
6 private estate, 389 U.S. at 429, and *Deutsch* involved private claims against Japanese and German
7 corporations for allegedly forcing the plaintiffs to work as slave laborers during World War II, 324
8 F.3d at 692. Although both cases were brought against private defendants, they implicated questions
9 of exclusive federal authority, and thus the plaintiffs’ state law claims could not stand. The same is
10 true here with even greater force: Plaintiffs may not use state law to manage alleged intelligence-
11 gathering functions of the Department of Defense or punish an alleged agent to those functions. *See*
12 *Stehney v. Perry*, 101 F.3d 925, 939 (3rd Cir. 1996) (“Were the courts to give effect to the New
13 Jersey . . . law in this context, it would . . . prevent any New Jersey employer from serving as an
14 NSA contractor, an impermissible state interference with exclusive federal responsibility in matters
15 of national security.”).

16 **B. Plaintiffs’ State Law Claims Are Preempted Because They Seek to Regulate**
17 **Directly the Alleged Activities of the Federal Government**

18 Separately, the Supremacy Clause commands that “the activities of the Federal Government
19 are free from regulation by any state.” *Mayo v. United States*, 319 U.S. 441, 445 (1943); *see also*
20 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). This “intergovernmental immunity of
21 the Supremacy Clause” means that “states may not directly regulate the Federal Government’s
22 operations or property.” *Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996). Yet that
23 is what the exclusively state law claims in these cases purport to do: to regulate the military’s
24 alleged intelligence-collection operations in a time of active conflict. The Supremacy Clause plainly
25 does not allow state laws—even laws that do not appear on their face to target federal agents or
26 authority—to regulate the conduct of alleged federal programs.

27 The intergovernmental immunity doctrine holds that a state law is “invalid” where it
28 “regulates the United States directly or discriminates against the Federal Government or those with

1 whom it deals,” *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality opinion), or
2 where it “directly obstruct[s] the activities of the Federal Government,” *id.* at 437-38. This rule
3 carries particular weight “where, as here, the rights and privileges of the Federal Government at
4 stake”—those pertaining to war powers and the national defense—“find their origin in the
5 Constitution.” *Hancock v. Train*, 426 U.S. 167, 178-79 (1976). The doctrine is borne of the
6 constitutional need to “forestall[] ‘clashing sovereignty’ by preventing the States from laying
7 demands directly on the Federal Government.” *United States v. New Mexico*, 455 U.S. 720, 735-36
8 (1982). This premise—that the power of the states does not extend to regulate the federal sovereign
9 or federal programs—means that the consistency of the alleged federal program with federal rules is
10 beside the point for purposes of immunity from *state* law. When it comes to state regulation, “the
11 federal function must be left free.” *Mayo*, 319 U.S. at 447. That is not to say that there can be no
12 remedy for any unlawful conduct in this realm. But if there is to be a remedy, it must be a federal
13 one. *See Zschernig*, 389 U.S. at 441.

14 The intergovernmental immunity doctrine prevents the states from applying even generally
15 applicable rules to a federal program. In *Johnson v. Maryland*, 254 U.S. 51 (1920), for example,
16 Maryland prosecuted a postal employee for driving a postal truck in the state without a state driver’s
17 license. Justice Holmes, in overturning the conviction, explained that “even the most unquestionable
18 and most universally applicable of state laws” may not “interrupt the acts of the general government
19 itself.” *Id.* at 55-56. In *Mayo*, the Supreme Court invalidated a Florida requirement for labeling
20 bags of fertilizer as applied to the federal government, observing that “the federal function must be
21 left free.” 319 U.S. at 447. And in *City of Los Angeles v. United States*, 355 F. Supp. 461, 464
22 (C.D. Cal. 1972), the district court held that the city could not extract generally applicable municipal
23 pilotage fees from civilian-manned U.S. Naval vessels, explaining that the city could not “regulate
24 and control the manner in which defendant shall carry on War or provide for the National Defense.”
25 These cases illustrate that federal government programs must remain free of regulation by state laws,
26 if the restriction is anything more than “incidental[],” *North Dakota*, 495 U.S. at 441, unless the
27 government has consented to the regulation. *See, e.g., Hancock*, 426 U.S. at 179 (licensing
28 requirements); *EPA v. California*, 426 U.S. 200, 201-02 (1976) (same); *Blackburn*, 100 F.3d at 1435

1 (California Resort Act inapplicable in Yosemite National Park).

2 Plaintiffs' own allegations make clear that they are attempting to use state law to regulate the
 3 alleged activities of the NSA. From the outset of their complaint, the Chulsky Plaintiffs, for
 4 example, announce that their "lawsuit challenges Defendants' illegal actions in permitting the [NSA]
 5 and affiliated governmental agencies to . . . conduct surveillance on Defendants' customers' . . .
 6 telephone calls and internet communications" *Chulsky Am. Compl.* ¶ 1. More generally, each
 7 of the complaints at issue focuses on the propriety of the *government's* alleged actions. *E.g., Bready*
 8 *Compl.* ¶ 13 ("[T]he United States Government requested that . . . Defendant . . . participate in a
 9 program to monitor and or intercept the telephone and or internet communications, and or records of
 10 those communications, of all their subscribers in order to search for terrorist activity"); *Chulsky*
 11 *Am. Compl.* ¶ 21 ("[T]he NSA accomplishes these surveillance activities through the installation . . .
 12 of . . . equipment placed on the premises . . . of the Defendants"); *Riordan Compl.* ¶ 14
 13 ("Verizon began providing the NSA on an ongoing basis with residential customer telephone calling
 14 records and access to other information about Verizon's customers and subscribers."). Plaintiffs'
 15 requested relief would (if there were any merit to their claims) regulate the NSA by enjoining
 16 alleged intelligence programs.

17 To the extent that Plaintiffs' dispute is with Verizon, it is only over Verizon's alleged
 18 *assistance* to the NSA. Plaintiffs take aim at the alleged cooperation of a purported agent (Verizon)
 19 in order to obstruct the alleged activities of the purported *principal* (the NSA).⁵ It is well settled that
 20 "[t]he sovereign can act only through its agents," *Kentucky v. Ruckelshaus*, 497 F.2d 1172, 1175 (6th
 21 Cir. 1974), and that state law "must give way" when it interferes with the federal government's
 22 authority, regardless of "whether the United States exercises its rights directly or through the use of
 23 private persons," *Union Oil Co. v. Minier*, 437 F.2d 408, 411 (9th Cir. 1970). This circumstance is
 24 therefore nothing like cases in which the Supreme Court has held that a generally applicable state
 25 law may lay an incidental burden on the federal government when it is directed principally at a

26 _____
 27 ⁵ This Court recognized that the complaint in *Riordan* alleged that Verizon "voluntarily acted
 28 as [an] agent[] for the NSA's purposes" and "in furtherance of NSA's interests." *Riordan*, 2007 WL
 163106, at *9. Based on these allegations, the Court found jurisdiction under the federal officer
 removal statute. *Id.*

1 private entity *qua* private entity, even though the entity does business with the United States. *See*
 2 *New Mexico*, 455 U.S. at 740-41 (allowing imposition of state use tax on privately owned
 3 corporations that contracted with federal government). In such cases, the incidental state burden is
 4 permissible because it still leaves room for the private party to assist or contract with the federal
 5 government. *See North Dakota*, 495 U.S. at 441 (upholding state liquor regulations that did “not
 6 restrict the parties from whom the Government [could] purchase liquor”). Here, by contrast,
 7 Plaintiffs seek to marshal state law to thwart an alleged relationship between the federal government
 8 and its purported agent and thereby to regulate alleged federal programs. *See id.* at 437-38 (“[T]he
 9 States may not directly obstruct the activities of the Federal Government.”); *City of Los Angeles*, 355
 10 F. Supp. at 465 (“A state statute becomes unconstitutional when applied so as to impede or condition
 11 the operation of federal programs and policies.”). The Supremacy Clause does not permit Plaintiffs
 12 to use state law to restrain the federal government’s alleged programs.

13 C. Federal Law Expressly Preempts the State Law Records Claims

14 Plaintiffs’ state law records claims are also preempted because if Verizon, as alleged,
 15 disclosed any call records, those disclosures would have been authorized by federal law. As
 16 explained more in Verizon’s Motion to Dismiss the Master Consolidated Complaint, a grave
 17 emergency existed in the wake of September 11 that threatened citizens’ lives as well as the nation’s
 18 critical infrastructure, including Verizon’s own property. Thus, the actions alleged by Plaintiffs
 19 would have been expressly authorized by the Stored Communications Act’s emergency and property
 20 exceptions. *See* 18 U.S.C. § 2703(c)(3).⁶

21
 22 ⁶ Moreover, 18 U.S.C. § 2708 provides that “[t]he remedies and sanctions described in [the
 23 SCA] are the only judicial remedies and sanctions for nonconstitutional violations of this chapter.”
 24 Although this Court has previously concluded that this provision “does not completely preempt suits
 25 under state law,” *Riordan*, 2007 WL 163106, at 3, Defendants respectfully submit that the
 26 provision’s plain language reaches Plaintiffs’ state law claims and that this provision provides yet
 27 another basis for dismissal of those claims. *See Voicenet Commc’ns v. Corbett*, Civ. A. No. 04-
 28 1318, 2006 U.S. Dist. LEXIS 61916, at *20, 2006 WL 2506318, at *7 (E.D. Pa. Aug. 30, 2006)
 (holding that § 2708 precludes a cause of action under 42 U.S.C. § 1983); *Quon v. Arch Wireless
 Operating Co.*, 445 F. Supp. 2d 1116, 1138 (C.D. Cal. 2006) (“The SCA thus displaces state law
 claims for conduct that is touched upon by the statute, such as in divulging stored electronic
 communications to third parties.”); *Muskovich v. Crowell*, No. 3-95-CV-80007, 1995 U.S. Dist.
 LEXIS 5899, at *2, 1995 WL 905403, at *1 (S.D. Iowa Mar. 21, 1995) (“The clear import of
 section 2708 is that Congress intended for ECPA remedies to be exclusive and to preempt state law
 claims.”). Defendants also submit that the federal common law requiring uniform rules on matters

1 **II. THE *CHULSKY* PLAINTIFFS' CLAIMS SOUNDING IN FRAUD MUST BE**
 2 **DISMISSED FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY**

3 As explained above, all of Plaintiffs' state laws claims are preempted and thus should be
 4 dismissed. The *Chulsky* Plaintiffs' fourth, sixth, and eighth claims should also be dismissed for
 5 failure to plead fraud with particularity, as required by Federal Rule of Civil Procedure 9(b).⁷ Rule
 6 9(b), which applies to removed actions, *see* Fed. R. Civ. P. 81(c), provides that "[i]n all averments of
 7 fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ.
 8 P. 9(b). To plead fraud with particularity, a plaintiff must "state the time, place, and specific content
 9 of the false representations as well as the identities of the parties to the misrepresentation." *Edwards*
 10 *v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (internal quotation marks omitted); *see also*
 11 *Schreiber Distrib. Co. v. Serv-Well Furniture, Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Where the
 12 false representation is alleged to have been set forth in a document, the plaintiff must attach the
 13 document or allege the specific content of the document. *Edwards*, 356 F.3d at 1066.

14 Plaintiffs' fourth, sixth, and eighth claims sound in fraud but fail to plead fraud with
 15 particularity. The fourth claim—for "malicious misrepresentation"—alleges that Verizon made
 16 "misrepresentations of material facts that were made knowingly, without belief in its truth, or in
 17 reckless or careless disregard of the truth." Am. Compl. ¶ 98. As a claim of common law fraud, it is
 18 subject to Rule 9(b). *See, e.g., F.D.I.C. v. Bathgate*, 27 F.3d 850, 876 (3d Cir. 1994). But nowhere
 19 in this claim do Plaintiffs identify with any specificity the misrepresentations allegedly made.
 20 Rather, the claim just vaguely asserts that Verizon "acknowledged [its] duty under the law [to]
 21 protect the confidentiality of Plaintiffs' telecommunications service information." Am. Compl. ¶ 97.

22 The sixth claim—for violation of the New Jersey Consumer Fraud Act—asserts that Verizon
 23 has engaged in "deception, fraud, false promises, false pretenses and/or misrepresentations" and that
 24 it "knowingly and with intent concealed, suppressed or omitted material facts." *Id.* ¶¶ 105-106.
 Because this claim "sound[s] in fraud," it is subject to the heightened pleading requirements of Rule

25 pertaining to national security preempts Plaintiffs' state law claims. *See New SD, Inc. v. Rockwell*
 26 *Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996); *United States v. Pappas*, 94 F.3d 795, 801 (2d Cir.
 1996).

27 ⁷ Unlike the *Chulsky* complaint, the *Riordan* and *Bready* complaints do not assert claims for
 28 fraud.

1 9(b). *Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F. Supp. 2d 494, 510 (D.N.J. 2000);
 2 *see also Cinalli v. Kane*, 191 F. Supp. 2d 601, 609 (E.D. Pa. 2002); *Zebersky v. Bed Bath & Beyond,*
 3 *Inc.*, No. 06-CV-1735, 2006 U.S. Dist. LEXIS 86451, at *13, 2006 WL 3454993, at *4 (D.N.J. Nov.
 4 28, 2006). But the claim again does not identify in any way the statements by Verizon alleged to
 5 have been fraudulent. Instead, the claim references only undescribed “interactions with Plaintiffs.”
 6 Am. Compl. ¶ 106.

7 Finally, the eighth claim—for “Deceptive Business Practices” and “Fraudulent Use and
 8 Distribution of Items Containing Personal Information of Another”—alleges:

9 Defendants, through their promotional literature and/or written notices and/or other
 10 written material provided to the public and/or the Plaintiffs and New Jersey Class
 11 members represented that the personal, private and confidential records and
 12 information of the Plaintiffs and New Jersey Class members as set forth herein would
 be protected from disclosure to and use by the governmental authorities without
 appropriate consent and/or authorization and/or legal authority while at all relevant
 times the Defendants *knew such representations to be false.*

13 *Id.* ¶ 125 (emphasis added). This claim, which sounds in fraud, is subject to the requirements of
 14 Rule 9(b). *See Kennedy Funding, Inc. v. Lion’s Gate Dev., LLC*, No. 05-4741, 2006 U.S. Dist.
 15 LEXIS 48997, at *7, 2006 WL 1044807, at *5 (D.N.J. July 17, 2006). Again, however, these
 16 allegations of fraud lack the specificity required by Rule 9. Plaintiffs notably fail to identify or
 17 describe in any detail whatsoever (let alone the detail required by Rule 9(b)) the alleged
 18 “promotional literature,” “written notices,” and “other written material” that supposedly contain
 19 false assertions.

20 For these reasons, the *Chulsky* Plaintiffs’ fourth, sixth, and eighth claims should be
 21 dismissed.

22 **III. THE CHULSKY PLAINTIFFS’ CONTRACT CLAIMS MUST BE DISMISSED**
 23 **BECAUSE THEY FAIL TO IDENTIFY THE CONTRACTS AT ISSUE**

24 In addition to being preempted, the *Chulsky* Plaintiffs’ claims for breach of contract (Claim
 25 III) and for violation of the Truth-in-Consumer Contract, Warranty and Notice Act (Claim VII) also
 26 must be dismissed because Plaintiffs have failed even to identify the contracts they assert are the
 27 basis for their claims.⁸ To state a claim for breach of contract, a Plaintiff must, at a minimum,

28 ⁸ The *Riordan* and *Bready* complaints do not assert contract claims.

1 identify the contract at issue. *See, e.g., Rasidescu v. Midland Credit Mgmt., Inc.*, 435 F. Supp. 2d
2 1090, 1099 (S.D. Cal. 2006) (“Plaintiff again fails to identify the alleged contract between the
3 parties, and the facts and circumstances surrounding the alleged breach of contract. Without such
4 information, the claims in the first amended complaint fail to give fair notice to Defendants of the
5 actions of which they are accused, in direct contravention to Rule 8 of the Federal Rules of Civil
6 Procedure.”); *Howell v. American Airlines, Inc.*, No. 05-CV-3628, 2006 U.S. Dist. LEXIS 89229, at
7 *10, 2006 WL 3681144, at *4 (E.D.N.Y. Dec. 11, 2006) (“[T]he complaint in this case does not
8 adequately allege a breach of contract. Plaintiff’s Verified Complaint does not even identify the
9 agreement at issue, much less indicate which terms in that agreement were allegedly breached.”);
10 *Ohio Cas. Ins. Co. v. Bank One*, No. 95 C 6613, 1996 U.S. Dist. LEXIS 12933, at *28, 1996 WL
11 507292, at *8 (N.D. Ill. Sept. 5, 1996) (to same effect); *Murphy v. Neuberger*, No. 94 Civ. 7421,
12 1996 U.S. Dist. LEXIS 11164, at *45, 1996 WL 442797, at *14 (S.D.N.Y. Aug. 6, 1996) (to same
13 effect).⁹

14 Plaintiffs’ third and seventh claims turn on the contents of contracts they allege they entered
15 into with Verizon, but Plaintiffs fail even to identify the contracts that are supposedly the basis of the
16 claims. In their third claim for breach of contract, Plaintiffs allege that Verizon “agreed to provide
17 for a subscription fee, and Plaintiffs and class members agreed to purchase from [Verizon] various
18 telecommunications and electronic communication services.” Am. Compl. ¶ 91. But no specific
19 customer agreement is attached, quoted, or even cited. Plaintiffs further allege that Verizon
20 “impliedly and expressly promised to protect the privacy and confidentiality of its customers’
21 information, identity, records, subscription, use details, and communications, and, to abide by
22 federal and state law.” *Id.* ¶ 92. But again, no specific contract is even identified.

23 Similarly, in their seventh claim, Plaintiffs allege that Verizon “offered and/or entered into a

24 _____
25 ⁹ *See also Aaron v. Aguirre*, No. 06-CV-1451, 2007 U.S. Dist. LEXIS 16667, at *75, 2007 WL
26 959083, at *16 (S.D. Cal. Mar. 8, 2007) (citing plaintiff’s failure to specify contracts as part of the
27 reason for dismissing plaintiff’s Interference With Contractual Relations claim for failure to plead
28 sufficiently the elements of the claim); *AT&T Corp. v. Overdrive, Inc.*, No. 1:05CV1904, 2007 U. S.
Dist. LEXIS 1921, at *39, 2007 WL 120654, at *14 (N.D. Ohio Jan. 10, 2007) (citing plaintiffs’
failure to specify a contract as part of the reason for dismissing plaintiffs’ tortious interference claim
for insufficiency of allegations), *recon. denied by AT&T Corp. v. Overdrive, Inc.*, 2007 U.S. Dist.
LEXIS 6600, 2007 WL 315709 (N.D. Cal. Jan. 30, 2007).

1 written consumer contract and/or gave or displayed a written consumer warranty, notice or sign
2 which included a provision that violated a clearly established right of Plaintiff as established by
3 State or Federal law.” *Id.* ¶ 117; *see also id.* ¶ 118. Plaintiffs do not, however, identify any
4 particular contract, warranty, notice, or sign that they contend underlies their conclusory assertions.

5 In these circumstances, the *Chulsky* Plaintiffs’ contract claims should be dismissed for failure
6 adequately to state a claim.

7 **CONCLUSION**

8 For the reasons set forth above, this Court should grant Verizon’s Motion To Dismiss the
9 *Chulsky, Riordan, and Bready* Complaints.

10
11 Respectfully submitted,

12
13 Dated: April 30, 2007

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