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12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

15 IN RE NATIONAL SECURITY AGENCY)
TELECOMMUNICATIONS RECORDS)
16 LITIGATION, MDL No. 1791)
17 This Document Relates To:)
18 ALL CASES Except: *Al-Haramain Islamic*)
19 *Foundation, Inc. v. Bush*, No. 07-0109; *Center*)
20 *for Constitutional Rights v. Bush*, No. 07-1115;)
21 *Guzzi v. Bush*, No. 06-06225; *Shubert v. Bush*,)
22 No. 07-0693; *Clayton v. AT&T Commc'ns of the*)
Southwest, No. 07-1187; *U.S. v. Adams*, No. 07-)
23 1323; *U.S. v. Clayton*, No. 07-1242; *U.S. v.*)
Palermino, No. 07-1326; *U.S. v. Rabner*, No. 07-)
24 1324; *U.S. v. Volz*, No. 07-1396; *McMurray v.*)
Verizon Communications, Inc. No. 09-0131)

MDL Docket No 06-1791 VRW

CLASS ACTION

**NOTICE OF NEW FACTUAL
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
MOTION OF THE UNITED STATES
SEEKING TO APPLY 50 U.S.C. § 1885a
TO DISMISS THESE ACTIONS**

Courtroom: 6, 17th Floor
Judge: The Hon. Vaughn R. Walker

1 Plaintiffs hereby submit new government statements and disclosures, made after the
2 December 2, 2008, oral argument, to assist the court in its determination of the above-referenced
3 motion.¹

4 1. Attached hereto as Exhibit A is a true and correct copy of a *New York Times* article
5 published on April 15, 2009, revealing further information about the NSA's warrantless
6 wiretapping and its violation of existing law and court orders. (Eric Lichtblau and James Risen,
7 *Officials Say U.S. Wiretaps Exceeded Law*, NEW YORK TIMES, April 15, 2009, at A1).

8 2. Attached hereto as Exhibit B is a true and correct copy of the Justice Department's
9 statement regarding the unlawful surveillance described in Exhibit A.

10 3. Attached hereto as Exhibit C is a true and correct copy of a statement by the Director of
11 National Intelligence, Dennis C. Blair, given the day after the New York Times published the news
12 story above. (Dennis C. Blair, STATEMENT BY THE DIRECTOR OF NATIONAL INTELLIGENCE, DENNIS
13 C. BLAIR, April 16, 2009).

14 4. In Exhibit A, the *New York Times* reported that an inquiry by the Justice Department
15 uncovered that the National Security Agency had improperly intercepted private e-mail messages
16 and phone calls of Americans in recent months, exceeding the limits established by FISA.

17 5. The Justice Department's statement (Exhibit B) confirms and expands upon the
18 concessions in the *New York Times* report. The statement admits that the government needed to
19 take "comprehensive steps to correct the situation and bring the [NSA surveillance] program into
20 compliance" "with existing laws and court orders." This is an admission that the NSA surveillance
21 program has been out of compliance "with existing laws and court orders."

22 6. The *New York Times* also reports that intelligence officials described the practice of
23 "overcollection' of domestic communications of Americans . . . as significant and systemic." The
24 officials stated that the NSA was "improperly capturing information involving significant amounts
25 of American traffic."

26 7. In Exhibit C, published the day after the *New York Times* article above, the Director of
27

28 ¹ The Gov't Motion to Dismiss is Document 469; Plaintiffs Opposition is Document 483.

1 National Intelligence, whose office supervises the NSA, also admitted violations. In it the Director
2 of National Intelligence, Dennis Blair, admits that the “NSA has made mistakes and intercepted the
3 wrong communications.” Thus, both the Justice Department (see Exhibit B) and the Director of
4 National Intelligence (see Exhibit C) have made admissions verifying the existence of the NSA’s
5 unlawful “overcollection” of domestic communications.

6 8. This new information is further proof that the certification of former Attorney General
7 Michael Mukasey that is the sole basis for the government’s pending motion to dismiss is not
8 supported by “substantial evidence”. (September 19, 2008 certification of former Attorney General
9 Michael Mukasey (Docket 469-3) pursuant to 50 U.S.C. § 1885a (“section 802”). In his
10 certification, the former Attorney General attested that the claims against Defendants all fall within
11 one or more provisions of section 802(a), i.e., asserting that all post-January 17, 2007 surveillance
12 in which Defendants have participated has been lawfully conducted pursuant to one or more of the
13 statutory authorities listed in section 802(a)(1)-(3). However, the government now admits that there
14 has been post-January 17, 2007 surveillance that is not in “compliance with existing laws and court
15 orders.” Accordingly, there is a triable issue of material fact about the accuracy and veracity of the
16 former Attorney General’s certification.

17 9. The new information of significant and systemic “overcollection” also undermines the
18 former Attorney General’s assertion that no content-dragnet has ever occurred. (Public
19 Certification of the Attorney General, at 2:18-19).

20 10. In addition, the new information further demonstrates that section 802 deprives Plaintiffs
21 of due process by depriving them of an adequate opportunity to be heard and to contest the veracity
22 and accuracy of the former Attorney General’s certification.

23 11. Plaintiffs respectfully request that Exhibits A, B, and C be considered along with the other
24 evidence submitted in support of Plaintiffs’ Opposition to Motion of the United States Seeking to
25 Apply FISAAA § 802 (50 U.S. C. §1885a) to Dismiss These Actions (Docket 483).

26 12. Finally, Plaintiffs respectfully renew their request that, prior to any ruling on the
27 government’s summary judgment motion, they be afforded an adequate opportunity to conduct
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