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22 UNITED STATES DISTRICT COURT  
 23 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 24 SAN FRANCISCO DIVISION

25 IN RE NATIONAL SECURITY AGENCY )  
 26 TELECOMMUNICATIONS RECORDS )  
 27 LITIGATION, MDL No. 1791 )

MDL Docket No. 06-1791 VRW

28 This Document Relates To:

**CLASS ACTION**

ALL CASES

**PLAINTIFFS' SUR-REPLY IN  
OPPOSITION TO GOVERNMENT  
MOTION TO STAY PROCEEDINGS**

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Date: February 9, 2007  
 Time: 2:00 p.m.  
 Courtroom: 6, 17th Floor  
 Judge: The Hon. Vaughn R. Walker

1 The government has long maintained that the secrecy of its surveillance program would be  
2 irrevocably compromised by any attempt by this Article III Court to adjudicate the constitutional  
3 and statutory legality of the wholesale, suspicionless surveillance it is conducting of the  
4 communications of millions of innocent Americans. It has similarly maintained that procedures  
5 like those established by Congress in 50 U.S.C. § 1806(f), under which the Court protects the  
6 government's interest in the secrecy of its surveillance techniques by first reviewing *in camera* and  
7 *ex parte* any information provided by the government concerning the surveillance, are insufficient  
8 and inadequate.

9 Plaintiffs, in their previous filings have demonstrated to the contrary why the government's  
10 surveillance is not a secret and have submitted independent record evidence of the ongoing  
11 surveillance that is occurring. Plaintiffs have thereby shown that they are "aggrieved persons" who  
12 may use section 1806(f) to litigate whether the surveillance they are suffering is lawful.<sup>1</sup> As  
13 Congress provided in that section: "[W]henver any motion or request is made by an aggrieved  
14 person . . . to discover or obtain applications or orders or other materials relating to electronic  
15 surveillance . . . the United States district court . . . shall, notwithstanding any other law, . . . review  
16 *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance  
17 as may be necessary to determine whether the surveillance of the aggrieved person was lawfully  
18 authorized and conducted." 50 U.S.C. § 1806(f).

19 \_\_\_\_\_  
20 <sup>1</sup> The government's argument that plaintiffs have not yet proven they are "aggrieved persons" and  
21 must do so before the Court can use the procedures of section 1806(f), Gov't Reply in Support of  
22 Stay at 12, ignores the *undisputed* record evidence showing wholesale, suspicionless government  
23 surveillance of millions of innocent Americans. *See, e.g.*, Declaration of Mark Klein (*Hepting* Dkt.  
24 230); Declaration of J. Scott Marcus (*Hepting* Dkt. 231); Plaintiffs' Request for Judicial Notice  
25 (*Hepting* Dkt. 20); Declaration of Michael Markman (*Hepting* Dkt. 182, 194); Declaration of Elena  
26 DiMuzio (*Hepting* Dkt. 298); Declaration of Barry Himmelstein (MDL Dkt. 156). Nor is the state  
27 secrets privilege the reason why the government has not disputed the evidence in the Klein and  
28 Marcus declarations; the government has confirmed that the information that is the subject of the  
Klein and Marcus declarations can be litigated without intruding on state secrets. *Hepting* 6/23/06  
RT at 76:16-20 ("THE GOVERNMENT: We have not asserted any privilege over the information  
that is in the Klein and Marcus declarations. THE COURT: Either in the declaration or its  
exhibits? THE GOVERNMENT: We have not asserted a privilege over either of those.").

AT&T also has not disputed the authenticity or reliability of the testimony and evidence of Mr.  
Klein, a disinterested non-party to the litigation, by, for example, showing that Mr. Klein was not

1 The government's unbidden and *sua sponte* filing of January 11, 2007 (MDL Dkt. 120),  
2 further undermines its assertion that there is no practical way for this litigation to advance pending  
3 conclusion of the interlocutory appeal in *Hepting*. In order to further its own litigation interests,  
4 the government has submitted "materials relating to the surveillance," 50 U.S.C. § 1806(f), "for the  
5 Court's *in camera*, *ex parte* consideration," MDL Dkt. 120 at 2:2-3. In its public notice of this  
6 filing, the government stated: "The classified materials lodged with the Court on January 11, 2007  
7 (as reflected in the notice of lodging filed on January 13, 2007), concern the Foreign Intelligence  
8 Surveillance Court orders that were publicly announced today." MDL Dkt. 127 at 2:12-15.

9 As the Court has noted, section "1806(f), in pertinent part, provides procedures for  
10 consideration of the propriety of FISA orders." Order Denying Remand (MDL Dkt. 130) at 7:20-  
11 22. The procedures of section 1806(f) begin with exactly the sort of *in camera*, *ex parte*  
12 submission of surveillance-related materials that the government made in its January 11  
13 submission. Thus, it appears that the government has no reluctance to utilize procedures like those  
14 contemplated by section 1806(f) to submit surveillance-related materials when those procedures  
15 suit its own litigation purposes, even while protesting that similar procedures cannot reasonably be  
16 used to allow plaintiffs to pursue their case. The government cannot have it both ways.<sup>2</sup>

17 Moreover, the information the government has submitted to the Court relates to its  
18 surveillance of persons it has probable cause to believe are confirmed terrorists. The FISA orders

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19 an AT&T employee at the time of the events in question, that he did not have access to the  
20 facilities in question, that he was not present at the facilities at the times he states he was, or that  
21 other facts in his declaration are false. Nor has AT&T contested the authenticity of the Klein  
22 Exhibits. To the contrary, AT&T has confirmed the status of Mr. Klein as an AT&T employee  
23 until May 2004. Declaration of AT&T Managing Director—Asset Protection James Russell, Ex. A  
24 (*Hepting* Dkt. 220). It has also vouched for the authenticity of the documentary evidence attested  
25 to by Mr. Klein by asserting that those documents are AT&T's trade secrets and by asserting that  
26 their contents accurately describe AT&T's networks and facilities. *Id.* at ¶¶ 5 to 6, 10 to 13, 15, 17,  
27 20-22. It has likewise vouched for the correctness of the percipient observations testified to by Mr.  
28 Klein. *Id.* at ¶¶ 5 to 6, 15, 19.

<sup>2</sup> Significantly, the government's submission occurred months after the Court denied the  
government's state secrets privilege motion to dismiss and while that issue is up on appeal. Thus,  
the January 11 submission cannot have been made for the purpose of invoking the state secrets  
privilege, as the government's earlier *ex parte*, *in camera* filings were (*see Hepting* Dkt. 124), but  
instead must be directed to other issues in the litigation.

1 that the materials in the government's submission concern are "orders authorizing the Government  
2 to target for collection international communications into or out of the United States *where there is*  
3 *probable cause to believe that one of the communicants is a member or agent of al Qaeda or an*  
4 *associated terrorist organization.*" MDL Dkt. 127 at 2:4-7 (emphasis added).<sup>3</sup>

5 The government's willingness to submit these materials to the Court belies its assertion that  
6 it cannot similarly submit *in camera* and *ex parte*, under the protective procedures of section  
7 1806(f) as Congress intended, information concerning its surveillance of law-abiding Americans  
8 who are *not* "members or agents of al Qaeda or an associated terrorist organization." Information  
9 about targeted surveillance of known terrorists is obviously more, not less, sensitive than  
10 information about suspicionless mass surveillance of ordinary Americans. The government's  
11 refusal to submit these less sensitive materials, in addition to being self-contradictory, is also  
12 contrary to the Court's recognition of its fundamental Article III duty in this case: "While the court  
13 recognizes and respects the executive's constitutional duty to protect the nation from threats, the  
14 court also takes seriously its constitutional duty to adjudicate the disputes that come before it. *See*  
15 *Hamdi v Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ('Whatever power the United  
16 States Constitution envisions for the Executive in its exchanges with other nations or with enemy  
17 organizations in times of conflict, it most assuredly envisions a role for all three branches when  
18 individual liberties are at stake.'). To defer to a blanket assertion of secrecy here would be to  
19 abdicate that duty, particularly because the very subject matter of this litigation has been so  
20 publicly aired." *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006).

21 The government's willingness to make its recent voluntary *ex parte*, *in camera* submission  
22 to the Court during the pendency of the *Hepting* interlocutory appeal supports the conclusion that  
23 procedures like those established by Congress in section § 1806(f) can reasonably be utilized by  
24 the Court to proceed forward with this litigation, and that the Court can reasonably do so without  
25 awaiting the conclusion of the *Hepting* interlocutory appeal.

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28 <sup>3</sup> Plaintiffs note that even the government does not agree with Defendant Sprint Nextel's argument  
that the FISA orders render plaintiffs' case moot. (MDL Dkt. 141 at 5:5-11).

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DATED: February 5, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 5, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties whose e-mail addresses have been registered in the case as required by the Court..

DATED: February 5, 2007

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