CASE NO.: 06-17132, 06-17137

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL, AND ERIK KNUTZEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLEES,

V.

AT&T CORPORATION,

DEFENDANT-APPELLANT, AND

THE UNITED STATES,

INTERVENOR AND APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE VAUGHN R. WALKER, CHIEF DISTRICT JUDGE
CIVIL No. C-06-0672-VRW

REQUEST OF PLAINTIFFS-APPELLEES FOR JUDICIAL NOTICE OF STATEMENT BY THE DIRECTOR OF NATIONAL INTELLIGENCE OF THE UNITED STATES

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PLAINTIFFS-APPELLEES' REQUEST FOR JUDICIAL NOTICE

The Plaintiffs-Appellees in *Hepting v. AT&T Corp*., No. 06-17132 and *Hepting v. United States* No. 06-17137 (hereinafter collectively "*Hepting*") respectfully request, pursuant to Federal Rule of Evidence 201 and the inherent authority of the Court, that the Court take judicial notice of the admission made by the Director of National Intelligence of the United States, during an interview with the *El Paso Times* newspaper published on August 22, 2007, that the telecommunications companies sued in this litigation and in *In re National Security Agency Telecommunications Records Litigation* (N.D. Cal. MDL No 06-CV-01791 VRW) with respect to the National Security Agency ("NSA")'s surveillance program "had assisted" the Government.

LEGAL AUTHORITIES IN SUPPORT OF THIS REQUEST FOR JUDICIAL NOTICE

Federal Rule of Evidence 201 authorizes this Court to take judicial notice of such admissions because they are "not subject to reasonable dispute in that" they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. Rule Evid. 201(b); *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004). Further, the Rule mandates that judicial notice be taken where it is "requested by a party and supplied with the necessary information," *id*. at 201(d), and authorizes judicial notice "at any stage of the proceeding," *id*. at 201(f).

The facts for which the Plaintiffs-Appellees request judicial notice can and should be judicially noticed because they are "not subject to reasonable dispute," as they are party-admissions about the NSA program that come directly from the Director of National Intelligence ("DNI"). The facts are easily verifiable, as they are taken from public statements that DNI Michael McConnell made in a recorded interview. A true and correct copy of the transcript of the interview is attached hereto as Exhibit A. As the admissions of the United States, a party to this litigation, the statements are not hearsay and are admissible. Fed. R. Evid. 801(d)(2).

Many courts have taken judicial notice of the type of information at issue in this request. *See*, *e.g.*, *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 n. 4 (1933), amended on other grounds, 291 U.S. 649 (1934) (taking judicial notice of official reports put forth by the Comptroller of the Currency); *Ieradi v. Mylan Laboratories, Inc*., 230 F.3d 594, 597-98 (3rd Cir. 2000) (taking judicial notice of information in a newspaper article); *Blair v City of Pomona*, 223 F.3d 1074 (9th Cir. 2000) (taking judicial notice of an independent commission's report on the code of silence among police officers); *Heliotrope Gen., Inc. v. Ford Motor Co*., 189 F.3d 971, 981 (9th Cir. 1999) (taking judicial notice of information contained in news articles); *Clemmons v Bohannon*, 918 F.2d 858, 865 (10th Cir. 1990), vacated on other grounds, on reh. *en banc* 956 F2d 1523 (10th Cir. 1992) (taking

judicial notice of government reports and Surgeon General's reports concerning health risk of environmental tobacco smoke); *B.T. Produce Co. v Robert A. Johnson Sales, Inc*. (S.D.N.Y. 2004) 354 F.Supp.2d 284, 285-286 (taking judicial notice of U.S. Department of Agriculture report); *Wietschner v. Monterey Pasta Co*., 294 F.Supp.2d 1102, 1108 (N.D. Cal. 2003) (taking judicial notice of press releases issued by the Securities and Exchange Commission); *Del Puerto Water Dist. v United States Bureau of Reclamation*, 271 F.Supp.2d 1224, 1234 (E.D. Cal. 2003) (taking judicial notice of public documents, including Senate and House Reports); *Feldman v Allegheny Airlines, Inc*. (D. Conn. 1974) 382 F.Supp. 1271, reversed on other grounds 524 F.2d 384 (2nd Cir. 1975) (taking judicial notice of data contained in President's Economic Report).

DIRECTOR OF NATIONAL INTELLIGENCE MCCONNELL'S ADMISSION

Earlier this week (and thus after oral argument), during an interview with Chris Roberts of the *El Paso Times* first published on August 22, 2007, (DNI McConnell said:

> [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**.

Exhibit A, at p. 2 (emphasis added).[1]

The Plaintiffs-Appellees have already notified this Court of the Attorney General's testimony that admitted that "companies" assisted the Government, and of the recent statement by Michigan Congressman Peter Hoekstra, the ranking Republican on the House Select Committee on Intelligence, that the "communications companies" who were helping the Government are the very same who are facing the lawsuits in this case and in *In re National Security Agency Telecommunications Records Litigation* (N.D. Cal. MDL No 06-CV-01791 VRW). Moreover, even without these statements, the record evidence shows that AT&T's cooperation with the Government's warrantless surveillance is no secret. *See* Plaintiffs-Appellees Answering Brief at pp. 5-16.

Despite this, the Government persists in its legal position that whether or not it had an "espionage relationship" with the telecommunications company defendants remains a state secret. For instance, in its Response to Plaintiffs' Request for Judicial Notice filed on August 7, 2007, the Government stated: "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 alleged surveillance activities – is a state secret" (Response at pp. 1-2), and "as the Nation's top

[1] Transcript available at <http://www.elpasotimes.com/news/ci_6685679>.

intelligence officials explained in their public and classified declarations, any further elaboration on the public record concerning these matters would reveal information that could cause the very harms [that the] assertion of the state secrets privilege is intended to prevent," (*Id.* at p. 3), and "[t]hat statement says absolutely nothing about whether the 'companies' referred to were telecommunications carriers, much less whether one of the 'companies' was AT&T (or, for that matter, any other telecommunications carrier)." (*id.* at p. 4).[2]

In the statement at issue here, the nation's top intelligence official, the DNI now admits that the companies currently being sued, which include AT&T, "had assisted" in the Government's warrantless surveillance and interception activities. The DNI refers to the companies as "partners," and complains that "they were sued." Taken in context, it is clear that the DNI is referencing the defendant telecommunications companies in this litigation as well as the Multi District Litigation. *See In re: Sealed Case*, __ F.3d __, 2007 WL 2067029, *7 and *9 (D.C. Cir. July 20, 2007) (holding that circumstantial evidence and inferences therefrom are sufficient to make a prima facie case).

[2] In their Reply brief, the Government made the same argument: "But as stressed by General Alexander and Director Negroponte, the Government's state secrets assertion squarely encompasses the question of 'NSA's purported involvement with AT&T'; '[t]he United States can neither confirm nor deny allegations concerning intelligence *** relationships' and any such confirmation or denial 'could reasonably be expected to cause exceptionally grave damage to the national security.' ER 57-59; see ER 63-64." Gov't Reply Brief at p. 20.

CONCLUSION

For the reasons stated above, the Plaintiffs-Appellees respectfully request that this Court take judicial notice that the United States has admitted that it sought and received the participation of carriers, including AT&T, in conducting its warrantless surveillance program.

Respectfully submitted,

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