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13 UNITED STATES DISTRICT COURT
 14
 15 NORTHERN DISTRICT OF CALIFORNIA

16 TASH HEPTING, GREGORY HICKS)
 CAROLYN JEWEL and ERIK KNUTZEN)
 17 on Behalf of Themselves and All Others)
 Similarly Situated,)
 18)
 Plaintiffs,)
 19)
 20 v.)
 21 AT&T CORP., AT&T INC. and)
 DOES 1-20, inclusive,)
 22)
 Defendants.)
 23

Case No. C-06-0672-VRW

**UNITED STATES’ OPPOSITION TO
 PLAINTIFFS’ MOTION TO
 FILE SUPPLEMENTARY MATERIAL**

Judge: The Hon. Vaughn R. Walker

INTRODUCTION

24
 25 Plaintiffs seek to submit as supplementary material a June 30, 2006 article in USA Today
 26 that they claim contains “important information” relating to the United States’ Assertion of the
 27 Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary

1 Judgment. Plaintiffs claim that the information in this article rebuts the United States' assertions
2 made at the June 23, 2006 oral argument. Plaintiffs are mistaken and their motion should be
3 denied.

4 ARGUMENT

5 A newspaper article is, of course, perhaps the purest form of hearsay and certainly cannot
6 be admitted for the truth of any matter asserted, even on summary judgment. Beyond this,
7 assuming the article was accepted for the mere fact of what it states, and not its truth content, the
8 article does not undermine what the United States has said – indeed it confirms our position in
9 material respects.

10 First, as with prior media reports, this report is quite far from any kind of official or
11 formal acknowledgment of any information by the President or responsible agency. It is replete
12 with references to “anonymous” sources. This does not serve to declassify anything, even if it
13 purportedly comes from a member of the legislative branch who reportedly was provided with
14 certain information. Courts have consistently refused to deem “official” a disclosure made by
15 someone other than the agency that maintains the particular information. *See, e.g., Frugone v.*
16 *CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) (“we do not deem ‘official’ a disclosure made by
17 someone other than the agency from which the information is being sought”); *Salisbury v. United*
18 *States*, 690 F.2d 966, 971 (D.C. Cir. 1982) (“[B]are discussions by this court and the Congress of
19 [the National Security Agency’s] methods generally cannot be equated with disclosure by the
20 agency itself of its methods of information gathering”); *Hudson River Sloop Clearwater, Inc. v.*
21 *Dep’t of the Navy*, 659 F. Supp. 674, 684 (E.D.N.Y. 1987) (“[O]nly authorized and official
22 disclosures can result in declassification. Thus, even if plaintiffs were able to obtain evidence
23 that an unauthorized ‘leak’ had in fact occurred, these statements could not, as a matter of law,
24 result in declassification of the existence of a Navy proposal to deploy nuclear weapons at the
25 homeport.”), *aff’d*, 891 F.2d 414, 421 (2d Cir. 1989).

26 Indeed, in *Halkin v. Helms* (“*Halkin I*”), 598 F.2d 1,4 (D.C. Cir. 1978), the court did not
27 pause over the fact that certain information about activities undertaken by the National Security

1 Agency to intercept international telegrams had been publicly acknowledged during the course of
2 congressional hearings in upholding the Government's state secrets privilege assertions in that
3 case. *See id.* at 4, 10. Rather, it expressly *reversed* a district court finding that, because
4 congressional committees had revealed information about an NSA program, further disclosure
5 "would pose no threat to NSA's mission." *See id.* at 10.¹

6 Thus, with due respect to the legislative branch, even if individual members discussed
7 classified information with USA Today (which of course cannot be deemed proven on the basis
8 of this article), that would in no way constitute any confirmation, acknowledgment, or
9 permissible disclosure of classified information, which remains under the *exclusive* control of the
10 President and his designees, such as the Director of National Intelligence. *See Department of the*
11 *Navy v. Egan*, 484 U.S. 518, 527 (1988).

12 Moreover, this particular newspaper story, far from lending clarity to anything, merely
13 adds to the muddled and confused information about the matter in the media. Among other
14 things, the article concedes that only "limited responses" were provided based on national
15 security concerns. *See* Article, Exhibit 1 to DiMuzio Declaration at 1. It reports on admitted
16 errors in USA Today's prior story on the matter. *See id.* at 1-2. And it contains more
17 unconfirmed speculation about what particular telecommunications carriers did or did not do.
18 *See id.* Thus, precisely as the Government has argued here, this type of incomplete, inaccurate
19

20
21 ¹ *See also* *Halkin v. Helms* ("Halkin II"), 690 F.2d 977, 994 (D.C. Cir. 1982); *Edmonds*
22 *v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 76-77 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6 (D.C.
23 Cir. 2005) ("That privileged information has already been released to the press or provided in
24 briefings to Congress does not alter the Court's conclusion" that the government sufficiently
25 invoked the state secrets privilege). Similarly, in other cases involving the protection of
26 classified information, courts have consistently held that because some information about
27 classified activities has made its way into the public domain does not mean that information
28 about those activities must be declassified. *See, e.g., Fitzgerald v. CIA*, 911 F.2d 755, 766 (D.C.
Cir. 1990); *Public Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993); *Edmonds v. FBI*,
272 F. Supp. 2d 35, 49 (D.D.C. 2003); *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236,
1242-43 (4th Cir. 1985); *Afshar v. Department of State*, 702 F.2d 1125, 1130-31 (D.C. Cir.
1983); *El-Masri v. Tenet*, No. 1:05cv1417, 2006 WL 1391390, *5 (E.D.Va. 2006 May 12, 2006).

1 speculation from anonymous sources cannot plausibly constitute an indication of actual fact on
2 the matter, let alone actual confirmation of anything. Moreover, to require that the true facts
3 protected by the Government's state secrets assertion be disclosed by the Executive branch,
4 based on anonymous media speculation, would obviously eviscerate the state secrets privilege,
5 by placing it at the whim of individuals, even legislators, who anonymously leak or even attempt
6 to discuss classified matters in some "limited" fashion. It would also result in inherently
7 unreliable information in newspapers forcing the disclosure of actual, confirmed fact, and
8 provide terrorist adversaries with certainty as to the Government's actions in the face of the
9 uncertainty reflected in media reports.

10 **CONCLUSION**

11 If the court wishes to read this newspaper article, it obviously can do so, though it should
12 not consider it as evidence for its truth content. And it does not, as a matter of fact or law, trump
13 the Executive's assertion of the state secrets privilege. Plaintiffs' motion to supplement the
14 record should be denied.

15 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION TO FILE SUPPLEMENTARY MATERIAL, Case No. C 06-0672-VRW**, will be served by means of the Court's CM/ECF system, which will send notifications of such filing to the following:

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