



July 30, 2007

Ms. Cathy Catterson
Clerk, United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

**RE: *Hepting, et al. v. AT&T Corp., et al*, No. 06-17132
(Consolidated with Nos. 06-17137, 06-36083)
(Scheduled for oral argument on August 15, 2007)**

Dear Ms. Catterson:

Pursuant to FRAP 28(j), we respectfully call this Court's attention to *In re: Sealed Case*, __ F.3d __, 2007 WL 2067029 (D.C. Cir. July 20, 2007).

In *Sealed Case*, Plaintiff filed a *Bivens* action alleging a wiretap in violation of his Fourth Amendment rights. The D.C. Circuit reversed the FRCP 12(b)(6) dismissal of one defendant, which had been granted pursuant to the state secret privilege. The Court held in pertinent part:

Circumstantial evidence and inferences therefrom are sufficient to make a *prima facie* case, and the state secret privilege does not shift the burden of proof onto the plaintiff. *Id.* at *7, *9.

Dismissal based on potential privileged defenses is warranted only if such defenses are meritorious, rather than based on conjecture or speculation. *Sealed Case*, at *10 (“allowing the mere prospect of a privileged defense to thwart a citizen’s efforts to vindicate his or her constitutional rights would run afoul of the Supreme Court’s caution against precluding review of constitutional claims, see *Webster v. Doe*, 486 U.S. [592,] 603-04 [(1998)], and against broadly interpreting evidentiary privileges...”) Only “[i]f the defendant proffers a valid defense that the district court *verifies upon its review of state secrets evidence*, then the case must be dismissed.” *Id.* at *12 (emphasis added).

Courts are entitled to review the purportedly state secret information while adjudicating the merits of claims and defenses. *Id.* at *4 (noting that “[t]he district court also requested the *ex parte, in camera* submission of the reports subject to the claim of privilege.”); *10 (endorsing an “appropriately tailored *in camera* review of the privileged record” to adjudicate defenses); and *13 (suggesting use of the Classified Information Procedures Act, 18 U.S.C. app. III, may be appropriate “so that [Plaintiff’s] case could proceed.”).

Totten v. United States, 92 U.S. (2 Otto) 105 (1876) is limited to secret espionage contracts. “In *Tenet v. Doe*, 544 U.S. 1, 8-9 (2005), the Supreme Court clarified that *Totten*, which eliminates actions that ‘depend[] upon the existence of [a] secret espionage relationship,’ performs a different function than *Reynolds* [345 U.S. 1 (1953)]” *Id.* at *10.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Cindy Cohn", written over a horizontal line.

Cindy Cohn, Esq.
Counsel for *Hepting* plaintiffs.

CERTIFICATE OF SERVICE

I, Leticia Perez, hereby certify that I am over the age of 18 years, not a party to the cause. My business address is 454 Shotwell Street, San Francisco, California, 94110.

On July 30th, 2007, I caused the foregoing document:

LETTER PRESENTING SUPPLEMENTAL AUTHORITY: *IN RE*:

SEALED CASE to be served on:

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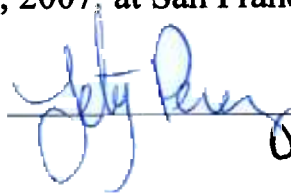
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by delivering them to Federal Express for delivery the next day.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of July, 2007, at San Francisco, California.



Leticia Perez