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

IN RE NATIONAL SECURITY AGENCY)	MDL Docket No. 06-1791 VRW
TELECOMMUNICATIONS RECORDS)	
LITIGATION, MDL No. 1791)	
)	
This Document Relates To:)	Relates to Case No.
)	
<u>Robert Clayton, et al. v. AT&T</u>)	07-cv-1187-VRW
<u>Communications of the Southwest, Inc.,</u>)	
<u>et al., (W.D.Mo.)</u>)	SURREPLY TO THE UNITED
)	STATES' MOTION FOR
)	SUMMARY JUDGMENT
)	
)	Courtroom: 6, 17 th Floor
)	Judge: The Hon. Vaughn R. Walker
)	Hearing: May 7, 2009

**SURREPLY TO THE UNITED STATES'
MOTION FOR SUMMARY JUDGMENT**

Because 28 U.S.C. § 517 does not authorize the Government's Motion for Summary Judgment in Case No. 07-1187, the Government's Motion for Summary Judgment must be denied as to this case.

28 U.S.C. § 517 provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending

in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.” This authority is broader than the authority granted in 28 U.S.C. §2403, a statute which is limited to constitutional issues. Intervention as of right is governed by Rule 24(a) of the Federal Rules of Civil Procedure. In order to be entitled to intervention pursuant to Rule 24(a), the Government must satisfy the four-pronged test cogently described by the United States District Court for the District of Columbia in *Roeder v. Islamic Republic of Iran*, 195 F.Supp.2d 140, 154-157 (D. D.C. 2002) *affirmed by*, *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003) *certiorari denied by*, *Roeder v. Islamic Republic of Iran*, 542 U.S. 914, 124 S.Ct. 2836 (Mem.)(2004).

The Government cites no case law in support of its contention that it may act in Case No. 07-1187 without formal intervention, even pursuant to §517. Plaintiff was unable to find any case in which the Government filed or was granted a dispositive motion in a case in which it had not formally intervened. Because the Government has not presented a motion to intervene to the Court, there has been no finding by this Court that the Government has satisfied the four-pronged test for intervention in this case. The Plaintiff in Case No. 07-01187 would oppose a motion to intervene by the Government should such a motion be presented to the Court.

Because the Government has not intervened in Case No. 07-01187 and there is no authority to support the Government’s claim that it is entitled to

summary judgment in a case in which it has not formally intervened, the Government's motion for summary judgment must be denied as to this case.

WHEREFORE, for the foregoing reasons, the Plaintiff in Case No. 07-01187 respectfully requests that this Court deny the Government's motion for summary judgment as to this case.

Dated: 4-23-09

Respectfully submitted,

/s/ Jennifer L. Heintz

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