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18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA

20 CAROLYN JEWEL, TASH HEPTING,
 21 GREGORY HICKS, ERIK KNUTZEN and
 JOICE WALTON, on behalf of themselves
 22 and all other similarly situated,

23 Plaintiffs,

24 v.

25 NATIONAL SECURITY AGENCY, et al.,

26 Defendants.

Case No. C-08-4373-VRW

CLASS ACTION

**DECLARATION OF CINDY COHN
 PURSUANT TO FED. R. CIV. P. 56(f) IN
 OPPOSITION TO GOVERNMENT
 DEFENDANTS' MOTION TO DISMISS
 AND FOR SUMMARY JUDGMENT**

Date: July 15, 2009
 Time: 10:30 a.m.
 Dept: 6, 17th Floor
 Judge: Vaughn R. Walker

Date Comp. Filed: September 18, 2008

1 I, CINDY COHN, declare and state:

2 1. I am an attorney duly licensed to practice law in the courts of the State of
3 California, and I am a member of the bar of this district. I am also Legal Director for the
4 Electronic Frontier Foundation, counsel of record to the Plaintiffs in this action. I am familiar
5 with the records and proceedings in this action as well as the records and proceedings (with the
6 exception of the *in camera*, *ex parte* materials submitted by the Government) in *In Re National*
7 *Security Agency Telecommunications Records Litigation*, MDL No. 06-1791 VRW (“the
8 MDL”).

9 2. In *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, (9th Cir. 2009), the Ninth
10 Circuit held that neither the Federal Rules of Civil Procedure nor the state secrets evidentiary
11 privilege established in *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953) would permit a
12 district court to dismiss a well-pleaded complaint at the pleadings stage on the basis of an
13 evidentiary privilege that must be invoked during discovery or at trial. 563 F.3d at 1009. As in
14 *Jeppesen*, the Government here has not filed an answer to the complaint in this case, and
15 discovery has not begun. However, because the Government has styled its motion as a motion to
16 dismiss or alternatively for summary judgment, Plaintiffs are compelled to invoke their rights
17 under Rule 56(f) to have an opportunity to conduct discovery to obtain “facts essential to justify
18 its opposition” to summary judgment.

19 3. During the course of opposing the Government’s motion to dismiss and/or for
20 summary judgment in the MDL, on October 16, 2008, Plaintiffs filed an extensive factual record
21 that establishes the genuine issues as to the material facts surrounding the Government’s
22 unlawful surveillance of millions of ordinary Americans. MDL Docket Nos. 479, 486-495. This
23 Court may take judicial notice of the existence of that factual record under Federal Rule of
24 Evidence 201. Plaintiffs summarized that factual record in their Summary of Voluminous
25 Evidence filed under Federal Rule of Evidence 1006, a true and correct copy of which is attached
26 hereto as Exhibit A.¹ Plaintiffs have also filed several Notices of Additional Authorities

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28 ¹ The Summary of Voluminous Evidence was filed electronically as MDL Docket No. 481. The
evidence itself was filed manually, see MDL Docket No. 484, because it was too voluminous to

1 containing additional information that has been discovered since the Summary of Voluminous
2 Evidence was filed. MDL Docket Nos. 535, 627 (“Additional Authorities”).

3 4. In addition to the evidence Plaintiffs have already presented, Plaintiffs are entitled
4 under Rule 56(f) to conduct discovery before the Court decides the Government’s motion.
5 Plaintiffs respectfully submit that further information supporting their opposition is in the hands
6 of other parties and witnesses, including the Government and its agents and employees and the
7 telecommunications companies and their agents and employees. Discovery is likely to reveal
8 additional facts that will help demonstrate that there are genuine issues of material fact that
9 preclude granting the Government’s motion.

10 5. As the Court ordered in *Al Haramain* (MDL Docket No. 537), if necessary, at
11 least some of Plaintiffs’ attorneys would seek a security clearance in order to allow them to
12 conduct discovery.

13 6. The evidence that Plaintiffs intend to uncover through discovery is available
14 through several channels, as outlined below.

15 7. Plaintiffs would take the deposition of former government officials who have
16 spoken publicly about the communications carriers’ involvement in the NSA’s warrantless
17 surveillance, including Defendants Richard B. Cheney, Michael B. Mukasey, John M.
18 McConnell, David S. Addington, Alberto R. Gonzales, John D. Ashcroft and John D.
19 Negroponte, and nonparties Michael Chertoff, Keith B. Alexander, Michael V. Hayden, James
20 Comey, Andrew Card, Jack Goldsmith, John Yoo, Patrick Philbin, Robert S. Mueller III,
21 Thomas M. Tamm, Royce C. Lamberth and Russell Tice. As noted above, if needed Plaintiffs
22 would seek a security clearance to enable them to conduct this discovery in a manner that
23 protects national security.

24 8. Plaintiffs would seek further written and deposition discovery arising out of the
25 documents summarized in the accompanying Summary of Voluminous Evidence and in the
26 Additional Authorities filed in part to address any claims that any of the information in those
27 documents requires authentication, is hearsay, or is otherwise inadmissible.

28
be filed electronically.

1 9. For instance, the Summary of Voluminous Evidence references the unclassified
2 nature of 17 paragraphs of notes of then White House Counsel Alberto Gonzales' March 10,
3 2004 meeting with certain members of Congress known as the "Gang of Eight." The notes
4 discuss legal concerns about the program. As the Inspector General of the Department of Justice
5 reported: "The NSA officials determined that 3 of 21 paragraphs in the notes contains SCI
6 information about the NSA surveillance program [and] 1 paragraph contains SCI information
7 about signals intelligence." Declaration of Kurt Opsahl ("Opsahl Decl.," MDL Docket No. 479)
8 Ex. 7 (Office of the Inspector General, *U.S. Dept. of Justice, Report of Investigation Regarding*
9 *Allegations of Mishandling of Classified Documents by Att'y Gen. Alberto Gonzales* (Sep. 2,
10 2008), at p. 10, n.14). Those notes themselves are evidence, or at a minimum are likely to lead
11 to the discovery of admissible evidence, about the scope and legal justification for some portion
12 of the alleged surveillance.

13 10. Similarly, testimony regarding issues discussed at the March 10, 2004 meeting in
14 Attorney General Ashcroft's hospital room is not classified, since non-cleared personnel were
15 present. *See* Opsahl Decl. Ex. 11 (*Dept. of Justice Oversight: Hearing before the S. Judiciary*
16 *Comm. 110th Cong. (Jan 18, 2007)*).² Again, those issues are either directly relevant to the
17 surveillance alleged in this case or are likely to lead to the discovery of admissible evidence
18 about the facts of the surveillance that led to legal concerns about it at the Department of Justice.

19 11. Plaintiffs would take depositions of and seek documents from the named sources
20 in the published reports included in the Summary of Voluminous Evidence (Exhibit A hereto)
21 and in the Additional Authorities, regarding those sources' personal knowledge of published or
22 unpublished information or their discussions with or knowledge of other sources of information.

23 12. To the extent Plaintiffs are able independently to identify any additional sources
24 of evidence, Plaintiffs would seek to obtain declarations from, or propound depositions on
25 written questions to, any unnamed sources, including those quoted in news reports.

26 13. Plaintiffs would seek discovery regarding the fact of the carriers' interception and
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28 ²Available at http://www.washingtonpost.com/wp-srv/politics/documents/gonzalez_transcript_072407.html.

1 disclosure of the communications and communications records of the telecommunications
2 companies' customers, including those of the named Plaintiffs and class members.

3 14. Plaintiffs would take the depositions of Qwest executives including Joseph
4 Nacchio regarding non-privileged discussions with the NSA pertaining to warrantless
5 wiretapping, including content data acquisition. Published accounts note that unlike AT&T,
6 Qwest publicly disclosed that it received a request from the NSA to intercept and disclose
7 customer communications and data, and that it rejected the request.

8 15. Plaintiffs would take the depositions of Verizon executives regarding non-
9 privileged discussions with the NSA pertaining to warrantless surveillance, including content
10 data acquisition, among other things. For instance, a Verizon Wireless spokeswoman has
11 publicly disclosed that Verizon Wireless received but rejected requests by the NSA that Verizon
12 Wireless intercept and disclose customer communications and data.

13 16. Plaintiffs would request an inspection of the premises of AT&T's Folsom Street
14 facility under Fed. R. Civ. P. 34, including the WorldNet Internet room, the splitter cable, the
15 inside and outside of the splitter cabinet, and the area outside the SG3 Secure Room. Plaintiffs
16 would also request an inspection of the premises outside of other of AT&T's SG3 rooms, which
17 the record indicates exist in Atlanta, Seattle, San Jose, San Diego, and Los Angeles. Declaration
18 of Mark Klein ¶ 36 (*Hepting v. AT&T*, No. C-06-672 VRW, Docket No. 31 [Vol. 5, Ex. 78, p.
19 02041]).

20 17. Plaintiffs would take the depositions (or obtain the sworn declarations) of current
21 or former AT&T employees with knowledge of, and who worked in, the SG3 Secure Room,
22 doing so in a manner that would protect the identities of these witnesses, as needed. Such
23 persons would include, but are not limited to: (1) James W. Russell, who filed a Declaration
24 dated April 10, 2006, under seal due to AT&T trade secret concerns, *see* Notice of Manual
25 Filing, *Hepting* Docket No 42; and (2) the named author of certain exhibits to the Klein
26 Declaration that were also filed under seal. *See* Notice of Manual Filing, *Hepting* Docket No.
27 31.

28 18. Plaintiffs would request an inspection of AT&T's facilities housing the Daytona

1 database and databases used for similar purposes at AT&T and other carriers.

2 19. Plaintiffs would take depositions of the persons most knowledgeable about
3 AT&T's Daytona database and databases used for similar purposes at AT&T and other carriers.

4 20. Each of the topics of specific discovery outlined above is highly likely to yield
5 further evidence of genuinely disputed material facts relating to all of Plaintiffs' claims.
6 Specifically, the discovery would lead to evidence regarding the nature and scope of the
7 Government's surveillance program, the timing of efforts to concoct a legal justification for the
8 program, the efforts to mislead Congress and the FISA court about the illegal aspects of the
9 program, and the intention on the part of the individual defendants to violate the Wiretap Act,
10 ECPA, FISA and the Fourth Amendment.

11 I declare under penalty of perjury that the foregoing is true and correct.

12 Executed at San Francisco, California, this 3rd day of June 2009.

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/s/ per General Order 45X.B
CINDY COHN

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