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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 CAROLYN JEWEL, TASH HEPTING,
18 GREGORY HICKS, ERIK KNUTZEN and
19 JOICE WALTON, on behalf of themselves
and all other similarly situated,

20 Plaintiffs,

21 v.

22 NATIONAL SECURITY AGENCY, *et al.*,

23 Defendants.
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Case No. CV-08-4373-JSW

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

Date: December 14, 2012
Time: 9:00a.m.
Dept: 11, 19th Floor
Judge: Jeffrey S. White

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.

6 2. The Government here has not filed an answer to the complaint in this case, and
7 discovery has not begun. However, because the Government has styled its motion as a motion to
8 dismiss or alternatively for summary judgment, Plaintiffs are compelled to invoke their rights
9 under Rule 56(d) to have an opportunity to conduct discovery to obtain “facts essential to justify
10 its opposition” to summary judgment.

11 3. Along with this opposition, Plaintiffs are filing an extensive factual record that
12 establishes the genuine issues as to the material facts surrounding the Government’s unlawful
13 surveillance of millions of ordinary Americans. This Court may take judicial notice of the
14 existence of that factual record under Federal Rule of Evidence 201. Plaintiffs summarize that
15 factual record in their Summary of Voluminous Evidence filed under Federal Rule of
16 Evidence 1006, also filed herewith.

17 4. In addition to the evidence Plaintiffs present herewith, Plaintiffs are entitled under
18 Rule 56(d) to conduct discovery before the Court decides the Government’s motion. Plaintiffs
19 respectfully submit that further information supporting their opposition is in the hands of other
20 parties and witnesses, including the Government and its agents and employees and the
21 telecommunications companies and their agents and employees. Plaintiffs also submit that,
22 while some of it may be classified, much of it is not. This is based on the ongoing series of
23 government admissions to date documented in the evidence filed herewith, as well as
24 information from whistleblowers, including former NSA employees, members of Congress and
25 other information that is not properly subject to any classification or other secrecy. Discovery is
26 likely to reveal additional facts that will help demonstrate that there are genuine issues of
27 material fact that preclude granting the Government’s motion.

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1 5. Similar to what the Court ordered in *Al-Haramain* (MDL Docket No. 537, page
2 23, lines 17-26), if necessary, at least some of Plaintiffs’ attorneys would seek a security
3 clearance in order to allow them to conduct discovery that may require such clearance in order to
4 protect national security.¹

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

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

15 8. Plaintiffs would seek further written and deposition discovery arising out of the
16 documents summarized in the accompanying Summary of Voluminous Evidence both to further
17 develop any facts raised by them and to address any claims that any of the information in those
18 documents requires authentication, is hearsay, or is otherwise inadmissible.

19 9. For instance, the Summary of Voluminous Evidence references the unclassified
20 nature of 17 paragraphs of notes of then White House Counsel Alberto Gonzales’ March 10,
21 2004 meeting with certain members of Congress known as the “Gang of Eight.” The notes
22 discuss legal concerns about the program. As the Inspector General of the Department of Justice
23 reported: “The NSA officials determined that 3 of 21 paragraphs in the notes contains SCI

24 _____
25 ¹ The *Al-Haramain* Order stated in pertinent part:

26 Unless counsel for plaintiffs are granted access to the court’s rulings and, possibly, to at least
27 some of defendants’ classified filings, however, the entire remaining course of this litigation will
28 be ex parte. This outcome would deprive plaintiffs of due process to an extent inconsistent with
Congress’s purpose in enacting FISA’s sections 1806(f) and 1810. Accordingly, this order
provides for members of plaintiffs’ litigation team to obtain the security clearances necessary to
be able to litigate the case, including, but not limited to, reading and responding to the court’s
future orders.

1 information about the NSA surveillance program [and] 1 paragraph contains SCI information
2 about signals intelligence.” Summary of Evidence at 36 (citing Office of the Inspector General,
3 *U.S. Dept. of Justice, Report of Investigation Regarding Allegations of Mishandling of Classified*
4 *Documents by Att’y Gen. Alberto Gonzales* (Sep. 2, 2008), at p. 10, n.14). Those notes
5 themselves are evidence, or at a minimum are likely to lead to the discovery of admissible
6 evidence, about the scope and legal justification for some portion of the alleged surveillance.

7 10. Similarly, testimony regarding issues discussed at the March 10, 2004 meeting in
8 Attorney General Ashcroft’s hospital room is not classified, since non-cleared personnel were
9 present. Summary of Evidence at 53 (citing *Oversight of the Department of Justice: Hearing*
10 *before the S. Comm. on the Judiciary, 110th Cong. at 67* (July 24, 2007)). Again, those issues are
11 either directly relevant to the surveillance alleged in this case or are likely to lead to the
12 discovery of admissible evidence about the facts of the surveillance that led to legal concerns
13 about it at the Department of Justice.

14 11. Plaintiffs would take depositions of and seek documents from the named sources
15 in the published reports filed herewith and described in the Summary of Voluminous Evidence,
16 regarding those sources’ personal knowledge of published or unpublished information or their
17 discussions with or knowledge of other sources of information.

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

21 13. Plaintiffs would seek discovery regarding the fact of the carriers’ interception and
22 disclosure of the communications and communications records of the telecommunications
23 companies’ customers, including those of the named Plaintiffs and class members.

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

1 15. Plaintiffs would request an inspection of the premises of AT&T's Folsom Street
2 facility under Fed. R. Civ. P. 34, including the WorldNet Internet room, the splitter cable, the
3 inside and outside of the splitter cabinet, and the area outside the SG3 Secure Room. Plaintiffs
4 would also request an inspection of the premises outside of other of AT&T's SG3 rooms, which
5 the record indicates exist in Atlanta, Seattle, San Jose, San Diego, and Los Angeles. Declaration
6 of Mark Klein ¶ 36 (Dkt. #85).

7 16. Plaintiffs would take the depositions (or obtain the sworn declarations) of current
8 or former AT&T employees with knowledge of, and who worked in, the SG3 Secure Room,
9 doing so in a manner that would protect the identities of these witnesses, as needed. Such
10 persons would include, but are not limited to: (1) James W. Russell, who filed a Declaration
11 dated April 10, 2006, under seal due to AT&T trade secret concerns, and (2) the named author of
12 certain exhibits to the Klein Declaration that were also filed under seal.

13 17. Plaintiffs would seek third-party discovery about the network infrastructure of
14 AT&T in order to confirm how Internet traffic is routed within its network and through fiber
15 optic splitters in the facility on Folsom Street in San Francisco other AT&T facilities in order to
16 confirm that all or nearly all of AT&T's customers are members of the class.

17 18. Plaintiffs would request an inspection of AT&T's facilities housing the Daytona
18 database and databases used for similar purposes at AT&T and other carriers.

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

21 20. Each of the topics of specific discovery outlined above is highly likely to yield
22 further evidence of genuinely disputed material facts relating to all of Plaintiffs' claims.
23 Specifically, the discovery would lead to evidence regarding the nature and scope of the
24 Government's surveillance program, the timing and substance of efforts to concoct a legal
25 justification for the program, the nonexistence of judicial or other legal authority for the
26 surveillance, the efforts to mislead Congress, the public and the FISA court about the illegal
27 aspects of the program, and the intention on the part of the individual defendants to violate the
28 Wiretap Act, SCA, FISA and the Fourth Amendment.

