

1 ELECTRONIC FRONTIER FOUNDATION  
CINDY COHN (SBN 145997)  
2 [cindy@eff.org](mailto:cindy@eff.org)  
LEE TIEN (SBN 148216)  
3 KURT OPSAHL (SBN 191303)  
KEVIN S. BANKSTON (SBN 217026)  
4 JAMES S. TYRE (SBN 083117)  
454 Shotwell Street  
5 San Francisco, California 94110  
Telephone: (415) 436-9333; Facsimile: (415) 436-9993  
6 KEKER & VAN NEST, LLP  
RACHAEL E. MENY (SBN 178514)  
7 [rmeny@kvn.com](mailto:rmeny@kvn.com)  
8 PAULA L. BLIZZARD (207920)  
MICHAEL S. KWUN (198945)  
9 AUDREY WALTON-HADLOCK (250574)  
710 Sansome Street  
10 San Francisco, California 94111-1704  
Telephone: (415) 391-5400; Facsimile: (415) 397-7188  
11 LAW OFFICE OF RICHARD R. WIEBE  
RICHARD R. WIEBE (SBN 121156)  
12 [wiebe@pacbell.net](mailto:wiebe@pacbell.net)  
425 California Street, Suite 2025  
13 San Francisco, California 94104  
Telephone: (415) 433-3200; Facsimile: (415) 433-6382  
14 THE MOORE LAW GROUP  
THOMAS E. MOORE III (SBN 115107)  
15 [tmoore@moorelawteam.com](mailto:tmoore@moorelawteam.com)  
228 Hamilton Avenue, 3<sup>rd</sup> Floor  
16 Palo Alto, California 94301  
17 Telephone: (650) 798-5352; Facsimile: (650) 798-5001  
Attorneys for Plaintiffs

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, 17<sup>th</sup> 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.<sup>1</sup> Plaintiffs have also filed several Notices of Additional Authorities

27

28 <sup>1</sup> 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)*).<sup>2</sup> 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

27 \_\_\_\_\_  
28 <sup>2</sup>Available at [http://www.washingtonpost.com/wp-srv/politics/documents/gonzalez\\_transcript\\_072407.html](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.

13

14

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

15

16

17

18

19

20

21

22

23

24

25

26

27

28