

1 ELECTRONIC FRONTIER FOUNDATION
 CINDY COHN (SBN 145997)
 2 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
 PAULA L. BLIZZARD (SBN 207920)
 8 pblizzard@kvn.com
 MICHAEL S. KWUN (SBN 198945)
 9 mkwun@kvn.com
 AUDREY WALTON-HADLOCK (SBN 250574)
 10 awaltonhadlock@kvn.com
 710 Sansome Street
 11 San Francisco, California 94111-1704
 Telephone: (415) 391-5400; Facsimile: (415) 397-7188
 12 LAW OFFICE OF RICHARD R. WIEBE
 RICHARD R. WIEBE (SBN 121156)
 13 wiebe@pacbell.net
 425 California Street, Suite 2025
 14 San Francisco, California 94104
 Telephone: (415) 433-3200; Facsimile: (415) 433-6382
 15 THE MOORE LAW GROUP
 THOMAS E. MOORE III (SBN 115107)
 16 tmoore@moorelawteam.com
 228 Hamilton Avenue, 3rd Floor
 17 Palo Alto, California 94301
 Telephone: (650) 798-5352; Facsimile: (650) 798-5001
 18 Attorneys for Plaintiffs

20 UNITED STATES DISTRICT COURT
 21 NORTHERN DISTRICT OF CALIFORNIA

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

24 Plaintiffs,

25 v.

26 NATIONAL SECURITY AGENCY, et al.,

27 Defendants.

Case No. C-08-4373-VRW

CLASS ACTION

**PLAINTIFFS' ADMINISTRATIVE
 MOTION FOR LEAVE TO FILE
 SUPPLEMENTAL BRIEF ON THE
 SCOPE OF FISA ACT PREEMPTION**

Local Rule 7-11

Judge: Vaughn R. Walker

Date Comp. Filed: September 18, 2008

1 Pursuant to Civil Local Rule 7-11, Plaintiffs hereby seek leave to file a supplemental
2 brief on the scope of the FISA Act’s preemption of the State Secrets Privilege, especially in light
3 of the Court’s questioning on that subject during the hearing on July 15, 2009.

4 Plaintiffs’ counsel left a message for defense counsel Mr. Coppolino on July 30,
5 informing him of this motion and request and offering that plaintiffs would agree that the
6 government could have 10 court days to respond with a brief of comparable length. Cohn Decl.,
7 ¶ 2. Counsel said that he would prefer to reserve the government’s position until he sees the
8 motion and brief. He also indicated that given his current schedule, if the Court were to grant
9 Plaintiffs motion he would seek at least thirty days to respond to the brief from the date that the
10 motion was granted. Cohn Decl., ¶ 3.

11 The Court has previously held that “FISA preempts the state secrets privilege in
12 connection with electronic surveillance for intelligence purposes.” *In re NSA Telecomm. Litig.*,
13 564 F. Supp. 2d 1109, 1111 (N.D.Cal. 2008). Moreover, “Section 1806(f) is ... how courts
14 should handle claims by the government that the disclosure of materials relating to or derived
15 from electronic surveillance would harm national security.” *Id.* at 1119. However, the Court has
16 also held that “FISA preempts or displaces the state secrets privilege, but only in cases within the
17 reach of its provisions.” *Id.* at 1124.

18 The issue raised by the Court at oral argument for the first time was whether Section
19 1806(f)’s procedure for determining the legality of electronic surveillance reaches all claims to
20 enforce the “exclusive means” of regulating electronic surveillance that Congress established
21 with the FISA Act—which now includes the Wiretap Act and the SCA in addition to title 50—or
22 merely the subset of those claims placed in title 50. Plaintiffs believe that 1806(f)’s procedures
23 apply to all aspects of Congress’s “exclusive means” for regulating electronic surveillance,
24 wherever the court must decide whether surveillance is legal and the government claims that
25 disclosure of related material would harm national security.

26 Plaintiffs’ supplemental brief presents new information from the legislative history of the
27 FISA Act and addresses the plain language and context of section 1806(f) more fully than
28 counsel was able to do at oral argument. It also articulates the clear limiting principles within

1 section 1806(f) that restrict its scope to the problem Congress was attempting to solve—ensuring
2 justiciability of surveillance hidden behind a claim of national security, regardless of the
3 statutory footing for either the surveillance or the challenge brought to the surveillance. We
4 believe that the supplemental brief will assist the Court as it considers the currently pending
5 motion to dismiss.

6 Dated: August 3, 2009

Respectfully submitted,

7
8
9 By: _____ /s/

10 ELECTRONIC FRONTIER FOUNDATION
11 CINDY COHN (SBN 145997)
12 LEE TIEN (SBN 148216)
13 KURT OPSAHL (SBN 191303)
14 KEVIN S. BANKSTON (SBN 217026)
15 JAMES S. TYRE (SBN 083117)
16 454 Shotwell Street
17 San Francisco, California 94110
18 Telephone: (415) 436-9333
19 Facsimile: (415) 436-9993

20 KEKER & VAN NEST, LLP
21 RACHAEL E. MENY (SBN 178514)
22 PAULA L. BLIZZARD (SBN 207920)
23 MICHAEL S. KWUN (SBN 198945)
24 AUDREY WALTON-HADLOCK (SBN 250574)
25 710 Sansome Street
26 San Francisco, California 94111-1704
27 Telephone: (415) 391-5400
28 Facsimile: (415) 397-7188

RICHARD R. WIEBE (SBN 121156)
LAW OFFICE OF RICHARD R. WIEBE
425 California Street, Suite 2025
San Francisco, California 94104
Telephone: (415) 433-3200
Facsimile: (415) 433-6382

THOMAS E. MOORE III (SBN 115107)
THE MOORE LAW GROUP
228 Hamilton Avenue, 3rd Floor
Palo Alto, California 94301
Telephone: (650) 798-5352
Facsimile: (650) 798-5001

Attorneys for Plaintiffs