CONSOLIDATED CASE NOS. 09-16676, 09-16677, 09-16679, 09-16682, 09-16683, 09-16684, 09-16685, 09-16686, 09-16687, 09-16688, 09-16690, 09-16691, 09-16692, 09-16693, 09-16694, 09-16696, 09-16697, 09-16698, 09-16700, 09-16701, 09-16702, 09-16704, 09-16706, 09-16707, 09-16708, 09-16709, 09-16710, 09-16712, 09-16713, 09-16717, 09-16719, 09-16720, 09-16723

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION
MDL NO. 06-1791-VRW

NO. 09-16676

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL, AND ERIC KNUTZEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLANTS,

V.

AT&T CORPORATION, AT&T, INC.,

DEFENDANTS-APPELLEES,

AND

UNITED STATES OF AMERICA,

DEFENDANT-INTERVENOR-APPELLEE.

AND CONSOLIDATED CASES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE VAUGHN R. WALKER, CHIEF UNITED STATES DISTRICT JUDGE, PRESIDING

REPLY BRIEF OF SUPPLEMENTING APPELLANTS JOLL (No. 09-16723), ANDERSON (No. 09-16720), HERRON (No. 09-16704), AND LEBOW (No. 09-16719)

(PRIOR APPEAL: Nos. 06-17132, 06-17137 (Pregerson, Hawkins, McKeown, Js.))

[*COUNSEL LISTED ON SIGNATURE PAGE*]

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INTRODUCTION

Plaintiffs-Appellants in the four above-captioned actions ("the Supplementing Appellants") for their reply in support of their supplemental brief argue as follows. For the reasons argued in their opening brief, this reply brief, and at oral argument, the Court should grant the relief requested by the Supplementing Appellants.

ARGUMENT

I. THE SUPPLEMENTING APPELLANTS DID NOT FAIL TO PRESERVE THEIR ARGUMENTS ON APPEAL.

In their Response Brief, the AT&T Defendants-Appellees (hereafter, "AT&T") argue that the Supplementing Appellants "Failed to Preserve Their Argument for Appeal" because they "did not raise their current argument based on their allegations of pre-September-2001 conduct before the district court had dismissed their complaints." (AT&T Response at 6).

AT&T conveniently overlooks the long history of this MDL proceeding. On December 15, 2009, the Supplementing Appellants filed a Motion for Leave to File a Supplemental Brief. Over the objections of Defendants-Appellees, the Court granted the Supplementing Appellants' motion on February 12, 2010. In granting leave, the Court allowed the Supplementing Appellants to brief their supplemental issues despite the fact that counsel for all plaintiffs did not argue the Supplementing Appellants' issues in the response brief they filed on behalf of all

plaintiffs at the district court level on October 16, 2008, (Dkt. No. 482), or in the joint appeal submitted to this Court by counsel for all Plaintiffs-Appellants on December 8, 2009.

It is hardly surprising that the Supplementing Appellants' allegations of pre-9/11 conduct were not included in the response to AT&T's motion to dismiss filed on behalf of all plaintiffs at the district court level as it was impracticable to simultaneously argue in a single brief, as roughly 35 plaintiffs did in their underlying complaints, that the illegal conduct did not commence until shortly after 9/11 and, as 4 plaintiffs somewhat contradictorily did in their own underlying complaints, that the illegal conduct pre-dated 9/11 by seven months. Recognizing this reality and the inherent procedural difficulties of complex litigation of this nature, this Court permitted supplemental briefing on the Supplementing Appellants' allegations of pre-9/11 conduct and their claims against the government.

II. THE DISTRICT COURT ERRED IN DENYING LEAVE TO SEEK RECONSIDERATION

AT&T goes on to argue that "The District Court did not abuse its discretion in denying leave to seek reconsideration… because plaintiffs' allegations of pre-September 2001 conduct were of dubious sufficiency and validity at best…" (AT&T Response at 8, 11). But whether or not Plaintiffs' allegations of pre-9/11 spying were capable of surviving a Fed. R. Civ. P. 12 (b) (6) motion to dismiss in

light of their clear existence outside the scope of the immunity purportedly conferred by FISAAA is an issue that requires full briefing consistent with basic notions of fundamental fairness and due process.

AT&T and the United States argue that the Supplementing-Appellants should have filed amended master complaints, but as argued earlier, no master complaint was ever filed against AT&T or the government so there was nothing to amend. There was no reason to amend the BellSouth master complaint as it already said all that it needed to say to avoid dismissal under Fed. R. Civ. P. 12.

III. THE SUPPLEMENTING APPELLANTS' CLAIMS OF PRE-9/11 CONDUCT WERE ERRONEOUSLY DISMISSED PURSUANT TO FISAAA.

AT&T finally resorts to sleight-of-hand in a last ditch effort to avoid the reality of its untenable position. In its June 23, 2006 Order, the District Court clearly explained that:

> "The court believes that the Attorney General has adequately and properly invoked section 802's immunity ***to the extent that the allegations of the master consolidated complaints turn on actions authorized by the president between September 11, 2001 and January 7, 2007."*** (E.R. 45, emphasis added).

This Court should not ignore the plain meaning of the District Court's opinion. By qualifying its belief that the Attorney General had adequately and properly invoked section 802's immunity in the way indicated above, the District Court also opined that the Attorney General had ***not*** adequately and properly

invoked section 802's immunity to the extent that the allegations of the master consolidated complaints ***did not*** turn on actions authorized by the president between September 11, 2001 and January 7, 2007.

The District Court also said:

> "Section 802's immunity provision may ***only*** be invoked with regard to suits arising from actions authorized by the president between September 11, 2001 and January, 2007." (ER 44-45, emphasis added).

AT&T's argues, shockingly, that the District Court must have meant something other than what it said it meant. Without having actually read the classified certification of the Attorney General submitted to the District Court, AT&T argues, "Taken out of context, the order's statement appears incorrect…" (AT&T Response at 12, n. 5). If AT&T thought the District Court's Order was "incorrect" it could have filed a cross-appeal but chose not to do so.

Notably, the United States in its own response brief did not join AT&T in arguing that the District Court's "statement appears incorrect". The United States is the only party to this litigation to have actually seen the classified certification of the Attorney General. If the United States, having read the certification, agreed with AT&T, which had not read the certification, that the District Court's statement was "incorrect" it would have surely corroborated AT&T's guess. But it did not, confirming that the District Court did not err in finding that the Attorney General adequately and properly invoked Section 802 only to the extent that the

allegations of the master consolidated complaints turned on actions authorized by the president between September 11, 2001 and January 7, 2007.

IV. THE DISTRICT COURT ERRED IN DISMISSING *LEBOW'S* AND *ANDERSON'S* CLAIMS AGAINST THE GOVERNMENT.

While the District Court did not explain why it dismissed *Lebow's* and *Anderson's* claims against the Government, the most likely explanation is that the District Court's staff, in sorting the consolidated cases into cases brought against telecommunications carriers and cases brought against the United States, overlooked the fact that two of the cases, *Lebow* and *Anderson*, made allegations against ***both*** telecommunications carriers and the government and placed the two cases together with the over thirty cases making claims only against telecommunications carriers.

In its response brief, the United States acknowledges that "Section 802 applies only to claims against persons assisting the government; it does not apply to claims against the government itself. See 50 U.S.C. § 1885a; S. Rep. 110-209 at 8." (United States Response at 9). The United States goes on to argue that, despite this undisputed fact, the claims against the government alleged in *Lebow* and *Anderson* should, nevertheless, be dismissed because the NSA is named only as a "nominal defendant" in *Lebow* and because "Dismissal of the claims against the government in *Anderson* on standing grounds would be warranted for the same basic reasons as in *Jewel* and *Shubert*." (United States Response at 10).

But, of course, Jewel and Shubert were different suits brought by different plaintiffs with different counsel making different allegations. The *Anderson* and

Lebow plaintiffs are not in privity with the *Jewel* and *Shubert* plaintiffs in any way. To uphold the erroneous dismissal of their claims against the government, which undisputedly does not enjoy FISAAA immunity, would be a clear violation of the most basic notions of due process and fundamental fairness.

Moreover, the *Jewel* and *Shubert* cases were fully briefed and argued before the District Court on properly brought Fed. R. Civ. P. 12 motions to dismiss for lack of standing as opposed to the motion at issue here, which was a motion to dismiss based on the immunity purportedly given to the telecommunications companies. Furthermore, while it is true that the *Jewel* and *Shubert* cases have been dismissed and are currently being appealed, the *al-Haramain* and *Center for Constitutional Rights* cases are still pending before the District Court. In fact, the Plaintiffs in the *al-Haramain* case recently won summary judgment against the United States in their case. Dkt. No. 721.

CONCLUSION

The District Court erred in dismissing the Supplementing Appellants' claims alleging pre-9/11 spying and alleging claims against the United States because the immunity legislation does not purport to confer immunity for telecommunications carrier assistance provided prior to 9/11 or for claims against the United States. This Court should reverse the District Court at least with respect to these issues and remand at least the Supplementing Appellants' claims alleging pre-9/11 spying and claims against the United States to the District Court or to the four cases' originating transferor courts.

Dated: May 3, 2010

Respectfully submitted,

By: /s/ Steven E. Schwarz
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This reply brief complies with the type-volume limitation of Fed. R. App. Pro. 32(a)(7)(B) and Ninth Circuit Rule 32-1, as augmented by the limitation contained in the Order dated March 9, 2010, because it contains 1,397 words, excluding the parts of the brief exempted by Fed. R. App. Pro. 32(a)(7)(B)(iii).

This reply brief complies with the typeface requirements of Fed. R. App. Pro. 32(a)(5) and the type style requirements of Fed. R. App. Pro. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

s/ Steven E. Schwarz

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CERTIFICATE OF SERVICE

I, Steven E. Schwarz, an attorney, hereby certify that, on this 3rd day of May, 2010, I served the Reply Brief of Supplementing Appellants Joll (No. 09-16723), Anderson (No. 09-16720), Herron (No. 09-16704), and Lebow (No. 09-16719) on opposing counsel by using the Court's ECF electronic filing system which will send a copy to all parties registered with that system.

By: s/ Steven E. Schwarz