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UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

15

SAN FRANCISCO DIVISION

16

TASH HEPTING, GREGORY HICKS, )  
 CAROLYN JEWEL and ERIK KNUTZEN, on )  
 17 Behalf of Themselves and All Others Similarly )  
 Situated,, )

No. C-06-0672-VRW

18

Plaintiffs, )

**CLASS ACTION**

19

v. )

**PLAINTIFFS' OPPOSITION TO  
 ADMINISTRATIVE MOTION FOR  
 ORDER SHORTENING TIME AS TO  
 AT&T'S MOTION TO DISMISS**

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AT&T CORP., et al., )

**[CIVIL L.R. 7-11 AND 6-3(C)]**

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Defendants. )

Courtroom: 6, 17th Floor  
 Judge: Hon. Vaughn Walker

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1 Pursuant to Local Rule 6-3(c), plaintiffs hereby oppose defendants' Administrative Motion  
2 to Set Hearing Dates on Defendants' Motions to Dismiss.

3 The Administrative Motion seeks to accelerate the hearing on the motions to dismiss filed  
4 by defendants AT&T Corp. and AT&T Inc., by scheduling hearings on defendants' motions prior  
5 to the June 21 hearing set by this Court for plaintiffs' motion for a preliminary injunction and  
6 before the first open date on this Court's calendar, currently June 29, 2006.<sup>1</sup> This Administrative  
7 Motion should be denied because defendants have failed to provide good cause in support of their  
8 request for an expedited schedule and hearing. Instead, the hearings on defendants' motions, along  
9 with the hearing on government's announced motion to dismiss, should be set on the next available  
10 Law and Motion date, according to the ordinary processes of this Court.

11 **1. Background**

12 This case is a class action brought on behalf of all residential customers and subscribers of  
13 defendants AT&T Corp. and AT&T Inc. ("AT&T"), alleging, among other things, that AT&T is  
14 violating the Fourth Amendment of the United States Constitution and the federal wiretap statutes  
15 by conducting, on behalf of the government, warrantless, suspicionless searches and seizures of the  
16 domestic and international communications of millions of Americans.

17 On March 31, 2006, plaintiffs filed a preliminary injunction motion seeking interim relief  
18 on their claims. (Dkt. 16). The preliminary injunction motion presents evidence that the massive  
19 suspicionless interception by defendants of many millions of domestic as well as foreign  
20 communications is a surveillance program far broader than the one admitted to by the government  
21 so far, which is purportedly limited to foreign communications in which there is a reasonable  
22 suspicion that either the sender or the receiver is connected to Al Qaeda. The motion also contends  
23 that defendants have received no court order or other judicial authorization for this expanded  
24 program, and that defendants have received no executive branch authorization that comports with  
25 the Foreign Intelligence Surveillance Act, the Wiretap Act, or any other congressionally-

26 <sup>1</sup> The Motion of Defendant AT&T Corp. to Dismiss Plaintiffs' Amended Complaint (the "AT&T  
27 Corp. Motion") and the Motion of Defendant AT&T Inc. to Dismiss Plaintiffs' Amended  
28 Complaint (the "AT&T Inc. Motion") will be referred to in this Opposition collectively as the  
"Motions to Dismiss."

1 established procedure.

2 The preliminary injunction motion is supported by evidence including three internal AT&T  
3 documents, as well as testimony by a former AT&T employee and by an expert witness who  
4 explains how the documents and witness testimony support plaintiffs' claims. On April 26, this  
5 Court specially set the preliminary injunction motion for hearing on June 21, 2006, at 10:00 AM.  
6 Order Granting in Part AT&T's Motion to Shorten Time (Dkt. 78).

7 On April 28, defendants filed two Motions to Dismiss. The AT&T Corp. Motion (Dkt. 86)  
8 seeks to dismiss the case under various alternative theories of immunity and standing raised under  
9 FRCP 12(b)(6). The AT&T Inc. Motion (Dkt. 79) asserts that this Court lacks jurisdiction over  
10 AT&T Inc. Also on April 28, the United States government ("DOJ") filed a Statement of Interest  
11 pursuant to 28 U.S.C. § 517, stating its intention to intervene and move to dismiss on May 12 on  
12 the basis of the state secrets privilege. (Dkt. 82). On May 1, plaintiffs filed a letter brief regarding  
13 their request for an order compelling compliance by AT&T with limited discovery on the matters  
14 raised by the preliminary injunction motion. (Dkt. 94). Defendants responded on May 2 (Dkt. 103)  
15 requesting that the issue be discussed at the May 17, 2006 Case Management Conference set by the  
16 Court.

17 **2. AT&T Offers No Proper Basis to Accelerate the Court's Schedule**

18 AT&T has given no reason why it should receive special treatment and jump to the head of  
19 the line in the Court's schedule, taking a place on the already-full dates on this Court's Law and  
20 Motion calendar. If the AT&T Motions are heard on June 29, the next available Law and Motion  
21 date, it will neither substantially prejudice AT&T nor impair judicial economy.

22 Furthermore, while plaintiffs have been considerate of AT&T's requests to keep to a  
23 normal schedule and have not sought to expedite the briefing on the motion for a preliminary  
24 injunction, this should not be taken as a sign either that the widespread harms caused by the  
25 massive scope of AT&T's illegal conduct are trivial or that plaintiffs do not seek to stop AT&T's  
26 illegal activities as soon as possible. Plaintiffs allege that every day, millions of AT&T customers  
27 are having their communications illegally diverted and searched, and each day that passes only  
28 increases the number of private communications violated.

1 Moreover, the interaction of the schedule set by the Court for plaintiffs’ preliminary  
 2 injunction motion and AT&T’s proposed accelerated schedule for its motions to dismiss would  
 3 mean that AT&T will have over six weeks to respond to plaintiffs’ preliminary injunction motions  
 4 while plaintiffs would have less than three weeks to respond to AT&T’s two motions to dismiss,  
 5 which together raise numerous legal and factual issues.

6 While AT&T’s administrative motion does not address the putative motions to be filed by  
 7 the DOJ on May 12, these motions need not change this schedule either. The government proposes  
 8 to assert the state secrets privilege – an evidentiary privilege. *See United States v. Reynolds*, 345  
 9 U.S. 1, 6-7 (1953) (“the privilege against revealing military secrets, a privilege which is well  
 10 established in the *law of evidence*.” (emphasis added)). Until such time as state secrets are in  
 11 danger of actually being revealed through discovery, the state secret privilege has no application.  
 12 That threshold event has not yet occurred, and thus, there is no reason or urgency for the  
 13 government’s motion to go forward on the same schedule as the parties’ motions.

14 Finally, plaintiffs would be prejudiced if the Court granted both defendants’ request for a  
 15 June 8 hearing on its two dispositive motions and the government’s request that its own dispositive  
 16 motion be filed on May 12 and heard “in conjunction with” the parties pending motions (Dk. 82-1,  
 17 page 5:9-11). Taken together, these requests would unfairly require plaintiffs to respond to three  
 18 complex dispositive motions at the same time.<sup>2</sup>

19 **3. Plaintiffs’ Proposed Schedule**

20 Plaintiffs propose the following schedule, incorporating the schedule previously set by this  
 21 Court with the new motions:

May 18, 2006	AT&T’s Opposition to Plaintiffs’ Motion for Preliminary Injunction (previously set by the Court)
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 26 <sup>2</sup> Indeed, if the government’s motion is set for hearing on June 8 along with the defendants as the  
 27 government seems to request, it would mean that the government’s motion is heard on less than the  
 28 35 days notice required by Local Rule 7-2(a) and would give plaintiffs less than a week from the  
 filing of the motion on May 12 until their opposition papers are due on May 18.

1 2	May 25, 2006	Plaintiffs' Reply to AT&T's Opposition to Preliminary Injunction Motion (previously set by the Court)
3	June 8, 2006	Plaintiffs' Oppositions to AT&T's Motions to Dismiss
4	June 15, 2006	AT&T's Replies to Plaintiffs' Oppositions to Motions to Dismiss
5	June 21, 2006	Hearing on Motion for Preliminary Injunction (previously set by the Court)
6 7	June 29, 2006	Hearing on Motions to Dismiss (pursuant to the Court's current law and motion calendar)

8  
9 The DOJ's motions to intervene and dismiss can be heard at the next available date on the  
10 Court's Law and Motion calendar at the time of filing.

11 **4. Conclusion**

12 For the reasons stated above, plaintiffs respectfully request that defendants' Administrative  
13 Motion be DENIED.

14  
15 DATED: May 3, 2006

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the following non-CM/ECF participants:

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