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12 **UNITED STATES DISTRICT COURT**  
 13 **NORTHERN DISTRICT OF CALIFORNIA**

14 TOM CAMPBELL, *et al.*

15 Plaintiffs

16 v.

17 AT&T COMMUNICATIONS OF CALIFORNIA,  
 18 corporation, *et al.*

19 Defendants.

) C-06-3596-VRW

) **NOTICE OF MOTION AND**  
 ) **MOTION TO INTERVENE**  
 ) **BY THE UNITED STATES**  
 ) **OF AMERICA**

) Date: August 24, 2006  
 ) Time: 2:00 p.m.  
 ) Courtroom: 6

) Judge Vaughn R. Walker

1 **NOTICE OF MOTION AND MOTION TO INTERVENE**

2 PLEASE TAKE NOTICE that, on August 24, 2006,<sup>1</sup> before the Honorable Vaughn R.  
3 Walker, United States of America will move, pursuant to Rule 24(a) of the Federal Rules of Civil  
4 Procedure, for an order allowing the United States to intervene in this action for the purpose of  
5 ultimately seeking dismissal. The grounds in support of this motion are set out in the United  
6 States' memorandum below.

7 **MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES**

8 **INTRODUCTION**

9 Plaintiffs, subscribers of various communications services of AT&T, allege that AT&T  
10 participated in a Government program in which AT&T allegedly provided certain telephone  
11 records to the National Security Agency ("NSA") in violation of the California Constitution and  
12 state statute. Through the present motion, the United States seeks to intervene in this action,  
13 pursuant to Federal Rule of Civil Procedure 24(a), for the purpose of ultimately seeking dismissal  
14 of this action. For the reasons set forth below, the United States clearly meets all the  
15 requirements for intervention under Rule 24(a): (1) its application for intervention is timely; (2)  
16 the United States has a significantly protectable interest relating to the subject matter of this  
17 action, *i.e.*, the preservation of state secrets; (3) the United States needs to intervene because this  
18 action challenges alleged government surveillance activities; and (4) no other party in this  
19 lawsuit could adequately represent the United States' interest. Accordingly, the United States'  
20 motion to intervene should be granted.

21 **FACTUAL BACKGROUND**

22 A. **The Terrorist Surveillance Program**

23 The President has explained that, following the devastating events of September 11,  
24 2001, he authorized the National Security Agency ("NSA") to intercept international  
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26 <sup>1</sup> The United States has filed an Administrative Motion to Set Hearing Date for the United  
27 States' Motion to Intervene, requesting that the Court set the hearing date for this motion for  
28 August 24, 2006, – the present hearing date for Plaintiffs' motion to remand and AT&T's motion  
for a stay.

1 communications into and out of the United States of persons linked to al Qaeda or related  
2 terrorist organizations.<sup>2</sup> The Attorney General has further explained that in order to intercept a  
3 communication, there must be “a reasonable basis to conclude that one party to the  
4 communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an  
5 organization affiliated with al Qaeda.”<sup>3</sup> The purpose of these intercepts is to provide the United  
6 States with an early warning system to detect and prevent another catastrophic terrorist attack on  
7 the United States. *See* President’s Press Conference. The President has stated that the NSA  
8 activities “ha[ve] been effective in disrupting the enemy, while safeguarding our civil liberties.”  
9 *Id.*

10 **B. Allegations in Plaintiffs’ Complaint**

11 Following certain news articles, Plaintiffs filed this action, on May 26, 2006, in  
12 California Superior Court alleging that AT&T participated in a Government program in which  
13 AT&T allegedly provided certain telephone records to the National Security Agency (“NSA”) in  
14 violation of the Article I of the California Constitution and section 2891 of the Public Utilities  
15 Code. Compl. ¶¶ 1-47. Plaintiffs claim that, on or about May 11, 2006, they learned from  
16 newspaper reports that since shortly after September 11, 2001, AT&T has been providing to the  
17 NSA data relating to telephone calls made to and from AT&T’s California residential telephone  
18 customers. *Id.* ¶¶ 1, 19. They claim that AT&T is providing NSA with the personal calling  
19 records covering hundreds of millions of telephone calls made by millions of AT&T’s California  
20 residential customers, including plaintiffs. *Id.* ¶¶ 2, 19-21.

21 Plaintiff assert that the NSA uses and continues to use the calling records “to create a  
22 massive database to search for patterns of social interaction that might warrant further  
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25 <sup>2</sup> *See* Press Conference of President Bush (Dec. 19, 2005), *available at*  
26 <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html> (“President’s Press  
Conference”).

27 <sup>3</sup> Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden,  
28 Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at*  
<http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>.

1 investigation.” *Id.* ¶ 19. They claim that the database is accessible by the NSA, the Central  
2 Intelligence Agency, the Federal Bureau of Investigation, and the Drug Enforcement Agency. *Id.*  
3 ¶ 22. Plaintiffs further assert that AT&T has made these telephone records available to the NSA  
4 on a voluntary basis and not under compulsion of any legal process or by obtaining permission  
5 from its customers. *Id.* ¶ 23. Plaintiffs assert that California residential telephone customers,  
6 some of which requested that AT&T not provide any information to the NSA without a warrant,  
7 were not notified by AT&T that their personal call information was being made available to the  
8 NSA or other government agencies. *Id.* ¶ 29.

9 Plaintiffs seek an order that, *inter alia*, enjoins AT&T from “providing any customer  
10 calling records to the NSA” and orders AT&T “to disclose to each customer what files or records  
11 of that customer have been shared with any third party, including the dates and recipients of any  
12 such disclosure.” Complaint, Prayer for Relief.

13 C. **Procedural History**

14 On May 24, 2006, two days prior to the filing of this action, Verizon Communications  
15 Inc. (“Verizon”) submitted to the Judicial Panel on Multidistrict Litigation (“JPML”) a motion  
16 for transfer and coordination pursuant to 28 U.S.C. § 1407. That motion requests that the JPML  
17 (1) transfer 20 virtually identical purported class actions (pending before 14 different federal  
18 district courts) to a single district court; and (2) coordinate those actions for pretrial proceedings  
19 pursuant to 28 U.S.C. § 1407. Because this case was filed after Verizon’s motion for transfer  
20 and coordination, it was not subject to the original motion, but was noted to the JPML as a  
21 potential tag along action on June 6, 2006. The number of cases raising similar issues continues  
22 to increase and now totals well over 30 actions. A hearing on the motion for transfer and  
23 coordination before the JPML was held on July 27, 2006; that motion is pending.

24 On June 6, 2006, AT&T filed a notice of removal in this action, and, on June 30, 2006,  
25 moved to stay this action in light of the pending JPML proceedings. Plaintiffs moved to remand  
26 the case on July 5, 2006. A hearing on these motions is set for August 24, 2006.

27 Contemporaneous with this motion, the United States has filed a Statement of Interest in  
28 Opposition to Plaintiffs’ Motion to Remand.

**ARGUMENT**

**THE UNITED STATES IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT**

Rule 24(a) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). A potential intervenor must meet four requirements to satisfy Rule 24(a): “(1) the application for intervention must be timely; (2) the applicant must have a ‘significantly protectable’ interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect that interest; and (4) the applicant’s interest must not be adequately represented by the existing parties in the lawsuit.” *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001) (citing *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)). The Ninth Circuit generally construes Rule 24(a) liberally in favor of potential intervenors. *Southwest Ctr. for Biological Diversity*, 268 F.3d at 818; *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (“the requirements for intervention are broadly interpreted in favor of intervention”). The United States clearly meets all the standards for intervention.<sup>4</sup>

First, there should be no question that the Government’s motion to intervene is timely within the meaning of Rule 24. “In determining whether a motion for intervention is timely, we consider three factors: ‘(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.’” *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (quoting *County*

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<sup>4</sup> This Court granted the United States’ motion to intervene in the related suit, *Hepting v. AT&T Corp.*, No. C 06-0672-VRW (N.D. Cal.).

1 *of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986)). This case is only in its initial  
2 stages. Plaintiffs filed their Complaint on May 24, 2006 in California Superior Court. Docket  
3 No. 1. AT&T filed a notice of removal on June 6, 2006, and moved to stay this action in light of  
4 the pending JPML proceedings on June 30, 2006. Docket Nos. 1 &13. And Plaintiffs moved to  
5 remand the case on June 30, 2006. *See* Docket No. 14. A hearing on these motions is set for  
6 August 24, 2006. The United States has thus moved to intervene and filed a Statement of  
7 Interest in Opposition to Plaintiffs' Motion to Remand during the pending motion practice and  
8 before any scheduled hearing date in this case.<sup>5</sup> There can be no dispute that this motion is  
9 timely.

10 Second, the United States clearly has an interest relating to the subject matter of this  
11 action. This case involves a challenge to AT&T's alleged role in alleged foreign-intelligence  
12 surveillance activities involving the NSA. The United States intends to assert the state secrets  
13 privilege in this matter, and is hereby moving to intervene for the purpose of ultimately moving  
14 to dismiss the action.<sup>6</sup> Because the lawsuit challenges alleged intelligence activities of the  
15 United States and because the United States intends to assert the state secrets privilege over  
16 information at issue, the government's interest satisfies requirements of Rule 24(a).

17 Third, for these very reasons – that the lawsuit challenges alleged activities of the United  
18 States and that the United States intends to assert the state secrets privilege – the United States  
19 intends to seek dismissal of this action. It is appropriate to permit the United States to intervene  
20 to seek such dismissal. *See Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546-48 (2nd  
21 Cir. 1991) (United States intervened and successfully sought dismissal of the action based on the  
22 assertion of the state secrets privilege); *Fitzgerald v. Penthouse Int'l, Ltd.*, 77 F.2d 1236, 1239  
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24 <sup>5</sup> As explained in the Statement of Interest, because the United States seeks to intervene  
25 in this case, the United States, upon intervention, has an independent right to remove this action  
26 to federal court under 28 U.S.C. § 1442(a), and thus, *inter alia*, Plaintiffs' Motion to Remand  
should be denied.

27 <sup>6</sup> The state secrets privilege permits the Government to protect against the unauthorized  
28 disclosure in litigation of information that may harm national security interests. *See United*  
*States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

1 (4th Cir. 1985) (court allowed intervention where United States has a national interest in  
2 proceedings); *see also Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (“‘if the very  
3 subject matter of the action’ is a state secret, then the court should dismiss the plaintiff’s action  
4 based solely on the invocation of the state secrets privilege”) (quoting *Reynolds*, 345 U.S. at 11  
5 n. 26).

6 Finally, the United States’ interest is not adequately represented by the parties to the  
7 litigation. In determining whether a potential intervenor’s interests will be adequately  
8 represented by an existing party, courts consider: “(1) whether the interest of a present party is  
9 such that it will undoubtedly make all the intervenor’s arguments; (2) whether the present party is  
10 capable and willing to make such arguments; and (3) whether the would-be intervenor would  
11 offer any necessary elements to the proceedings that other parties would neglect.” *Southwest Ctr.*  
12 *for Biological Diversity*, 268 F.3d at 822. The intervenor’s burden of showing that the existing  
13 parties may not adequately represent its interest is “minimal,” and the potential intervenor “need  
14 only show that representation of its interests by existing parties ‘may be’ inadequate.” *Id.* at 822-  
15 23 (citing *Trbobich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). The court’s focus  
16 should be on the “subject of the action.” *Southwest Center for Biological Diversity*, 268 F.3d at  
17 823 (citation omitted).

18 None of the parties has either the obligation or the ability to assert the state secrets  
19 privilege in this litigation. The state secrets privilege belongs to the government alone and  
20 cannot be asserted by private citizens. *See Reynolds*, 345 U.S. at 7-8 (state secrets privilege must  
21 be asserted by head of department which has control over issue). Indeed, the parties are not  
22 aware of the breadth of the information covered by the privilege, and because information  
23 covered by the privilege is classified, they would, in any event, be unable to present the issues to  
24 the Court effectively and properly. Moreover, the parties’ interest may well be in the *disclosure*  
25 of state secrets to the extent that doing so might assist them in presenting their claims or defenses  
26 fully to vindicate their own private interests. Thus, only the United States is in a position to  
27 protect against the disclosure of information over which it intends to assert the state secrets  
28 privilege, and the United States is the only entity properly positioned to explain to the Court why

1 continued litigation of the matter threatens the national security. Accordingly, the United States  
2 should be permitted to intervene for the purpose of ultimately moving to dismiss this action on  
3 state secrets grounds.

4 Having satisfied the requirements of Rule 24(a), the United States should be allowed to  
5 intervene as of right.<sup>7</sup>

6 **CONCLUSION**

7 Accordingly, the United States respectfully requests that the Court grant its motion to  
8 intervene pursuant to Fed. R. Civ. P. 24(a).

9 Respectfully submitted,

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24 Dated: August 4, 2006

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25  
26  
27 <sup>7</sup> In the alternative, Rule 24(b) allows for permissive intervention where the motion is  
28 timely, the party has an interest in the litigation, and there is no undue delay or prejudice to the  
parties in allowing the intervention. See Fed. R. Civ. P. 24(b). As the discussion above  
demonstrates, the government has met these standards for permissive intervention.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **MOTION TO INTERVENE BY THE UNITED STATES OF AMERICA** with the Court's CM/ECF system and was served thereby this 4th day of August 2006 on:

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