UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EHAB ELMAGHRABY and JAVAID IQBAL, Plaintiffs, vs. JOHN ASHCROFT, et al. Defendants.	)	04 CV 1809 (JG)(SMG)
IBRAHIM TURKMEN, et al., Plaintiffs, vs. JOHN ASHCROFT, et al., Defendants.	)	02 CV 2307 (JG)(SMG)

UNITED STATES' REPLY IN SUPPORT OF ITS OBJECTIONS TO
MAGISTRATE JUDGE GOLD'S ORDER ENTERED ON MAY 30, 2006

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INTRODUCTION

In their opposition, plaintiffs state that they "have no reason to doubt" that the Department of Justice is "ordinarily scrupulous in its efforts to avoid intercepting an adversary's attorney-client communications" and that, if such intercepts occur, the Department "insulates those with knowledge of the intercepts from involvement in any pending . . . litigation." Plaintiffs' Memorandum in Opposition to the United States Objections to the Order of Magistrate Gold Entered May 30, 2006 (Docket No. 520-1)(Opp. Mem.) at 1. Further, plaintiffs do not articulate any basis for believing that Department of Justice attorneys have deviated or would deviate from these well established practices in the current litigation. To the contrary, the United States has gone above and beyond its "ordinarily scrupulous" efforts by expressly and affirmatively committing on the record that no intercepts of plaintiffs' attorney-client communications would be used in the defense of these actions. Additionally, the United States has agreed in principle to the use of a witness statement, crafted *sua sponte* by the Magistrate, designed to ensure that any witness who had access to classified information pertaining to any such communications would not reveal it to attorneys representing the United States.

Plaintiffs have failed to show why these commitments are insufficient to alleviate any concerns they may have regarding the Terrorist Surveillance Program (TSP). Likewise, they have failed to show why this Court should credit their unsubstantiated speculation of harm and wholly disregard the United States' legitimate national security concerns. Accordingly, this Court should vacate the Magistrate's order to the extent that it requires additional disclosures beyond those already made. At the very least, the Court should stay execution of the order until resolution of *Center for Constitutional Rights, et al. v. George W. Bush, et al.*, Civil Action No.

06 CV 313 (S.D.N.Y.) (*CCR*), which raises similar disclosure issues and which squarely presents the challenge to the TSP that plaintiffs are trying to import into this tort litigation.

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED ANY NEED FOR THE INFORMATION THAT THE MAGISTRATE ORDERED DISCLOSED.

As the United States explained in its opening brief, plaintiffs' alleged concerns regarding monitoring have evolved over the past four months. On March 24, 2006, plaintiffs demanded only that the United States certify that no such intercepts of attorney-client communications "have been or will be revealed to the United States' trial team or used in the defense of this action." *See* Plaintiffs' letter (*Turkmen* Docket No. 478) at 3. Once the United States addressed those concerns – and there is no dispute that it did – plaintiffs demanded more. Specifically, they sought disclosure of (a) whether the intercepts have been or will be revealed to any supervisor or witness, and (b) whether anyone on the trial team, any supervisor, or any witness is aware of the mere fact that an interception of attorney-client communications took place. *Id.*

Nowhere in their 30-page brief do plaintiffs explain their escalating demands. Although they try to argue that the additional disclosures are needed to dispel their "fears," Opp. Mem. at 14, they never explain what, precisely, those fears are in light of the United States' commitments or why they did not possess those fears four months ago. Plaintiffs escalating demands are particularly unjustified because, as noted, plaintiffs acknowledge that the Department of Justice is "ordinarily scrupulous in its efforts to avoid intercepting an adversary's attorney-client communications," and that, if such intercepts occur, the Department "insulates those with knowledge of the intercepts from involvement in any pending . . . litigation." Opp. Mem. at 1.

Plaintiffs never give any indication of what happened since March 24, 2006, that would lead them to believe that the United States is departing from its "ordinarily scrupulous" behavior. Indeed, all that has happened since then is that the United States fully complied with the disclosure that plaintiffs first requested.

Perhaps recognizing that they have no need for additional disclosures, plaintiffs try to avoid the issue by arguing waiver. They misrepresent to the Court that the United States "never raised below" its argument that "plaintiffs have not shown any need for the information." *See* Opp. Mem. at 4-5. In its letter to the Magistrate dated April 13, 2006, the United States expressly stated that "any reasonable concerns should have been satisfied" by the government's prior disclosures and that "[t]here is simply no need for further inquiry into whether anyone is aware of the mere existence or non-existence of any alleged interceptions." U.S. Letter dated April 13, 2006 (*Turkmen* Docket No. 485) at 2. There was no waiver.

At any rate, plaintiffs' arguments concerning why they need the discovery at issue are unavailing.[1] Their contention that supervisors might "instruct[]" the trial team to take certain litigation stances based in part on intercepted information, Opp. Mem. at 15, is completely undercut by the United States' commitment that "no such intercepts will be used in the defense

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[1] As a preliminary matter, plaintiffs' argument regarding the standard of review should be rejected. Plaintiffs' argue that, because the issue presented is not dispositive, the standard for reviewing the May 30th Order is clearly erroneous or an abuse of discretion. *See* Fed. R. Civ. P. 72(a). However, because the issue is whether the Magistrate had the authority to order the United States to disclose potentially classified information, this matter concerns a legal question and should be reviewed *de novo*. *See United States v. Kliti,* 156 F.2d 150, 152 (2d Cir. 1998); *Thomas v. Texaco, Inc.*, 998 F. Supp. 368, 369 (S.D.N.Y. 1998); *AAOT Foreign Economic Association (VO) Technostroyexport v. International Development and Trade Services, Inc.*, 1999 WL 970402 (Oct. 25, 1999 S.D.N.Y.). In any event, under either standard of review, the Magistrate's decision should be vacated to the extent that it requires additional disclosures.

of the action."[2] This representation (which is subject to Rule 11 of the Federal Rules of Civil Procedure) was made on behalf of the United States, not just the trial team, and thus it binds all government officials. No one – not the trial team, not the supervisors, not anyone – will use such intercepts in the defense of this action. Accordingly, even if the supervisors are aware of any intercepts, they cannot instruct the trial team to take litigation positions based on anything gleaned from those intercepts.

In essence, plaintiffs' contention that the supervisors will "instruct" the trial team is premised on the unstated and unsubstantiated assumptions that (1) the supervisors will flout the representation to the court (and all of the laws prohibiting the unauthorized disclosure of classified information, *see, e.g.,* 18 U.S.C. § 798; *see also* United States' Objections at 20, n. 8.), and that (2) the trial team will flout the representation (and laws) as well, or at least be tricked into using the information without their knowledge. Plaintiffs never try to justify these assumptions, which are effectively allegations of bad faith and disrespect for judicial authority. Moreover, plaintiffs never explain why the supervisors or the trial team would use classified information obtained from the TSP merely to win a tort suit challenging conditions of confinement. As explained in the United States's opening brief, the TSP is a critical tool designed to help prevent another al Qaeda attack, and plaintiffs have offered no basis to believe that any government official would risk compromising this invaluable asset in order to avoid an

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[2] Plaintiffs also argue that "'use in the defense' of this case'" is inadequate because it is unclear what it includes and might not include settlement decisions. The United States notes that it used this phrase because the Magistrate and plaintiffs themselves used it in articulating the discovery requests. *See* Transcript, dated March 7, 2006, at 31; *see* Plaintiffs' March 24, 2006 Letter (*Turkmen* Docket No. 478) at 3. In any event, the United States can confirm that its representation extends to settlement decisions.

alleged monetary liability. Finally, plaintiffs' argument is based on the assumption that, even though plaintiffs are allegedly unconnected to terrorism, the United States has nonetheless monitored their conversations based on the mistaken belief that they are associated with al Qaeda. Plaintiffs have no basis for this speculation, and the Court should not countenance it.

For the same reasons, this Court should reject plaintiffs' demand for disclosures regarding potential witnesses. Plaintiffs offer no basis for believing that the witnesses will flout the United States' representation on not using any intercepts (and simultaneously place the TSP at risk) by manipulating the trial team into using the intercepts. Indeed, plaintiffs' alleged concerns regarding witnesses are even less valid than their concerns regarding supervisors, because witnesses are in no position to "instruct[]" the trial team to do anything and because plaintiffs assert that they are not "questioning the witness's good faith." Opp. Mem. at 16.

Accordingly, even the proposed witness statement is unnecessary. But even if the Court were to conclude that additional assurances were needed, the witness statement would more than suffice. Plaintiffs contend that they need to "test" a witness's statements because "[c]ertain of the contemplated affirmations are not even within the witness's capacity to make at this time." *Id.* at 16 (emphasis added). However, this argument is not a challenge to the witness statement itself, but rather to the United States' very sensible proposal to limit discovery in light of the fact that government employees may not confirm or deny the existence of classified information. *See* United States' Objections at 26. Further, this argument at most justifies the duty to update that the Magistrate imposed. *See* Order at 11 ("The government's duty to respond is, of course, a continuing one, and any responses must be supplemented as . . . additional responsive information comes to light."). It does not warrant discarding the entire witness statement or

granting the discovery plaintiffs seek. If a witness is unable to predict "what questions plaintiffs' counsel will ask at depositions" or "subsequently has his or her recollection refreshed," Opp. Mem. at 16, and if the witness subsequently determines that his prior witness statement is inaccurate, he can so inform counsel.[3] Additionally, the witness statement itself provides that if a witness becomes aware of the substance of intercepted communications "in the future," he will not reveal them to trial counsel. In any event, it is hard to believe that any witness would have trouble making the representation "at this time." The witness does not have to engage in a complex analysis of "whether plaintiffs' rights are implicated," as plaintiffs suggest. *Id.* at 16. Rather, the witness need only make a straightforward assessment of whether any intercepts of which he is aware might be relevant to questions about the plaintiffs' confinement at the MDC four years ago.

Finally, even if the Court were to require disclosures on supervisors and witnesses – and it should not – the Court should not require the United States to disclose whether someone is aware of the mere fact that an alleged interception took place. Plaintiffs do not present a coherent argument that they need to know such information. Instead, they focus on whether supervisors and witnesses know the substance of any intercepted communications. *See, e.g.*, *id.* at 16 ("Plaintiffs face the possibility that any defense witness giving testimony in the case is aware of the substance of an attorney-client communication . . . ."); *id.* at 9 (arguing for

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[3] Likewise, plaintiffs' concern that counsel for the United States will interview a witness who refuses to sign the witness statement can be addressed by the court on a case by case basis and the adoption of additional safeguards.

disclosure of "the substance of plaintiffs' confidential communications with their attorneys").[4] Allegedly, such knowledge of the substance of intercepted communications would enable supervisors to "instruct[]" the trial team to take certain litigation stances, *id.* at 15, and would affect the answers that witnesses provide in depositions, *id.* at 16. Mere awareness of the fact of interception (without any knowledge of the substance) undisputably does not present these same concerns. Accordingly, at the very least, this Court should vacate the portion of the Magistrate's decision that requires supervisors, witnesses, and members of the trial team to reveal whether they are aware of the fact that any interception occurred.

II. THE MAGISTRATE MISUNDERSTOOD THE NATIONAL SECURITY ISSUE AND IMPROPERLY ORDERED THE DISCLOSURE OF SENSITIVE CLASSIFIED INFORMATION.

The Magistrate's decision not only improperly credits plaintiffs' unsubstantiated concerns, but it also improperly orders the disclosure of sensitive classified information. In its opening brief, the United States explained how the Magistrate erroneously equated the disclosure of the existence of a program with disclosure of the details of the program. *See* United States' Objections at 15-17. Whereas the existence of the TSP is public, sensitive details concerning the specific individuals being targeted, the types of communications being monitored, and the specific government officials involved in the monitoring are all assuredly not public. *See id.* at

[4] Admittedly, plaintiffs are inconsistent in what they are seeking. In another part of their brief, they do make a passing reference to learning whether the "fact of such monitoring has been disclosed to specified attorneys or witnesses," Opp. Mem. at 27, but they never try to justify such discovery. Elsewhere, plaintiffs seem to make a different point, suggesting that they are broadly "entitled to discovery of any statements made to their attorneys that are within defendant's custody or control," irrespective of who is aware of them, *id.* at 6, and that the "Court must be provided with sufficient information to determine whether interference in fact occurred." Yet plaintiffs undercut these statements by insisting that the United States need not "disclose whether there has been any government monitoring of plaintiffs' communications." *Id.* at 24.

17-20.

In their opposition, plaintiffs do not deny that the Magistrate erred in this regard. Instead, they assert that the Magistrate's error is immaterial because he alternatively held that the government failed to present a factual basis for its position. Opp. Mem. at 17. According to plaintiffs, the United States waived any objection to this aspect of the Magistrate's decision by not challenging it in the opening brief. *Id.* at 21.

Plaintiffs are incorrect. First, there was no waiver. The single sentence of the Magistrate's decision to which they refer states: "The government has failed to present any specific facts or information in support of its contention that providing the information sought by plaintiffs would result in the disclosure of classified information." Order, *Turkmen* Docket No. 497 at 7. In its opening brief, the United States objected to this very sentence: "The Magistrate mislabeled [the United States'] analysis as . . . lacking 'specific facts or information,' but that is simply because he misunderstood what information is public and what is not." *See* United States' Objections at 20 (emphasis added).

Moreover, the Magistrate's lone, conclusory sentence is erroneous. Indeed, the Magistrate himself notes earlier in his opinion that the United States did explain why even a negative response to the discovery questions could reveal classified information: "'If, for example, an official or employee, including trial counsel, did not know about such intercepts and so indicated in one case, any refusal to confirm or deny such intercepts in another case could itself reveal classified information.'" Order at 3 (quoting U.S. Letter dates March 17, 2006, at 1-2). Disclosure "'could tend to reveal classified information by inviting comparisons to the government's responses in other cases.'" Order at 4 (quoting U.S. Letter dated April 13, 2006, at

2). "Thus, even if no intercepts occurred in this case, a denial by the government as to such intercepts could tend to reveal classified information.'" Order at 3 (quoting U.S Letter dated March 17, 2006, at 1-2); *see also* U.S. Letter dated March 27, 2006 (Docket No. 479), at 2; U.S. Letter dated May 12, 2006 (Docket No. 490), at 3.[5]

The Magistrate never explained why this analysis was inadequate. Nor does he indicate what additional "facts or information" he was requiring. Considering his confusion on what facts were public – which plaintiffs do not dispute – it appears that the Magistrate simply "mislabeled [the United States'] analysis as . . . lacking 'specific facts or information' . . . because he misunderstood what information is public and what is not." *See* United States' Objections at 20 (emphasis added).

Contrary to plaintiffs' suggestion, *see* Opp. Mem. at 18-25, the Magistrate was not requiring the United States to formally invoke the state secrets privilege and support it with a declaration from Ambassador Negroponte written solely for the purpose of this litigation. The Magistrate never said he was, and such a requirement would be unreasonable. As the Magistrate himself noted, the discovery that plaintiffs seek "has nothing to do with the claims in this case." Transcript of March 7, 2006, *Turkmen* Docket No. 481, at 29, 33.[6] Further, plaintiffs' alleged

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[5] Furthermore, the United States advised the Magistrate on more than one occasion that the similar national security issues were presented in the *CCR* case. *See* U.S. Letter dated May 5, 2006 (Docket No. 489), at 2; U.S. Letter dated May 12, 2006 (Docker No. 490), at 3.

[6] Because the discovery is irrelevant to plaintiffs' claims and to the subject matter of this action (a tort suit challenging conditions of confinement), Rule 26(b)(1) of the Federal Rules of Civil Procedure is not implicated. Likewise, Rule 26(b)(3) is not implicated because the discovery at issue (the knowledge of attorneys and witnesses) is not a "document[]" or "tangible thing[]," and it was not "prepared in anticipation of litigation or for trial." And disclosure under Rule 801(d)(2) is not required because the United States has specifically represented that it will not use any intercepts in its defense of these cases, and thus any intercepted statements would not

fears are speculative. *See supra* at 2-5; *see also* United States' Objections at 22-24. And lantiffs cite no authority supporting their position that they are entitled to the discovery at issue. All of the right-to-counsel cases cited in their brief concern the rights of criminal defendants, and none involves classified information. Opp. Mem. at 8. Additionally, these cases simply recognize the unremarkable proposition that if monitoring of attorney-client communications has already been established, there can be a judicial inquiry on the nature or effect of that monitoring.[7] Here, plaintiffs – who are not criminal defendants and who are seeking classified information – have not established that any monitoring of attorney-client communications has occurred, let alone transmitted to any government agent remotely involved in the litigation of this case. Plainitffs are simply on a fishing expedition, and if a formal assertion of the state secrets privilege were

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be introduced at trial as party-opponent admissions.

[7] *See Weatherford v. Bursey*, 429 U.S. 545, 552 (1977) ("If anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial.") (emphasis added); *State v. Sugar*, 417 A.2d 474 (N.J. Sup. Ct. 1980); *State v. Sugar*, 495 A.2d 90, 93 (N.J. Sup. Ct. 1985); *United States v. DiDominico*, 78 F.3d 294, 300 (7th Cir. 1996).

In a supplemental letter, plaintiffs suggest that a recent district court decision, *Hepting v. AT&T*, No. 06 Civ. 672 (N.D. Ca. July 20, 2006), supports their position, *see* Plaintiffs' Letter dated July 21, 2006 (Docket No. 528), but that case is inapposite. According to the court, the question addressed in its opinion did not concern the "classified details" of a surveillance program but only the general issue of "whether AT&T intercepted and disclosed communications or communication records to the government." *Hepting*, No. 06 Civ. 672, at 34. Further, the court determined that "significant amounts of information" on this issue "are already non-classified or in the public record." *Id.* By contrast, the discovery ordered by the Magistrate concerns "classified details" regarding who specifically is a target of monitoring, what types of communications are being monitored, and which specific government officials are involved in the monitoring. In any event, *Hepting* was wrongly decided, and the United States plans to appeal the decision. Indeed, the district court itself recognized that an appeal was in order when it *sua sponte* certified the case for interlocutory appeal under 28 U.S.C. § 1292(b).

required here, then the government would be burdened in virtually any tort suit involving the government. Ambassador Negroponte would have a full-time job writing declarations, and the federal courts would have a cottage industry of adjudicating state secrets issues. Especially considering that the state secret privilege is to be rarely and "not . . . lightly invoked," *United States v. Reynolds*, 345 U.S. 1, 7 (1953), the United States should not be required to assert it here.

Finally, plaintiffs err in suggesting that a response to the Magistrate's order would not reveal classified information. According to plaintiffs, "there is no need, at this time, for the Government to specify under what programs any particular monitoring has taken place." Opp. Mem. at 26-27. But the mere fact (if true) that plaintiffs are being monitored is itself classified information, even if the government does not specify the program under which plaintiffs are being monitored. The critical question is <u>whether</u> they are being monitored, not just <u>how</u> they are being monitored. Moreover, it is no response that the government might be able to deny that anyone is aware of any monitoring of plaintiffs' attorney-client communications. First, even a denial could tend to reveal classified information, especially when compared to responses in other cases, *see* United States' Objections at 19-20. Second, even if a denial would not reveal any classified information, the Court does not know that the United States will be able to provide a denial. Because a confirmation of monitoring would reveal classified information, and because the discovery that the Magistrate ordered might require a confirmation, the discovery presents the risk that the government would have to reveal classified information. Accordingly, this Court should vacate the Magistrate's order.

III. IN THE ALTERNATIVE, THE EXECUTION OF THE MAGISTRATE'S ORDER SHOULD BE STAYED UNTIL THE RESOLUTION OF THE *CCR* CASE.

In the alternative, because a fully developed record exists in the *CCR* case that is ripe for a ruling and pertains directly to the matter at bar, the Court should stay the Magistrate's order. Attempting to obfuscate the similarities between the two cases, plaintiffs contend that the *CCR* plaintiffs "are not currently seeking disclosure of specific or general surveillance practices," Opp. Mem. at 13, and that "there is no overlap between the issues in theses cases" sufficient to justify a stay, *id.* at 28-29. But plaintiffs are incorrect. As they probably know, the *CCR* complaint expressly seeks disclosure. Specifically, in the prayer for relief, plaintiffs request the court to "[o]rder that Defendants disclose to Plaintiffs all unlawful surveillance of Plaintiffs' communications carried out pursuant to the program" and "turn over to Plaintiffs all information and records in their possession relating to Plaintiffs that were acquired through the warrantless surveillance program . . . ." *CCR* Compl. at 15-16.

Moreover, materials submitted to the court in the *CCR* case indicate that the *CCR* plaintiffs' themselves view the discovery requests in *Turkmen* as relevant to the claims being made in *CCR*. *See* Mem. in Support of Plaintiffs' Mot. for Partial Summary Judgment (*CCR* Docket No. 6) at 11; Affirmation of William Goodman (Director of CCR) in Support of Plaintiffs' Motion for Summary Judgment at ¶ 13 (stating that [s]ince the public disclosure of the existence of the NSA Program, the *Turkmen* plaintiffs have submitted an interrogatory to the United States [quoting Interrogatory No. 9]"), attached hereto at Exh. 1; Affirmation of Rachel Meeropol (*CCR* Docket No. 60) at ¶ 14 (discussing request for disclosure in *Turkmen* and outlining efforts made to compel the government to make such disclosures), attached hereto at

Exh. 2. And although the plaintiffs in *CCR*, *Turkmen*, and *Elmaghraby* are not identical, the case law does not require identity of parties. *See* United States' Objections (Docket No. 511) at 27. What matters is that the *CCR* plaintiffs include the Center for Constitutional Rights and Rachel Meeropol, who are counsel for the *Turkmen* plaintiffs,[8] alleging the same monitoring-related injury as the *Turkmen* plaintiffs, and thus can fully represent the interests of the *Turkmen* plaintiffs.

Finally, contrary to plaintiffs' suggestion, it would not be "highly inefficient" to grant the stay. Plaintiffs contend that staying the Magistrate's order "would result either in a stay of depositions or require deposition witnesses to return for a second round of depositions to address the areas contemplated by the May 30, 2006 Order."[9] Opp. Mem. at 29. But plaintiffs have already accepted and tolerated this alleged "inefficiency"; indeed, they have already agreed to defer questioning with respect to the issues before the Court in one deposition that has already occurred and in two more that are currently scheduled.[10]

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[8] Although not a party to the *CCR* case, counsel in the *Elmaghraby* case have posited virtually identical concerns here in support of their request for information pertaining to their client.

[9] Plaintiffs also argue that a motion to stay should have been presented to the Magistrate who is handling "all discovery matters." Opp. Mem. at 28. Because the May 30th Order provided that the United States was not required to make any disclosures if objections were filed, it contains a self-executing stay which was put into effect when the United States filed its objections. *See* Order at 10. Accordingly, it was unnecessary to take any further action before the Magistrate with respect to staying the effect of his order. Moreover, the Magistrate would have no authority to take any action on the May 30th Order after the objections were filed. **[cite]**

[10] For these three depositions, the plaintiffs have reserved their right to ask such questions at a later time, depending upon the Court's ruling. With respect to a fourth deposition, which is currently scheduled for September 6 and 7, plaintiffs have indicated that they amenable to proceeding under a similar arrangement, though they have not yet agreed to do so.

CONCLUSION

For the foregoing reasons, the United States requests that the Court vacate the portion of the May 30, 2006 Order requiring the additional disclosures. In the alternative, the United States requests a stay of the execution of the order until the *CCR* case is resolved.

Dated: 7/28/2006

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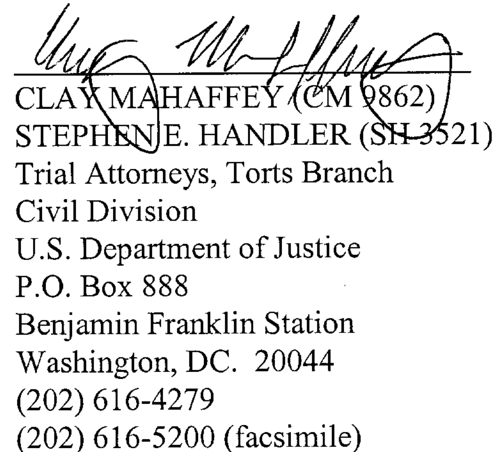

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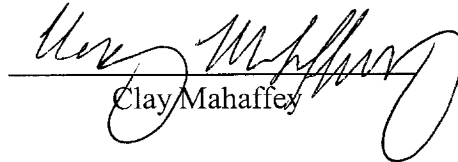
CERTIFICATE OF SERVICE

I hereby certify that copies of the United States' Reply in Support of its Objections to Magistrate Judge Gold's Order Entered on May 30, 2006, was sent to the plaintiffs' attorneys and the attached Counsel of Record via electronic mail and/or First Class Mail, on 7/28/2006.



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