Nos. 06-2095, 06-2140

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

REPLY BRIEF OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the Plaintiffs-Appellants certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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REPLY BRIEF OF PLAINTIFF-APPELLEES/CROSS-APPELLANTS

As plaintiffs argued in their opening brief, the district court erroneously granted defendants' motion to dismiss plaintiffs' datamining claims based on the state secrets privilege. *See* Pl. Br. 65-70. Dismissal was improper because this case comes nowhere close to fitting within the extremely narrow category of cases in which courts have dismissed suits at the outset because they involved secret espionage contracts or other contexts in which "the very subject matter" of the case is a state secret. Because the case does not fit within that narrow category, dismissal at the

pleadings stage based on state secrets was improper because prior to discovery, neither the court nor the parties could evaluate whether privileged evidence is necessary or even relevant to the claims.

I. *TOTTEN* DOES NOT BAR PLAINTIFFS' DATAMINING CLAIMS.

To support dismissal of the datamining claims, the government improperly conflates two distinct doctrines, the state secrets privilege and "the *Totten* bar." Govt. Br. 50. The state secrets privilege is a rule of evidence, while the *Totten* bar is a rule of justiciability. The *Totten* bar applies almost exclusively to cases concerning "contract[s] for secret services with the government." *Totten v. United States*, 92 U.S. 105, 107 (1875). *Totten* involved a suit brought by a spy to enforce a secret contract for espionage allegedly negotiated with President Lincoln during the Civil War. *Id.* The *Totten* bar does not support dismissal of this case because plaintiffs' datamining claims, like their wiretapping claims, do not depend on confirming any secret contract with the government. Plaintiffs are not spies or secret contractors, but rather are citizens alleging that the government may not conduct warrantless electronic surveillance in violation of the Constitution.

The Supreme Court recently distinguished *Totten*'s categorical bar from the evidentiary state secrets privilege in *Tenet v. Doe,* 544 U.S. 1, 9

(2005). As the Court explained, unlike the state secrets privilege, the *Totten* doctrine is a "unique and categorical bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Id.* at 12 (Justice Scalia, concurring). The Court noted the "obvious difference" between a contract action like *Totten* initiated by an unacknowledged covert spy, and an employment discrimination action such as *Webster v. Doe*, 486 U.S. 592 (1988), brought by an "acknowledged (though covert)" employee of the CIA. *Id* at 10. Only in the former instance is the "core concern" of *Totten* implicated: "preventing the existence of the plaintiff's relationship with the Government from being revealed." *Id.* In this case – like discrimination actions such as *Webster* – the claims do not depend on any secret relationship being revealed, and therefore *Totten* does not apply.[1]

Accordingly, most courts applying *Totten* have properly confined the doctrine to claims involving agreements governing espionage or other

[1] The only other Supreme Court case that even referenced (but did not rely on) *Totten* during the last several decades is *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981), a case that would have revealed the location of nuclear weapons had it been allowed to proceed. Clearly the current case presents no comparable risk.

secret services,[2] and have refused to apply *Totten* to claims that do not attempt to enforce such agreements.[3] Most recently, the district court in *Hepting v. AT&T Corp.* found *Totten* inapplicable to claims against the telephone companies arising from the NSA datamining program because plaintiffs were not parties to covert agreements. 439 F. Supp. 2d 974, 991 (N.D. Cal. 2006); *cf. Terkel v. AT&T*, 441 F. Supp. 2d 899, 906-908 (N.D. Ill. 2006) (dismissing datamining claims against phone company but rejecting application of *Totten* because "[d]isclosing the mere fact that a telecommunications provider is providing its customer records to the government . . . is not a state secret without some explanation about why disclosures regarding such a relationship would harm national security") . Like *Hepting*, the district court in this case should have rejected the

[2] *See, e.g., Guong v. United States*, 860 F.2d 1063, 1065-67 (Fed. Cir. 1988) (affirming dismissal of action by alleged covert agent's breach of contract action against CIA); *Kielczynski v. CIA*, 128 F. Supp. 2d 151, 162-64 (E.D.N.Y. 2001) (dismissing putative covert CIA agent's action for breach of contract), *aff'd*, 2003 WL 187164 (2d Cir. 2003).

[3] *See, e.g., Clift v. United States*, 597 F.2d 826, 830 (2d Cir. 1979) (in action under the Invention Secrecy Act seeking damages based on government secrecy order and government's use of plaintiff's patented cryptographic system, Circuit Court vacated order of dismissal of claim based on *Totten* because plaintiff did not have a contract for secret services with government); *Spock v. United States*, 464 F. Supp. 510, 519-20 n.11 (S.D.N.Y. 1978) (distinguishing *Totten* on basis that the case did not involve a secret contract).

application of *Totten* to plaintiffs' datamining claims, which involve no secret contracts or services.

Though some courts have improperly conflated the *Totten* bar and the state secrets privilege to dismiss cases at the outset where the "very subject matter" is a state secret, neither the Supreme Court nor the Sixth Circuit has ever dismissed a case based on this theory. In any event, as plaintiffs argued in their opening brief, the "very subject matter" of the datamining program is no state secret. Pl. Br. 66-67. Department of Homeland Security Secretary Chertoff has acknowledged the program and defended its supposed legality.[4] The datamining program is the subject of numerous cases both in federal court and before state public service commissions. *See, e.g., Re Verizon New England, Inc.*, Nos. 7183, 7192, 2006 WL 2689827 at *11 (Vt. Pub. Serv. Bd., Sept. 18, 2006) (denying motion to dismiss claims that Verizon violated state law by providing customers' call records to the NSA, *inter alia*, because "there is no longer

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[4] *See* Morton Kondracke, *NSA Data Mining Is Legal, Necessary, Chertoff Says*, REPORTER-TIMES, Jan. 25, 2006, *available at* http://www.reporter-times.com/?module=displaystory&story_id=30032&format=html. Although the government seeks to cast Secretary Chertoff's admission as "media speculation," the article was not the product of a journalist's ruminations but rather reported an interview with Secretary Chertoff. Because Secretary Chertoff admitted the existence of the datamining program, the government cannot now retract the admission to preclude plaintiffs from litigating their datamining claims.

any secret to which a claim of privilege might attach" regarding information in Verizon's public statements).[5] Given the amount of information publicly available about the datamining program, there is simply no way to characterize the "very subject matter" of the program as a state secret.

II. PRE-DISCOVERY DISMISSAL OF PLAINTIFFS' DATAMINING CLAIMS WAS IMPROPER.

Where it is clear that the *Totten* bar does not apply, courts have held that dismissal of claims based on state secrets at the pleadings stage is improper because prior to discovery, neither a court nor the parties can properly evaluate whether privileged evidence will be necessary or even relevant to the litigation. *See* Pl. Br. 65-67. Accordingly, courts have not hesitated to reject pre-discovery motions to dismiss based on the state secrets privilege. *See* Pl. Br. 66 n.61. Dismissal based on the state secrets

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[5] Public Service Commission actions regarding the datamining program are also pending in Maine, Connecticut, Missouri, and New Jersey. The government is seeking injunctions in federal court to prevent the commissions from proceeding. *United States v. Palermino*, No. 3:06-1405 (D. Conn., filed September 6, 2006); *United States v. Adams*, No. 1:06-97 (D. Me., filed August 21, 2006); *United States v. Gaw,* No. 4:06-1132 (E.D. Mo., filed July 25, 2006); *United States v. Farber*, No. 3:06-2683 (D. N.J., filed June 14, 2006), and *United Sates v. Voltz*, No. 2:06-188 (D. Vt., filed October 2, 2006). A motion to vacate an order that conditionally transferred these actions to Judge Vaughn Walker of the N.D. Cal. is pending before the Judicial Panel on Multidistrict Litigation. *See* MDL Docket No. 1791, November 17, 2006, letter from Jeffery N. Lüthi, Clerk of the MDL Panel.

privilege is a draconian measure that should be invoked only when no amount of effort and care on the part of the court and the parties will safeguard privileged material. *See In re United States*, 872 F.2d 472, 476-77 (D.C. Cir. 1989) (denying request for mandamus directing trial court to dismiss case due to alleged state secrets). Numerous cases involving classified technology and clandestine programs have been litigated, and even where the privilege is validly invoked regarding some evidence, many cases have been allowed to proceed based on non-privileged evidence.[6]

Given Secretary Chertoff's admission and the pendency of numerous federal lawsuits and other investigations into the datamining program, the government's assertion that allowing plaintiffs' datamining claims in *this* case to go forward would be "playing with fire" rings hollow. Govt. Br. 51. Just as the *Hepting* court concluded that it would be premature to

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[6] *See, e.g., Crater Corp. v. Lucent Technologies, Inc.*, 423 F.3d 1260 (Fed. Cir. 2005) (trade secrets claims involving underwater connectors for fiber optics); *DTM Research L.L.C. v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001) (trade secrets lawsuit related to datamining technology); *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979) (patent lawsuit about classified cryptographic device); *Kronisch v. United States,* 150 F.3d 112, 116 (2d Cir. 1998); *Kronisch v. Gottlieb,* 213 F.3d 626 (2d Cir. 2000) (claims involving CIA clandestine LSD program); *Birnbaum v. United States,* 588 F.2d 319 (2d Cir. 1978) (covert CIA mail opening program); *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968) (defamation case involving covert CIA spies); *Monarch Assur. PLC v. United States,* 244 F.3d 1356, 1364 (Fed. Cir. 2001) (claims involving covert CIA financing).

dismiss the datamining claims before discovery and without allowing plaintiffs to attempt to gather material in support of their case from non-privileged sources, the district court should have rejected dismissal here. *Hepting v. AT&T Corp.,* 439 F. Supp. 2d at 994, 997-98; *see also* Pl. Br. 68-69. The government attempts to distinguish *Hepting* on the grounds that there were other claims pending in that case. Govt. Br. 51. But the *Hepting* court's refusal to dismiss the datamining claims was not based on the presence of other claims that had to be resolved. *See Hepting,* 439 F. Supp. at 997-98. Rather, the court refused to dismiss the datamining claims because "the government and telecommunications companies ha[d] made substantial public disclosures on the alleged NSA programs. It is conceivable that these entities might disclose … other pertinent information … as this litigation proceeds. " *Id.* The district court in this case should have adopted the same reasoning to reject dismissal of plaintiffs' datamining claims at this stage of the litigation.

III. CONCLUSION

The Court should reverse the district court's dismissal of plaintiffs' claims challenging the datamining program.

DATED this 18 day of December 2006.

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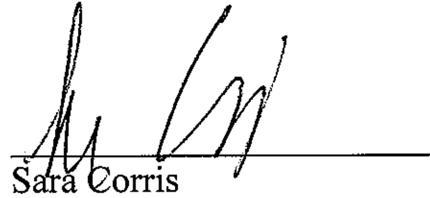
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains no more than 1,300 words, and was prepared in 14-point Times New Roman font using Microsoft Word.



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CERTIFICATE OF SERVICE

I certify that on this 18th day of December, 2006, I served two copies of the foregoing brief upon the following counsel by FedEx next-day courier:

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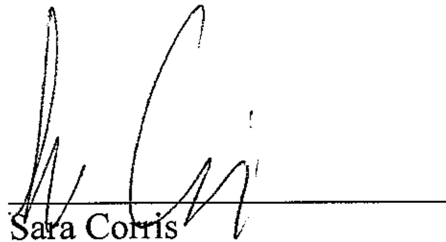

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