UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, *et al.*,		
	Plaintiffs,	
- against -		02 CV 2307 (JG) (SMG)
JOHN ASHCROFT, *et al.,*		
	Defendants.	
EHAB ELMAGHRABY, *et al.*,		04 CV 1809 (JG) (SMG)
	Plaintiffs,	
- against -		
JOHN ASHCROFT, *et al.,*		
	Defendants.	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE UNITED STATES' OBJECTIONS TO THE ORDER OF MAGISTRATE JUDGE GOLD ENTERED MAY 30, 2006

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PRELIMINARY STATEMENT

This memorandum of law is submitted jointly on behalf of plaintiffs in Turkmen, et al. v. Ashcroft, et al., 02 Civ. 2307 (JG) (SMG), and Elmaghraby, et al. v. Ashcroft, et al., 04 Civ. 1809 (JG) (SMG), in opposition to the United States' objections to the Honorable Steven M. Gold's Order dated May 30, 2006. As the Court is aware, these cases, which have been proceeding in tandem for the purposes of coordinating discovery, involve allegations of serious misconduct and abuse of plaintiffs in the Government's response to the events of September 11, 2001. Most significantly, plaintiffs were selected for abuse and mistreatment because of the Government's unfounded suspicion that plaintiffs were involved in terrorist activity, based solely on plaintiffs' race, religion and national origin. Both lawsuits allege significant interference by the Government with plaintiffs' attorney-client relationship, including monitoring of plaintiffs' privileged communications with their counsel, while plaintiffs were held at the federal Metropolitan Detention Center ("MDC") in Brooklyn, New York.

Now plaintiffs are all outside the United States, and must often use telephone or other electronic means to consult their attorneys. In this context the Court must consider the Government's objections to Magistrate Judge Gold's order requiring disclosure to plaintiffs of the limited fact of whether individuals involved in defending these cases are aware of continued monitoring of plaintiffs' privileged communications since their release from the MDC. The issues presented by the Government's objections are simple, and there is nothing surprising about this dispute except the Government's position. Case law indicates, and plaintiffs 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; that when such intercepts occur, it insulates those with knowledge of the intercepts from involvement in any pending or anticipated litigation; and that it make prompt disclosure of the relevant facts to its adversary and the court.

All plaintiffs ask, and all that Magistrate Judge Gold ordered, is some assurance that the same practices are followed here. Despite the clear legal mandate, the United States seeks to shield from disclosure information to which plaintiffs are normally entitled as a matter of basic discovery practice, and information that plaintiffs have shown to be relevant and necessary in this litigation. The Government's only basis for resisting such discovery is its oblique reference to a rare and harsh evidentiary privilege meant to safeguard military or state secrets. But the Government has never formally invoked that privilege, or satisfied any of its strict requirements, or shown that it protects interference with the attorney-client privilege. The Government's attempt to buttress its intangible claims of secrecy by relying on declarations filed in a separate case, involving different parties, facts and issues, and provided solely for the Court's "convenience" (United States' Objections to Magistrate Judge Gold's Order Entered on May 30, 2006, hereafter "Obj.," 13 n.6) only underscores the insufficiency of its submission here.

STATEMENT OF FACTS

The current dispute began as a result of interrogatories served by the plaintiffs in Turkmen which asked whether the Government had monitored any communications between plaintiffs and their counsel since the plaintiffs' removal from the United States. In written objections to those interrogatories, the Government maintained that it need not respond because the requests did not relate to any claim in the Turkmen complaint. (See Letter from Stephen E. Handler, counsel for United States, to Rachel Meeropol, counsel for Plaintiffs (Feb. 28, 2006) (Obj. at Tab 1)). At a conference before Judge Gold on March 7, 2006, the Court ruled that although the interrogatories were not addressed to "the claims in this case," plaintiffs' counsel "can't be expected to prepare their case if they think that somebody's listening to their

conversations with their client."[1] (Mar. 7, 2006 Tr., attached hereto as Ex. 1, at 31). He ordered that plaintiffs in both Turkmen and Elmaghraby were entitled to:

> 1. A representation that no member of the trial team is aware that any surveillance of privileged communications has occurred;
>
> 2. A representation that as far as counsel for the United States is aware, none of the witnesses who might testify in this case is aware that any surveillance has occurred; and
>
> 3. A representation that counsel will not use any evidence developed through any surveillance mechanism in connection with the defense of these matters. (Id.)

At the March 7 Conference, Mr. Handler, counsel for the United States, partially complied with the Court's Order by confirming that he was aware of neither the fact nor the substance of any monitoring of plaintiffs' privileged conversations. (Id. at 32). By letter dated March 17, 2006, the United States nonetheless requested reconsideration of the Court's Order, and for the first time, claimed in one sentence that compliance with the Order "could" lead to the disclosure of classified information. (See Letter from Stephen E. Handler, counsel for United States to The Honorable Steven M. Gold (Mar. 17, 2006) (Turkmen Docket No. 477)). The United States specified neither the facts underlying the basis for its objection, nor invoked any specific privilege preventing compliance with the Court's Order.

In letters subsequently submitted for Judge Gold's consideration, plaintiffs repeatedly noted the untimeliness and insufficiency of the Government's objection (see n. 10 below). The Government nonetheless declined to submit any further explanation, either legal or factual, for its stated concern. After an attempt to broker a compromise at an April 21, 2006 Conference, on

[1] Although the Elmaghraby plaintiffs had not served interrogatories similar to those served in Turkmen, consistent with Judge Gold's practice to date, the Court ordered that the United States make responsive disclosures in both cases. All letters submitted to the Court on this issue since the March 7 conference have been filed on behalf of plaintiffs in both actions, without objection by the United States.

May 30 Judge Gold entered an Order denying the Government's request for reconsideration and requiring the Government to make the following disclosures:

> (1) state whether any member of the trial team is aware of any monitoring or surveillance of communications between any of the plaintiffs and their attorneys in either of these related actions. The "trial team" includes all attorneys and support staff who are participating in the defense of this case, as well as any supervisors or other individuals who are providing guidance or advice or exercising decision-making authority in connection with the defense of the United States in these case;
>
> (2) state whether any individual who has been identified as a likely witness in either of these cases is aware of any monitoring or surveillance of communications between any of the plaintiffs and their attorneys in either of these related actions; and
>
> (3) state whether any information obtained from monitoring or surveillance of communications between any of the plaintiffs and their attorneys in either of these related actions will be used in any way by the United States in its defense of these cases and, if so, identify the information that will be so used.
>
> (May 30, 2006 Order by Magistrate Judge Gold, hereafter "Order," at 11). The Order does not require the Government to affirm or deny any fact concerning monitoring or surveillance itself, only the knowledge of persons defending these actions—a limited disclosure ordered in recognition that (1) parties to litigation are as a general matter entitled to know whether their attorney-client communications are being monitored by an adversary, and (2) that the context of this litigation presents additional grounds for concern not present in the typical case. (Id. at 5-6). Moreover, Judge Gold found that the United States had not provided any specific or convincing evidence to substantiate its allegations of harm to national security. (Id. at 7). This remains the case.

ARGUMENT

Although the United States conspicuously fails to frame its objections according to the relevant standard of review, the Magistrate's Order may only be reversed for clear error. See FED. R. CIV. P. 72(a). The United States bases its objections on two premises: (1) that the plaintiffs have not shown any need for the information ordered disclosed by Judge Gold; and (2)

that Judge Gold misconstrued the nature of the Government's objection to disclosure. As to the first argument, which was never raised below and which has therefore been waived, the United States ignores the well-established civil discovery principle that parties are always entitled to know whether their party-opponent has access to their oral or written statements. Moreover, the Government disregards the central importance of the attorney-client privilege to our adversarial system, and the concomitant power of the federal courts to exercise their supervisory powers to protect the integrity of such communications. Even when considering the Government's argument on its own terms, however, plaintiffs have provided ample justification for Judge Gold's Order in this case.

This is especially the case when balanced against the United States' unsupported and conclusory argument that complying with the Magistrate's Order could result in the disclosure of classified information. Contrary to the Government's contentions, the Magistrate considered all of its arguments in opposition to disclosure and rejected them not because of any misunderstanding of the Government's asserted concerns, but because the Government failed to support its privilege argument with relevant facts or law. It cannot remedy that defect here, despite its forlorn attempt to rely on declarations submitted in a different case, involving different issues and different legal claims. For these reasons, amplified below, plaintiffs respectfully request that the Court reject the Government's objections to the Magistrate's Order.

I. STANDARD OF REVIEW

Because the issue presented to the Court is not a dispositive matter, the standard for review of Magistrate Judge Gold's Order is whether it is clearly erroneous or an abuse of discretion. See FED. R. CIV. P. 72(a); Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990) (matters involving pretrial discovery, as they are rarely dispositive, are generally subject to the "clearly erroneous" standard). A magistrate judge possesses broad discretion to

decide discovery disputes and should not be overruled unless that discretion is clearly abused. Woodard v. City of New York, 99 Civ. 1123, 2000 U.S. Dist. LEXIS 5231, *6 (E.D.N.Y. Mar. 10, 2000). The Government fails to satisfy its burden of demonstrating that the Magistrate's Order should be reversed. Plaintiffs therefore respectfully urge this Court to affirm Magistrate Judge Gold's well-reasoned opinion.

II. THE MAGISTRATE DID NOT ABUSE HIS DISCRETION IN CONCLUDING THAT PLAINTIFFS ARE ENTITLED TO KNOW WHETHER INDIVIDUALS INVOLVED IN THE DEFENSE OF THESE ACTIONS ARE AWARE OF ANY INTERCEPTION OF ATTORNEY-CLIENT COMMUNICATIONS.

After public disclosure of an unlegislated system of warrantless interception of electronic communications by the National Security Agency, known by the administration as the "terrorist surveillance program" ("TSP "), plaintiffs in Turkmen sought discovery on this matter because of their serious and reasonable fears that their privileged attorney-client communications have been intercepted. Such disclosures are not only relevant to plaintiffs' claims, but also necessary to allow plaintiffs and plaintiffs' counsel to communicate freely during this litigation.

A. Plaintiffs Are Entitled To Know Whether Their Party Opponents Have Access To Their Privileged Communications.

As Judge Gold recognized, plaintiffs are entitled to discovery of any statements made to their attorneys that are within defendant's custody or control, as such statements are obviously relevant to the claims and defenses at issue in the pending litigation. (See Order at 5, citing FED. R. CIV. P. 26(b)(1)). Indeed, Rule 26(b)(3) of the Federal Rules of Civil Procedure specifically requires defendant to disclose "a statement concerning the action or its subject matter previously made by" plaintiffs, and one would expect any statements made by plaintiffs to their counsel to be encompassed by this Rule. Plaintiffs also are entitled to discover statements which could be introduced at trial as party-opponent admissions, FED. R. EVID. 801(d)(2). Donlin v. Aramark Corp., 162 F.R.D. 149, 150 (D. Utah 1995) (requiring plaintiff to answer questions at deposition

because answers could constitute admissions to be introduced at trial). Plaintiffs' entitlement to discovery of any statements which constitute admissions or Rule 26(b)(3) statements, Koch v. Koch Industries, Inc., 85 Civ. 1636, 1992 WL 223816, *12 (D. Kan. Aug. 24, 1992) (ordering discovery of such statements), necessarily implies the right to discover the material identified in Judge Gold's Order.

Even if the information sought by plaintiffs were not relevant to the claims in the case, and thus not normally discoverable, the Magistrate properly concluded that disclosure of the information is necessary to protect the attorney-client privilege. The United States never disputed below that the necessity of protecting attorney-client communications is sufficient in and of itself for the exercise of the Court's supervisory power in this case. As the Magistrate recognized in his Order, "[t]he significance of the attorney-client privilege and its goal of frank and candid communication between a represented party and his counsel is too well-settled to require lengthy citation." (Order at 6). The privilege "is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Any interception of the communications between attorney and client therefore represents a frontal assault upon the attorney-client privilege that is vital to our adversarial system of justice. In re Lott, 424 F.3d 446, 450 (6th Cir. 2005); see also, Lonegan v. Hasty, 04 CV 2743, 2006 U.S. Dist. LEXIS 41807, *47-48 (E.D.N.Y. June 22, 2006) (audio-recording of detainees' conversations with their lawyers at MDC states a claim for a violation of the Fourth Amendment and the Wiretap Act). Attorneys have an ethical duty not to "[e]ngage in conduct that is prejudicial to the administration of justice." DR 1-102.

Recognizing the pivotal role of the privilege in our judicial system, the courts agree that, where privileged attorney-client communications are intercepted by Government agents, any

subsequent litigation will prompt judicial inquiry into the nature, purpose, content and potential use of the intercepted communication. See Weatherford v. Bursey, 429 U.S. 545, 556-58 (1977) (considering whether interception is purposeful, results in disclosure of strategy, or influences any of the evidence offered at trial); e.g., State v. Sugar, 417 A.2d 474 (N.J. Sup Ct. 1980) ("Sugar I") and 495 A.2d 90, 93 (N.J. Sup. Ct. 1985) ("Sugar II") (holding testimony of witness who intercepted privileged attorney-client communication tainted as a matter of law). These cases establish that plaintiffs and the Court must be provided with sufficient information to determine whether interference in fact occurred, and whether particular evidence produced by the Government has been tainted by surveillance of attorney-client communications. See e.g., United States v. DiDominico, 78 F.3d 294, 300 (7th Cir. 1996) (evidentiary hearing, if promptly requested, is reasonable to dispel chill caused by alleged invasion of attorney-client privilege).

Where an attorney's strategy is disclosed, or where the surveillance of attorney-client communications is purposeful and unjustified, courts have automatically barred the Government from presenting evidence and, in at least one instance, from cross-examining defense witnesses. See United States v. Levy, 577 F.2d 200 (3d. Cir. 1978); Graddick v. State, 408 So. 2d 533, 547 (Ala. Crim. App. 1981); Wilson v. Superior Court, 139 Cal. Rptr. 61, 66 (Cal . Ct. App. 1977); State v. Cory, 382 P.2d 1019, 1022-23 (Wash. 1963). See also, United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975) (stating approval of *per se* rule barring presentation of evidence in the context of "offensive interference" with attorney-client relationship without any justification, as a moral and legal condemnation of "such egregious and unequivocal conduct"). And if there is ongoing surveillance, as the Government pointedly refuses to deny, prohibiting use of tainted evidence may be insufficient because of the damage to a confidential attorney-client relationship and the need for deterrence of prosecutorial misconduct. See DiDominico, 78 F.3d at 299 (even

if no use is made of intercepted communications, continuous surveillance would "greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel"); see also Sugar I, 417 A.2d at 481 (if "eavesdropping is not an isolated occurrence … [f]undamental fairness would require [dismissal of a related indictment] to eliminate the risk of apparent judicial tolerance and to deter more effectively the illegal practices themselves"). The Magistrate's Order simply requires disclosure of the information necessary to make the above determinations and to protect the integrity of the attorney-client privilege.

The Government, however, maintains that it has the prerogative to litigate these cases without disclosing to plaintiffs or the Court whether defendants, witnesses, or attorneys participating in the Government's defense know the substance of plaintiffs' confidential communications with their attorneys. We know of no precedent that would support such an arrangement, and note that the posture of these cases—unlike many criminal cases which involve review of surveillance after the fact—presents an opportunity for the Court to mitigate the prejudicial effect of any ongoing surveillance while the parties are still engaged in discovery. Cf. Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992) (promise that privileged material will not be used at trial, "will not suffice to ensure free and full communication by clients who do not rate highly a privilege that is operative only at the time of trial").

B. Plaintiffs Have Ample Reason for Concern That Their Communications Are Being Monitored.

The United States' selective targeting of plaintiffs in the aftermath of the September 11 tragedy, and its interference with plaintiffs' right to legal representation during their detention at the MDC, amplify their current fears. The United States discounts any chill to the attorney-client

relationship through logical slight-of-hand. The United States cites plaintiffs' allegations that they were cleared of any connection to terrorism prior to being deported and suggests that plaintiffs can have no reasonable fear of interception of their communications under a program that only targets terrorists.[2] (Obj. at 3). The United States argues further that if plaintiffs actually are terrorists, then their communications are likely subject to interception through other means, like the Foreign Intelligence Surveillance Act ("FISA"), and the possibility of interception under the TSP could only result in a marginal additional chill. (Id.)

This argument ignores the heart of plaintiffs' complaint: that they were swept up after September 11, 2001 and treated as terrorists, without any evidence, because of plaintiffs' race, national origin and religion—an allegation which receives substantial support from the report issued in April 2003 by the Office of the Inspector General of the Department of Justice. (See Second Amended Complaint in Turkmen, Ex. 1 at 15-17 (Docket No. 28). During their confinement at the MDC, plaintiffs were subjected to substantial loss of liberty and abuse, including surveillance of their communications with their counsel, because of the United States' unsupported assumption that they had ties to terrorist organizations. (Order at 6 (noting that OIG report found evidence that attorney-client meetings were video- and audio-taped)). Just five years ago, neither plaintiffs' innocence, nor the stark illegality of defendants' actions, protected plaintiffs from the unauthorized surveillance and other mistreatment that gave rise to these lawsuits.

Against the backdrop of the United States' previous mistreatment of plaintiffs, publicly available information regarding the TSP's scope and operations amplifies plaintiffs' legitimate

[2] The Government contradicts this argument later in their brief. When arguing that compliance with Judge Gold's Order would disclose classified information, the Government refuses to rule out use of the TSP to monitor individuals who have been "cleared" of involvement in terrorism. (Obj. at 21.).

concerns despite their lack of connection to any terrorist groups or activities. According to public statements, the NSA intercepts "calls ... [the government has] a reasonable basis to believe involve al Qaeda or one of its affiliates."[3] The NSA also targets the calls of individuals it deems suspicious based on a suspected but unspecified "link" to al Qaeda or related terrorist organizations,[4] or believes belong to an organization that the government considers to be "affiliated" with al Qaeda,[5] or have provided some unspecified support for al Qaeda.[6] The NSA intercepts communications without obtaining a warrant or any other type of judicial authorization.[7]

Under the TSP, communications are intercepted without probable cause to believe that the surveillance targets have committed or are about to commit any crime, or are foreign powers or agents thereof. Rather, the NSA intercepts communications when the agency has, in its own judgment, merely a "reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."[8]

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[3] Michael Hayden, Remarks at the National Press Club on NSA Domestic Surveillance, Jan. 23, 2006 (hereinafter Hayden Press Club).

[4] E.g., George W. Bush, Press Conference, Dec. 19, 2005, transcript available at: http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html ("I authorized the interception of international communications of people with known links to al Qaeda and related terrorist organizations.").

[5] Alberto Gonzales, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Dec. 19, 2005 (hereinafter Gonzales/Hayden Press Briefing) ("[W]e have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.").

[6] Id.

[7] Michael Hayden, Gonzales/Hayden Press Briefing ("The period of time in which we do this is, in most cases, far less than that which would be gained by getting a court order.").

[8] Alberto Gonzales, Gonzales/Hayden Press Briefing (emphasis added); see also Hayden Press Club (explaining that the NSA intercepts calls "we have a reasonable basis to believe involve Al Qaida or one of its affiliates").

Given this information and the Government's past behavior, plaintiffs have reason to fear that the Government will repeat its past mistakes, and rely on the unbounded and unreviewable TSP to conduct warrantless monitoring of plaintiffs' communications. The prospect of FISA monitoring, because it is subject to judicial review and minimization procedures, raises a far less substantial concern than monitoring pursuant to the TSP. See United States v. Bynum, 360 F.Supp. 400, 410 (S.D.N.Y. 1973) (judicial review of ongoing surveillance is a "vital aspect of the minimization requirement—perhaps the most vital"); 50 U.S.C. § 1806(a) (stating that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character"); id. § 1801(h) (defining required "minimization" procedures); 18 U.S.C. § 2518(5) (equivalent for Title III).

It is no answer that plaintiffs and their counsel should trust that the United States will not misuse the unbounded authority it claims. (See Obj. at 8). Whether an advantage in these cases is the objective of Government interception; plaintiffs are concerned with the effect. Our tripartite government was so created to avoid the necessity of blind trust, and in recognition that such trust may not always be warranted. See Hamdan v. Rumsfeld, ___ S. Ct. ___, 2006 U.S. LEXIS 5185, *138-39 (June 29, 2006) (Kennedy, J, concurring in part) ("Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid."). To allow the Executive to have the first and final say on the extent of its own power, and ask potential victims to trust that it will wield that power appropriately, flies in the face of the most basic separation of powers principles. See Clinton v. Jones, 520 U.S. 681, 699 (1997).

Indeed, Congress enacted FISA in 1978 in response to the Church Committee's "revelations that warrantless electronic surveillance in the name of national security ha[d] been

seriously abused." S. Rep. No. 95-604 (I), at 7-8, reprinted in 1978 U.S.C.C.A.N. 3904, 3908-09. Prior to FISA, the executive systematically wiretapped American citizens without warrants or judicial authorization and targeted domestic groups advocating social change within the United States, including civil rights organizations and leaders that sought to improve the plight of racial minorities. Senate Select Committee to Study Government Operations with Respect to Intelligence Activities and the Rights of Americans (Book II), S. Rep. No. 94-755, at 22 (1976). Then, as now, use of broad labels like "national security" and "subversion" in identifying targets exponentially increased the executive's claimed authority to engage in warrantless surveillance. Id., at 332.

Finally, in their continuing attempt to discount the present chill to attorney-client communications, the United States characterizes plaintiffs' reasonable fear regarding interceptions of attorney-client conversations as a "backdoor channel" to obtain information relevant to a separate case, Center for Constitutional Rights, et al., v. Bush, et al., No. 06 Civ. 313 (GEL)(S.D.N.Y) (Obj. at 14). This completely unsupported assertion requires little comment. Plaintiffs in that matter are not currently seeking disclosure of specific or general surveillance practices; rather, they have moved for partial summary judgment on the theory that the Court can rule on the illegality of the TSP based on information available from the public record, without the aid of discovery. (See Docket Nos. 5-7 in No. 06 Civ. 313).

Counsel for plaintiffs in these cases, in contrast, are five separate law firms and non-profit organizations, which all have legitimate concerns about the impact of surveillance on their ability to represent their clients, and thus seek information specific only to those narrow concerns. Counsel would be neglecting their professional obligations if they failed to seek information on suspected governmental interference on their clients' behalf. See, e.g., New York

State Bar Association, Opinion 709 (1998) ("It is fair to state that an attorney has a duty to use reasonable care to protect client confidences and secrets"); id., Opinion 700 (1998) ("the ethical obligation of a lawyer to guard the confidences and secrets of a client 'exists without regard to the nature or source of information or the fact that others share the knowledge'").

III. THE UNITED STATES' PREVIOUS STATEMENTS DO NOT DISPEL PLAINTIFFS' LEGITIMATE FEARS.

While the United States' various disclosures to the Court and plaintiffs' counsel regarding interception and potential use of intercepted attorney-client communications call into question the seriousness of the Government's security concerns (addressed below), these statements do not alleviate plaintiffs' legitimate fears. The United States has made two separate and equally insufficient statements disavowing use of intercepted communications. First, when the issue was initially addressed at the March 7 Conference, Mr. Handler responded to the Magistrate's questioning regarding the interceptions by denying any personal knowledge of any such surveillance. (Ex. 1 at 32). Second, in a subsequent letter to the Court, the United States stated that "no member of the trial team has received any intercepts of attorney-client communication[,] . . . expects or intends to receive any intercepts of attorney-client communications[, and] . . . no such intercepts will be used in the defense of the action." (Letter from Stephen E. Handler, counsel for United States to the Honorable Steven M. Gold (Mar. 27, 2006) (Turkmen Docket No. 479)).

As the Magistrate concluded, neither of these statements provides adequate assurance to plaintiffs and their counsel because neither (1) provides information as to whether the trial team's supervisors have access to information regarding privileged communications between plaintiffs and their counsel and will consider such information when making strategic litigation decisions; nor (2) provides reassurance that witnesses who may testify in the course of the

litigation do not have knowledge of intercepted communications.

Without making any assumptions about what counsel for the United States means by "use in the defense" of this action (e.g., whether settlement decisions are considered part of the Government's "defense"), the representation is inadequate given the United States' narrow limitation of the "litigation team" to its three courtroom lawyers (see Obj. Ex. 3 ¶ 3), excluding "any supervisors or other individuals who are providing guidance or advice or exercising decision-making authority." (Order at 11). It is no comfort to plaintiffs if the trial team is kept in the dark regarding attorney-client communications, but is instructed to take certain litigation stances based in part on information gleaned from privileged communications known by their superiors.

Second, the statements by the United States provide no information regarding witnesses who may testify in these cases. Instead, the United States asks this Court to order that plaintiffs must proceed without any opportunity to probe potential witnesses' knowledge of communications between plaintiffs and plaintiffs counsel, or, at the most, would ask this court to endorse four questions which the United States claims "balance" the interests of both parties. (Obj. at 25). Under the Government's proposal, any "witnesses who have relevant factual knowledge regarding the plaintiffs' allegations" would be asked—but not required—to sign the following statement when interviewed by trial attorneys for the United States:

> (1) I am not aware of any surveillance or interception of the substance of attorney-client communications between plaintiffs and their counsel in these actions; OR
>
> (2) I have never been made aware of the substance of any attorney-client communications between plaintiffs and their counsel in these actions; OR
>
> (3) I do not have, and have not had since the first time I met with trial counsel representing the United States, i.e., Stephen Handler, Clay Mahaffey and Ernesto Molina (hereinafter the "trial counsel"), any recollection of the substance of any attorney-client communications between plaintiffs and their counsel in these actions; OR

> (4) I have not communicated the substance of any attorney-client communications between plaintiffs and their counsel in these actions I recall to trial counsel and have not used the substance of any attorney-client communications between plaintiffs and their counsel in these actions to influence trial counsel's conduct of this case in any manner, I agree not to do so in the future, and I cannot anticipate any reason why truthfully answering questions relevant to the allegations plaintiffs make in this case would require me to communicate the substance of any attorney-client communications.

(Obj. at Ex. 3). After seeking the statements as it desires, the United States would still be able to interview any witness who cannot sign the statement and plaintiffs would be allowed no discovery regarding the matters set forth in the statements. (Obj. at 10 n. 4).

The four disjunctive questions pressed by the United States were abandoned by Magistrate Judge Gold because, as he recognized, the statement allows for an untenable situation. Plaintiffs face the possibility that any defense witness giving testimony in the case is aware of the substance of an attorney-client communication, but (1) claims to "no longer remember" the substance of that communication, (2) swears not to "use" the communication in any way, or (3) believes that he or she will be able to answer questions without communicating the substance of the communication. But plaintiffs will neither be told that the witness believes any of these things, nor permitted to explore the subject. This is unacceptable. "Plaintiffs should be entitled to test ….any …important statement made by an adverse witness, and not be required merely to rely upon a conclusory declaration without access to the underlying specific facts." (Order at 8). Under the Government's proposal, the witness is the sole judge of whether plaintiffs' rights are implicated, a task which (even without questioning the witness's good faith) is impossible for the witness to perform in a neutral and objective fashion. Certain of the contemplated affirmations are not even within the witness's capacity to make at this time: no witness will know what questions plaintiffs' counsel will ask at depositions, and there is no guidance for a witness who, while having no recollection of certain information at the time of signing the affirmation, subsequently has his or her recollection refreshed, through testifying at a

deposition or otherwise. Thus, contrary to the United States' contention, the Magistrate did not abuse his discretion by declining to rely on the disjunctive witness statement.

IV. THE MAGISTRATE JUDGE DID NOT ABUSE HIS DISCRETION BY REJECTING THE UNITED STATES' UNSUPPORTED NATIONAL SECURITY PRIVILEGE.

Against plaintiffs' compelling need, the United States seeks to prevent the disclosure ordered by the Magistrate based on vague and unsubstantiated "national security concerns." Indeed, the United States identifies the "primary infirmity" of the Magistrate's decision as resting on "the erroneous premise that complying with the Order would not reveal any sensitive classified information." (Obj. at 15). Attributing the Magistrate's conclusion to his observation that the TSP has been the subject of extensive public discussion and disclosures, the United States proceeds to argue that the Magistrate improperly conflated disclosures regarding the "existence of the TSP with disclosure of the details of the TSP." (Id. (emphasis in original)). Defendant's argument rests on an erroneous factual premise, and is incorrect as a matter of law.

A. The Magistrate Judge Properly Concluded That The United States Provided No Evidentiary Support for Its Assertion of "National Security Concerns."

The principal reason that the Magistrate rejected the Government's assertion of "national security concerns" was not his conclusion that relevant classified information already had been disclosed to the public, but the Government's failure to provide any factual basis or legal standard in support of its assertions. (Order at 7). While adverting vaguely to fears regarding disclosure of "classified information," the United States specified neither why the disclosures in question involved classified information, nor how compliance with the Order would result in such disclosures. (See, e.g., Letter from Stephen E. Handler to the Honorable Steven M. Gold (Turkmen Docket No. 477) at 2). The Government has never even specified what kind of

privilege is threatened by compliance with the Court's Order.[9] Defendant's Objections are no more helpful, as they seem to rely on the military and state secrets privilege, which was never invoked below and is not invoked here. United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (military and state secrets privilege must be formally asserted by head of department "which has control over the matter, after actual personal consideration by that officer").

1. *The United States Has Not Provided Adequate Factual Support for its "National Security Concerns."*

It is axiomatic that a party asserting a privilege preventing disclosure bears the burden of demonstrating an entitlement to that privilege. In re Ashanti Goldfields Sec. Litig., 213 F.R.D. 102, 104 (E.D.N.Y. 2003). Inherent to this burden is the obligation to provide a factual basis for the privilege asserted. Id. at 104 (party asserting privilege must make a "detailed and convincing showing of the harm to be anticipated from the disclosure" (internal quotation marks omitted)); see also LOCAL CIVIL RULE 26.2.

In an analogous context of Freedom of Information Act (FOIA) litigation, where the Government seeks to respond to a FOIA request with a so-called "Glomar response"—that is, a response neither confirming nor denying the existence of certain information—this factual submission usually consists of a public affidavit explaining with as much detail as possible the reasons why the disclosure would damage national security. Phillippi v. Central Intelligence Agency, 546 F.2d 1009, 1013 (D.C. Cir. 1976). The opposing party may then seek any discovery necessary "to clarify the agency's position or to identify the procedures by which that position was established." Id. Courts tend to allow Glomar responses where the confirmation or

[9] Moreover, by not asserting the privilege in objection to the original interrogatories, the United States waived the privilege. Fed. R. Civ. P. 34(b); Sheikhan v. Lenox Hill Hosp., 98 Civ. 6468, 1999 WL 199010, *2 (S.D.N.Y. April 9, 1999) ("The weight of authority holds that an unjustified failure to assert an objection in a timely manner . . . results in a waiver of the objection or privilege.") This is true despite the "harsh consequences" of finding waiver. Id. at *2.

denial of the existence of information "would remove any lingering doubts that a foreign intelligence service might have on the subject, and where the perpetuation of such doubts may be an important means of protecting national security." American Civil Liberties Union v. Department of Defense, 389 F.Supp. 2d 547, 561 (S.D.N.Y. 2005) (internal quotation marks omitted). As shown below, however, the United States has failed to explain how the ordered disclosures could threaten national security.

The Government's argument that the disclosures ordered by Judge Gold would reveal classified information was first articulated in a letter from counsel for the United States dated March 17, 2006. In that letter the United States asserted, without any factual basis, that no official or government employee, including trial counsel, can publicly confirm or deny whether any communications were intercepted by classified means in this case, because any refusal to confirm or deny such intercepts in another case "could itself tend to reveal classified information." (Letter from Stephen E. Handler to the Honorable Steven M. Gold (Turkmen Docket No. 477) at 2).

The United States' failure to provide any factual support for its assertion of a classified information privilege was noted by plaintiffs during argument (Apr. 21, 2006 Tr., attached hereto as Ex. 2, at 8-9) and in numerous letters.[10] Despite repeated opportunities to address this omission, the Government chose to ignore its well-established obligation to provide some evidentiary basis for invocation of a privilege against disclosure. Defendant's March 27, 2006 letter contained precisely the same conclusory language as its March 17 request for

[10] See Letter from Alexander A. Reinert, counsel for Plaintiffs, to the Honorable Steven M. Gold (Mar. 24, 2006) (Turkmen Docket No. 478 at 2-3); Letter from Alexander A. Reinert, counsel for Plaintiffs, to the Honorable Steven M. Gold (Mar. 30, 2006) (Turkmen Docket No. 482 at 2-3); Letter from Rachel Meeropol, counsel for Plaintiffs to the Honorable Steven M. Gold (May 5, 2006) (Turkmen Docket No. 488 at 4); Letter from Alexander A. Reinert, counsel for Plaintiffs, to the Honorable Steven M. Gold (May 12, 2006) (Turkmen Docket No. 491 at 2).

reconsideration. (Letter from Stephen E. Handler to the Honorable Steven M. Gold (Turkmen Docket No. 479 at 2). Defendant's April 13, 2006 letter added a citation to the Executive Order related to the disclosure of classified information. (Letter from Stephen E. Handler to the Honorable Steven M. Gold (Apr. 13, 2006) (Turkmen Docket No. 485 at 2)). This citation, however, only establishes the basic proposition that classified information should not be disclosed except in certain conditions; it says nothing about whether the disclosures ordered in this case would or, in the Government's words, "could" tend to reveal classified information. Defendant's May 5 and May 12, 2006 letters offer no further elucidation of the basis for its assertion that disclosure of the information in this case would reveal classified information. (See Letter from Stephen E. Handler to the Honorable Steven M. Gold (May 5, 2006) (Turkmen Docket No. 489); Letter from Stephen E. Handler to the Honorable Steven M. Gold (May 12, 2006) (Turkmen Docket No. 490)).

Given the Government's repeated failure 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," Judge Gold necessarily found that the Government's assertion was "conclusory" and unsupported by "specific facts or information."[11] (Order at 7). Reference to "national security" does not obviate the Government's failure to fulfill its burden. Cf. Doe v. Gonzales, 449 F.3d 415, 423 (2d Cir. 2006) (Cardamone, J. concurring) ("While

[11]It was only after noting this stark failure by the Government that the Magistrate proceeded to consider the potential concerns arising from disclosure and conclude that "it is difficult to imagine what relevant facts remain secret but would be revealed if the information at issue were provided." Id. The Magistrate was put in the position of having to "imagine" the Government's national security concerns precisely because of the Government's failure to submit any factual evidence before Judge Gold. This makes the Government's criticism of the Magistrate all the more remarkable, because it was the Government's failure of proof which put the Magistrate in the position of having to imagine the factual basis for the Government's position. Accepting arguendo the Government's position that the Magistrate guessed wrong, the Government has no party to blame but itself.

everyone recognizes national security concerns are implicated when the government investigates terrorism within our Nation's borders, such concerns should be leavened with common sense so as not to trump the rights of the citizenry under the Constitution.").

The United States raises no objection to the finding that it failed to meet its factual burden, and therefore has waived any right to object to that aspect of Judge Gold's order. FED. R. CIV. P. 72(a). It is the general rule that "a party's failure to object to any purported error or omission in a magistrate judge's report waives further judicial review of the point" and may only be excused in the interests of justice. Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003); Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 419 F.Supp. 2d 206, 210 (N.D.N.Y 2005). Therefore, where a party makes objections concerning some portions of a magistrate judge's nondispositive order, its failure to object to other portions constitutes that party's consent to the Magistrate's recommendation on those issues. J.G. Peta, Inc. v. Club Protection, Inc., No. 99 Civ. 616, 2000 WL 156836, *1 n.1 (N.D.N.Y. Feb. 9, 2000).

2. *The United States' Failure to Provide Factual Support for its "National Security Concerns" Cannot be Cured Here.*

Nor can the Government's omissions be remedied now. In this Circuit, the law is clear that, absent compelling grounds, a district court should not consider supplemental evidence submitted in support of objections to a magistrate judge's order. Paddington Partners v. Bouchard, 34 F.3d 1132, 1137-38 (2d Cir. 1994) (party has no right to present additional evidence with objections without providing justification for not providing such evidence in proceedings before the magistrate); accord Henrietta D. v. Giuliani, No. 95 CV 0641, 2001 WL 1602114, *4 (E.D.N.Y. Dec. 11, 2001). Otherwise, the magistrate's role is reduced to "that of a mere dress rehearser." Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840

F.2d 985, 991 (1st Cir. 1988). Having made absolutely no attempt to explain or justify its failure to submit record evidence to the Magistrate, the Government cannot remedy that failure here.

B. The United States' Vague Worries Regarding "National Security Concerns" Do Not Amount to Any Judicially Recognized Privilege and Are Not Supported by Precedent.

The United States not only failed to provide any factual basis to support its asserted "national security concerns," but also failed to indicate any specific privilege which could protect the information from disclosure. Given this failure, the United States occupies shaky terrain when it seeks to bring to the Court's attention irrelevant averments submitted in a different case. These submissions, the unclassified Declarations of Major General Richard J. Quirk and John D. Negroponte, were submitted in support of the Government's assertion of a specified privilege—the military and state secrets privilege—in a different case, Center for Constitutional Rights, et al., v. Bush, et al., 06 Civ. 313 (GEL) (S.D.N.Y.), involving different information—i.e., whether the TSP is illegal. For the reasons detailed below, they cannot provide support for the Government's assertion of "national security concerns" in this case.

1. *The Declarations Submitted With the Government's Objections Should Be Stricken From the Record.*

The United States has not asserted the military and state secrets privilege in this case. The privilege must be formally asserted by "the government itself," lodged by "the head of the department which has control over the matter," and must be supported by evidence demonstrating that the head of the department "personal[ly] consider[ed]" the effect of the disclosures at issue. Ellsberg v. Mitchell, 709 F.2d 51, 56-57 (D.C. Cir. 1983). Because the United States cannot claim to have met any of these requirements, the state secrets doctrine should play no role in the Court's consideration.

Instead, the United States seeks to rely on the Quirk and Negroponte Declarations in support of its assertion of "national security concerns," without actually submitting the declarations or explaining why they should be considered. The United States explains that it did not submit similar declarations to Judge Gold because they were not introduced in Center for Constitutional Rights, et al., v. Bush, et al., until May 26, 2006, but this is an excuse that defies credulity. Presumably, Messrs. Negroponte and Quirk were available to submit declarations in the instant cases between March and May 2006; the Government does not help its cause by demonstrating its ability to submit the declarations in a different case during the same time frame. Moreover, a similar submission by Mr. Negroponte was made on May 13, 2006 in a lawsuit against AT&T for its involvement in the TSP. See Hepting et al. v. AT&T, et al., No. 06 Civ. 0672 (VRW) (N. D. Cal.) (Docket No. 124-2). As detailed above, plaintiffs in this case repeatedly remarked upon the absence of evidence to support the Government's assertions of national security concerns. Evidently the Government chose not to submit such material to Judge Gold and, like any other party in civil litigation, it must live with the consequences of that choice.

2. *The Quirk and Negroponte Declarations Do Not Support the Government's Position.*

Even if the Court were to consider the Quirk and Negroponte submissions on their face, however, they would not support the Government's asserted national security concerns in this case. In deciding whether to withhold disclosure on the grounds of national security interests, this court must not relinquish its "independent responsibility." Goldberg v. Dep't of State, 818 F.2d 71, 77 (D.C. Cir. 1987). In the FOIA context, the Government's submissions must "describe the documents and the justifications for nondisclosure with reasonably specific detail, [and] demonstrate that the information withheld logically falls within the claimed exemption."

Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981); see also Campbell v. Dep't of Justice, 164 F.3d 20, 30-31 (D.C. Cir 1998) ("consistent with the agency's general obligation to create as full a public record as possible" government submissions must not be "conclusory … vague or sweeping"). The requirements for the Government are no less stringent in a private civil suit than in a FOIA case, especially where, as here, the critical issues of protecting attorney-client communications are at stake. With these standards in mind, the Government's invocation of vague "national security concerns" in this case cannot be supported by the new factual information submitted by defendants.

First of all, the Quirk and Negroponte declarations are not addressed to the national security concerns asserted in this case. They were submitted to support the United States' assertion of the military and state secrets privilege in Center for Constitutional Rights, et al., v. Bush, et al. (Quirk Decl. ¶ 2; Negroponte Decl. ¶ 3.) Messrs. Quirk and Negroponte assert that they personally reviewed the information at issue in that case, and concluded that further litigation in that case, and disclosure of the information requested in that case, would damage national security. (Quirk Decl. ¶ 2; Negroponte Decl. ¶¶ 2-3.) They make no such assertion here.

Here, for instance, the plaintiffs do not seek to know whether they have been subjected to any surveillance by the NSA or pursuant to the TSP. Rather, they seek only to know whether the individuals specified in Judge Gold's order are aware of any Government monitoring of the plaintiffs' communications with their attorneys. The Government need not specify by what means it has monitored plaintiffs' communications, nor need the Government disclose whether there has been any Government monitoring of plaintiffs' communications; it must only disclose whether the individuals specified in Judge Gold's order are aware of plaintiffs' communications

with their counsel.

Clearly, the goal of the very specific and limited certifications outlined in the Magistrate's Order was simply to ensure that plaintiffs' attorneys could feel secure in their communications with their clients, and vice versa, a security that is part of the bedrock of the United States legal system. (See Order at 6). As Judge Gold recognized when first approaching this issue, counsel "cannot be expected to prepare their case if they think that somebody's listening to their conversations with their client." (Ex. 1 at 31). The United States appeared to understand this concern initially, when Mr. Handler, as trial counsel, advised on the record at the March 7 conference that he had "no knowledge" about such monitoring. (Id. at 32).

Even if the Quirk and Negroponte declarations were read to address the disclosures at issue in this case, they are insufficient in another regard. Both declarations refer to classified information and argument contained in declarations submitted in camera and ex parte to the Hon. Gerard E. Lynch, United States District Judge. (Quirk Decl. ¶¶ 2, 7, 8, 9; Negroponte Decl. ¶¶ 2, 9, 12, 13.) These classified declarations have not been submitted in the instant case, nor can they be submitted at this late date, and therefore the unclassified declarations cannot be of any substantial assistance to the United States.

3. *The Cases Cited by the United States Do Not Support Its Privilege.*

Finally, the cases relied upon by the United States for the proposition that disclosure of the existence of a program is distinct from disclosure of the details of a program also cannot support their claim of privilege here. First, the cases cited by the United States each involve an assertion of the state secrets privilege, which has not been asserted in this case. See El Masri v. Tenet, 1:05 cv 1417, 2006 U.S. Dist. LEXIS 34577, *1-2 (E.D. Va. May 12, 2006); Halkin v. Helms (Halkin I), 598 F.2d 1, 12 (D.C. Cir. 1978); Halkin v. Helms (Halkin II), 690 F.2d 977,

985 (D.C. Cir. 1982). As discussed above, the state secrets privilege may only be invoked by certain procedures, and not by counsel's argument.

Second, the cases cited by the United States are much broader in the scope of information requested than the limited and discrete information at issue in the present action. Halkin I and II involved an action brought by plaintiffs alleging constitutional violations based on the fact their communications were allegedly being monitored by the government. Accordingly, their discovery requests were much broader, going to whether any such monitoring of plaintiffs was occurring overall, and the nature of such monitoring. Halkin II, 690 F.2d at 991; Halkin I, 598 F.2d at 4-5. Similarly, El-Masri was a case brought by a plaintiff claiming to be an innocent victim of the United States' "extraordinary rendition" program, in which the Court held that any answer admitting or denying plaintiffs' allegations would necessarily require disclosure of specific operational details of the program. El-Masri, 2006 U.S. Dist. LEXIS at *17-18. In those cases, unlike the instant case, the Government's claim of privilege was supported by specific factual submissions. Halkin I, 598 F.2d at 8-9 (concluding that privilege was supported by classified and unclassified material); Halkin II, 690 F.2d at 991-93 (reviewing facts asserted in affidavit submitted by Government); El-Masri, 2006 U.S. Dist. LEXIS at *17-18 (concluding that privilege was supported by the details contained in the classified and unclassified declarations of the Director of the CIA).

Here, the United States has submitted no evidence tending to show that disclosure of the requested material may reveal classified information. Indeed, the arguments made by the Government actually suggest otherwise. First of all, as noted above, plaintiffs do not seek disclosure of monitoring activities based on whether they have been authorized by the NSA's TSP; therefore, there is no need, at this time, for the Government to specify under what programs

any particular monitoring has taken place. Plaintiffs only seek disclosure of monitoring of their privileged communications with their attorneys, to the extent that the substance or fact of such monitoring has been disclosed to specified attorneys or witnesses. Therefore, compliance with the Court's Order will not disclose any information regarding the strategy or methods used specifically for intelligence gathering.

In addition, as the Magistrate recognized, the fact that the Government is using electronic surveillance in its fight against terrorism is hardly a secret. (Order at 7-8.) And, as the Government itself argues here, it may well be that interceptions of attorney-client communications in this case, if they occur, are not shared with the individuals subject to Judge Gold's Order. (Obj. at 20 n.8 (arguing that "no one could reasonably expect" attorneys on case to have information related to TSP surveillance of plaintiffs)). If so, compliance with Judge Gold's Order—whether the Government denied or confirmed the fact that certain individuals were aware of electronic surveillance of plaintiffs' communications with their attorneys—is highly unlikely to reveal secret information regarding the TSP. If the Government answers with a denial, it would confirm that the Government has not allowed any interceptions to affect this case. On the other hand, if the Government could not answer Judge Gold's Order with a blanket denial, rather than suggest any fact regarding the NSA's TSP, it would suggest improper and embarrassing surveillance by the United States in an attempt to gain a strategic advantage in this civil case.

V. THE UNITED STATES' REQUEST FOR A STAY OF EXECUTION OF THE MAGISTRATE'S ORDER SHOULD BE DENIED.

The United States in the alternative asks this Court to exercise its discretion to stay the Magistrate's Order until the final resolution of Center for Constitutional Rights, et al., v. Bush, et al. The United States contends that a stay would not prejudice the plaintiffs in this action, would

avoid unnecessary burden on the defendant, and would conserve judicial resources. (Obj. at 27). The United States' analysis is erroneous.

First, since the Court has referred all discovery matters to Magistrate Judge Gold, the United States should have addressed its stay request to the Magistrate while the parties were litigating the disclosure issue below, or after Judge Gold issued his May 30, 2006, Order. Second, the cases cited by the United States applying a five factor balancing test to determine a party's stay application each involve a party who seeks to stay a civil action to preserve his Fifth Amendment privilege pending a parallel criminal proceeding. See, e.g., United States v. Kordel, 397 U.S. 1, 12 n. 27 (1970); Bridgeport Harbour Place I v. Ganim, 269 F.Supp. 2d 6, 8 (D. Conn. 2002). These cases inevitably involve identical parties, and significantly overlapping issues. Without a stay in such a circumstance, a party may be forced to choose between waiving his/her Fifth Amendment privilege and responding to civil discovery, thereby risking self-incrimination in the criminal case or default in the civil case.

This case does not involve the same considerations. First of all, the parties in CCR, Turkmen and Elmaghraby are not the same. The plaintiffs and defendants are obviously different. And while the government appears to rely heavily on the fact that one of the attorneys in Turkmen is a plaintiff in CCR, this does not establish an identity of the parties, and ignores the concerns of the Elmaghraby plaintiff who is not at all involved in CCR and has a right to have this matter adjudicated in the instant cases. Second, contrary to the United States' assertions, the issues in the three cases are not the same. Unlike CCR, neither Turkmen nor Elmaghraby involves a challenge to the legality of the TSP, nor information specific to surveillance under the TSP. Indeed, in these cases, the Government may satisfy its disclosure obligations without making any reference to TSP-specific surveillance. Therefore, there is no overlap between the

issues in these cases and the issues in CCR significant enough to justify the drastic remedy of a stay.

Moreover, while the United States characterizes plaintiffs' concern in Elmaghraby and Turkmen as a "limited discovery issue," the requested disclosures are critical to plaintiffs' ability to prepare for and conduct discovery in these cases. The depositions of defendants and third-party witnesses are imminent in Elmaghraby and Turkmen, and Judge Gold's Order permits that certain issues be investigated during those depositions. Staying enforcement of the Magistrate's order would be highly inefficient, because it 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.

The United States' citation to Lardner v. United States Dep't of Justice, 03 Civ. 0180, 2005 WL 758267 (D.D.C. March 31, 2005), is of no moment. In that case, the district court simply noted that it had stayed the case to await a decision from the court of appeals which addressed an issue significant to resolution of Lardner. Here, the United States asks this Court to stay proceedings to await the decision of a sister district court—not a controlling court of appeals—which will be decided on a different record and involves different parties and issues. No precedent is cited for such a broad request, which could delay critical discovery in this case until the parties in CCR have exhausted all of their appellate remedies.

CONCLUSION

Magistrate Gold's May 30, 2006 order requires the minimal disclosure by the United States necessary to protect the attorney-client privilege and allow plaintiffs to move forward in litigating this case. The United States has not put forward any specific or convincing arguments to explain why such disclosures should have any effect on national security. For the foregoing

reasons, plaintiffs respectfully request that the United States' motion to vacate the Order, or stay its execution, be denied.

Dated: New York, New York
July 10, 2006

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 10, 2006, copies of Plaintiffs' Memorandum in Opposition to the United States' Objections to the Order of Magistrate Judge Gold Entered May 30, 2006, with Exhibits 1 and 2, were served upon each the following counsel and parties *pro se* electronically or by first class mail, as indicated.

s/ Michael Winger

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