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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:
NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS
LITIGATION

MDL Docket No 06-1791 VRW
ORDER

This Document Relates To:

06-3574; 06-3596

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On May 26, 2006, plaintiffs brought suit against Verizon Communications, Inc in San Francisco superior court to enjoin Verizon's alleged disclosure to the National Security Agency (NSA) of telephone calling records of its California residential customers. Doc #1, 06-3574. Plaintiffs allege these disclosures violate their privacy rights under (i) the California Constitution and (ii) California Public Utilities Code § 2891. Id. A similar suit was brought against AT&T Corporation in San Francisco superior court on May 26, 2006. Doc #1, 06-3596.

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1 Verizon and AT&T removed these actions to this court on
2 June 5 and 6, 2006, respectively, relying on 28 USC §§ 1441 and
3 1442. Doc #1, 06-3574; Doc #1, 06-3596. Plaintiffs in both
4 actions dispute the propriety of removal and have moved to remand
5 these actions to state court, asserting that none of defendants'
6 bases for removal creates jurisdiction in this court. Doc #20, 06-
7 3574; Doc #14, 06-3596. On August 4, 2006, the United States filed
8 a "statement of interest" in opposition to plaintiffs' motions to
9 remand. Doc #44, 06-3574; Doc #46, 06-3596. For reasons discussed
10 below, the court DENIES plaintiffs' motions to remand.

11
12 I

13 On a motion to remand to state court, a defendant bears
14 the burden of showing that a federal court would have jurisdiction
15 from the outset; in other words, that removal was proper. Gaus v
16 Miles, Inc, 980 F2d 564, 566 (9th Cir 1992). To meet this burden,
17 a defendant must overcome a "strong presumption" against removal.
18 Id. Courts "strictly construe the removal statute against removal
19 jurisdiction[, and] federal jurisdiction must be rejected if there
20 is any doubt as to the right of removal in the first instance."
21 Id. See also Plute v Roadway Package Sys, Inc, 141 F supp 2d 1005,
22 1008 (ND Cal 2001) ("any doubt is resolved in favor of remand").

23 Plaintiffs move to remand the case for lack of subject
24 matter jurisdiction. See 28 USC § 1447(c) ("If at any time before
25 final judgment it appears that the district court lacks subject
26 matter jurisdiction, the case shall be remanded."). In their
27 removal papers, defendants assert a number of bases for removal
28 including that (1) plaintiffs' claims are completely preempted by,

1 inter alia, the Foreign Intelligence Surveillance Act, 50 USC §
2 1801 et seq, Title III of the Omnibus Crime Control and Safe
3 Streets Act of 1968 and the Electronic Communications Privacy Act,
4 codified as amended 18 USC § 2510 et seq, as well as federal common
5 law principles relating to national security affairs, see, e g,
6 Tenet v. Doe, 544 US 1, 7-11 (2005); (2) adjudication of
7 plaintiffs' claims will require resolution of substantial, disputed
8 issues of federal law, see, e g, Grable & Sons Metal Prods Inc v
9 Darue Eng'g and Mfg, 125 S Ct 2363, 2368 (2005); and (3) removal is
10 proper pursuant to 28 USC § 1442(a)(1). Notice Removal (Doc #1).
11 Additionally, the government argues that remand would be futile
12 because it would intervene under state law and remove pursuant to §
13 1442(a)(1). The court addresses these arguments in turn.

14
15 II

16 A

17 Federal jurisdiction is normally measured by the
18 yardstick of the well-pleaded complaint rule. "Under this rule, 'a
19 cause of action arises under federal law only when the plaintiffs'
20 well-pleaded complaint raises issues of federal law.' For removal
21 to be appropriate, a federal question must appear on the face of
22 the complaint." Toumajian v Frailey, 135 F3d 648, 653 (9th Cir
23 1998) (quoting Metropolitan Life Ins Co v Taylor, 481 US 58, 63
24 (1987) and citing Franchise Tax Board v Construction Laborers
25 Vacation Trust, 463 US 1, 9-10 (1983)). A corollary to the well-
26 pleaded complaint rule - one that gives content to "well-pleaded" -
27 is the doctrine of complete preemption.

28 //

1 The jurisdictional doctrine of complete preemption
2 provides that, in some instances, "the preemptive force of [federal
3 statutes] is so strong that they completely preempt an area of
4 state law. In such instances, any claim purportedly based on that
5 preempted state law is considered, from its inception, a federal
6 claim, and therefore arises under federal law." Ansley v
7 Ameriquist Mortg Co, 340 F3d 858, 862 (9th Cir 2003) (citing
8 Balcorta v Twentieth Century-Fox Film Corp, 208 F3d 1102, 1107 (9th
9 Cir 2000). See also Wayne v DHL Worldwide Express, 294 F3d 1179,
10 1183 (9th Cir 2002). Put simply, the test for complete preemption
11 "is whether Congress clearly manifested an intent to convert state
12 law claims into federal-question claims." Ansley v Ameriquist
13 Mortg Co, 340 F3d 858, 862 (9th Cir 2003) (citing DHL Worldwide
14 Express, 294 F3d at 1184).

15 Complete preemption arises only in "extraordinary"
16 situations. DHL Worldwide Express, 294 F3d at 1184. Indeed, the
17 Supreme Court presently has identified three federal statutes that
18 preempt state law completely: (1) § 301 of the Labor-Management
19 Relations Act, 29 USC § 185; (2) § 502 of the Employee Retirement
20 Income Security Act of 1974, 29 USC § 1132; and (3) the usury
21 provisions of the National Bank Act, 12 USC §§ 85, 86. Beneficial
22 Nat'l Bank v Anderson, 539 US 1, 7-8 (2003).

23 In its most recent treatment of the complete-preemption
24 doctrine, the Supreme Court concluded that two provisions of the
25 National Bank Act – those that (1) permitted national banks to
26 charge certain interest rates and (2) provided a cause of action
27 against banks that charge an interest rate greater than permitted
28 under the Act – completely preempted state-law claims challenging

1 the validity of interest rates charged by the defendant bank.
2 Beneficial Nat'l Bank, 539 US at 9-11. Although the statutory text
3 did not expressly preclude the operation of state law, the Court
4 concluded that the Act provided the "exclusive" cause of action for
5 usury challenges. See *id* at 11.

6 Defendants contend that federal law governing national
7 security matters "leaves no room for plaintiffs' state-law privacy
8 claims." Doc #29 at 7, 06-3574. Safeguarding national security is
9 said to fall squarely within the federal government's "supreme
10 sphere of action." *Id* (citing Murphy v Waterfront Comm'n of NY
11 Harbor, 378 US 52, 76 n16 (1964)). See also *id* ("The Founders
12 recognized that among the 'principal purposes to be answered by
13 [the] union' are '[t]he common defence of the members' and 'the
14 preservation of the public peace, as well against internal
15 convulsions as external attacks.'" (citing *The Federalist* No 23, at
16 126, Alexander Hamilton)). But defendants' repeated invocation of
17 the "sweeping authority of Congress and the Executive" to protect
18 national security misses the mark. Doc #29 at 7-9, 06-3574. Under
19 the doctrine of complete preemption, the question is not whether
20 Congressional authority exists, it is instead whether that
21 authority has been exercised to its fullest extent.

22 If a federal statute lacks express statutory exclusivity
23 language, as here, the analysis focuses upon factors such as the
24 "structure and purpose" of the relevant statutes; whether they
25 contain "complex, detailed, and comprehensive provisions" that
26 "create a whole system under federal control" and whether there
27 exist "extensive federal remedies." In re Miles, 430 F3d 1083,
28 1088 (9th Cir 2005) (internal citations omitted).

1 To support complete preemption, defendants first cite the
2 Stored Communications Act ("SCA"), 18 USC § 2701 et seq, which was
3 enacted as part of the Electronic Communications Privacy Act of
4 1986 ("ECPA"), Pub L No 99-508, 100 Stat 1848 (1986). The SCA
5 regulates disclosure of non-content "record[s] or other information
6 pertaining to a subscriber." 18 USC § 2702(c). The SCA specifies
7 that "[t]he remedies and sanctions described in this chapter are
8 the only judicial remedies and sanctions for nonconstitutional
9 violations of this chapter." Id § 2708.

10 Plaintiffs dispute the import of § 2708, contending that
11 it is the counterpart to 18 USC § 2518(10)(c), both of which were
12 added to the ECPA for a limited purpose: to prevent criminal
13 defendants from suppressing evidence based on electronic
14 communications or customer records obtained in violation of ECPA's
15 provisions. Doc #43 at 6, 06-3596. To support this
16 interpretation, plaintiffs first cite the legislative history of §
17 2518(10)(c). See S REP No 99-541 at 23; H R REP No 99-647 at 75
18 (1986) ("The purpose of this provision is to underscore that * * *
19 the Electronic Communications Privacy Act does not apply the
20 statutory exclusionary rule contained in title III of the Omnibus
21 Crime Control and Safe Streets Act of 1968 to the interception of
22 electronic communications."). Next, plaintiffs note that § 2708's
23 legislative history adopts § 2518(10)(c)'s discussion by reference.
24 See H R REP No 99-647 at 75 (1986). Doc #43 at 6, 06-3596. In
25 view of the similarity of the language between the two provisions,
26 and given the House Report's express reference back to the
27 discussion of § 2518(10)(c), the court agrees with plaintiffs'
28 interpretation of the statute. See also United States v Smith, 155

1 F3d 1051, 1056 (9th Cir 1998) (finding that § 2708 precludes
2 suppression as a remedy for violation of SCA). Accordingly, the
3 court concludes that the SCA does not completely preempt suits
4 under state law.

5 Alternatively, defendants argue that the Foreign
6 Intelligence Surveillance Act ("FISA") completely preempts
7 plaintiffs' state law claims. According to defendants, FISA
8 constitutes a set of "complex, detailed, and comprehensive
9 provisions" that "create a whole system under federal control."
10 Doc #23 at 8, 06-3596. The court concurs with defendants that FISA
11 regulates, at least in substantial part, many aspects of foreign
12 intelligence surveillance, including electronic surveillance, 50
13 USC §§ 1801-1811, physical searches, id §§ 1821-1829, pen registers
14 and trap and trace devices, id §§ 1841-1846, and access to business
15 records, id §§ 1861-1862. But neither a regulation's complexity
16 nor its comprehensiveness is sufficient for complete preemption. A
17 cursory review of the United States Code reveals that to hold
18 otherwise would override broad swaths of state law.

19 More damaging to defendants' theory is language in FISA
20 that appears to contemplate state court litigation. For example, §
21 1806(f), in pertinent part, provides procedures for consideration
22 of the propriety of FISA orders "[w]henver * * * any motion or
23 request is made by an aggrieved person pursuant to any other
24 statute or rule of * * * any state before any court or other
25 authority of * * * any state to discover or obtain applications or
26 orders or other materials relating to electronic surveillance * * *
27 ." 50 USC § 1806(f). See also id §§ 1845(f), 1825(g). The
28 statutory exemption in § 1861(e) also implies the availability of

1 civil claims with respect to the production of records. It
2 provides that "[a] person who, in good faith, produces tangible
3 things under an order pursuant to this section shall not be liable
4 to any other person for such production." 50 USC § 1861(e). FISA
5 thus contemplates that, in the absence of a government order for
6 business records under 50 USC § 1861(a)(1) (as alleged here),
7 injured parties will have causes of action and remedies under other
8 provisions of state and federal law. Hence, the court finds that
9 FISA does not completely preempt plaintiffs' state law claims.

10 Finally, the court turns to the argument that the federal
11 common law completely preempts plaintiffs' state law claims. The
12 Supreme Court has held that "a few areas, involving 'uniquely
13 federal interests,' are so committed by the Constitution and laws
14 of the United States to federal control that state law is
15 pre-empted and replaced, where necessary, by federal law of a
16 content prescribed (absent explicit statutory directive) by the
17 courts - so-called 'federal common law.'" Boyle v United States
18 Techs Corp, 487 US 500, 504 (1988). Absent congressional
19 authorization, courts may only create new federal common law if the
20 operation of state law governing the dispute would (1)
21 "significant[ly] conflict" with (2) "uniquely federal interests."
22 See Boyle, 487 US at 504 (1988). Cases justifying judicial
23 creation of preemptive federal rules are extremely limited:
24 "[w]hether latent federal power should be exercised to displace
25 state law is primarily a decision for Congress,' not the federal
26 courts." Atherton v FDIC, 519 US 213, 218 (1997) (quoting Wallis v
27 Pan American Petroleum Corp, 384 US 63, 68 (1966)).

28 //

1 Plaintiffs contend that no conflict exists between
2 plaintiffs' California privacy claims and any uniquely federal
3 interest. Displacing state law requires that a "significant
4 conflict between some federal policy or interest and the use of
5 state law * * * be specifically shown." Atherton, 519 US at 218
6 (quoting Wallis, 384 US at 68). A "significant conflict" occurs
7 when the application of state law runs counter to a federal policy
8 or would frustrate specific objectives of federal legislation. See
9 Boyle, 487 US at 507, 509 (duty of care under state tort law was
10 "precisely contrary" to duty imposed by government contract).

11 Defendants cannot show the requisite "significant
12 conflict" here because the California laws on which plaintiffs'
13 claims are based do not make unlawful an act of defendants that
14 federal law or policy deems lawful. Under state and federal law,
15 defendants may present as an affirmative defense any assertion that
16 it acted pursuant to legal process, including a legal federal
17 process. See Cal Pub Util Code § 2894. Moreover, in view of
18 Congress's extensive legislation addressing surveillance via FISA,
19 portions of Title III and the SCA, it would be anomalous for the
20 court to supplant this detailed work with a set of federal common
21 law rules. Accordingly, the court concludes that the federal
22 common law does not completely preempt plaintiffs' state law
23 claims.

24
25 B

26 The court next considers the argument that plaintiffs'
27 claims give rise to jurisdiction under the "embedded federal issue"
28 doctrine described in Empire Healthchoice Assurance, Inc v McVeigh,

1 126 S Ct 2121 (2006) and Grable & Sons Metal Prods, Inc v Darue
2 Eng'g & Mfg, 545 US 308 (2005). State law claims confer federal
3 jurisdiction under this doctrine if they "necessarily raise a
4 stated federal issue, actually disputed and substantial, which a
5 federal forum may entertain without disturbing any congressionally
6 approved balance of federal and state judicial responsibilities."
7 Grable, 545 US at 314 (2005). As the Court in Grable observed,
8 this rule "captures the commonsense notion that a federal court
9 ought to be able to hear claims recognized under state law that
10 nonetheless turn on substantial questions of federal law, and thus
11 justify resort to the experience, solicitude, and hope of
12 uniformity that a federal forum offers on federal issues." Id at
13 311.

14 Applying this framework, the Court determined in Grable
15 that a landowner's quiet title claim against a tax sale purchaser,
16 which alleged that the Internal Revenue Service provided inadequate
17 notice under federal law to the owner before the sale, involved "an
18 important issue of federal law that sensibly belongs in a federal
19 court." Id at 315. In evaluating the particular statute at issue
20 in Grable, the Court emphasized that the case's outcome hinged on
21 the meaning of the incorporated federal statute, that the federal
22 government had a significant interest in the particular dispute and
23 that only a limited number of quiet title cases will actually raise
24 a contested matter of federal law. Id at 314.

25 In a more recent case, the Supreme Court clarified
26 Grable, remarking that the case covers a "special and small
27 category" of federal question jurisdiction. Empire Healthchoice
28 Assurance, Inc v McVeigh, 126 S Ct 2121, 2136 (2006). The Court

1 further observed that federal issues posing pure questions of law
2 whose resolution "would be controlling in numerous other cases" are
3 more likely to qualify as substantial federal issues for purposes
4 of § 1331. Id at 2137. Conversely, "situation-specific" federal
5 issues are less likely to provide a basis for exercising
6 jurisdiction over a state law claim. Id.

7 Notwithstanding the Supreme Court's recent guidance, the
8 parties dispute the scope of the embedded federal issue doctrine.
9 According to plaintiffs, the well-pleaded complaint rule mandates
10 that the federal issue in question be embedded within the
11 affirmative elements of the state law claim itself, as opposed to
12 an anticipated defense. Defendants concede that a federal defense
13 is insufficient to create federal jurisdiction, Doc #29 at 21, but
14 assert that the state secrets privilege presents a threshold issue
15 of justiciability that does not fall neatly into either category
16 (cause of action or defense).

17 Defendants further insist that plaintiffs' focus on claim
18 elements fails to hew to the standard promulgated in Grable. The
19 relevant inquiry, defendants contend, is whether state-law claims
20 "implicate significant federal issues" or "raise a stated federal
21 issue, actually disputed and substantial." Doc #29 at 12-13
22 (citing Grable, 545 US at 313, 314). To confine the court's
23 inquiry to the elements of plaintiffs' claims would allegedly
24 impose a "single, precise, all-embracing test" of the kind the
25 Court eschewed in Grable. Id at 314. See also id at 313
26 (endorsing a "common-sense accommodation of judgment to [the]
27 kaleidoscopic situations that present a federal issue"). To
28 defendants, a "common-sense accommodation of judgment" warrants the

1 conclusion that issues related to the state secrets privilege
2 "implicate federal interests of the highest order that are
3 sufficient to create federal jurisdiction." Doc #29 at 22, 06-
4 3574.

5 The court agrees with defendants that the state secrets
6 privilege plays a unique role in the present cases. Most
7 significantly, under the Totten bar, if the "very subject matter
8 of the action' is a state secret, then the court should dismiss the
9 plaintiff's action based solely on the invocation of the state
10 secrets privilege." Id (quoting Reynolds, 345 US at 11 n26). See
11 also Reynolds, 345 US at 11 n26 (characterizing Totten as a case
12 "where the very subject matter of the action, a contract to perform
13 espionage, was a matter of state secret. The action was dismissed
14 on the pleadings without ever reaching the question of evidence,
15 since it was so obvious that the action should never prevail over
16 the privilege."); Tenet v Doe, 544 US 1, 8 (2005) (concluding that
17 "Totten precludes judicial review in cases * * * where success
18 depends upon the existence of a secret espionage relationship with
19 the Government"). Even in cases whose "very subject matter" is not
20 a state secret, the state secrets privilege nevertheless requires
21 dismissal if national security concerns prevent plaintiffs from
22 proving the *prima facie* elements of their claim, and summary
23 judgment in favor of the defendant if those concerns prevent the
24 defendant from invoking a valid defense. Kasza v Browner, 133 F3d
25 1159, 1166-67 (9th Cir 1998).

26 To be sure, as plaintiffs note, the state secrets
27 privilege "belongs to the government and must be asserted by it."
28 Reynolds, 345 US at 7. But the court expects the government to

1 assert the privilege in the present cases. In an order setting the
2 initial case management conference, the court asked whether "the
3 government intend[s] to assert the state secrets privilege in all
4 of the cases transferred pursuant to MDL 1791." Doc #49, 06-1791.
5 In response, during the case management conference, the government
6 confirmed its intention to assert the privilege in all of the cases
7 pending before the court pursuant to MDL 1791.

8 Plaintiffs contend that the court's order in Hepting, 06-
9 762, renders the effect of the state secrets privilege undisputed
10 in the present cases. But this argument belies the court's
11 certification of the Hepting order for appeal pursuant to 28 USC §
12 1292(b). The court certified the order because the state secrets
13 privilege is an issue for which "there is a substantial ground for
14 difference of opinion." See Doc #308 at 70, 06-672. ("[G]iven
15 that the state secrets issues resolved herein represent controlling
16 questions of law as to which there is a substantial ground for
17 difference of opinion and that an immediate appeal may materially
18 advance ultimate termination of the litigation, the court certifies
19 this order for the parties to apply for an immediate appeal
20 pursuant to 28 USC § 1292(b)."). Therefore, the court's ruling in
21 Hepting does not determine unequivocally the effect of the state
22 secrets privilege, particularly with respect to the present cases.

23 Apart from being disputed, the application of the
24 privilege also poses a "substantial" question of federal law. As
25 the DC Circuit observed, if privileges were ranked by importance,
26 the "privilege to protect state secrets must head the list."
27 Halkin, 598 F2d at 7. In marked contrast to most privileges and
28 affirmative defenses, the state secrets privilege, "[w]hen properly

1 invoked, * * * is absolute" and "[n]o competing public or private
2 interest can be advanced to compel disclosure of information found
3 to be protected" by it. Ellsberg, 709 F2d at 57; Reynolds, 345 US
4 at 11 ("[E]ven the most compelling necessity cannot overcome the
5 claim of privilege if the court is ultimately satisfied that
6 military secrets are at stake.").

7 Finally, permitting these cases to proceed in federal,
8 rather than state, court will not "disturb[] any congressionally
9 approved balance of federal and state judicial responsibilities."
10 Grable, 126 S Ct at 2368. Plaintiffs have not demonstrated that
11 Congress has mandated that state judicial officers be involved in
12 litigation of this kind. Nor would the court's recognition of the
13 availability of a federal court to consider claims of state secrets
14 result in a spate of cases being filed in federal court that
15 properly belong in state courts.

16 To remand on the grounds that "evidentiary privileges"
17 cannot form the basis for federal jurisdiction under the embedded
18 federal issue doctrine would elevate form over substance. As
19 applied to the present cases, the state secrets privilege functions
20 unlike a standard evidentiary privilege. Here, the privilege is
21 "not only a contested federal issue, but a substantial one," for
22 which there is "a serious federal interest in claiming the
23 advantages thought to be inherent in a federal forum." Grable 545
24 US at 313. Accordingly, the court finds that plaintiffs' claims
25 give rise to federal jurisdiction under the "embedded federal
26 issue" doctrine.

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C

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2 The court turns to defendants' contention that removal is
3 proper under the federal officer removal statute, 28 USC §
4 1442(a)(1). Removal jurisdiction is proper under § 1442(a)(1) when
5 "[t]he United States or any agency thereof or any officer (or any
6 person acting under that officer) of the United States or or any
7 agency thereof[] [is] sued * * * for any act under color of such
8 office * * * ." A defendant seeking removal under this provision
9 must demonstrate that (1) "it is a 'person' within the meaning of
10 the statute"; (2) "there is a causal nexus between [the
11 defendant's] actions, taken pursuant to a federal officer's
12 directions, and plaintiff's claims"; and (3) "it can assert a
13 'colorable federal defense.'" Durham v Lockheed Martin Corp, 445
14 F3d 1247, 1251 (9th Cir 2006) (quoting Jefferson County v Acker,
15 527 US 423, 431 (1999)). The availability of removal in these
16 cases turns on the second of these three requirements.

17 In construing the "acting under" requirement, courts
18 generally find that persons are "acting under" a federal officer if
19 acts forming the basis of the state suit were performed pursuant to
20 a federal officer's direct orders or comprehensive and detailed
21 regulations. By contrast, that the relevant acts occurred under
22 the "general auspices of federal direction" is usually
23 insufficient. See, e g, Arness v Boeing North Am, 997 F Supp 1268,
24 1273 (CR Cal 1998); Fung v Abex Corp, 816 F Supp 569 (ND Cal
25 1992).

26 In Camacho v Autoridad de Telefonos de Puerto Rico, 868
27 F2d 482 (1st Cir 1989), the First Circuit applied the federal
28 officer removal statute to facts similar to those alleged in the

1 present cases. The court held that an action against quasi-public
2 telephone companies for participating in a wiretap of plaintiffs'
3 telephones in violation of Puerto Rican law was properly removed to
4 federal district court under the federal officer removal statute.
5 868 F2d at 489. The reach of § 1442(a)(1) extended to private
6 persons because the carriers acted at the behest of federal
7 officers conducting the wiretap pursuant to the Omnibus Crime
8 Control and Safe Streets Act (18 USCA §§ 2510-2520). Id.

9 Yet, as plaintiffs note, Camacho's pertinence to the
10 present motions is undermined by one critical distinction: the
11 defendant telephone companies in Camacho were sued for their role
12 in aiding federal agents in conducting a wiretap pursuant to a
13 federal court order issued under Title III. Camacho, 868 F2d at
14 489. Hence, the government's level of compulsion in Camacho was
15 clear. Here, it is unknown whether the government compelled
16 defendants to disclose the records. The government will likely
17 assert the state secrets privilege, rendering defendants unable to
18 admit or deny whether such an order from the government existed.
19 As a result, defendants must rely on plaintiffs' complaint to
20 demonstrate that they acted under the direction of a federal
21 officer. Plaintiffs' allegations include the following:

22 Beginning sometime after September 11, 2001, AT&T
23 began providing the NSA on an ongoing basis with
24 residential customer telephone calling records and
access to other information about AT&T's customers
and subscribers.

25 * * *

26 AT&T has made these telephone records available to
27 the NSA on a voluntary basis. They were not
28 provided under the compulsion of any legal process
such as a warrant, court order or subpoena.

1 Doc #1 (compl), ¶¶ 19, 23, 06-3596.

2 Plaintiffs contend that the allegations fail to
3 demonstrate that defendants acted under the direction of a federal
4 officer because they "do not assert detailed direction and control
5 by the government." Doc #43 at 24, 06-3596. In support,
6 plaintiffs cite Watson v Phillip Morris Companies, Inc, 420 F3d
7 852, 856-57 (8th Cir 2005), and Winters v Diamond Shamrock Chemical
8 Company, 149 F3d 387 (5th Cir 1998), for the proposition that a
9 federal officer must administer comprehensive control over a
10 defendant to satisfy the standard. The court in Watson affirmed
11 the removal of a class action suit alleging that a cigarette
12 manufacturer violated the Arkansas Deceptive Trade Practices Act
13 because the Federal Trade Commission exercised extensive control
14 over cigarette advertising. Watson, 420 F3d at 856. In Winters,
15 the court approved removal under § 1442(a)(1) of a products
16 liability suit against a manufacturer of Agent Orange because the
17 government specified the formula for Agent Orange, as well as the
18 packaging, labeling and shipping requirements. Winters, 149 F3d at
19 399. The court in both cases emphasized the comprehensive and
20 detailed control exercised by the government.

21 The court declines to impose the rigid standard from
22 Watson and Winters for two reasons. First, a high level of
23 specificity was necessary in Watson and Winters in order to
24 establish a causal nexus between the conduct charged in plaintiffs'
25 claims and the acts performed by defendants at the direction of
26 official federal authority. For example, in Winters, the precise
27 chemical formula used in Agent Orange was pertinent to the
28 underlying claims for negligence and products liability. In the

1 present cases, however, the exact procedures allegedly used to
2 disclose the records are of little consequence to plaintiffs' legal
3 theories. For instance, under California Public Utilities Code §
4 2891, the particular methods defendants used to submit the customer
5 calling records to the NSA would not matter; absent a statutory
6 exemption, mere disclosure is enough. Requiring excessive detail
7 would run contrary to the nature of plaintiffs' claims in the
8 present cases.

9 Second, although the defendants in Watson and Winters
10 complied with strict federal regulation, they ultimately were
11 advancing their own interests. That is, defendants presumably
12 contracted to produce Agent Orange and advertised for cigarettes
13 for their own financial benefit. Here, plaintiffs allege that the
14 NSA uses the information "to create a massive database to search
15 for patterns of social interaction that might warrant further
16 investigation." Doc #1 at 19, 06-3596. Hence, based on the facts
17 as alleged in plaintiffs' complaints, defendants voluntarily acted
18 as agents for the NSA's purposes. See *Id.*, ¶ 23 ("AT&T has made
19 these telephone records available to the NSA on a voluntary
20 basis"). The fact that the disclosure advanced the interests of
21 the NSA more than defendants also weighs in favor of finding
22 jurisdiction under § 1442(a)(1).

23 In short, the court concludes that the level of
24 specificity of the federal direction required under § 1442(a)(1)
25 should correspond to both the nature of the underlying legal claims
26 and the purpose of the relevant activities. A less demanding
27 specificity requirement is appropriate here because the mere act of
28 disclosure triggers plaintiffs' claims (subject to various

1 defenses) and because defendants allegedly acted in furtherance of
2 NSA's interests. Accordingly, these allegations suffice to confer
3 federal jurisdiction under the federal officer removal statute.

4
5 D

6 Finally, the court addresses the statement of interest
7 filed by the United States. Doc #44, 06-3574. In its statement,
8 the government argues that its intervention in these cases provides
9 separate grounds for removal pursuant § 1442(a), thereby rendering
10 remand futile. *Id.* Hence, the government avers that remand would
11 serve only as a delay and a waste of resources for the parties and
12 the federal and state courts. *Id.* at 4.

13 In Bell v City of Kellogg, 922 F2d 1418, 1424-25 (9th Cir
14 1991), the Ninth Circuit adopted a futility exception to the remand
15 provisions of 28 USC § 1447. After the district court held that
16 plaintiffs lacked standing to challenge the federal aspects of the
17 case, the district court dismissed the entire case, rather than
18 remand certain pendant state claims. The Ninth Circuit approved
19 this procedure, holding that "[w]here the remand to state court
20 would be futile, * * * the desire to have state courts resolve
21 state law issues is lacking" and such remands would be
22 inappropriate because "no comity concerns are involved." 922 F2d
23 at 1424-25 (citing MAIN v Commissioner, Maine Dep't of Human Servs,
24 876 F2d 1051, 1054 (1st Cir 1989)).

25 Plaintiffs question the "continued vitality" of the
26 futility exception, asserting that the Supreme Court undermined the
27 exception four months later in International Primate Protection
28 League v Administrators of Tulane Education Fund, 500 US 72 (1991).

1 Doc #53 at 4, 06-3596. In that case, the Supreme Court declined to
2 assess defendant's argument that his second attempt at removal
3 would be successful pursuant to § 1442(a). 500 US at 89. Whether
4 defendant acted under a federal officer posed a "mixed question of
5 law and fact [that] should not be resolved in the first instance by
6 [the Supreme Court], least of all without an appropriate record."
7 Id. These "uncertainties in the case * * * preclude[d] a finding
8 that a remand would be futile." Id.

9 The court disagrees with plaintiffs' reading of Primate
10 Protection League. To be sure, the Supreme Court confirmed the
11 narrowness of the futility exception, but it did not sound the
12 doctrine's death knell, at least not loud enough to overturn clear
13 Ninth Circuit precedent. Moreover, after Primate Protection
14 League, the Ninth Circuit has reaffirmed the doctrine's vitality
15 (in unpublished opinions that this court dare not cite). See 9th
16 Cir R 36-3(c).

17 Nonetheless, as this court observed in Re-Con Bldg Prods
18 v Guardian Ins Co, 2000 WL 432830, at *1 (ND Cal 2000)), the
19 standard to invoke the futility exception is exacting, as it
20 requires the court to find that a state court action would
21 inevitably be removed to federal court. For example, in Bell, the
22 Ninth Circuit dismissed the case after concluding it was
23 "absolute[ly] certain[]" that plaintiff would not prevail in state
24 court. Bell, 922 F2d at 1425. See also Pacific Sound Resources v
25 Burlington Northern & Santa Fe RR Co, 2006 WL 1441983, at *1 & n1
26 (WD Wash 2006).

27 Here, the futility of remand hinges on two predicates:
28 (1) California state law provides the government a right to

1 intervene and (2) the government's intervention would trigger
2 removal under § 1442(a). With respect to the first predicate, the
3 government contends that California law provides an unconditional
4 right to intervene under California code of civil procedure
5 § 387(b). This section provides:

6 [I]f the person seeking intervention claims an
7 interest relating to the property or transaction
8 which is the subject of the action and that person
9 is so situated that the disposition of the action
10 may as a practical matter impair or impede that
11 person's ability to protect that interest, unless
12 that person's interest is adequately represented by
13 existing parties, the court shall, upon timely
14 application, permit that person to intervene.

15 In the present actions, the government has a significant interest
16 that defendants cannot adequately represent because only the
17 government has the ability to assert the state secrets privilege.
18 See Reynolds, 345 US at 7-8 ("The privilege belongs to the
19 government and must be asserted by it; it can neither be claimed
20 nor waived by a private party" and must be "lodged by the head of
21 the department which has control over the matter, after actual
22 personal consideration by the officer."). Hence, only the
23 government is capable of protecting against the disclosure of
24 information that it alleges would reasonably endanger national
25 security interests.

26 Although the government's right of intervention is
27 straightforward, the parties dispute the second predicate – whether
28 intervention by the government would be grounds for removal under §
1442(a). According to plaintiffs, the "plain language" of the
statute precludes removal by the government because plaintiffs have
not "commenced" an action "against the United States." Doc #53 at

1 4, 06-3596 (citing 28 USC § 1442(a)(1) ("commenced in a State court
2 against * * * [t]he United States * * *"). See also In Re Estate
3 of Bobby Masters, 361 F Supp 2d 1303, 1307 (ED Ok 2005) (federal
4 government's intervention in state court probate proceeding did not
5 support removal because state court matter not "commenced against"
6 United States).

7 In response, defendants point out that plaintiffs' narrow
8 construal of § 1442(a) belies the case law, as courts regularly
9 permit third-party defendants to remove under § 1442(a)(1).
10 See, e g, IMFC Professional Services of Florida, Inc v Latin
11 American Home Health, Inc, 676 F2d 152, 156 (5th Cir 1982); Johnson
12 v Showers, 747 F2d1228, 1229 (8th Cir 1984); Nolan v Boeing Co, 919
13 F2d 1058, 1066 (5th Cir 1990). In United States v Todd, 245 F3d
14 691 (8th Cir 2001), for example, the Eighth Circuit rejected
15 plaintiff's argument that "the removal of [the] case to federal
16 court was improper because [he] did not sue any federal defendant
17 or rely on any federal law in his complaint." 245 F3d at 693. The
18 Todd court concluded that the United States, having intervened in
19 the action to raise a federal defense to the production of
20 documents under the Federal Freedom of Information Act, had a right
21 to remove the action under § 1442. Id. Defendants' interpretation
22 is also underscored by the Ninth Circuit's determination that the
23 ability of the United States to remove under § 1442 is not keyed to
24 their status as "defendants," which is a statutory prerequisite of
25 removal under § 1441. Ely Valley Mines, Inc v Hartford Acc and
26 Indem Co, 644 F2d 1310,1314 (9th Cir 1981) ("While [§] 1441 * * *
27 provides for removal 'by the defendant or the defendants,' [§]
28 1442(a) uses the language * * * of removal 'by them'").

