Jeannene Smith
312 S. Lincoln Avenue
Cherry Hill, NJ 08002
(856) 321-0808

For Defendant, Jeannene Smith

MASHA ALLEN, by her Parent and Guardian, FAITH ALLEN Plaintiff(s) v. FAMILIES THRU INTERNATIONAL ADOPTION, INC. *And* CHILD PROMISE, INC. (formerly known as Reaching Out thru International Adoption, Inc.) *and* REACHING OUT THRU INTERNATIONAL ADOPTION, INC. *And* JEANNENE SMITH Defendants *And* FAMILIES THRU INTERNATIONAL ADOPTION, INC. Third Party Plaintiff v. ADAGIO HEALTH, INC. (formerly known as Family Health Council, Inc., *and* trading as "Family Adoption Center") Third Party Defendant	**UNITED STATES DISTRICT COURT** **DISTRICT OF NEW JERSEY** **Civil No. 08-4614 (JHR)** *Judge Ann Marie Donio* **DEFENDANT SMITH'S *BRIEF AMICUS CURIAE*** **IN RESPONSE TO ATTORNEY'S SUPPLEMENTAL MEMORANDUM** **IN SUPPORT OF PLAINTIFFS' COUNSEL'S MOTION FOR LEAVE TO WITHDRAW FROM CASE**

Comes Now, the Defendant, JEANNENE SMITH, *pro se*, to provide a *Brief Amicus Curiae* for the Court pursuant to the New Jersey *Code of Judicial Ethics [Cannon 3(A)(6)]* in Response[1] to Plaintiff's Counsel's Supplemental Memorandum to Withdraw Motion, [*Docket Entry No. 34*] and as reasons states:

[1] Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was likely to give offense.
Something there is that doesn't love a wall.
Robert Frost, *Mending Wall*, in THE POETRY OF ROBERT FROST 32-36 (Edward Connery Lathem ed., Holt 1979).

1. In his Supplemental Memorandum, Robert Hunn states, *"Thorough research of this issue has not revealed any cases where the specific issue was addressed."* Nevertheless, in support of his position, Petitioner states four times in the first six paragraphs of his Memorandum that *"... communications that will likely involve a disclosure of attorney client information; information that is privilege...."* is the rational behind *"...Petitioners and plaintiffs having* ex parte *communications with the court to discuss the reasons for the withdraw."* [*sic*] [2] *Your Amicus* herein suggests Mr. Hunn is confusing the purposes behind these two, distinct concepts.

Historical Precedent of Due Process

2. The developmental history of the British/American "constitutional law" concept of due process begins, of course, with the Magna Carta,[3] through the Trial of Sir Walter Raleigh and its progeny, the American "Bill of Rights" to the US Constitution, to today's debate over the use of "secret" National Security Courts. (For a revealing description of Sir Walter Raleigh's trial, *See*, *Crawford v. Washington*, 541 U.S. 36 (2004), and J. Scalia's historical tracings of the right to confront one's accusers 'face to face' as embodied in the Sixth Amendment and the rational for *ex parte* evidence as "utterly incompetent").[4] (*Cf*: *UpJohn v. United States*, 449 U.S. 383 (1981), which discusses the attorney/client privilege – of note to the UpJohn Court was the idea that the protection of the privilege extends only to communications and not to facts, *i.e.*, a fact is one thing and a communication concerning a fact is an entirely different thing, *e.g.*, the client cannot be compelled to answer the question, "What did you say or write to [your] attorney?", but [the client] may not refuse to disclose any relevant fact, merely because s/he incorporated a statement of such fact into [the] communication to his/her attorney.)

3. Furthering this embodiment of 'utterly incompetent' evidence *via ex parte* communication, is the NEW JERSEY CODE OF JUDICIAL CONDUCT, and more specifically, *Cannon 3(A)(6)*:

> A judge should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to or the subject matter of a proceeding if

[2] Defendant does not object to the Motion to Withdraw; Defendant DOES OBJECT to "...Petitioners and plaintiffs having *ex parte* communications with the court to discuss the reasons for the withdraw."

[3] *See generally*, http://en.wikipedia.org/wiki/Magna_Carta for an historical review of the actual drafting and signing of the document.

[4] Also found at: http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=541&invol=36

the judge gives notice to the parties of the person to be consulted and the nature of the advice, and affords the parties reasonable opportunity to participate and to respond.

Legal Analysis of Ex Parte Communications

4. While Plaintiff's Counsel is correct that this appears to be an issue of 'first impression' for the Federal Court in Camden, N.J., some writings do exist on the subject:

   (a) Judicial Opinion Writing Handbook, *Joyce J. George*, 5th ed., (2007) at p. 85. [ISBN 0837732344, 9780837732343]

   > *Ex parte* communications complicate decisions to be made. They exclude any opportunity to object, counter, or explain what has been presented. Further, such communications prohibit the presentation of other relevant matter and give only part of the information necessary to a reasoned decision. In relying on an *ex parte* communication, the judge may find himself making a decision upon less than all of the available information. [citing: *Jeffrey M. Shaman, et al*, Judicial Conduct and Ethics, 2d ed. (1995)]

   (b) NY Bar Advisory Opinion 08-62, June 6, 2008, (*The Advisory Committee cannot advise an inquiring judge, where the ethical issues raised within the inquiry are couched within larger legal issues, which must first be determined by the inquiring judge.*); attached hereto and incorporated herein as *Exhibit "1"*.

   > First, the judge should determine whether the significantly exculpatory material at issue is protected by the attorney-client privilege. If it is privileged, "the issue of attorney-client confidentiality ... presents a legal question, not a question of judicial ethics" (Opinion 04-123). If, however, the judge determines that the privilege does not apply, the judge should disclose the information (Opinion 07-192), even if defense counsel claims that the information is protected by the attorney-client privilege and expects the judge to maintain confidentiality.

   (c) *In re: NSA Telecommunications Litigation*, No. M:06-cv-01791-VRW, [Docket No. 239] and Request for Administrative Order Concerning Government *Ex parte, In Camera Filings*; attached hereto and incorporated herein as *Exhibit "2"*.

   > "...We are concerned that a pattern is developing in which the government presents secret filings to the Court with no indication whatsoever of their topic or context, and does so outside the confines of any briefing or other scheduled filing in the case...." [Note: fint 1]

   - April 13, 2007, letter to the Hon. Vaughn R. Walker, Chief Judge, United States District Court for the Northern District of California, by Cindy Cohn, Co-chair of Plaintiffs' Executive Committee (*with attachments*).

5. Based upon *Your Amicus'* research, there appear in this case conflicting "legal" and "ethical" dilemmas, neither of which is subject to facile, syllogistic analysis; the appropriate balancing of competing priorities requires at least some factual predicate(s), or alternatively, a series of "presumptions" to substitute for facts.

Factual Analysis of the pending Motion & Opposition

6. It is interesting that neither Mr. Hunn's Motion or Supplemental Memorandum, nor Mr. Haber's Opposition rely on "specifics," but rather, their [unsupported] conclusory statements, (which lack any underlying factual predicates), in their analysis that "...*clearly justice is better served by the court permitting* ex parte *discussion....*". (Hunn's Supplemental, at p.5). Based upon their filings however, it would seem facts do exist:

   (a) KGRSB filed the instant litigation on September 15, 2008 and continued to investigate the case. For example, KGRSB came into possession of New Jersey Division of Youth and Family Services investigation of Masha's adoption; [Motion, at p. 4]

   (b) As a result of the dispute, the relationship between Mr. Bills and Mr. Hunn has deteriorated to the point where Mr. Bills and Mr. Hunn can no longer work together or speak to each other by telephone; [Supplemental, at p. 5]

   (c) At this meeting, Mr. Gordon and Mr. Hunn agreed to undertake the representation, submitted a contingency fee agreement that was then executed by both Masha Allen and Faith Allen, thereby retaining KGRSB with respect to "PA/NJ Adoption Cases," which by its terms included, *but was not limited to*, the claims asserted in the present action. This written agreement specifically acknowledged that Mr. Bills was the referring attorney and an arrangement for the division of fees had been made between the attorneys. (*emphasis added*) [Opposition, at p. 3]

   Nevertheless, all these "facts" seem to be represented by counsel(s) as "attorney/client privilege," (as they well may be), and if so, then counsel(s) are under a solemn duty not to disclose their client's secrets, to the Court or anyone else, without their client's consent.[5]

7. For guidance, *Your Amicus* references the posits of one scholarly, ABA text:

   > ABA Compendium of Professional Responsibility Rules and Standards, Center for Professional Responsibility (American Bar Association)(2004), [ISBN 1590312996, 9781590312995] CANNON 15: *How Far a Lawyer May Go in Supporting a Client's Cause*, at p. 354.
   >
   > *The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.*

   See also, Id., CANNON 16: *Restraining Clients from Improprieties*:

[5] It is axiomatic that the "privilege" rests with the client, and not the attorney; however, once waived, the privilege is waived forever and to all things. ("The ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client, but also encourages laymen to seek early legal assistance.") *See, Hickman v. Taylor*, 329 U.S. 495 (1947).

> *A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Court, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing, the lawyer should terminate their relationship.*[6]

8. Based upon the dearth of factual disclosure by either Plaintiff's Counsel or Plaintiff's "*Intervening-Special Appearance*" Counsel, it would appear that the Court must accept the conclusory declarations, *to wit*: (a) there is a legitimate basis for the need to withdraw as Plaintiff's attorney(s); and (b) legal ethics do not permit disclosure of those bases, as the Court is no more entitled to *ex parte* factual revelations (which are *privileged*) than any other party to the matter, *i.e.*, there is no "national security" emergency in this case.

Conclusion

9. *Your Amicus* agrees with both Plaintiffs' counsels that the appropriate test is that expressed by J. Donio in *McKowan Lowe v. Jasmine, et al*, Case 1:94-cv-05522-RBK-AMD [*Docket Entry No. 398*]:

   a. the reasons withdrawal is sought;
   b. the prejudice withdrawal may cause to other litigants;
   c. the harm withdrawal might cause to the administration of justice; and
   d. the degree to which withdrawal will delay the resolution of the case.

   Id., at p. 4 (*citations omitted*).

10. How the Court resolves this test, given the paucity of information provided to date, by both counsels for Plaintiff, other than the presumption of "*trust me when I say...*" (substituting professional Cannons for 'due process') is beyond the scope of *Your Amicus' Brief* herein, but it is NOT "*clearly justice is better served by the court permitting* ex parte *discussion,*" (*Supra.*, p.4), which reverts to "Star Chamber" tactics[7].

Respectfully submitted,
BY JEANNENE SMITH
312 S. Lincoln Avenue
Cherry Hill, NJ 08002
(856) 321-0808

DATED: _____

_____
JEANNENE SMITH

[6] Ancillary but related: CANNON 13: *Contingency Fees - A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including risk and uncertainty of the compensation, but should always be subject to the supervision of a Court, as to its reasonableness,* at p. 353.

[7] *See, e.g.*, http://www.luminarium.org/encyclopedia/starchamber.htm; http://en.wikipedia.org/wiki/Star_Chamber

Exhibits:

1. Copy of NY Bar Advisory Opinion 08-62, June 6, 2008; and
2. Copy of *In re: NSA Telecommunications Litigation*, No. M:06-cv-01791-VRW, [Docket No. 239].

POINTS & AUTHORITIES IN SUPPORT THEREOF

1. the New Jersey *Code of Judicial Ethics*;
2. *Crawford v. Washington*, 541 U.S. 36 (2004)
3. As otherwise cited herein;
4. The record in this case.

_____
Jeannene Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under Penalties of Perjury that on this _____ day of April 2009 a copy of the foregoing Defendant's *pro se* *Brief Amicus Curiae* *in Response to Supplemental Memorandum in Support of Plaintiff's Counsel's Motion to Withdraw* was mailed *via* US Postal Service, First-Class, Postage Pre-Paid to:

Robert N. Hunn, Esquire
KOLSBY, GORDON, ROBIN,
SHORE & BEAR
2000 Market Street, 28th Floor
Philadelphia, PA 19103

CHILD PROMISE, INC.
(*formerly known as Reaching Out Through International Adoption, Inc.*)
and
REACHING OUT THROUGH
INTERNATIONAL ADOPTION, INC.
c/o Joseph P. Hudrick, Registered Agent
4 Ridge Road
Southampton, NJ 08088

Donald C. Cofsky, Esquire
DOFSKY & ZEIDMAN, LLC
209 Haddon Avenue
Haddonfield, NJ 08033

Steven A. Haber, Esquire
OBERMAYER, REBMANN,
MAXWELL & HIPPEL, LLC
20 Brace Road, Suite 300
Cherry Hill, NJ 08034

ADAGIO HEALTH, INC.
(*formerly known as Family Health Council, Inc. and trading as Family Adoption Center*)
960 Penn Avenue, Suite 600
Pittsburgh, PA 15222

David S. Bills, P.C.
3340 Peachtree Road, N.E., Suite 1530
Atlanta, GA 30326-1008

_____
Jeannene Smith, *pro se*

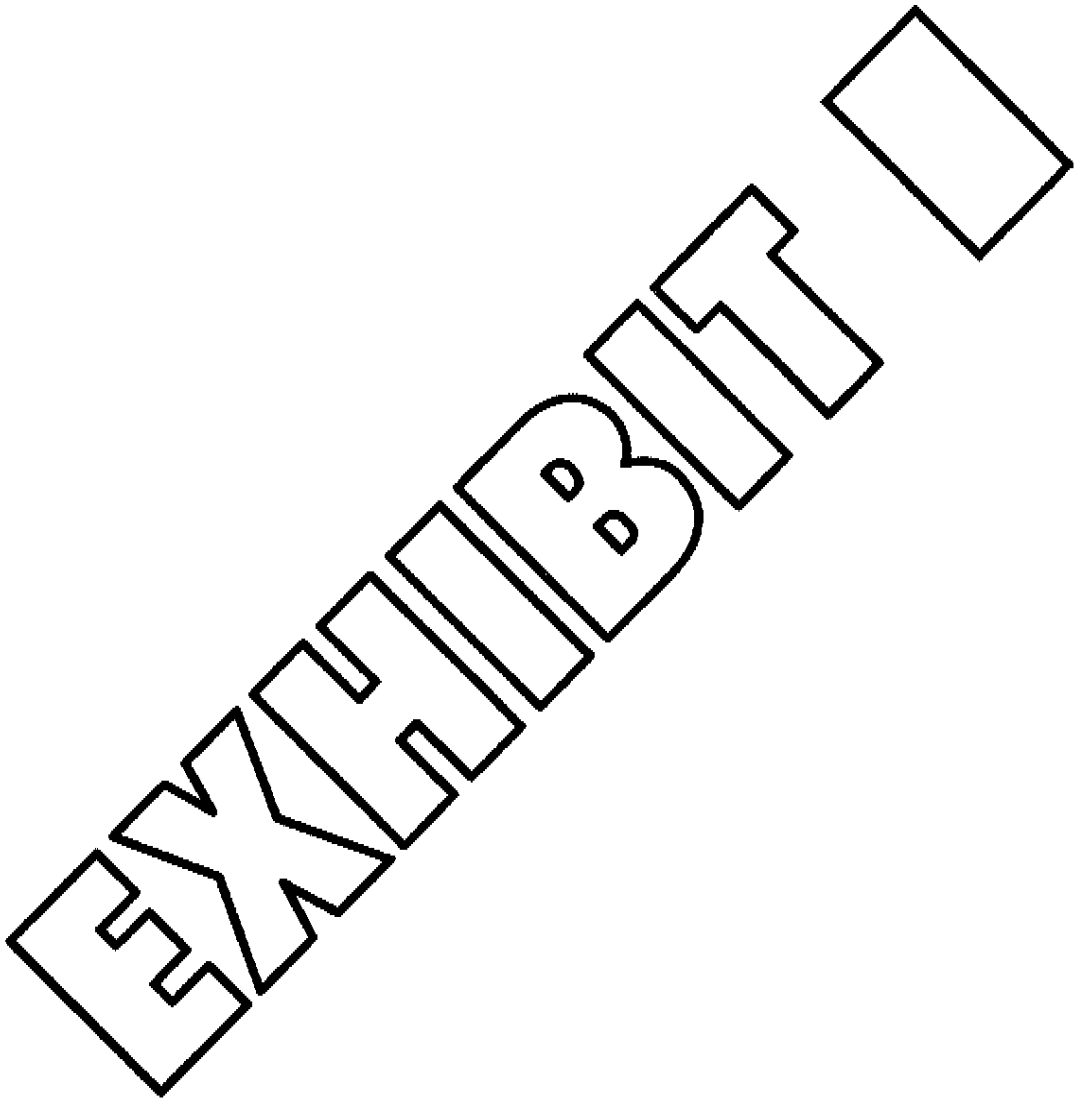
EXHIBIT D

Opinion 08-62

June 6, 2008

Digest: The Advisory Committee cannot advise an inquiring judge where the ethical issues raised within the inquiry are couched within larger legal issues, which must first be determined by the inquiring judge.

Rules: 22 NYCRR 100.2(A); 100.3(B)(1); 100.3(B)(6); Opinions 07-192; 04-123.

Opinion:

Defense counsel in a criminal proceeding (hereafter "defense counsel") asked the presiding judge to relieve him/her from the representation. Defense counsel explained to the judge *ex parte* that a former client recently admitted, in confidence, that he/she pre-arranged with the police to stop a particular vehicle in which the defendant was a passenger so that the defendant could be arrested. If the former client's story is correct, the police lied to the grand jury about why they stopped the vehicle. Defense counsel asserts that a continuing attorney-client privilege prevents him/her from revealing this information to current counsel or the prosecutor "and expected that [the judge] would not disclose it either." The judge, on the one hand, considers the information to be significantly exculpatory, but, on the other, believes it might potentially be covered by a "lingering attorney-client privilege." Consequently, the judge inquires whether he/she may or must disclose it to the prosecutor, defendant and defendant's newly appointed counsel in the interest of justice.

The Rules Governing Judicial Conduct provide that a judge "shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding" (22 NYCRR 100.3[B][6]). Depending on the content, context, and circumstances of a case, a judge who receives an *ex parte* communication may be required to disclose its substance to all parties and attorneys (*see* Opinion 07-192).

Here, the judge has determined that the *ex parte* information is significantly exculpatory for a criminal defendant. In the Committee's view, the resolution of this inquiry turns on additional legal determinations to be made by the judge.

First, the judge should determine whether the significantly exculpatory material at issue is protected by the attorney-client privilege. If it is privileged, "the issue of attorney-client confidentiality ... presents a legal question, not a question of judicial ethics" (Opinion 04-123). If, however, the judge

determines that the privilege does not apply, the judge should disclose the information (Opinion 07-192), even if defense counsel claims that the information is protected by the attorney-client privilege and expects the judge to maintain confidentiality.

Second, if the judge determines the significantly exculpatory material is privileged, the judge should further determine whether he/she is nonetheless legally permitted or required to disclose such information. If the judge determines, under the facts and circumstances of the case, that he/she may or must legally disclose the exculpatory information even though privileged, the judge may ethically do so. However, if the judge determines he/she is legally bound to keep the exculpatory information confidential, that is the ethically appropriate course of action (*see* 22 NYCRR 100.2[A] ["[a] judge shall respect and comply with the law"]; 100.3[B][1] ["[a] judge shall be faithful to the law" and "not be swayed by partisan interests, public clamor or fear of criticism"]).

Although the inquiring judge did not ask about recusal, under the particular and unique circumstances presented, he or she should also consider whether it is appropriate to continue sitting on this case.

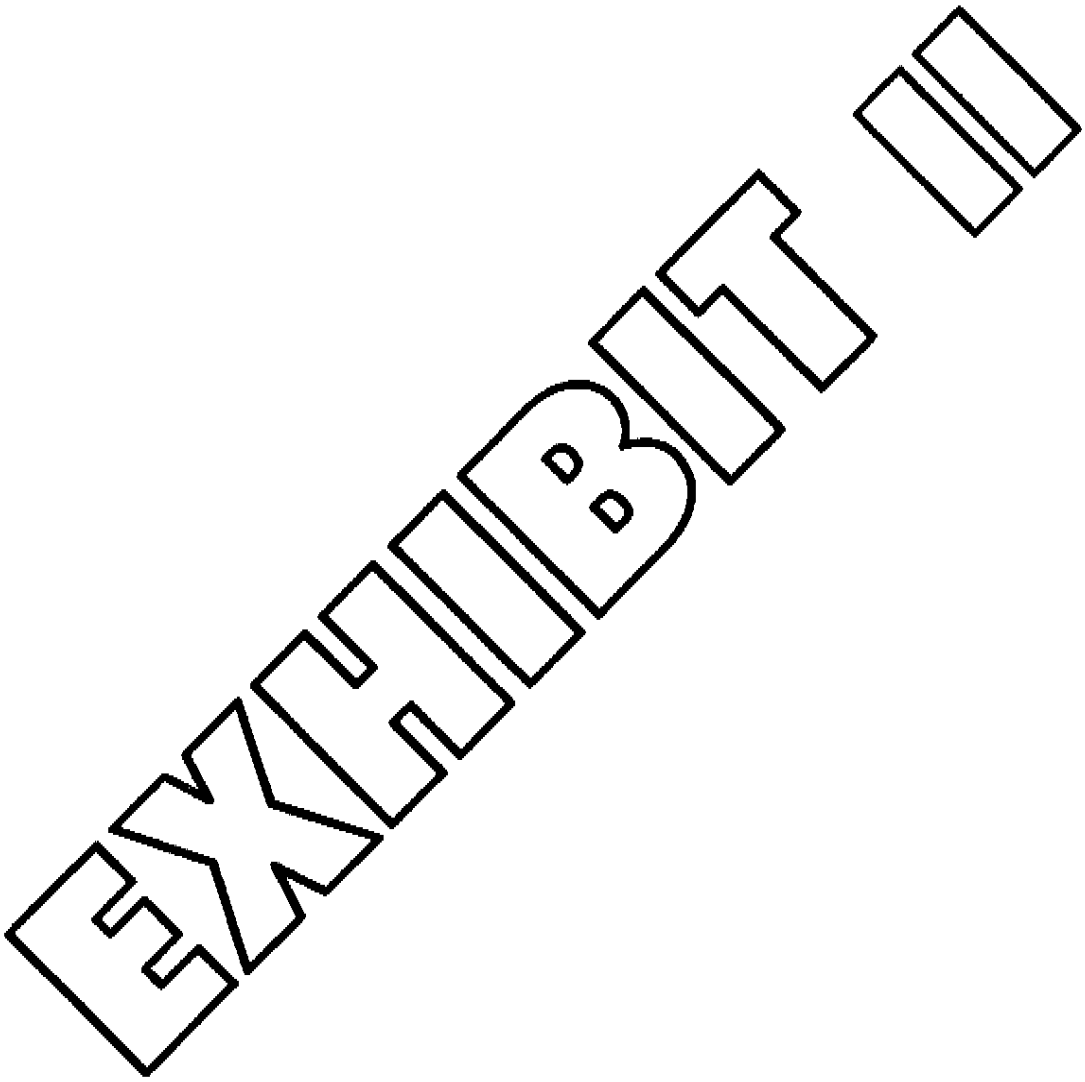
EXHIBIT D

Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

April 13, 2007

Hon. Vaughn R. Walker
Chief Judge
United States District Court
for the Northern District of California
450 Golden Gate Avenue, Courtroom 6
San Francisco, CA 94102

RE: ***In re NSA Telecommunications Litigation*, No. M:06-cv-01791-VRW, *Docket No. 239 and Request for Administrative Order Concerning Government Ex parte, In Camera Filings***

Dear Judge Walker:

On behalf of the plaintiffs in all of the actions in this MDL proceeding, and pursuant to Local Rule 7-11(a), we write to seek a formal process to control the government's submission of *ex parte, in camera* filings. The immediate impetus for this request is Docket No. 239 filed by the government on April 9, but it also arises out of similar past filings by the government, such as Docket No. 120, filed January 13. We are concerned that a pattern is developing in which the government presents secret filings to the Court with no indication whatsoever of their topic or context, and does so outside the confines of any briefing or other scheduled filing in the case. On April 10, I sent an email to government counsel asking for some basic context or explanation about Docket No. 239 (Exh. A). On April 11 the government responded "There is nothing more we can add to our notice at this time." (Exh B).

Plaintiffs recognize that, under some limited circumstances, it may be appropriate for this Court to consider *ex parte* and *in camera* filings. *See* 50 U.S.C. § 1806(f); *see also Hepting*, Dkt. No. 171 (Case No. 06-0672-VRW) (order after briefing supported by unclassified redacted declarations and allowing *in camera, ex parte* filing of particular material). However, it conflicts with basic notions of due process and the First Amendment's presumption of access to judicial process to make such filings without any formal request to do so, followed by a court order permitting the filing. *See Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1346 (9th Cir. 1981) (examination of *ex parte* information impinges upon "principles of due process upon which our judicial system depends to resolve disputes fairly and accurately."); *Guenther v. Comm'r of Internal Revenue*, 939 F.2d 758, 760 (9th Cir. 1991) ("Only in light of a 'compelling justification' would *ex parte* communications be tolerated."); *see generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (discussing the importance of open judicial processes).

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Moreover, it conflicts with well-established procedures in cases in which the state secrets privilege has been asserted. A similar situation existed in *Ellsberg v. Mitchell*, 709 F.2d 51, 63 (D.C. Circ. 1983). Evaluating governmental response to interrogatories, the D.C. Circuit first denied the government's assertion that the requirement of "utmost deference" to executive assertions of the state secrets privilege prevented the Court from requiring further public information from the government. It noted:

> The defendants fail to recognize that it is equally well established that courts must not abdicate "to the caprice of executive officers" their control over the evidence submitted in a case.

Id. at 60, n. 44. The court then required the government to publicly explain both the scope of the claimed state secret or secrets and the claimed potential harm from disclosing information provided *ex parte, in camera* to the court under the state secrets privilege, stating:

> The more specific the public explanation, the greater the ability of the opposing party to contest it. The ensuing arguments assist the judge in assessing the risk of harm posed by dissemination of the information in question. This kind of focused debate is of particular aid to the judge when fulfilling his duty to disentangle privileged from non-privileged materials – to ensure that no more is shielded than is necessary to avoid the anticipated injuries.

Id. at 63; see id. at 64 ("the case before us . . . considerable time and resources might have been saved by adherence to the principle that *in camera* proceedings should be preceded by as full as possible a public debate over the basis and scope of a privilege claim").

Similarly, in upholding a district-court order enforcing a grand jury subpoena to the President, the D.C. Circuit in *Nixon v. Sirica*, 487 F.2d 700, 721 (D.C. Cir. 1973) (*en banc*), observed that the proper procedure for assessing claims of executive privilege is to have the President submit, prior to any *in camera* hearing or examination, "more particular claims of privilege, . . . accompanied by an analysis in manageable segments." *Id.* "Without compromising the confidentiality of the information," the D.C. Circuit held, "the analysis should contain descriptions specific enough to identify the basis of the particular claim or claims." *Id.*

The government has followed this rule in the Ninth Circuit. In *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998), the government publicly filed an unclassified affidavit that listed ten categories of information it said were privileged as state secrets, providing a public explanation of "why certain environmental data is sensitive to the national security." *Id.* at 1181-83 (Appendix) (setting forth government's unclassified affidavit).

Here, in contrast, the government has provided no context whatsoever for its *ex parte, in camera* submissions, much less provided the categorical information provided in *Kasza*. It has thereby deprived plaintiffs of any opportunity to ascertain what sorts of arguments

and information have been placed before the Court, much less lodge a coherent opposition to the government's filing.

For instance, it may be that Docket No. 239 concerns the reauthorization by the Foreign Intelligence Surveillance Court ("FISC") of the portions of the government's surveillance program that have been submitted to it. The government has publicly admitted that such reauthorizations would be necessary and this secret filing comes at the time that such a reauthorization would be required under the government's public admissions. Yet if that is the case then the fact of reauthorization, which was already publicly admitted by the government, is not properly a secret.

While portions of the FISC Order(s) may be properly submitted *in camera* (*see* 50 U.S.C. § 1806(f)), the mere fact of a FISC reauthorization should not be. If the government's submission concerns reauthorization of the FISC Order(s), it should be required to publicly state so. Moreover, plaintiffs are entitled to the opportunity to argue that the FISC authorizations of other portions of the government's surveillance program are irrelevant to this MDL proceeding overall, or that the Order(s) are irrelevant at least to the vast majority of the cases in the MDL which are consumer class actions focusing on wholesale surveillance of ordinary Americans, since the government has never indicated that it has submitted this portion of its surveillance activities to the FISC.

Alternatively, Docket 239 may relate only to the briefing that is currently ongoing in the "state officials" cases, or only to those cases that include claims that may be implicated by the FISC Order(s), and was merely mismarked by the government as relating to "all cases." In these instances the government should amend its filing.

Or it may be that the filing relates to something else altogether. If the government can ignore the requirement that it provide even the most basic context for its *ex parte, in camera* filings, plaintiffs are left to engage in these sorts of guessing games.[1] As *Kasza*, *Ellsberg*, and other cases demonstrate, this is not appropriate for federal litigation, even when the state secrets privilege has been raised.

Accordingly, Plaintiffs request an Order from this Court for Docket 239, and setting out processes for any future *ex parte, in camera* filings by the government in this MDL proceeding. Plaintiffs request that if the filing is not in response to an order of the Court authorizing the filing and not otherwise authorized by the federal or local rules, the government be required to make a public motion for leave to file the information. In its

[1] The problem created by the government may be as much one for the Court as for the plaintiffs. Docket 239 states that the underlying material has been lodged "with the Court Security Officer …." The Court Security Officer is an employee of the Department of Justice and, as we understand it, is located in Washington, D.C., not San Francisco. In the absence of any information from the government about the nature or relevance of the filing underlying Docket 239, the Court will have no way of knowing when, or under what circumstances, it should seek to review the underlying filing.

motion, the government should be required to demonstrate, first, good cause for the government to make a filing, public or secret, that is not otherwise authorized by the federal or local rules, and, second, good cause why the filing should be made *ex parte, in camera* rather than in the public docket. If the filing is in response to an order of the court authorizing the filing or is otherwise authorized by the federal or local rules, the government should be required to make a public motion along with any *ex parte, in camera* filing demonstrating good cause why the filing should be made *ex parte, in camera* rather than in the public docket. In either case, the public motion must include descriptions of the information specific enough to identify the basis of the particular claim or claims of privilege, including, at a minimum:

1. The privilege asserted;
2. Categories of information in the sealed material covered by the privilege, and
3. Either:
    a. An explanation of why the non-disclosed information is sensitive to the national security (or other basis for the asserted privilege), or
    b. An indication of why such an explanation would itself endanger national security (or other basis for the asserted privilege).

See e.g. Ellsberg at 63. While these minimal requirements do not eliminate the due process and other concerns raised by the government's *ex parte, in camera* filings, they do reduce them and are consistent with the application of the state secrets privilege in both this Circuit and others.

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

//s//

Cindy Cohn
Co-chair of Plaintiffs' Executive Committee

Encl: Attachments A and B

EXHIBIT A

From: Cindy Cohn <cindy@eff.org>
Subject: **Dckt 239**
Date: April 10, 2007 4:38:19 PM PDT
To: "Tony ((CIV)) Coppolino" <Tony.Coppolino@usdoj.gov>, "Andrew ((CIV)) Tannenbaum" <Andrew.Tannenbaum@usdoj.gov>
Cc: "Bruce A. Ericson" <bruce.ericson@pillsburylaw.com>

Dear Andrew and Tony,

Plaintiffs note that yesterday the government filed an ex parte,in camera submission (Dckt 239) relating to "all actions." This filing gives no indication of the subject matter of the information provided to the Court, fails to provide the specific categories of the information submitted, contains no explanation of why the information provided is sensitive to the national security or why it is appropriately filed in the absence of any pending motion. See e.g. Kasza v. Browner 133 F.3d 1159, 1181-3 (9th Cir. 1998).

As you know, after motion practice in Hepting last spring, the Court permitted the government to file certain affidavits ex parte, in camera (Hepting Dckt #171). The Court did not, however, authorize ongoing ex parte, in camera filings, much less filings outside the context of a motion or other scheduled proceedings and unaccompanied by an appropriate public explanation. Such secret filings are inconsistent with due process and the caselaw involving the state secrets privilege, which provides that the government should give as much of a public explanation as possible for the information provided in camera, consistent with the needs of national security.

Perhaps this filing relates only to the briefing filed last week in the "state officials" cases rather than all cases. If so, the appropriate step would be to file an amended pleading reflecting this limitation.

Regardless of the scope of the filing, however, the government must abide by the requirements set by the settled caselaw on the state secrets privilege and provide descriptions specific enough to identify the basis of the particular claim or claims of privilege, including categories of information covered by the privilege and a public explanation of why the nondisclosed information is sensitive to the national security. Should you fail to do so by Thursday, April 12, we will seek appropriate relief from the Court.

Please feel free to contact me to discuss this further.

Cindy

EXHIBIT B

From: "Coppolino, Tony \(CIV\)" <Tony.Coppolino@usdoj.gov>
Subject: **RE: Dckt 239**
Date: April 11, 2007 4:27:47 PM PDT
To: "Cindy Cohn" <cindy@eff.org>
Cc: "Bruce A. Ericson" <bruce.ericson@pillsburylaw.com>, "Coppolino, Tony \(CIV\)" <Tony.Coppolino@usdoj.gov>, "Tannenbaum, Andrew \(CIV\)" <Andrew.Tannenbaum@usdoj.gov>

Cindy -

There is nothing more we can add to our notice at this time

Tony Coppolino
(202) 514-4782

-----Original Message-----
From: Cindy Cohn [mailto:cindy@eff.org]
Sent: Tuesday, April 10, 2007 7:38 PM
To: Coppolino, Tony (CIV); Tannenbaum, Andrew (CIV)
Cc: Bruce A. Ericson
Subject: Dckt 239

Dear Andrew and Tony

Plaintiffs note that yesterday the government filed an ex parte,in camera submission (Dckt 239) relating to "all actions." This filing gives no indication of the subject matter of the information provided to the Court, fails to provide the specific categories of the information submitted, contains no explanation of why the information provided is sensitive to the national security or why it is appropriately filed in the absence of any pending motion. See e.g.
Kasza v. Browner 133 F.3d 1159, 1181-3 (9th Cir. 1998).

As you know, after motion practice in Hepting last spring, the Court permitted the government to file certain affidavits ex parte, in camera (Hepting Dckt #171). The Court did not, however, authorize ongoing ex parte, in camera filings, much less filings outside the context of a motion or other scheduled proceedings and unaccompanied by an appropriate public explanation. Such secret filings are inconsistent with due process and the caselaw involving the state secrets privilege, which provides that the government should give as much of a public explanation as possible for the information provided in camera, consistent with the needs of national security.

Perhaps this filing relates only to the briefing filed last week in the "state officials" cases rather than all cases. If so, the appropriate step would be to file an amended pleading reflecting this limitation.

Regardless of the scope of the filing, however, the government must abide by the requirements set by the settled caselaw on the state secrets privilege and provide descriptions specific enough to identify the basis of the particular claim or claims of privilege, including categories of information covered by the privilege and a public explanation of why the nondisclosed information is sensitive to the national security. Should you fail to do so by Thursday, April 12, we will seek appropriate relief from the Court.

Please feel free to contact me to discuss this further.

Cindy

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