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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 IN RE NATIONAL SECURITY AGENCY
17 TELECOMMUNICATIONS RECORDS
18 LITIGATION

19 This Document Relates Only to:
20 *Center for Constitutional Rights v. Bush,*
(Case No. 07-1115)

No. M:06-cv-01791-VRW

**REPLY MEMORANDUM
IN SUPPORT OF
PLAINTIFFS' MOTION TO
SUPPLEMENT COMPLAINT**

Judge: Hon. Vaughn R. Walker

no hearing date (submitted on the papers)

1 Defendants claim that Plaintiffs' attempt to supplement their complaint should be rejected
2 because the supplemental complaint "introduce[s] separate, distinct, and new claims and causes of
3 action" challenging "distinct [legal] authorities" for surveillance from those challenged in the
4 original complaint, and because the proposed supplemental claims are "futile" since Plaintiffs lack
5 standing to pursue them. Both arguments should be rejected.

6 "The purpose of [Rule 15(d)] is to promote as complete an adjudication of the dispute
7 between the parties as is possible." *La Salvia v. United Dairymen of Arizona*, 804 F.2d 1113 (9th
8 Cir. 1986) (quoting WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1504). While "courts
9 typically require some relationship between the original" complaint and the supplemental material,¹
10 an application for leave to supplement is "addressed to the discretion of the court and should be
11 freely granted when doing so will promote the economic and speedy disposition of the entire
12 controversy between the parties" and will not prejudice the opposing party. WRIGHT & MILLER,
13 FEDERAL PRACTICE & PROCEDURE § 1504, at 187 (2d ed. 1990) (citing cases); *see also* Advisory
14 Committee Note, 1963 Amendments ("Rule 15(d) is intended to give the court broad discretion in
15 allowing a supplemental pleading."); *Keith v. Volpe*, 858 F.2d 467, 473-75 (9th Cir. 1988).

16 The dispute between the parties here is defined not by the source of legal authority
17 underlying the claims or defenses, but by the *injury* Plaintiffs assert: the fact that Plaintiffs are
18 required to undertake countermeasures to mitigate the harm posed by warrantless surveillance
19 without judicially-supervised minimization.² "Plaintiffs maintain that the statute is unconstitutional

20
21 ¹ WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1504, at 183 (2d ed. 1990).

22 ² In Defendants' Notice of Statutory Amendments to the Foreign Intelligence Surveillance
23 Act, Dkt. 18 (Aug. 8, 2007), at 3 lines 13-18, Defendants claim that "Plaintiffs' ... alleged chill
24 derives from their belief that the now-inoperative [NSA Program] did not involve FISA
25 minimization procedures," and imply that Plaintiffs chilling-effect theory could not underlie
26 standing to challenge the new FISA amendments in the Protect America Act because "the [Act]
27 now expressly applies FISA minimization procedures to surveillance conducted pursuant to the
28 amendments and directed at individuals outside the United States."

26 At best this assertion is based on a naive reading of the new statute. Section 105B(a)(5) of
27 the PAA mandates only that "minimization procedures to be used with respect to such acquisition
28 activity meet the definition of minimization procedures under section 101(h)" of FISA, 50 U.S.C.
§ 1801(h). However, the definition in FISA section 1801(h) begins "'Minimization procedures',
with respect to electronic surveillance, means..." (emphasis added). Since "electronic surveillance"

1 as applied to their conversations under the First and Fourth Amendments, and seek injunctive relief
 2 to protect their ability to consult with their clients with assurances of confidentiality essential to
 3 their communications.” Proposed Supp. Compl., Dkt. 19, ¶2. The Supreme Court has allowed
 4 plaintiffs to introduce supplemental claims that were quite distinct, legally and factually, from
 5 those in the original complaint where the injuries asserted by plaintiffs were consistent over time:

6 The original complaint had challenged racial segregation in schools which were
 7 admittedly public. The new complaint charged that Prince Edward County was still
 8 using its funds, along with state funds, to assist private schools while at the same
 9 time closing down the county’s public schools, all to avoid the desegregation
 10 ordered in the *Brown* cases. The amended complaint thus was not a new cause of
 11 action but merely part of the same old cause of action arising out of the continued
 12 desire of colored students in Prince Edward County to have the same opportunity
 13 for state-supported education afforded to white people, a desire thwarted before
 14 1959 by segregation in the public schools and after 1959 by a combination of closed
 15 public schools and state and county grants to white children at the Foundation’s
 16 private schools. ... Such amendments are well within the basic aim of the rules to
 17 make pleadings a means to achieve an orderly and fair administration of justice.

18 *Griffin v. County Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 226-27 (1964). Here, similarly,
 19 Plaintiffs’ proposed supplemental claims “aris[e] out of the continued desire” to be able to
 20 communicate in confidence with overseas clients, witnesses, co-counsel, and other important
 21 litigation participants without the need to take extraordinary countermeasures to mitigate the harm
 22 caused by the threat of unlawful warrantless surveillance.

23 A Ninth Circuit case cited by Defendants also upheld a grant of leave to supplement with
 24 claims based on statutory authorities not cited in the original complaint. In *Keith v. Volpe*, a court
 25 of appeals panel approved of a grant of leave even though the supplemental complaint “involve[d]
 26 additional statutes” as the basis for its new claims, those claims did not arise out of the same

27 under PAA is defined to exclude foreign-target surveillance, PAA § 105B(a)(5) imposes no
 28 minimization requirement on the executive.

Even if the PAA did impose a minimization requirement, it would not be a *judicially-supervised* minimization requirement. The minimization procedures mentioned in PAA § 105B(a)(5) are not subject to the one-time review by the FISA court set forth in Section 3 of the Act; instead that review is limited to whether the government clearly erred in determining that the procedures in place are reasonable measures to ensure targets are reasonably believed to be outside the United States.

In any event, a one-time judicial review of general procedures cannot fulfill the constitutional requirement that minimization procedures be subject to ongoing judicial oversight. *See* Pls. Suppl. Br., Dkt 13, at 8 n.17, 17 n.31 (describing constitutional dimensions of ongoing judicially-supervised minimization requirement).

1 “transaction or occurrence” as the original claims, and the complaint added a party that originally
 2 was a plaintiff (the city of Hawthorne) as a defendant. In that case, the original suit was brought by
 3 groups seeking replacement housing for minorities displaced by freeway construction; when the
 4 city of Hawthorne, years later, refused to approve replacement housing developments, some of the
 5 original plaintiffs sought to supplement to add claims against the city. The Ninth Circuit held that
 6 the text of Rule 15(d) made clear that it did not mandate a transactional test (in sharp contrast to the
 7 compulsory counterclaim and joinder rules), and that the fact that “the supplemental pleading
 8 technically states a new cause of action should not be a bar to its allowance, but only a factor to be
 9 considered by the court in the exercise of its discretion.” Instead, district courts should look to
 10 whether “some relationship” exists “between the newly alleged matters and the subject of the
 11 original action.” *Keith*, 858 F.2d at 474; *see also Rowe v. U.S. Fidelity & Guar. Co.*, 421 F.2d 937,
 12 943 (4th Cir. 1970) (setting forth same “some relationship” standard).³

13
 14 ³ *Planned Parenthood of Southern Arizona v. Neely*, 130 F.3d 400, 402-03 (9th Cir. 1997)
 15 (per curiam), is not to the contrary. There, plaintiffs attempted to file a supplemental complaint in a
 16 case where there was a four-year-old final unappealed judgment in their favor. The court of appeals
 17 panel, speaking *per curiam*, held that supplementing the original complaint would “not serve to
 18 promote judicial efficiency.” (One presumes an element of judge-shopping might have been at
 work in plaintiffs’ decision to file a supplemental four years after the resolution of the original
 case; by mandating a new action be filed the court of appeals presumably ensured the matter would
 end up back on the random assignment wheel for the district.)

19 The fact that the original case had been long concluded presumably is what led the court of
 20 appeals to describe the supplemental claims as a “new and distinct” cause of action. *Neely*, 130
 21 F.3d at 402. The court was clearly *not* attempting to engage in line-drawing as to whether the
 22 claims of the supplemental were adequately close—had “some relationship”—to the claims of the
 23 original complaint. Defendants citation of *Neely* as authority for the standard that one cannot use a
 supplemental complaint to introduce “‘a separate, distinct, and new cause of action’ to a case”
 simply reads those words out of context. Defs. Opposition to Pls.’ Motion to Supplement Compl.,
 Dkt. 22, at 12 lines 5-8. The correct standard in ordinary circumstances is the “some relationship”
 standard set forth in *Keith* and the other cases discussed above.

24 Similarly irrelevant are *Matsushita Electric Indus. Co. Ltd v. CMC Magnetics Copr.*, 2007
 25 WL 127997 (N.D. Cal. 2007) and *Align Tech. Inc. v. Orthoclear*, 2006 WL 1127868 (N.D. Cal.
 26 2006), cited in Defendants’ Opposition at page 12. In *Matsushita*, the defendant’s supplemental
 27 counterclaims were based on patents that bore no relation to the patents that were the basis of the
 28 plaintiff’s claim. 2007 WL 127997 at *3 (“The proposed counterclaim [by CMC] involves an
 entirely different product than Matsushita’s infringement claims”). In *Align Technology*, the
 existing claims related to defendant’s alleged trademark infringement, and alleged false statements
 regarding dental practitioner training and certification programs; the proposed supplemental claims
 related to supposed hazards of dental products sold by plaintiffs. *See* 2006 WL 1127868 at *1. In

1 The “some relationship” standard is not a difficult one for Plaintiffs to meet. In the instant
2 case, as in *Griffin* and *Keith*, the facts and claims asserted in the original complaint and those in the
3 supplemental complaint are related closely enough to merit their resolution in one proceeding
4 before this Court. Indeed, Defendants obviously believe this is the case since they have argued that
5 “the FISA amendments provide an additional basis for dismissal” of the *original* complaint.
6 Defendants’ Notice of Statutory Amendments to the Foreign Intelligence Surveillance Act, Dkt. 18
7 (Aug. 8, 2007), at 3 lines 5-6. Presumably Defendants believe they could introduce defenses based
8 on the FISA amendments of the “Protect America Act” in a supplemental *answer* to the original
9 complaint; it follows that it is a sound exercise of this Court’s discretion to allow challenges to the
10 constitutionality of the PAA, based on the same sort of harm, in a supplemental complaint. Such a
11 result is consistent with “[o]ne of the basic policies of the [federal] rules”: “that a party should be
12 given every opportunity to join all of his grievances against another party regardless of when they
13 arose.” WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1506, at 196 (2d ed. 1990).
14 Barring leave to supplement the original complaint, Plaintiffs’ alternative would be to file a new
15 complaint in the Southern District of New York. (Based on their assertions concerning the
16 differences between the two sets of claims, Defendants presumably would not request transfer to
17 this district under the MDL statute.) That would hardly be the most efficient way to “promote the
18 economic and speedy disposition of the entire controversy between the parties.”

19 * * *

20 Defendants also argue that “[e]ven a cursory examination of Plaintiffs’ proposed
21 supplemental complaint” reveals that plaintiffs lack standing, and therefore it would be futile for
22 this Court to grant leave to supplement. Essentially that is an argument that this Court should
23 dismiss the supplemental claims before they are ever allowed to become a part of this case.

24 Unsurprisingly, the cases Defendants claim are authority for such a premature ruling on
25 standing are all inapposite or involve exceptional factual circumstances. *See* Defs. Opposition to
26

27 both cases, the district courts effectively applied the “some relationship” standard—and found the
28 supplemental claims *completely and utterly* unrelated to the existing claims.

1 Pls.’ Motion to Supplement Compl., Dkt. 22, at 5. None of the cases cited stand for the position
2 that a court should generally decide standing issues on a motion for leave to supplement.

3 The first case Defendants cite, *Foman v. Davis*, 371 U.S. 178 (1962), simply does not stand
4 for the proposition that “supplementation ... should be denied if the proposed amendment would be
5 futile,” Defs. Opp., Dkt. 22, at 4-5. Indeed, in *Foman* the Supreme Court reversed both the court of
6 appeals and the district court and held that the plaintiff *should* be allowed to supplement her
7 complaint despite the fact the motion for leave was filed after dismissal.⁴

8 In *Klamath-Lake Pharmaceutical Ass’n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276 (9th
9 Cir. 1983), the supplement proposed by plaintiffs would only have affected the amount of
10 damages; it was held futile because by the time it was offered, the liability issue had already been
11 decided against plaintiff. The court of appeals upheld the liability finding and thus found the
12 district court was within its discretion to deny leave—although the court of appeals emphasized
13 that use of a trial court’s discretion to deny leave would be “review[ed] ... strictly” in this Circuit.
14 701 F.2d at 1292.⁵

15 In *Smith v. Commanding Officer, Air Force Acct’g & Fin. Ctr.*, 555 F.2d 234 (9th Cir.
16 1977) (per curiam), plaintiff attempted to amend his complaint to repair defects of subject matter
17 jurisdiction after remand from the court of appeals. The district court actually considered the
18 amendments and found that they failed to cure the jurisdictional defects, holding only in the

19 _____
20 ⁴ In its very brief opinion in *Foman*, the Court said that such generous leave ought to be
21 granted to amend “[i]f the underlying facts or circumstances relied upon by a plaintiff may be a
22 proper subject of relief,” but that casual choice of phrase can hardly be taken (as Defendants here
23 would read it) to mean that courts should scrutinize the proposed supplemental, and, if it fails to
24 state a claim, leave should be withheld. (Moreover, *Foman* was decided before 1963 amendments
25 to Rule 15(d) that made it clear that leave could be granted even if the original complaint failed to
26 state a claim; because many courts had decided (prior to 1963) that leave should be denied when
27 the original complaint was defective in this regard, courts might sensibly have been more inclined
28 to simultaneously give close scrutiny to the supplemental claims at the motion for leave stage as
well.)

⁵ Similarly, *Chaset v. Fleeer*, 300 F.3d 1083 (9th Cir. 2002) involved absurd claims that
purchasers of trading cards suffered financial injury for RICO purposes when special randomly-
placed bonus cards did not appear in packs they purchased. The court of appeals summarily held
that no amendment could cure the “basic flaws” in the original pleading.

1 alternative that even if they could cure the jurisdictional defects the court would deny leave to
2 amend. *Id.* at 235. In a very terse per curiam opinion, the court of appeals came to the same
3 conclusions: while it began its analysis by stating in the subjunctive that “[e]ven if” jurisdiction
4 existed on the amended allegations, the district court was within its discretion in denying leave, it
5 subsequently analyzed the merits of the jurisdictional amendments in the last paragraph of its
6 opinion. The court’s statements regarding the propriety of denying leave when amendments are
7 futile are thus dicta.

8 None of this purported “Ninth Circuit authority” stands for the proposition that Defendants
9 advance here: that courts should essentially decide the merits in favor of the supplementing party
10 before allowing leave. Defendants’ arguments that Plaintiffs lack standing would be more
11 appropriately decided on their promised motion to dismiss.⁶ At that point Plaintiffs will be able to
12 make assertions regarding specific types of communications that are problematic under the new
13 statute (assertions which Defendants concede may be relevant to the standing calculus, *see* Defs.
14 Opposition to Pls.’ Motion to Supplement Compl., Dkt. 22, at 8 lines 17-19), perhaps adducing
15 expert testimony as to why the surveillance regime created by the PAA is problematic for attorneys
16 and legal workers situated as Plaintiffs are (testimony whose relevance Defendants’ counsel
17 claimed was restricted to the specific legal regime existing before the PAA at oral argument on
18 August 9, 2007, Tr. at 57:5-58:25), and show the relationship of those communications to
19 Plaintiffs’ legal claims.

20 On the merits, many of Defendants’ arguments regarding standing have already been
21 rehashed several times, and are incorrect for the reasons laid out in Plaintiffs’ previous briefs, *see*
22 Pls. Suppl. Br., Dkt 13, at 10-26; Pls. Opp. to MTD, Dkt. 56 (S.D.N.Y.), at 2-13, 32-33; Pls. Reply
23 in Suppt. of Summary Judgment, Dkt. 74 (S.D.N.Y.), at 1-8, and in the oral arguments before
24 Judge Lynch, Oral Arg. Tr. (Sept. 5, 2006) at 16-37, 52-53, and this Court.

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26
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28 ⁶ *See* Defs. Opposition to Pls.’ Motion to Supplement Compl., Dkt. 22, at 5 n.1.

1 **CONCLUSION**

2 As Defendants point out, it is “[n]early two years after this suit was filed,” and it is now
3 nearly two months after the filing of Plaintiffs’ motion for leave, yet Plaintiffs have still not been
4 able to resolve the question of their legal rights against the threat of lawless, unchecked
5 government surveillance. Plaintiffs urge this court to expeditiously grant their motion for leave,
6 thereby allowing them to move for injunctive relief against the threat of surveillance under the new
7 FISA amendments.

8 For the foregoing reasons, Plaintiffs request that the Court grant their motion for leave.

9 Respectfully submitted,

10 _____
11 /s/Shayana Kadidal

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October 5, 2007

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Certificate of Service

I, Shayana Kadidal, certify that on October 5, 2007 (PDT), I caused the foregoing Reply Memorandum to be filed electronically on the ECF system and served via email on the counsel for defendants listed below.

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