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

17
 18 TASH HEPTING, GREGORY HICKS,
 CAROLYN JEWEL and ERIK KNUTZEN
 19 on Behalf of Themselves and All Others
 Similarly Situated,

20 Plaintiffs,

21 vs.

22 AT&T CORP., AT&T INC. and DOES 1-20,
 23 inclusive,

24 Defendants.

No. C-06-0672-VRW

**MOTION OF DEFENDANT
 AT&T INC. TO DISMISS
 PLAINTIFFS' AMENDED
 COMPLAINT; SUPPORTING
 MEMORANDUM**

[Fed. R. Civ. P. 12(b)(2), 12(b)(6)]

Date: June 8, 2006
 Time: 2 p.m.
 Courtroom: 6, 17th Floor
 Judge: Hon. Vaughn R. Walker
 Filed concurrently:
 1. Declaration of Starlene Meyerkord
 2. Proposed order

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TABLE OF CONTENTS

Page

NOTICE OF MOTION AND MOTION TO DISMISS.....iv

ISSUE TO BE DECIDEDiv

MEMORANDUM OF POINTS AND AUTHORITIES..... 1

I. INTRODUCTION..... 1

II. STATEMENT OF FACTS..... 1

 A. Background on AT&T Inc..... 1

 B. AT&T Inc.’s lack of contact with the State of California. 2

 C. AT&T Inc.’s lack of involvement in the conduct alleged in the Amended Complaint..... 2

III. ARGUMENT. 4

 A. Principles governing motions to dismiss for lack of personal jurisdiction..... 4

 B. AT&T Inc. lacks the “minimum contacts” necessary to create jurisdiction in the State of California. 4

 1. Plaintiffs cannot establish general jurisdiction over AT&T Inc. 5

 2. Plaintiffs cannot establish specific jurisdiction over AT&T Inc. 7

 C. The activities of AT&T Corp. within California do not subject AT&T Inc. to the Court’s jurisdiction. 8

 D. AT&T Inc. should also be dismissed for the reasons stated in the motion to dismiss filed concurrently by AT&T Corp. 9

IV. CONCLUSION. 10

TABLE OF AUTHORITIES

1		Page
2		
3	Cases	
4	Bancroft & Masters, Inc. v. Augusta Nat’l Inc.,	
5	223 F.3d 1082 (9th Cir. 2000)	5
6	Brand v. Menlove Dodge,	
7	796 F.2d 1070 (9th Cir. 1986)	5
8	Burger King Corp. v. Rudzewicz,	
9	471 U.S. 462 (1985)	7, 8
10	Covad Communications Co. v. Pacific Bell,	
11	1999 U.S. Dist. LEXIS 22789 (N.D. Cal. Dec. 14, 1999).....	6
12	Cubbage v. Merchant,	
13	744 F.2d 665 (9th Cir. 1984)	4
14	Directory Dividends, Inc. v. SBC Communications, Inc.,	
15	2003 WL 21961448 (E.D. Pa. July 2, 2003)	9
16	Doe v. Unocal Corp.,	
17	248 F.3d 915 (9th Cir. 2001)	4, 5, 8
18	Gammino v. SBC Communications, Inc.,	
19	2005 WL 724130 (E.D. Pa. Mar. 29, 2005)	6
20	GoInternet.net, Inc. v. SBC Communications, Inc.,	
21	2003 WL 22977523 (Pa. Com. Pl. Dec. 17, 2003).....	9
22	Gordy v. Daily News, L.P.,	
23	95 F.3d 829 (9th Cir. 1996)	8
24	Go-Video Inc. v. Akai Electric Co., Ltd.,	
25	885 F.2d 1406 (9th Cir. 1989)	4
26	Helicopteros Nacionales de Colombia v. Hall,	
27	466 U.S. 408 (1984)	5
28	International Shoe Co. v. Washington,	
	326 U.S. 310 (1945)	4
	Newman v. Motorola, Inc.,	
	125 F. Supp. 2d 717 (D. Md. 2000).....	7
	Pena v. Valo,	
	563 F. Supp. 742 (C.D. Cal. 1983).....	4
	Perkins v. Benguet Consolidated Mining Co.,	
	342 U.S. 437 (1952)	5

1 Phonetel Communications, Inc. v. U.S. Robotics Corp.,
2 2001 U.S. Dist. LEXIS 7233 (N.D. Tex. June 1, 2001) 7

3 Shaffer v. Heitner,
4 433 U.S. 186 (1977) 5

5 Von Grabe v. Sprint PCS,
6 312 F. Supp. 2d 1285 (S.D. Cal. 2003) 7

Constitution

7 United States Constitution
8 Amendment V 4, 7

Statutes and Codes

9 California Code of Civil Procedure
10 Section 410.10 4

Rules

11 Federal Rules of Civil Procedure
12 Rule 12(b)(1) iv
13 Rule 12(b)(2) iv, 4
14 Rule 12(b)(6) iv

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 There is no basis for personal jurisdiction over AT&T Inc. A pure holding
4 company, AT&T Inc. does not make or sell goods or services to residents of California or
5 to anyone at all. AT&T Inc. is incorporated in Delaware and headquartered in Texas and
6 has no offices or employees in California. No factual allegations tie it to any of the
7 activities underlying the claims asserted by the Amended Complaint. In short, AT&T Inc.
8 has no business presence in California. Because AT&T Inc. lacks the minimum contacts
9 with the State of California needed to subject it to the Court's jurisdiction, the Amended
10 Complaint should be dismissed as to it.

11 Plaintiffs appear to have named AT&T Inc. as a defendant because they
12 misunderstand its activities. If plaintiffs have a dispute with anyone, it is not AT&T Inc.

13 **II. STATEMENT OF FACTS.**

14 **A. Background on AT&T Inc.**

15 AT&T Inc. is incorporated in Delaware. Its principal (and only) place of business is
16 in San Antonio, Texas. Declaration of Starlene Meyerkord in Support of Motion of
17 Defendant AT&T Inc. to Dismiss Plaintiffs' Amended Complaint, filed concurrently
18 ("Meyerkord Decl.") ¶¶ 2-3; *see also* FAC ¶ 18.

19 AT&T Inc. is a holding company, conducts no business of its own and has no assets
20 other than stock in its subsidiaries. AT&T Inc. provides no telecommunications services or
21 Internet services to the public, and does not itself make or sell any products or services.
22 Meyerkord Decl. ¶¶ 4-5.

23 AT&T Inc. does not provide telecommunications or Internet services to the public
24 or, for that matter, make or sell any products or services. *Id.* ¶ 5. It owns various
25 subsidiaries, some of which offer telecommunications services. *Id.* ¶¶ 4, 8. Each of its
26 affiliated subsidiaries that does business in the State of California has its own, separate
27 corporate, partnership or limited liability company identity and structure. *Id.* ¶ 7.

28

1 **B. AT&T Inc.'s lack of contact with the State of California.**

2 AT&T Inc. is a foreign holding company without any operations in California. It
3 does not do business in the State. In particular:

- 4 • It has no employees or distributors resident in California.
- 5 • It does not have an office or mailing address in California, and it does not own or
6 lease any real property in California.
- 7 • It has never been registered or otherwise qualified to do business in the State of
8 California, and did not appoint an agent for service of process in California for
9 such purpose.
- 10 • It does not pay income, property or use taxes to the State of California.
- 11 • It does not manufacture any product of any kind or provide any service of any
12 nature that could find its way through the stream of commerce into the State of
13 California.
- 14 • It has not chosen to avail itself of the privilege of doing business in the State of
15 California.
- 16 • It is a pure holding company that conducts no business itself.

17 Meyerkord Decl. ¶¶ 4, 11-14.

18 **C. AT&T Inc.'s lack of involvement in the conduct alleged in the Amended**
19 **Complaint.**

20 The Amended Complaint accuses defendants of violating the rights of telecom-
21 munications customers of AT&T Corp. It says that defendants did so by allowing the
22 government to intercept or gain access to certain information about these customers.

23 The claims alleged in the Amended Complaint apparently arose in California.
24 Because AT&T Inc. has no business presence in California, these allegations do not and
25 cannot apply to AT&T Inc. Meyerkord Decl. ¶ 17. AT&T Inc. has no customers and offers
26 no telecommunications services. As noted, it is a pure holding company.

27 The Amended Complaint acknowledges the separate corporate identities of AT&T
28 Inc. and AT&T Corp. *See, e.g.*, FAC ¶¶ 17-18. But plaintiffs incorrectly assert that both

1 “AT&T Corp. and AT&T Inc. are telecommunications carriers, and both offer electronic
2 communications service(s) to the public and remote computing service(s).” FAC ¶ 19.
3 Plaintiffs further allege that “[p]rior to the acquisition and merger, AT&T Corp. and SBC
4 [Communications Inc.] both had a significant business presence in California for many
5 years. The new AT&T Inc. and its subsidiary, AT&T Corp., continue to have a significant
6 business presence in California.” FAC ¶ 21; *see also* FAC ¶¶ 48, 49. These allegations are
7 flat wrong as to AT&T Inc. *See, e.g.*, Meyerkord Decl. ¶¶ 4-5.

8 The FAC’s conclusory allegations about AT&T Inc. are accompanied by no factual
9 detail. The FAC alleges that AT&T Corp.—not AT&T Inc.—provided the United States
10 with access to its telecommunications network. FAC ¶¶ 42-47, 51-61. AT&T Inc. is not
11 singled out once in the FAC’s description of its seven claims. *See* FAC ¶¶ 78-149
12 (describing claims against AT&T Corp. and “defendants” generically, but not describing
13 any conduct by AT&T Inc.). Plaintiffs concede that the challenged conduct “began before
14 AT&T Corp. was acquired by AT&T Inc. (formerly known as SBC Communications,
15 Inc.)” FAC ¶ 7. Plaintiffs appear to have named AT&T Inc. as a defendant in the belief
16 that AT&T Inc. may some day integrate its subsidiaries’ telecommunications networks and
17 become involved in the challenged conduct. Plaintiffs state as much on their website:

18 **Why Is the Case Against Both AT&Ts?**

19 While the case focuses on the acts of AT&T Corp. (pre-merger), AT&T
20 Inc. has begun a transition process designed to integrate the former SBC’s
21 telecommunications network with AT&T Corp.’s network, ultimately
22 leading into unified networks. The lawsuit alleges that the facilities and
23 technologies of the former SBC are being or will imminently be used to
24 transmit the communications of AT&T Corp. customers, and will continue
25 the violation of the privacy of its customers.

23 Electronic Frontier Foundation, *ATT-NSA FAQ*, <http://www.eff.org/legal/cases/att/faq.php>.
24 *See also* FAC ¶¶ 62-63. Even if plaintiffs are correct in asserting that the networks of the
25 former SBC and the former AT&T are being integrated now or may be integrated in the
26 future, that does not implicate AT&T Inc.: It remains a holding company that does not
27 itself make or sell any products or services. Meyerkord Decl. ¶¶ 4-5.

28

1 **III. ARGUMENT.**

2 **A. Principles governing motions to dismiss for lack of personal jurisdiction.**

3 Rule 12(b)(2) of the Federal Rules of Civil Procedure governs motions to dismiss
4 for lack of personal jurisdiction. Plaintiffs have the burden of establishing that the Court
5 has personal jurisdiction over the defendants. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th
6 Cir. 2001) (citing *Cabbage v. Merchant*, 744 F.2d 665, 667 (9th Cir. 1984)). In assessing
7 the plaintiffs' showing, the Court may consider evidence presented in affidavits. *Unocal*,
8 248 F.3d at 922. The allegations in a plaintiff's complaint, if contradicted by a defendant's
9 affidavits, are insufficient. *See Pena v. Valo*, 563 F. Supp. 742, 747 (C.D. Cal. 1983)
10 (holding that plaintiff failed to make even a *prima facie* showing that the court had
11 jurisdiction where plaintiff attempted to rely on "the conclusory allegations of his
12 complaint" in response to the allegations set forth in defendants' affidavits).

13 To exercise personal jurisdiction over a nonresident defendant in a federal question
14 case like this, the Court must first determine that "a rule or statute potentially confers
15 jurisdiction over the defendant and then conclude that asserting jurisdiction does not offend
16 the principles of Fifth Amendment due process." *Unocal*, 248 F.3d at 921-22 (quoting *Go-*
17 *Video Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989)). This means that
18 the Court may exercise jurisdiction over a party where doing so comports with the law of
19 the State of California and meets the requirements of due process. *Unocal*, 248 F.3d at 923.

20 California Code of Civil Procedure section 410.10 extends the jurisdiction of the
21 state's courts to circumstances consistent with the state and federal constitutions. Thus, the
22 analysis focuses on constitutional limits rather than state law.

23 **B. AT&T Inc. lacks the "minimum contacts" necessary to create jurisdiction in**
24 **the State of California.**

25 Under the due process clause of the federal Constitution, it is a prerequisite to a
26 court's jurisdiction that a foreign defendant have such "minimum contacts" with the forum
27 state that maintenance of suit would not offend "traditional notions of fair play and
28 substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In

1 *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-15 (1984), the United
2 States Supreme Court set forth the standards for both general and specific jurisdiction. If a
3 defendant has sufficient “contacts” with the forum, it may be subject to suit there on all
4 claims wherever they arise (general jurisdiction). In other cases the jurisdictional
5 sufficiency of the defendant’s contacts depends on an assessment of the “relationship
6 among the defendant, the forum and the litigation” (specific jurisdiction). *Id.* at 414
7 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). Neither general nor specific
8 jurisdiction over AT&T Inc. exists here.

9 **1. Plaintiffs cannot establish general jurisdiction over AT&T Inc.**

10 “If the defendant’s activities in the forum are substantial, continuous and systematic,
11 general jurisdiction is available; in other words, the foreign defendant is subject to suit even
12 on matters unrelated to his or her contacts to the forum.” *Unocal*, 248 F.3d at 923 (citing
13 *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446 (1952)). “The standard for
14 establishing general jurisdiction is ‘fairly high’ and requires that the defendant’s contacts be
15 of the sort that approximate physical presence.” *Bancroft & Masters, Inc. v. Augusta Nat’l*
16 *Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (citation omitted) (quoting *Brand v. Menlove*
17 *Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986)). To establish the “minimum contacts”
18 necessary to support general jurisdiction, plaintiffs must establish that AT&T Inc. has
19 “continuous and systematic” contacts with California tantamount to doing business within
20 the state. *Helicopteros*, 466 U.S. at 416. Plaintiffs cannot meet this burden because AT&T
21 Inc. does not engage in activities of the sort or scope that constitute “continuous and
22 systematic” contacts with the State of California.

23 AT&T Inc.’s relationship to the acts alleged in the Amended Complaint is based
24 solely on its stock ownership in AT&T Corp. Contrary to plaintiffs’ conclusory allegations
25 (FAC ¶ 21), AT&T Inc. does not do business in the State of California and lacks contacts
26 with the State of California that are “continuous and systematic.” *See* Meyerkord Decl.
27 ¶¶ 11-17. AT&T Inc. has never been registered or otherwise qualified to do business in
28 California, and did not appoint an agent for service of process in California for such

1 purpose. It has no employees or distributors resident in California. *Id.* It owns or leases no
2 property in California, has no office or mailing address in California, and provides no
3 telecommunication, Internet or any other services in California. *Id.* Further, AT&T Inc.
4 does not manufacture any product of any kind or provide any service of any nature that
5 could find its way through the stream of commerce into California. *Id.* AT&T Inc.
6 conducts no business itself. *Id.* ¶ 4. These facts demonstrate that plaintiffs' allegations are
7 incorrect: AT&T Inc. does not have the systematic business contacts with California
8 required to establish general jurisdiction.

9 It is predictable that plaintiffs will direct the Court to the existence of the AT&T
10 family brand as a supposed basis for imposing jurisdiction on AT&T Inc. This family
11 brand is used by the AT&T operating companies that are direct and indirect subsidiaries of
12 AT&T Inc. This family brand is maintained through advertising, the AT&T website, and
13 other marketing activities. Although a layperson might attribute these marketing activities
14 to AT&T Inc., the fact is that these activities are undertaken by AT&T's subsidiaries, not
15 by the holding company itself. As discussed below, the activities of these subsidiaries are
16 not attributable to AT&T Inc. without a finding of agency or alter ego, which cannot be
17 made here.

18 Plaintiffs may rely on two cases that mistakenly attribute marketing activities to
19 AT&T Inc.'s predecessor corporation, SBC. In *Covad Communications Co. v. Pacific Bell*,
20 1999 U.S. Dist. LEXIS 22789 (N.D. Cal. Dec. 14, 1999), jurisdiction rested on a news
21 release speaking broadly about the scope of the operating companies' networks and
22 expenditures, and apparently on Internet job postings. The court's opinion is far from clear,
23 stating at one point that "plaintiff has presented a powerful case that SBC *may* conduct a
24 variety of activities" (emphasis added), and at another point stating that SBC is *either*
25 "present in California" *or* is "more than a simple holding company." *Id.* at 21. To similar
26 effect, in *Gammino v. SBC Communications, Inc.*, 2005 WL 724130 (E.D. Pa. Mar. 29,
27 2005), the court found, without any evident basis, that statements appearing on the SBC
28 brand website should be attributed to the holding company.

1 Following a more rigorous analysis, a greater number of courts have rejected
2 jurisdiction over SBC and other telephone holding companies, notwithstanding the
3 existence of family brands, websites or marketing activities undertaken by their
4 subsidiaries. In *Newman v. Motorola, Inc.*, 125 F. Supp. 2d 717 (D. Md. 2000), the court
5 required plaintiffs to show that the products and services appearing on the SBC brand
6 website were to be supplied by the holding company rather than one of its subsidiaries.
7 Plaintiffs could not make the showing because the facts would not support it. Courts also
8 rejected jurisdiction over telephone holding companies in *Von Grabe v. Sprint PCS*, 312 F.
9 Supp. 2d 1285 (S.D. Cal. 2003) (holding that use of a common trade name on website and
10 in other marketing activities did not provide a basis for jurisdiction over Sprint Corp.) and
11 *Phonetel Communications, Inc. v. U.S. Robotics Corp.*, 2001 U.S. Dist. LEXIS 7233 (N.D.
12 Tex. June 1, 2001) (holding that although the Verizon website offered goods and services to
13 customers in Texas, plaintiff failed to show that the holding company was responsible for
14 the website).

15 The record here shows that the AT&T brand website is maintained and administered
16 by a subsidiary of AT&T Inc., not by AT&T Inc. Meyerkord Decl. ¶ 15. None of the
17 goods or services offered on the AT&T brand website are provided by AT&T Inc. *Id.* ¶ 16.

18 **2. Plaintiffs cannot establish specific jurisdiction over AT&T Inc.**

19 It is possible to assert jurisdiction over a foreign corporation that does not do
20 business within the state if the plaintiffs can demonstrate a sufficient nexus between the
21 foreign corporation and the activities within the state that gave rise to the cause of action.
22 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). As interpreted by the Supreme
23 Court, the due process clause requires that a foreign corporation have “fair warning” that a
24 particular activity may subject it to the jurisdiction of a foreign sovereign. *Id.* Where a
25 forum state seeks to assert specific jurisdiction over an out-of-state defendant who has not
26 consented to suit, this “fair warning” requirement can only be satisfied if the defendant has
27 “purposefully directed” its activities at residents of the forum and the litigation results from
28 alleged injuries that “arise out of or relate to” those activities. *Id.* The Ninth Circuit has

1 established a three-part test to evaluate the nature and quality of a
2 defendant's contacts so as to determine the availability of specific
jurisdiction:

3 (1) The nonresident defendant must do some act or consummate some
4 transaction within the forum or perform some act by which he purposefully
avails himself of the privilege of conducting activities in the forum, thereby
invoking the benefits and protections of its laws.

5 (2) The claim must be one which arises out of or results from the
defendant's forum-related activities.

6 (3) Exercise of jurisdiction must be reasonable.
7

8 *Unocal*, 248 F.3d at 923 (citing *Gordy v. Daily News, L.P.*, 95 F.3d 829, 831-32 (9th Cir.
9 1996)).

10 The allegations of the Amended Complaint are directed at activities allegedly
11 committed by AT&T Corp. Plaintiffs cannot establish any activities undertaken by AT&T
12 Inc. itself (*i.e.*, not through a subsidiary) within the State of California, let alone any that
13 were "purposefully directed" at residents of California or caused the injuries at issue.
14 Accordingly, there has been no "fair warning," or any warning, to AT&T Inc. that its
15 activities would subject it to the jurisdiction of courts in California. Absent such warning,
16 due process precludes the exercise of that jurisdiction. *Burger King*, 471 U.S. at 472.

17 **C. The activities of AT&T Corp. within California do not subject AT&T Inc. to**
18 **the Court's jurisdiction.**

19 Where plaintiffs can meet the high burden of showing that a holding company and
20 its subsidiaries operate as a single functioning entity, they may establish jurisdiction over a
21 foreign parent corporation by relying on the activities of a domestic subsidiary. To meet
22 this burden, plaintiffs must show that the subsidiary is an agent or alter ego of the parent.
23 Plaintiffs have not and cannot meet this burden here.

24 The alter-ego test requires plaintiffs to prove that there is such a unity of interest and
25 ownership that the separate personalities of the two corporations no longer exist, and that
26 failure to disregard their separate identities would result in fraud or injustice. *Unocal*,
27 248 F.3d at 926. The agency test requires proof that the subsidiary functions as the parent
28 corporation's representative in performing services that are so important to the foreign

1 parent corporation that if it did not have a representative to perform them, the corporation's
2 own officials would be required to undertake substantially similar activities. *Id.* at 928.

3 Agency and alter ego theories have been previously litigated by plaintiffs attempting
4 to impose jurisdiction on SBC, the corporate predecessor of AT&T Inc. To counsels'
5 knowledge, only once has a district court held that SBC is the alter ego or agent of its
6 subsidiaries. In that case, *Directory Dividends, Inc. v. SBC Communications, Inc.*,
7 2003 WL 21961448 (E.D. Pa. July 2, 2003), the court found that SBC and its subsidiaries
8 were presented as an integrated entity on the SBC website, and that SBC controlled the
9 activities of its subsidiaries. The court appears to have been particularly moved by its
10 website analysis, finding it to be "compelling" grounds to disregard the corporate form.

11 *Directory Dividends* is wrongly decided. A later opinion distinguished it on the
12 basis of its mistaken factual finding that SBC has ignored the corporate form of its
13 subsidiaries. See *GoInternet.net, Inc. v. SBC Communications, Inc.*, 2003 WL 22977523,
14 *7-*8 (Pa. Com. Pl. Dec. 17, 2003) ("That the companies may have a close relationship or
15 may coordinate and cooperate is not sufficient to impute foreign contacts.") (internal
16 quotations omitted).

17 The record before this Court shows that AT&T Corp. is separate and distinct from
18 AT&T Inc. and is capable of satisfying any potential judgment. Meyerkord Decl. ¶ 10.
19 AT&T Corp. has its own management, its own board of directors, and maintains its own
20 corporate minutes. *Id.* AT&T Corp.'s management and board of directors are responsible
21 for the management and operations of AT&T Corp. *Id.* There is nothing in this record to
22 support a claim by plaintiffs to collapse these distinct legal entities and impose jurisdiction
23 on AT&T Inc. because of the in-state activities of AT&T Corp.

24 **D. AT&T Inc. should also be dismissed for the reasons stated in the motion to**
25 **dismiss filed concurrently by AT&T Corp.**

26 AT&T Inc. also urges the Court to dismiss it on the grounds urged by AT&T Corp.
27 in its separate motion. Rather than burden the Court with repetitive briefing, AT&T Inc.
28 simply incorporates the arguments of AT&T Corp. by reference.

1 **IV. CONCLUSION.**

2 For the foregoing reasons, defendant AT&T Inc. submits that this action should be
3 dismissed with prejudice as to it.

4 Dated: April 28, 2006.

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