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

17 In re:
18 NATIONAL SECURITY AGENCY TELE-
COMMUNICATIONS RECORDS LITIGA-
TION
19
20
21
22 This Document Relates To:
23 *McMurray v. Verizon Communications, Inc., et*
24 *al.*, No. 09-cv-0131-VRW
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27
28

MDL Dkt. No. 06-1791-VRW
**MOTION TO DISMISS OF TELECOM-
MUNICATIONS CARRIER DEFENDANTS**
[Fed. R. Civ. P. 12(b)(1), 12(b)(6)]
Date: May 14, 2009
Time: 2:30 p.m.
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker
Filed concurrently:
1. Proposed Order
2. Motion to Dismiss of Specially Appearing
Defendants AT&T Inc. and BellSouth
Corporation
a. Declaration of Thomas Koch
b. Declaration of James Lacy
c. Proposed Order

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1 **NOTICE OF MOTION AND MOTION TO DISMISS**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on May 14, 2009, at 2:30 p.m., before the Honorable Vaughn
4 R. Walker, United States District Chief Judge, in Courtroom 6, 17th floor, 450 Golden Gate Avenue,
5 San Francisco, California, defendants Verizon Communications Inc. and AT&T Corp., and Specially
6 Appearing Defendants AT&T Inc. and BellSouth Corporation¹ (collectively, “carriers” or “carrier
7 defendants”), will move and hereby do move, pursuant to Federal Rules of Civil Procedure 12(b)(1)
8 and 12(b)(6), to dismiss the Complaint (Dkt. 1, Attach. No. 2) filed by Rev. Joe McMurray et al.
9 (“plaintiffs”) challenging the constitutionality of § 802 of the Foreign Intelligence Surveillance Act
10 (“FISA”) (added by the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436).

11 This motion is made on the grounds that plaintiffs’ Fifth Amendment takings claim (Count 1)
12 is meritless because plaintiffs do not hold a vested property right in their pending, unadjudicated
13 claims against the carrier defendants and this Court lacks jurisdiction to adjudicate the claim; that
14 Plaintiffs’ separation of powers claim (Count 2) fails because § 802 permissibly amended the legal
15 standard underlying the lawsuits brought against the carriers; and that Plaintiffs’ due process claim
16 (Count 3) must be dismissed because the retroactive application of § 802(a) to pending cases is con-
17 stitutionally permissible. And, in addition to these arguments made by the Government and in prior
18 briefing in this case, this motion is based on the argument that even if plaintiffs’ claims did not fail
19 in their entirety on the merits, their claims *against the carriers* must be dismissed because the carri-
20 ers are not proper defendants in this action. The carriers are private entities that are not alleged to
21 have taken *any* relevant action with respect to the passage and application of § 802, much less state
22 action that would implicate constitutional concerns. For similar reasons plaintiffs have no standing
23 to sue the carrier defendants, because the carriers did not cause any harm, and relief against them
24 could not redress any supposed harm.

25 This motion is based on this notice of motion and motion, the memorandum that follows, all

26
27 ¹ AT&T Inc. and BellSouth Corporation are not subject to personal jurisdiction in New York, which
28 is where the complaint was filed. Accordingly, those entities have concurrently filed a separate mo-
tion to dismiss for lack of personal jurisdiction.

1 pleadings and records on file in this action, and any other arguments and evidence presented to this
2 Court at or before the hearing on this motion. To minimize duplicative arguments, where possible
3 the carrier defendants have cross-referenced the Government's motion to dismiss the *McMurray*
4 complaint,² as well as the Government's³ and the carriers'⁴ prior briefing concerning the constitu-
5 tionality of the FISA Amendments Act of 2008.

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² U.S. Mot. to Dismiss Plaintiffs' Compl. (Dkt. 583) ("U.S. *McMurray* Motion").

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³ Corrected United States' Reply in Support of Mot. to Dismiss or in the Alternative, for Summary Judgment (Dkt. 520) ("U.S. FISAAA Brief").

27

⁴ Brief of Telecommunications Carrier Defendants in Support of the United States' Mot. to Dismiss or, in the Alternative, for Summary Judgment (Dkt. 508) ("Carriers' FISAAA Brief").

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION AND SUMMARY OF ARGUMENT**

3 In 2006, all but one of the plaintiffs in this action, who claim to be current and former
4 subscribers of the carrier defendants, brought a different suit against the carriers seeking monetary
5 damages and injunctive relief for the alleged disclosure of “subscriber conversations, information
6 and records to the United States in violation of the Electronic Communications Privacy Act (ECPA)
7 and the Stored Communications Act.” Compl. ¶ 9, *McMurray v. Verizon Commc’ns* (No. 09-0131)
8 (“Complaint”) (*McMurray* Dkt. 1, Attach. 2) (describing the 2006 complaint); *see* Amended Compl.,
9 *McMurray v. Verizon Commc’ns Inc.*, No. 1:06-3650 (S.D.N.Y.) (“2006 Complaint”). By order of
10 the Judicial Panel on Multidistrict Litigation (JPML), that lawsuit was transferred to this Court for
11 consolidated pretrial proceedings. *See In re NSA Telecomms. Records Litig.*, 444 F. Supp. 2d 1332,
12 1335 (J.P.M.L. 2006). It later was among the lawsuits with respect to which the Attorney General
13 submitted a certification and the United States sought dismissal pursuant to § 802 of the Foreign
14 Intelligence Surveillance Act (FISA) (added by the FISA Amendments Act of 2008 (FISAAA), Pub.
15 L. No. 110-261, 122 Stat. 2436). *See* Dkt. 469. Plaintiffs and their counsel joined in the extensive
16 briefing challenging the constitutionality of § 802, which now is pending before this Court. *See*
17 MDL Dkts. 482, 524.

18 For reasons passing understanding, in July 2008 these same plaintiffs – represented by the
19 same lawyers – also separately filed an entirely new lawsuit outside of the MDL, in the Southern
20 District of New York, in which they also attacked the constitutionality of § 802. That separate law-
21 suit, which the JPML also transferred to this Court, is the subject of this motion to dismiss. Plain-
22 tiffs assert three causes of action – that § 802 violates the Takings Clause (Count 1), the separation
23 of powers (Count 2), and due process (Count 3). *See* Compl. ¶¶ 18-39. They identify only the first
24 of these as presenting anything new. Pls’ Opp’n to U.S. Admin. Mot. (Dkt. 7) at 5. In fact, each of
25 the three claims is legally infirm.

26 For reasons the government already has explained in its Motion to Dismiss, the Complaint
27 should be dismissed in its entirety. *First*, the *McMurray* plaintiffs argue that by requiring dismissal
28 of their original 2006 lawsuit, § 802 violates the Takings Clause of the Fifth Amendment. Such a

1 challenge, however, can succeed only when the thing that allegedly was “taken” – here, the pending
2 lawsuit – is a property interest that the government may not abridge without paying just compensa-
3 tion. The Ninth Circuit, however, and “every circuit court to have addressed the issue[,] has . . .
4 concluded that no vested property right exists in a cause of action unless the plaintiff has obtained a
5 final, unreviewable judgment.” *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1299 (C.D. Cal. 2006)
6 (collecting cases). Indeed, in their prior briefing, the MDL plaintiffs, including the *McMurray* plain-
7 tiffs, themselves recognized that the “Takings Clause did not apply to [a] cause of action that had not
8 been reduced to final judgment.” *See* MDL Pls.’ Reply Br. (Dkt. 524) at 17 n.16. Moreover, as the
9 Government properly explains, even if plaintiffs’ claim for damages were a protected property inter-
10 est, this Court lacks the jurisdiction to consider plaintiffs’ takings claim. *Second*, plaintiffs contend
11 that § 802 trenches upon the judicial function. This cause of action is similarly meritless. Because
12 Congress amended the legal standard underlying the lawsuits brought against the carriers, § 802
13 does not violate the separation of powers. *Third*, plaintiffs allege that the application of § 802 to
14 pending claims, including the 2006 Complaint, violates due process. But it is black-letter law that
15 Congress may enact legislation affecting claims that have not reached final judgment so long as the
16 law is merely rational. Although plaintiffs clearly disagree with Congress’s policy judgment, they
17 have not alleged – nor could they – that § 802 lacks a rational basis.

18 For all of these reasons, plaintiffs’ claims must be dismissed in their entirety. But plaintiffs’
19 claims *against the carriers* are particularly flawed, and so must be dismissed for an additional reason
20 that the government has not discussed – namely, the Complaint does not articulate any cause of ac-
21 tion that properly could be brought against the carriers, which are *private parties* that are not respon-
22 sible for enacting or invoking § 802. Nowhere does the Complaint allege that these private defen-
23 dants have undertaken *any* relevant conduct. And it certainly makes no allegation that could support
24 the extraordinary idea that these private entities could “take” plaintiffs’ putative causes of action,
25 deny them due process, or otherwise engage in action that could be deemed “state action.” For
26 closely related reasons, plaintiffs have no standing to sue the carrier defendants – the Complaint
27 does not allege that the carriers took any action that caused the alleged constitutional violations, nor
28 does it seek any relief against the carriers that could redress the supposed injury. Causation and re-

1 dressability are essential components of the “irreducible constitutional minimum of standing,” and
2 they have not and could not be alleged here. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560
3 (1992). The Complaint must be dismissed.

4 ARGUMENT

5 I. THE COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY

6 In the Government’s Motion to Dismiss, and in the prior briefing on the constitutionality of
7 FISAAA, the defendants in the MDL have set forth arguments why the Complaint must be dis-
8 missed. *See supra* nn.2-4. We incorporate those arguments by reference, and reiterate them briefly
9 here, to preserve them.

10 A. Section 802 Does Not Violate The Takings Clause

11 Plaintiffs contend that their “right to recover” under various statutes, “as expressed through
12 the Pending Actions, are property rights” protected by the Fifth Amendment’s guarantee that the
13 government will not take “private property ... without just compensation.” Compl. ¶ 19. This claim
14 must be dismissed in its entirety for at least two reasons.

15 First, as the Government has explained, the dismissal of plaintiffs’ pending lawsuit seeking
16 money damages from carriers would not as a matter of law constitute a taking. *See U.S. McMurray*
17 Motion 4-7. “The Fifth Amendment’s Takings Clause prevents the Legislature . . . from depriving
18 private persons of *vested property rights* except for a ‘public use’ and upon payment of ‘just com-
19 pensation.’” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (emphasis added). “[A] party’s
20 property right in any cause of action,” however, “does not vest until a final unreviewable judgment
21 is obtained.” *Grimesy v. Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) (internal quotation marks omit-
22 ted) (rejecting takings claim); *see also U.S. McMurray* Motion 4-5 (collecting cases). Plaintiffs’
23 2006 lawsuit has not reached a final judgment, and so its dismissal by virtue of § 802 could not con-
24 stitute a taking.

25 Second, this Court lacks jurisdiction to consider takings claims against the federal govern-
26 ment, including those in which declaratory or equitable relief is sought. *See U.S. McMurray* Motion
27 3-4; *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1286 n.6 (9th Cir. 1997) (“neither injunctive nor
28 declaratory relief is available for a takings claim against the United States”); *Consejo de Desarrollo*

1 *Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1172-73 (9th Cir. 2007). Rather, as
2 the Government has explained, a takings claim is premature when (as here) the plaintiff has not pur-
3 sued just compensation under the Tucker Act. See U.S. *McMurray* Motion 3-4.

4 **B. Section 802 Does Not Violate The Separation Of Powers**

5 For the reasons previously set forth (*see* Carriers' FISAAA Br. 8-14), plaintiffs' claim that
6 § 802 violates the separation of powers (*see* Compl. ¶¶ 22-35) also must be dismissed. The
7 Complaint principally contends that § 802 violates the separation of powers because it "mandates
8 legislative dismissal of plaintiffs' claims . . . without adjudication by a court." Compl. ¶ 23; *see also*
9 *id.* ¶ 35 ("the Act is unconstitutional in that it purports to adjudicate cases and controversies pending
10 before a court of the United States"). This argument, which appears to be based on *United States v.*
11 *Klein*, 80 U.S. (13 Wall.) 128 (1871), is without merit.

12 As the carriers' prior brief explains in greater detail (*see* Carriers' FISAAA Br. 8-10), it is
13 well established that Congress may amend the law applicable to pending cases that have not yet
14 reached final judgment: "[*Klein*'s] prohibition does not take hold when Congress 'amend[s]
15 applicable law'" as opposed to simply prescribing a rule of decision in a particular case. *Plaut v.*
16 *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson v. Seattle Audubon Soc'y*, 503
17 U.S. 429, 441 (1992)). "[I]t is of no constitutional consequence that [legislation] affects, or is even
18 directed at, a specific [case] so long as the legislation modifies the law." *Ecology Ctr. v. Castaneda*,
19 426 F.3d 1144, 1149 (9th Cir. 2005) (internal quotation marks omitted); *see also Robertson*, 503
20 U.S. at 434-35. Here, Congress amended the law. Section 802 sets forth an immunity that is
21 available in any case – now or in the future, pending or not yet filed – in which the standards of the
22 section are met.

23 To the extent the *McMurray* plaintiffs mean to argue that § 802 violates the separation of
24 powers on the theory that it permits the Executive Branch to exercise adjudicatory power, *see*
25 Compl. ¶ 34, that theory likewise fails. Under § 802, a certification by the Attorney General is
26 subject to judicial review for "substantial evidence." *See* FISA § 802(b)(1). Judicial review of this
27 sort is common under numerous statutes – most notably, the Administrative Procedure Act – and
28 raises no constitutional concerns. *See* Carriers' FISAAA Br. 14-15; *see, e.g., Noriega-Perez v.*

1 *United States*, 179 F.3d 1166, 1174-78 (9th Cir. 1999) (rejecting Article III challenge to ALJ’s
2 authority to hold administrative hearing and impose fine for document fraud under immigration
3 laws, where Article III court reviewed factual determinations for substantial evidence).

4 **C. Section 802 Does Not Violate Due Process**

5 Plaintiffs’ due process claim (Count 3) also must be dismissed. It alleges a denial of due
6 process – specifically, that “by interposing defenses that did not exist at the time of the underlying
7 acts of the defendants and that did not exist in law at the time of commencement of the actions,
8 [§ 802] violates . . . due process.” Compl. ¶ 39. The nub of plaintiffs’ claim is that a new law can-
9 not constitutionally be applied to the facts underlying a pending lawsuit. But it never has been the
10 case that the filing of a lawsuit insulates it from legislative action. On the contrary, as we have ex-
11 plained, Congress may amend existing law in a manner that affects both pending and future litiga-
12 tion, so long as a case has not reached final judgment. *Plaut*, 514 U.S. at 227; *see* U.S. FISAAA Br.
13 6-10; Carriers’ FISAAA Br. 9-10. And it is equally well-settled that a court must “apply the law in
14 effect at the time it renders its decision even though that law was enacted after the events that gave
15 rise to the suit.” *Landgraf*, 511 U.S. at 273 (citation and internal quotation marks omitted). The ret-
16 roactive application of § 802 is fully consistent with due process.

17 Thus, the Ninth Circuit has squarely rejected a similar challenge, holding that “[t]o comport
18 with the requirements of due process, the retroactive application of a statute must be supported by a
19 legitimate legislative purpose furthered by a rational means.” *In re Consol. U.S. Atmospheric*
20 *Testing Litig.*, 820 F.2d 982, 991-92 (9th Cir. 1987). As the court explained, the “burden is on one
21 complaining of a due process violation to establish that the legislature has acted in an arbitrary and
22 irrational way.” *Id.* (internal quotation marks omitted); *see also, e.g., Fields v. Legacy Health Sys.*,
23 413 F.3d 943, 956 (9th Cir. 2005). It is “well established that legislative Acts adjusting the burdens
24 and benefits of economic life come to the Court with a presumption of constitutionality.” *Usery v.*
25 *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Here, plaintiffs have not even attempted to
26 make the weighty showing that § 802 is arbitrary or lacks a “rational legislative purpose.” *Pension*
27 *Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). The product of two years of
28 extensive deliberation, § 802 embodies the bipartisan conclusion that in light of “the unique

1 historical circumstances of the aftermath of September 11, 2001,” private companies that allegedly
2 responded to the Government’s request for assistance and those that did not act at all should not be
3 put to the burden of pending and future litigation, particularly in light of the overwhelming difficulty
4 of defending a lawsuit involving state secrets. S. Rep. No. 110-209, at 8-9, 12 (2007); *see* U.S.
5 FISAAA Br. 14 n.13; *see also* Supplemental Br. of Telecommunications Carrier Defendants in
6 Support of the United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment (Dkt.
7 571), at 12-13. Because the retroactive application of § 802(a) to pending cases, *see* § 802(i), is
8 supported by a legislative purpose that is far more than merely rational, plaintiffs’ due process claim
9 must be dismissed. *See Atmospheric Testing*, 820 F.2d at 991-92; *cf. Logan v. Zimmerman Brush*
10 *Co.*, 455 U.S. 422, 432-33 (1982) (“[T]he State remains free to create substantive defenses or
11 immunities for use in adjudication – or to eliminate its statutorily created causes of action
12 altogether In [such a] case, the legislative determination provides all the process that is due.”).

13 **II. THE COMPLAINT MUST BE DISMISSED AS AGAINST THE CARRIERS WHICH,**
14 **AS PRIVATE PARTIES, ARE NOT PROPER DEFENDANTS TO THIS SUIT**

15 In addition to these previously-briefed reasons why the Complaint must be dismissed in its
16 entirety, at a minimum the claims must be dismissed as against the carriers for the fundamental
17 reason that these entities are private parties that are not alleged to have undertaken *any* conduct –
18 much less state action – that is relevant to plaintiffs’ supposed constitutional injury. It is hornbook
19 law that “the conduct of private parties lies beyond the Constitution’s scope in most instances.”
20 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991). Relevant here, the Fifth
21 Amendment – and even more obviously the separation of powers doctrine – “applies only to the
22 federal government”; consequently, the carriers “is not restricted” by the relevant constitutional
23 provisions unless they are “part of the federal government or [their] actions constituted federal
24 action.” *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401,
25 1406 (9th Cir. 1996) (affirming dismissal of constitutional claim because the defendant was a private
26 entity not subject to the Fifth Amendment’s Due Process Clause); *see generally United States v.*
27 *International Bhd. of Teamsters*, 941 F.2d 1292, 1295 (2d Cir. 1991) (“Because the United States
28 Constitution regulates only the Government, not private parties, a litigant claiming that his

1 constitutional rights have been violated must first establish that the challenged conduct constitutes
2 ‘state action.’”).

3 Here, the only conduct relevant to this Complaint is the passage and invocation of § 802.
4 Compl. ¶ 20 (“By mandating dismissal of the Pending Actions, the Act immunizes the
5 telecommunications carriers for such prior damages without compensation to plaintiffs and without
6 adjudication of their claims, a taking of property”); *see also id.* ¶ 11 (“The Act, as signed into
7 law by the President on or about July 9, 2008, purports to mandate dismissal of all such pending
8 actions.”); *id.* ¶ 12 (“Section 802(a) of the Act requires dismissal of the Pending Action”); *id.*
9 ¶¶ 23, 37. With regard to that conduct, not only have plaintiffs failed to allege that the carriers
10 undertook *state* action, they do not allege that these defendants took *any* relevant action whatsoever.
11 Accordingly, these private parties are not proper defendants, and the claims against them must be
12 dismissed. *See Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1034-35 (9th Cir. 1989) (dismissing
13 claims against private parties seeking declaration that laws were unconstitutional); *American*
14 *Bankers*, 75 F.3d at 1406; *see also Matsuda v. City & County of Honolulu*, 512 F.3d 1148, 1150 (9th
15 Cir.) (substantive due process claims concern “state action”), *cert. denied*, 128 S. Ct. 2964 (2008);
16 *Flagg v. Yonkers Sav. & Loan Ass’n, FA*, 396 F.3d 178, 186 (2d Cir. 2005) (affirming dismissal;
17 defendant “was not a ‘state actor’ for purposes of evaluating the legal merits of the [plaintiff’s]
18 takings claim.”); *Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308, 313 (2d Cir. 2003) (affirming
19 dismissal of takings claim against corporation; complaint failed to “show that [corporation’s alleged
20 action] was conduct that was fairly attributable to the State.”); *Bajwa v. Sunoco, Inc.*, 320 F. Supp.
21 2d 454, 459 (E.D. Va. 2004) (“[T]he takings clause does not provide for a cause of action against a
22 private party.”).⁵

23 For the same reasons, plaintiffs’ claims also must be dismissed for lack of standing. To sat-
24 isfy the “case or controversy” requirement of Article III, plaintiffs bear the burden of establishing
25 that (1) they “suffered an injury in fact that is concrete and particularized, and actual or imminent;

26 _____
27 ⁵ In the unlikely event the takings claim survived a motion to dismiss, the carriers reserve their statu-
28 tory right to submit briefing. *See* FISA § 802(d) (“Any . . . defendant in a civil action . . . shall be
permitted to participate in the briefing or argument of any legal issue in a judicial proceeding con-
ducted pursuant to this section.”).

1 (2) the injury is *fairly traceable* to the challenged conduct; and (3) the injury is *likely to be redressed*
2 by a favorable court decision.” *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220,
3 1225 (9th Cir. 2008) (emphases added). Even if plaintiffs had suffered a cognizable injury, *but cf.*
4 *supra* at 6-7, they have not alleged any causal connection between conduct by the carrier defendants
5 and their supposed injury. *Salmon Spawning*, 545 F.3d at 1225. And with good reason: Section
6 802 is triggered when the government, not a private entity, certifies the requisite facts, and a federal
7 district court finds them supported by substantial evidence. *See* FISA § 802(a) (a “civil action . . .
8 shall be promptly dismissed, if the Attorney General certifies to the district court” that at least one of
9 the five criteria in § 802(a) has been met); *id.* § 802(b)(1). The constitutional requirement of re-
10 dressability is similarly lacking. No relief awarded against the carrier defendants could possibly
11 remedy the supposed constitutional violations. The plaintiffs themselves appear to recognize this, as
12 they do not even seek relief against the carriers; they only ask the Court to “enjoin[] the United
13 States from enforcing said provisions of the Act.” Compl. 17 ¶ 1.

14 **CONCLUSION**

15 For the foregoing reasons, the Complaint should be dismissed.
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Dated: March 16, 2009

Respectfully submitted,

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DECLARATION PURSUANT TO GENERAL ORDER 45, § X.B

I, Marc H. Axelbaum, hereby declare pursuant to General Order 45, § X.B, that I have obtained the concurrence in the filing of this document from the other signatories listed above.

I declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on March 16, 2009, at San Francisco, California.

By: /s/ Marc H. Axelbaum
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