UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON VICINAGE

THE UNITED STATES OF AMERICA,	Civil Action No. 06-2683 (FLW)
Plaintiff,	
v.	
STUART RABNER, in his official capacity as Attorney General of the State of New Jersey, et al.,	
Defendants.	

BRIEF OF DEFENDANTS RABNER, NOLAN, AND O'DONNELL IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE CLAIM UPON WHICH RELIEF CAN BE GRANTED, OR IN THE ALTERNATIVE TO ABSTAIN, AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF CITATIONS OF CASES AND AUTHORITIES

STATUTES CITED

RULES AND REGULATIONS CITED

OTHER AUTHORITIES CITED

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The State Defendants rely on the procedural history and statement of facts set forth in their principal brief submitted to this Court on September 8, 2006, with the following additions:

On September 28, 2006, the Judicial Panel on Multidistrict Litigation (the "Panel") entered a Conditional Transfer Order pursuant to Rule 7.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation ("RPJPML"), 199 F.R.D. 425, 435-36 (2001), and 28 U.S.C. §1407, transferring this matter to the United States District Court for the Northern District of California to be consolidated with 33 matters pending before Chief Judge Vaughn R. Walker. The Conditional Transfer Order does not become effective until it is filed with the Clerk of the Northern District of California. RPJPML 7.4(a). Transmittal of the Order was stayed until October 13, 2006, to give the parties an opportunity to object to the transfer. Id.

On October 13, 2006, the State Defendants filed with the Panel an objection to the Conditional Transfer Order. The objection stays transmittal of the Conditional Transfer Order to the Clerk of the Northern District of California until further order of the Panel. RPJPML 7.4(c). The State Defendants must file a motion to vacate the Conditional Transfer Order on or before October 27, 2006. Id. The Panel will schedule argument on that motion at "the next appropriate hearing session of the Panel." Id. The Conditional Transfer Order and the anticipated

motion by the State Defendants to vacate that Order do "not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court." RPJPML 1.5.

ARGUMENT

POINT I

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION

As discussed at length in the State Defendants' principal brief, the Complaint does not state a viable cause of action. No statute, constitutional provision, Executive Order or legal precedent vests in the United States a cause of action to preclude a state official from asking for information that might be protected from disclosure under federal law. While the state secrets privilege or some other federal law might ultimately prevent the disclosure of information sought by the Subpoenas, that determination may be made in the course of a state court proceeding to enforce the Subpoenas. The United States cannot file suit in federal court to preclude a State's chief law enforcement officer from asking for information necessary for him to enforce New Jersey law. Plaintiff's arguments to the contrary are without merit.

Plaintiff relies heavily on In re Debs, 158 U.S. 564 (1895), arguing that it broadly affords the federal government a cause of action "to protect the public from injury to the general

welfare" (USb8-14). As precedents from our Circuit make clear, however, Debs does not go that far. As explained in the State Defendants' principal brief, the Third Circuit has rejected the federal government's claim to have a cause of action to prevent all violations of federal law. The district court in United States v. City of Philadelphia, 482 F. Supp. 1248 (E.D. Pa. 1979), denied the United States' purported cause of action to challenge the unconstitutional practices of a city police department on behalf of citizens who are deprived of their civil rights. Id. at 1267. The court held that Debs is limited to its

> extraordinary factual situation . . . posing a violent physical obstacle to the flow of interstate commerce and . . . a clear menace to the public welfare . . . the impact of [which] was immediate, creating an emergency environment where time was of the essence . . . [and] the army of the Nation, and all its militia [might properly have been utilized to address the harm].
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> [Id. at 1266.]

The Third Circuit affirmed the district court. United States v. City of Philadelphia, 644 F.2d 187 (1980), reh. denied, 644 F.2d 206 (3d Cir. 1981). The broad interpretation of Debs advanced by the United States in this case appears to be that urged by Judges Gibbons, Higginbotham, and Sloviter in their dissent from the denial of the petition for rehearing. Id. at 208-09, 216-17. The opinions of dissenting judges do not state the law of this Circuit.

Additionally, plaintiff's reliance (USb13 to 17) upon Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982), to support its claim to a cause of action is misleading and puzzling. It is misleading because the quoted language upon which the United States relies comes from a concurring opinion of Judges Gibbons, Higginbotham, and Sloviter, which did not command a majority of the court. Id. at 309, 316. It is puzzling because, although the Third Circuit affirmed a judgment of the district court holding that Pennsylvania had a cause of action to challenge the unconstitutional practices of a local police department on behalf of citizens deprived of their civil rights, the Third Circuit did not overrule United States v. City of Philadelphia, which a few months earlier held that the United States did not have this cause of action. See Porter, 659 F.2d at 331 n.7 (Garth, J., concurring in part and dissenting in part)(noting continuing viability of United States v. City of Philadelphia).

Likewise, the United States' reliance upon United States v. Virginia, 139 F.3d 984 (4th Cir. 1998), United States v. Colorado Supreme Court, 87 F.3d 1161 (10th Cir. 1996), and United States v. City of Pittsburgh, 757 F.2d 43 (3d Cir. 1985), (USb 8 to 9) is inapposite because these opinions address standing and Article III jurisdiction, and not whether the United States had a cause of action. The issues are different because

a federal "court must raise the standing issue sua sponte, if necessary, in order to determine if it has jurisdiction," Colorado Supreme Court, 87 F.3d at 1166, but a federal court has no obligation to raise, sua sponte, whether the United States has a cause of action. The difference is especially highlighted in the third of these opinions, City of Pittsburgh, 757 F.2d at 47-48, in which, although the United States had standing to bring the claim, the Third Circuit held that the United States lacked a cause of action because it misinterpreted the relevant statutory language.

Nor does the state secrets privilege provide the United States with a cause of action. It is one thing for the federal government to invoke the state secrets privilege as a shield during an ongoing proceeding to prevent disclosure of information that threatens national security. It is quite another to invoke the privilege as a sword in an attempt to establish disputed facts and demand summary relief in the form of a permanent injunction against a state official seeking to enforce state law.

The United States attempts to assert a cause of action and requests summary judgment premised only upon its say-so that "sovereign interests are threatened by the State Defendants' actions" (USb7-13 to 7-14), that the information sought is "important to our security," (USb8-25 to 8-26), that the Attorney

General's request for information risks "grave harm to the national security," (USb9-16 to 9-17), and that

> disclosure of the kinds of materials requested in New Jersey's subpoenas – indeed, the mere confirmation or denial of whether or to what extent such materials exist – would undermine national security by exposing intelligence information and impairing critical foreign intelligence gathering.
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> [USb9-6 to 9-9 (citing the Negroponte and Alexander declarations, whose truth the State Defendants have had no opportunity to contest)].

The State Defendants deny that these contentions are true and stand ready to litigate their truth in a State court proceeding to enforce the Subpoenas should the state secrets privilege or any other claim premised upon these contentions be raised as a defense to producing the requested information. The United States, on the other hand, seeks to quell any attempt to determine the truth of its assertions by invoking the privilege as an affirmative cause of action to preclude scrutiny of legally suspect behavior in conjunction with federal officials. Surely, the evidentiary privilege was not intended to provide the federal government with an impenetrable layer of protection from public view when its acts may have violated federal or state law.[1]

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[1] Because the United States does not have a cause of action under federal law, this Court lacks jurisdiction over the Complaint. As explained in the State Defendants' principal brief, the absence of a cause of action negates plaintiff's assertion of federal question jurisdiction, 28 U.S.C. §1331; and jurisdiction

POINT II

THE ISSUANCE OF THE SUBPOENAS IS NOT PREEMPTED BY FEDERAL LAW.

Even if this Court determines that the United States has a cause of action to seek injunctive and declaratory relief against the State Defendants, plaintiff cannot establish that the Subpoenas are preempted by federal law. The Supremacy Clause "may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law." New York State Conf. of Blue Cross Blue Shield v. Traveler's Ins. Co., 514 U.S. 645, 654 (1995). However, any analysis of whether state law must defer to federal law starts with the "presumption that Congress does not intend to supplant state law" and "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id. at 654-655 (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1985) and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

A. There Is No Explicit Statutory Command Preempting The Issuance of the Subpoenas.

State law can be preempted by an "explicit federal statutory command that state law be displaced." St. Thomas-St. John Hotel and Tourism Ass'n v. Government of the U.S. Virgin

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under 28 U.S.C. §1345, which allows the United States to appear in district courts as a party plaintiff, presupposes that the United States has a cause of action to do so.

Islands, 357 F.3d 297, 302 (3rd Cir. 2004)(citing Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)). Plaintiff argues that several statutes show that Congress provided an express command that any attempt by a State to investigate matters of national security must fall. See (USb16 to 18).

The statutes cited by plaintiff do not support this argument. For example, 50 U.S.C. §402 contains no express language discussing preemption, but rather, provides for the establishment of the National Security Council ("NSC") and various staff positions and subcommittees within the NSC. 50 U.S.C. §402(a)-(k). At least one Executive Order issued pursuant to this statute requires the Assistant to the President for Homeland Security to "facilitate collection from State and local governments . . . of information pertaining to terrorist threats or activities within the United States." Exec. Order 13228, 66 Fed. Reg. 51812 (October 8, 2001). That Executive Order also discusses the need for the Office of Homeland Security to "work with executive departments and agencies, State and local governments, and private entities to ensure the adequacy of the national strategy" for preventing terrorist attacks. Id. Thus, contrary to plaintiff's claim, federal law contemplates, and

indeed, requires, collaboration between the federal and state governments in securing our national security and homeland.[2]

Similarly, 50 U.S.C. §403-1, which establishes the position of Director of National Intelligence, is silent as to preemption of state investigations of state law violations. While the statute requires the Director to protect "intelligence sources and methods from unauthorized disclosure," this provides only a potential privilege against disclosure of information, not preemption of state law. The only possible application of 50 U.S.C. §403-1 is not as a bar to a State Attorney General investigating violations of state law, but as an admonition to the Director that he "take measures that are available to prevent disclosure regarding intelligence source and methods - for example, by asserting the state secrets privilege . . . ." Terkel v. AT&T Corp., 441 F. Supp. 2d 899, 906 (N.D. Ill. 2006).

Finally, plaintiff claims that Congress expressly preempted the Attorney General's consumer fraud investigation in 18 U.S.C. §798 because the statute makes it a crime to divulge

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[2] Plaintiff's reading of 50 U.S.C. §402 was rejected in Terkel. There, the court had grave doubts that the statute could be read as broadly as plaintiff asserts here. The court noted that a blanket grant of privilege based on the federal government's interpretation of the statute would, if taken to its logical conclusion, allow the withholding of illegal or unconstitutional activities "simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions." Id. To read the statute in this way would mean that section 6 "essentially trump[s] every other Congressional enactment and Constitutional provision." Id.

improperly any classified information "concerning the communication intelligence activities of the United States . . ." 18 U.S.C. §798(a). However, as noted in the State Defendants' principal brief, the Subpoenas do not seek "communications intelligence" as that term is defined in the statute; therefore, it is inapplicable to this case. See (SDb20 fn. 6).[3]

B. The Issuance of the Subpoenas Is Not Barred by Field Preemption.

Field preemption occurs when "federal law 'so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it . . . .'" St. Thomas-St. John Hotel, 357 F.3d at 302 (citing Cipollone v. Liggett Group, 505 U.S. 516 (1992)). Here, Congress provided ample room for state regulation of consumer fraud and telecommunications. The investigation of consumer fraud is an appropriate exercise of state police power. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 150 (1973). States have the power to regulate telecommunications. Ting v. AT&T, 319 F.3d 1126, 1136-37 (9th Cir.), cert. denied, 540 U.S. 811 (2003).

[3] Plaintiff's reliance on cases involving disclosure obligations are inapposite. In Missouri Protection & Advocacy Servs. v. Missouri Dep't of Mental Health, 447 F.3d 1021, 1024 (8th Cir. 2006), the court found "plain language" indicating preemptive intent on the part of Congress. Similarly, in National State Bank v. Long, 630 F.2d 981, 986 (3d Cir. 1980), the court found that legislative history of the Act in question "makes clear what the statute implies, federally chartered institutions are immune from these requirements." No such language exists here.

Nor is there any support for plaintiff's claim that the Subpoenas are preempted by the President's authority over the country's foreign affairs. See (USb15). Plaintiff's reliance on American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003), for this proposition is misplaced. In Garamendi, the Court was asked to examine a state statute that conflicted with an executive agreement entered into by the President. Executive agreements are a "longstanding practice" that allows the President to make agreements with other countries absent approval of Congress. Id. at 415. Generally, "executive agreements are fit to preempt state law" but the agreement in Garamendi lacked specific preclusive language doing so, requiring the Court to determine whether, by inference, the state law was preempted. Id. at 417.

Although the Court ultimately determined that the state statute was preempted under "conflict preemption," Justice Souter's majority opinion contained instructive language regarding claims of field preemption in the area of foreign affairs. Justice Souter cited with favor Justice Harlan's concurring opinion in Zschernig v. Miller, 389 U.S. 429 (1968), wherein he and Justice White found that the majority's "implication of preemption of the entire field of foreign affairs was at odds with some other cases suggesting that in the absence of positive federal action 'the States may legislate in areas of their traditional competence even though their statutes may have

an incidental effect on foreign relations.'" Id. at 419 (quoting Zschernig, 389 U.S. at 459). Under this rationale, a state statute must yield to federal interests only where the state law "impair[s] the effective exercise of the Nation's foreign policy." Garamendi, 539 U.S. at 419.

Although the Subpoenas do not infringe on foreign relations, even if they did, any such infringement would be incidental. The subpoenas seek general information to ensure that consumer rights are protected. The Subpoenas do not seek to stop the NSA or any telecommunications carrier from doing anything with respect to records sharing, nor do the Subpoenas ask for information about how or why the NSA uses phone records, but rather if records were turned over to the NSA by telecommunications carriers operating in New Jersey and whether such disclosures were in accord with New Jersey law.

Moreover, plaintiff relies on declarations of Director Negroponte and Director Alexander for its preemption claim. One member of the Court has cautioned against reliance on statements of executive branch officials in this arena

> lest we place considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch. Executive officials of any rank may of course be expected "faithfully [to] represen[t] the President's policy," but no authoritative text accords such officials the power to invalidate state law simply by conveying the Executive's view on matters of federal policy. The

> displacement of state law by preemption properly requires a considerably more formal and binding federal instrument.
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> [Id. at 442 (Ginsburg, J., dissenting) (quoting Zschernig, 389 U.S. at 423 n. 13).]

C. The Telecommunications Carriers Can Respond To The Subpoenas Without Violating Federal Law.

Conflict preemption "arises when a state law makes it impossible to comply with both state and federal law or when state law 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.'" St. Thomas-St. John Hotel, 357 F.3d at 302 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Plaintiff does not make a convincing argument that the state law at issue here, the New Jersey Consumer Fraud Act, poses an obstacle to the purposes and objectives of Congress or that it would be impossible for anyone to comply with that law and with the federal laws regarding national security intelligence gathering.

The only New Jersey law at issue in this case is the provision of the New Jersey Consumer Fraud Act authorizing the issuance of the Subpoenas. The execution of this provision would not frustrate any objectives that Congress intended to incorporate in federal statutes regarding intelligence gathering. As explained in the State Defendants' principal brief, New Jersey law permits the assertion of defenses in response to an investigatory subpoena from the Attorney General. Those

defenses, including the state secrets privilege and any other claim under federal law, can be adjudicated in either an enforcement proceeding or through a motion to quash in state court. Thus, to the extent that Congress intended to protect from disclosure any information sought by the Subpoenas, that objective can be fully protected consistent with New Jersey law.

What plaintiff seeks to prevent in this suit is not the disclosure of protected information, but the very act of asking for that information, as well as any judicial scrutiny -- either in the State courts or this Court -- of whether the United States' claim of privilege and grave threats to national security are, in fact, valid. The federal government presents an unsettling view of the law. According to the United States, no one, not even a State's chief law enforcement officer, can question whether a party's participation with the federal government in what has been reported to be a massive intrusion on individual privacy violates State law. Surely, if Congress intended to vest such sweeping powers in the President to the derogation of State officials and the detriment of the general public's privacy rights, it would have stated so expressly. There is no statement of intent anywhere in federal law that would preclude the Attorney General's investigation.

Additionally, it would not be impossible to comply both with the Subpoenas and federal law. As explained above,

compliance with New Jersey law could include objecting to production of the information sought in the Subpoenas on state secrets privilege or other grounds. Therefore, assuming that the information sought by the Subpoenas is protected from disclosure, the recipients need not violate federal law to respond to the Subpoenas. The question of whether the assertion of the privilege is valid would in that circumstance be adjudicated in a New Jersey court, ultimately subject to review by the Supreme Court of the United States.[4]

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that this Court deny plaintiff's motion for summary judgment, and dismiss the Complaint.

Respectfully submitted,

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By: /s/ Patrick DeAlmeida
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Dated: October 13, 2006

[4] Plaintiff's claim that Totten v. United States, 92 U.S. 105 (1876), and its progeny serve as an independent source for dismissal of this action should be given no weight. (USb22 to 23). Totten's categorical bar to suit applies only to parties that have a "secret" contractual espionage relationship with the United States. New Jersey has entered into no such agreement with the United States, making application of Totten inappropriate. See Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 991 (N.D. Cal. 2006)("In this case, plaintiffs made no agreement with the government and are not bound by any implied covenant of secrecy.")