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

16 In re:  
17 NATIONAL SECURITY AGENCY  
18 TELECOMMUNICATIONS RECORDS  
19 LITIGATION  
20 This Document Relates To:  
21 *Hepting, et al. v. AT&T Corp., et al.*,  
22 No. C-06-0672-VRW  
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MDL Dkt. No. 06-1791-VRW

**AT&T'S RESPONSE TO  
HEPTING PLAINTIFFS'  
ADMINISTRATIVE MOTION FOR  
SCHEDULING ORDER (DKT. 39)**

Courtroom: 6, 17th Floor  
Judge: Hon. Vaughn R. Walker

1 **I. INTRODUCTION.**

2 The *Hepting* Plaintiffs' Administrative Motion for Scheduling Order (Dkt. 39)  
 3 ("Motion") asks the Court to act prematurely and in only one of the approximately forty  
 4 cases that are in the process of being consolidated into this MDL proceeding.<sup>1</sup> It would  
 5 make no sense at this time to do either of the things the *Hepting* Plaintiffs  
 6 suggest—schedule an individual case management conference or require defendant **AT&T**  
 7 **CORP.** or specially appearing defendant **AT&T INC.** (collectively, "AT&T") to answer  
 8 the *Hepting* complaint. AT&T does not oppose the eventual scheduling of a consolidated  
 9 MDL case management conference; indeed, as noted by the *Hepting* Plaintiffs, the Court  
 10 has already indicated that it plans such a conference. See Practice and Procedure Order,  
 11 filed Aug. 31, 2006, Dkt. 15; Order filed Sept. 1, 2006, Dkt. 19. Lest the efficiencies of  
 12 coordinated case management be undercut, however, any action by the Court should await  
 13 transfer of the additional cases that will be part of the MDL and a ruling by the Ninth  
 14 Circuit on the cross-petitions under 28 U.S.C. § 1292(b) for review of the Court's July 20,  
 15 2006 Order (*Hepting* Dkt. 308).

16 The *Hepting* Plaintiffs have tried and failed before to force precipitous action on the  
 17 Court. On September 1, 2006, the Court ordered over plaintiffs' opposition (*see* Dkt. 13)  
 18 that "[a]ll pending filing deadlines in cases transferred to this court pursuant to MDL 1791  
 19 are hereby vacated until further order of the court following the initial case management  
 20 conference and issuance of a consolidated case management order." Order filed Sept. 1,  
 21 2006, Dkt. 19. This approach remains the most logical way to proceed. The case  
 22 management conference should await the arrival of all cases and parties. It also should

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 24 <sup>1</sup> In addition, the Motion is procedurally defective. Although couched as a motion under  
 25 Civil Local Rules 7-11 and 6-3(c), it does not meet the requirements of either. Rule 6-  
 26 3(c) relates to *oppositions* to motions to enlarge or shorten time, but the Motion is no such  
 27 thing. The Motion more closely resembles a motion under Rule 6-3(a), but the *Hepting*  
 28 Plaintiffs make no attempt to meet the requirements of that provision. They provide no  
 declaration making the detailed showing required by Rule 6-3(a). They also fail to  
 include a declaration explaining why a stipulation could not be obtained, as required by  
 Rule 7-11(a). The *Hepting* Plaintiffs made no attempt to meet and confer; they simply  
 filed this Motion without warning.

1 await news of whether the Ninth Circuit will review the July 20 *Hepting* Order. The case  
 2 should then proceed, as the Court has suggested, pursuant to a “*consolidated case*  
 3 management order” rather than by the piecemeal litigation of individual cases apparently  
 4 favored by the *Hepting* Plaintiffs.

5 **II. A CASE MANAGEMENT CONFERENCE SHOULD AWAIT TRANSFER**  
 6 **OF ALL OF THE CASES TO MDL 06-1791.**

7 The *Hepting* Plaintiffs’ view of how things should proceed is *Hepting*-centric,  
 8 ignoring the fact that this is an MDL in which the interests of numerous plaintiffs and  
 9 defendants need to be addressed. To afford everyone involved an opportunity to address  
 10 case management issues, a conference should not be scheduled until the MDL transfer  
 11 process is complete and all parties are before the Court. Particularly in this matter, the  
 12 MDL transfer process should be relatively quick. The *Hepting* Plaintiffs may wish to put  
 13 their own discovery and case management agenda ahead of all others, but doing so would  
 14 be at odds with the pretrial consolidation of these cases. See Practice and Procedure Order  
 15 filed Aug. 31, 2006, Dkt. 15, ¶ 2. All interested parties should be afforded an opportunity  
 16 to appear and discuss such issues before the Court decides how to proceed.

17 Requiring AT&T to answer the *Hepting* complaint now makes even less sense than  
 18 scheduling a conference. Before any answers are filed, all of the actions should be  
 19 transferred to this Court and a decision should be made as to whether the various plaintiffs  
 20 will file a consolidated master complaint. Precisely how such a complaint should be  
 21 answered, if at all, in light of the state secrets issues that remain in the various MDL cases  
 22 is also a subject that should be addressed by all parties at a conference. Accordingly, if,  
 23 when and how AT&T is required to answer the *Hepting* complaint should be addressed at  
 24 the case management conference, not before.<sup>2</sup> Assuming that the pending section 1292(b)

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26 <sup>2</sup> The fact that AT&T entities filed an answer in the *Gaw* case does not support the *Hepting*  
 27 Plaintiffs’ argument. That answer was to a complaint filed *by the government*, which, far  
 28 from making factual allegations implicating state secrets, was making purely legal  
 allegations about preemption in an effort to prevent a state regulatory agency from

(continued...)

1 petitions to the Ninth Circuit are granted, it may be that a full stay of the MDL pending  
 2 appeal is the most sensible immediate course of action. But if the Court should decide to  
 3 order AT&T to answer the complaint in some fashion, that process should go forward as  
 4 part of a consolidated, coordinated approach to all of the MDL cases.

5 AT&T believes that all pending cases related to MDL 06-1791 and subject to the  
 6 Panel's jurisdiction have been identified, and that all but one, which was tagged earlier this  
 7 week (and one day after it was filed), have now been included in existing Conditional  
 8 Transfer Orders ("CTOs") issued by the Panel. The existing CTOs embrace all major  
 9 categories of cases potentially subject to the MDL, including the most recent  
 10 category—five lawsuits brought by the United States against various states seeking to  
 11 preempt state investigations of alleged carrier cooperation with NSA intelligence activities.  
 12 Thus, after any oppositions to the current set of CTOs have been adjudicated by the Panel,  
 13 the full contours of the MDL will be clear. This Court should await completion of that  
 14 process before addressing issues that affect not just the *Hepting* Plaintiffs, but all parties to  
 15 the actions that may become part of this MDL.

16 The current status of the MDL process is summarized in Exhibit A hereto.

17 **III. A CASE MANAGEMENT CONFERENCE SHOULD ALSO AWAIT**  
 18 **RULING ON THE PETITIONS FOR PERMISSION TO APPEAL.**

19 As set forth in AT&T's Response to the August 14, 2006 Order in *Hepting* (Dkt. 34-  
 20 1), the cross-petitions for review of the Court's July 20, 2006 Order (*Hepting* Dkt. No. 308)  
 21 under 28 U.S.C. § 1292(b) were filed on July 31 and August 9, 2006, respectively. *See*  
 22 App. Case Nos. 06-80109, 06-80110 (U.S.C.A. 9th Cir.). As of the filing of this Response,  
 23 the Ninth Circuit has not acted on these petitions. In addition to waiting for all of the MDL  
 24 cases to reach this Court, the Court should wait to schedule a conference until the Ninth

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 (...continued)

26 invading the zone of state secrets the government has marked out in *Hepting* and other  
 27 cases. Answering the complaint in *Gaw* is not at all analogous to answering the  
 28 complaint in *Hepting*. The *Gaw* complaint does not raise any of the issues about  
 confirming or denying classified material that are presented squarely by the *Hepting*  
 complaint.

1 Circuit makes a decision on the petitions, when the Court will be better able to evaluate the  
2 potential merits of a stay of the entire MDL.<sup>3</sup>

3 The Court should also wait for that determination, and the resolution of any ensuing  
4 motions to stay the MDL pending review by the Ninth Circuit, before deciding whether to  
5 require AT&T to answer any of the complaints (or a master complaint, if the Court  
6 ultimately favors that approach). AT&T cannot at present answer the *Hepting* complaint in  
7 any meaningful way in light of the government's assertion of the state secrets privilege.  
8 Almost every paragraph of that lengthy complaint raises complex and difficult issues of  
9 privilege. Those issues should be evaluated after the Ninth Circuit acts on the section  
10 1292(b) petitions and after full discussion with all parties of the various substantive and  
11 procedural complications an answer might entail.

12 Recent developments in other cases highlight the likelihood of appellate review and  
13 the need to let the appellate process play out before proceeding in *Hepting* or any other  
14 individual cases that are part of the MDL. On September 7, 2006, the Honorable Garr M.  
15 King issued an opinion in *Al-Haramain Islamic Foundation, Inc. v. Bush*, \_\_\_ F. Supp. 2d  
16 \_\_\_, 2006 WL 2583425 (D. Or. Sept. 7, 2006). The government petitioned for  
17 interlocutory appeal under 28 U.S.C. § 1292(b), a true and correct copy of that petition is  
18 attached hereto as Exhibit B. The government's petition asks the Ninth Circuit to hold the  
19 petition in *Al-Haramain* pending a final ruling on the interlocutory appeal in *Hepting*,  
20 noting that the issues in *Hepting* substantially overlap those in *Al-Haramain*. Ex. B at 18.

21 Similarly, an appeal from the August 17, 2006 Order of the Honorable Anna Diggs  
22 Taylor granting a permanent injunction in *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich.  
23 Aug. 17, 2006), is pending in the U.S. Court of Appeals for the Sixth Circuit. On  
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25 <sup>3</sup> An administrative motion is the wrong place for the *Hepting* Plaintiffs' discussion of the  
26 propriety of a stay pending appeal. See Motion at 2:15-3:22. AT&T therefore will not  
27 address the issue of a stay here. These issues may be addressed in due course, if and  
28 when the parties move for a stay. Depending on what the Ninth Circuit does with the  
pending petitions, AT&T believes that a stay of the MDL pending appeal may be the  
most sensible and appropriate course of action.

