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

18 In re:

19 NATIONAL SECURITY AGENCY  
 20 TELECOMMUNICATIONS RECORDS  
 21 LITIGATION

23 This Document Relates To:

24 ALL ACTIONS  
25

MDL Dkt. No. 06-1791-VRW

**JOINDER IN UNITED STATES'  
 MOTION TO STAY PROCEEDINGS  
 PENDING DISPOSITION OF  
 INTERLOCUTORY APPEALS IN  
 HEPTING v. AT&T CORP.;  
 MEMORANDUM OF LAW**

Date: February 9, 2007  
 Time: 2:00 p.m.  
 Courtroom: 6, 17th Floor  
 Judge: Hon. Vaughn R. Walker

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**JOINDER**

The United States has moved this Court to stay proceedings in *In re National Security Agency Telecommunications Records Litigation*, No. M:06-cv-01791-VRW (“the MDL”) pending disposition of the government’s and AT&T’s appeals in *Hepting v. AT&T Corp.* See MDL Dkt. 67. Defendant AT&T Corp. (“AT&T”)<sup>1</sup> hereby joins the United States’ motion in its entirety and submits this brief to address more fully the jurisdictional implications of the *Hepting* appeals.

**MEMORANDUM OF LAW**

**ISSUE TO BE DECIDED**

Whether to stay proceedings in this MDL pending resolution of the United States’ and AT&T’s pending appeals in *Hepting*.

**INTRODUCTION**

The filing of an appeal divests a district court of jurisdiction over any issue that is a subject of the order being appealed. See *Natural Res. Def. Council v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). The United States has asserted that the *Totten* bar and the state secrets privilege preclude the disclosure of any information about the existence, sources, targets, or operations of the surveillance programs alleged by plaintiffs, or about AT&T’s claimed participation in them, and the Ninth Circuit is currently reviewing those assertions. This Court is thus without power to take any action in *Hepting* that could moot those asserted privileges by requiring disclosure of such information.

At a minimum, this means that there can be no meaningful discovery while the appeals are pending; no litigation of plaintiffs’ motion for a preliminary injunction; no order directing AT&T to present statutory certification defenses at any level of generality; no preparation or filing of a meaningful answer by AT&T; and no class certification proceedings. The Court’s remaining jurisdiction to proceed in *Hepting* is minimal.

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<sup>1</sup> Defendant AT&T Inc. has moved to dismiss the complaint on the ground that personal jurisdiction is lacking.

1           This Court should stay all proceedings in the MDL until the *Hepting* appeals are  
2 resolved because of these jurisdictional limitations in *Hepting*. Were the Court to proceed  
3 otherwise in the MDL, it could moot the appeals—for instance, by ordering the disclosure  
4 of information covered by the government’s privilege assertions that are directly at issue in  
5 the appeals. Such action would thwart the jurisdiction of the reviewing court in *Hepting*.<sup>2</sup>  
6 At the very least, this Court should take no step in any MDL case that it could not take in  
7 *Hepting* while the appeals are pending.

8           In addition to such jurisdictional limitations, practicality and prudence also suggest  
9 that further MDL proceedings should be stayed pending appellate review of the common  
10 threshold state secrets and other legal issues presented by those appeals. Should the Court  
11 of Appeals reverse this Court’s decision, dismissal of all cases will likely be appropriate.  
12 Even if the Court of Appeals affirms or modifies this Court’s ruling, its decision should  
13 nonetheless provide significant guidance concerning the appropriate legal standards and  
14 procedures to employ on remand. Given these circumstances, litigation of even minor  
15 issues in the MDL pending resolution of the appeals risks considerable unfairness to  
16 AT&T, would waste judicial and party resources, and poses unnecessary risks to national  
17 security.

18           For all these reasons, as well as the other reasons given by the United States, the  
19 Court should stay all MDL proceedings while the *Hepting* appeals remain pending.

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25 <sup>2</sup> It would also be futile. Any ruling by this Court implicating *Totten* or state secrets would  
26 invariably trigger further assertions of privilege by the United States and further appeals.  
27 The issues will not be meaningfully advanced in the process, and the parties will remain in  
28 the same position in which they already find themselves: waiting for the Ninth Circuit’s  
direction about whether and how this litigation can proceed.

1 **ARGUMENT**

2 **I. DURING THE PENDENCY OF AN APPEAL, A DISTRICT COURT HAS**  
3 **NO JURISDICTION TO TAKE ANY ACTION CONCERNING THE**  
4 **MATTERS INVOLVED IN THE APPEAL.**

5 “The filing of a notice of appeal is an event of jurisdictional significance—it confers  
6 jurisdiction on the court of appeals and divests the district court of jurisdiction of its control  
7 over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc.*  
8 *Co.*, 459 U.S. 56, 58 (1982); accord *City of Los Angeles v. Santa Monica Baykeeper*, 254  
9 F.3d 882, 886 (9th Cir. 2001); *Natural Res. Def. Council*, 242 F.3d at 1166; *United States v.*  
10 *Thorp*, 655 F.2d 997, 998 (9th Cir. 1981). Indeed, “[s]o complete is the transfer of  
11 jurisdiction that any orders of the district court touching upon the substance of the matter on  
12 appeal are considered null and void if entered subsequent to the timely filing of the notice  
13 of appeal.” 16A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3949.1 (3d  
14 ed. 2006).

15 The rule is the same for interlocutory appeals—an appeal divests the district court of  
16 jurisdiction over the “matters involved in the appeal.” *Thorp*, 655 F.2d at 998. While the  
17 “matters involved” in an appeal from a final order typically involve the entire case, the  
18 “matters involved” in an interlocutory appeal are typically more limited. Accordingly, an  
19 interlocutory appeal divests the court of jurisdiction over the issues encompassed within the  
20 order on appeal. See *City of Los Angeles*, 254 F.3d at 885-86 (“the filing of a notice of  
21 interlocutory appeal divests the district court of jurisdiction over the particular issues  
22 involved in that appeal”); see also *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205  
23 (1996); *Manual for Complex Litigation (Fourth)* § 15.12 (2004).

24 Where, as here, the interlocutory appeal concerns a privilege issue, the district court  
25 is jurisdictionally foreclosed from requiring disclosure of the information that is subject to  
26 the claim of privilege. See *Thorp*, 655 F.2d at 999. Disclosure risks mooted the appeal.  
27 Once privileged information has been disclosed, its confidentiality cannot be restored. See  
28



1 *United States v. Fei Ye*, 436 F.3d 1117, 1123 (9th Cir. 2006); *SG Cowen Secs. Corp. v. U.S.*  
2 *Dist. Court*, 189 F.3d 909, 914 (9th Cir. 1999).<sup>3</sup>

3 This jurisdictional bar is even more critical in an appeal concerning claimed state  
4 secrets, because “the privilege to protect state secrets must head the list [of privileges]. The  
5 state secrets privilege is absolute.” *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978). The  
6 purpose of the state secrets doctrine and the *Totten* bar is to protect the nation’s most  
7 sensitive and valuable security information, including military secrets and intelligence  
8 sources, targets, and methods. *See Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (“It would be  
9 inconsistent with the unique and categorical nature of the *Totten* bar—a rule designed not  
10 merely to defeat the asserted claims, but to preclude judicial inquiry—to first allow  
11 discovery or other proceedings in order to resolve the jurisdictional question.”); *Kasza v.*  
12 *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (once the state secrets privilege has been  
13 invoked as to “particular evidence, the evidence is completely removed from the case”).  
14 Thus, appeals of these issues divest the district court of jurisdiction over any aspect of a  
15 case that concerns information that may be protected from disclosure.

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20 <sup>3</sup> The Ninth Circuit has recognized this principle—the need to preserve privileged  
21 information, through interlocutory appeals, if necessary—in the context of a variety of  
22 privileges. *See, e.g., United States v. Griffin*, 440 F.3d 1138, 1142 (9th Cir.) (interlocutory  
23 appeal of marital privilege claim), *cert. denied*, 127 S. Ct. 259 (2006); *Agster v. Maricopa*  
24 *County*, 422 F.3d 836 (9th Cir.) (interlocutory review of federal peer-review privilege  
25 claim), *cert. denied*, 126 S. Ct. 473 (2005); *Bittaker v. Woodford*, 331 F.3d 715, 717-18 (9th  
26 Cir. 2003) (en banc) (interlocutory review of protective order defining scope of attorney-  
27 client privilege waiver). Indeed, the need to keep privileges intact is sufficiently important  
28 that it gives rise to a court of appeals’ extraordinary mandamus jurisdiction. *See,*  
*e.g., United States v. Fei Ye*, 436 F.3d 1117, 1123 (9th Cir. 2006) (trade secrets); *SG Cowen*  
*Secs. Corp. v. U.S. Dist. Court*, 189 F.3d 909, 913-14 (9th Cir. 1999); *Medhekar v. U.S.*  
*Dist. Court*, 99 F.3d 325, 326-27 (9th Cir. 1996) (statutory stay of discovery in PSLRA  
securities litigation); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491  
(9th Cir. 1988) (collecting cases).

1 **II. THIS COURT LACKS JURISDICTION TO TAKE ANY ACTION IN**  
 2 ***HEPTING* THAT MIGHT RISK DISCLOSURE OF INFORMATION**  
 3 **COVERED BY THE *TOTTENBAR* OR THE GOVERNMENT’S**  
 4 **ASSERTION OF THE STATE SECRETS PRIVILEGE.**

4 Applying these principles, this Court lacks jurisdiction to take any action in *Hepting*  
 5 that might risk the disclosure of information that the United States has argued, and the  
 6 Ninth Circuit could conclude, is protected from disclosure by federal national security  
 7 privileges. As the United States has explained, the privilege assertions now on appeal  
 8 embrace every material fact of relevance to the *Hepting* plaintiffs’ claims:

9 [W]e showed that adjudicating each of plaintiffs’ claims would require  
 10 confirmation or denial of the existence, scope, and potential targets of  
 11 alleged intelligence activities, as well as AT&T’s purported involvement  
 12 in such activities. The declarations made clear that such information  
 13 cannot be confirmed or denied without causing exceptionally grave  
 damage to national security; indeed, the most basic factual allegation  
 necessary for plaintiffs’ case—whether AT&T has engaged in certain  
 conduct at the behest of the NSA—can neither be confirmed nor denied by  
 AT&T or the United States.

14 U.S. § 1292(b) Petition (Ex. A) at 13. The nation’s most senior intelligence officials, in  
 15 asserting the state secrets privilege, have expressly confirmed that “[t]he United States can  
 16 neither confirm nor deny allegations concerning intelligence activities, sources, methods,  
 17 relationships, or targets. . . . [A]ny further elaboration on the public record concerning  
 18 these matters would reveal information that could cause the very harms my assertion of the  
 19 state secrets privilege is intended to prevent.” Decl. of John D. Negroponte, Director of  
 20 Nat’l Intelligence (“DNI”), *Hepting* Dkt. 124-2 ¶ 12.

21 Plaintiffs nonetheless propose that litigation in *Hepting* should proceed apace while  
 22 the Ninth Circuit considers the appeal. The vast majority of what plaintiffs propose –  
 23 including everything of any value to the litigation – is outside the scope of this Court’s  
 24 jurisdiction over *Hepting*.

25 *First*, discovery cannot be had into materials that might tend to confirm or deny  
 26 AT&T’s alleged involvement in NSA programs. Plaintiffs have sought numerous  
 27 categories of discovery that could have such an effect. For example, plaintiffs contend that  
 28 the Court can proceed “immediately” with discovery of the following information:

- 1           • “any documents that defendants assert are relevant to a certification-based  
2 defense against plaintiffs’ communications content claims,” *see* Jt. Case Mgmt.  
3 Stmt., MDL Dkt. 61-1 ¶ 6a, at 40-41;
- 4           • “[a]ny waivers or other correspondence from the Director of National  
5 Intelligence or his agents . . . and sent to private telecommunications companies  
6 exempting them from SEC reporting requirements,” *id.* ¶ 6g, at 41-42;
- 7           • “[d]iscovery into the AT&T network aimed at confirming which  
8 communications travel through the San Francisco facility as well as similar  
9 facilities referenced in Mr. Klein’s declaration and supporting materials and  
10 communications, and in the media,” *id.* ¶ 6m, at 42;
- 11           • “[a]ny contracts between AT&T and the company that provided the  
12 sophisticated machinery referenced in Mr. Klein’s declaration, plus all  
13 supporting materials and communications,” *id.* ¶ 6n, at 42-43; and
- 14           • “[a]ll documents regarding the San Francisco facility (and similar facilities)  
15 referenced in Mr. Klein’s declaration and supporting materials and  
16 communications provided to AT&T Inc. during the due diligence portion of the  
17 merger between AT&T Corp. and AT&T Inc.,” *id.* ¶ 6o, at 43.

18           Plaintiffs cannot take this discovery – or any other truly relevant discovery – while  
19 the Ninth Circuit is considering whether and how the state secrets privilege and the *Totten*  
20 bar apply. Plaintiffs’ requests are transparently aimed at discovering “the most basic  
21 factual allegation necessary for plaintiffs’ case—whether AT&T has engaged in certain  
22 conduct at the behest of the NSA,” U.S. § 1292(b) Petition (Ex. A) at 13, which the United  
23 States has asserted is a protected state secret. To respond to any such discovery threatens to  
24 cause precisely the harm that the United States has intervened—and appealed to the Ninth  
25 Circuit—to avoid.

26           *Second*, the pending appeals deprive this Court of jurisdiction over plaintiffs’  
27 motion for a preliminary injunction. The very premise of the motion is that AT&T has  
28 assisted the NSA in the alleged surveillance programs and has thereby committed the  
various violations of law alleged in the *Hepting* Complaint. *See* Pls.’ Mem. of P’s & A’s in  
Support of Mot. for Prelim. Inj., *Hepting* Dkt. 149-1, at 11. Any adjudication of whether  
plaintiffs have a “likelihood of success” on their claims would necessitate disclosure of not  
only AT&T’s participation or non-participation in the alleged surveillance, but also the  
scope of its supposed involvement. Indeed, in order to pursue this motion, plaintiffs seek a  
Rule 30(b)(6) deposition and related document discovery, including “any certifications or

1 other authorizations purporting to allow [AT&T] to intercept the communications of their  
2 customers.” Jt. Case Mgmt. Stmt. at 39.

3 The United States has asserted that any certifications, if they exist, are protected by  
4 the state secrets privilege. As plaintiffs acknowledge, *see id.*, this Court ruled on that issue  
5 in the order that is now before the Ninth Circuit. *See Hepting v. AT&T Corp.*, 439 F. Supp.  
6 2d 974, 995-96 (N.D. Cal. 2006). In fact, this Court has recognized that “uncovering  
7 whether and to what extent a certification exists might reveal information about AT&T’s  
8 assistance to the government that has not been publicly disclosed.” *Id.* at 995. A  
9 preliminary injunction motion cannot be litigated without revealing precisely the  
10 information that is subject to the state secrets assertion now before the Ninth Circuit or  
11 requiring another assertion of the same state secrets privilege already on appeal.

12 Moreover, the question of plaintiffs’ standing to proceed with their case is without  
13 doubt central to AT&T’s appeal of the issue whether the assertion of the state secrets  
14 privilege precludes plaintiffs from establishing their standing. Adjudicating any claim  
15 seeking preliminary injunctive relief before standing has been established would be  
16 improper. *See Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950  
17 F.2d 1401, 1405 (9th Cir. 1991) (court must determine party’s standing before a motion for  
18 preliminary injunction “because a ‘threshold question in every federal case’ is ‘whether the  
19 plaintiff has made out a “case or controversy” between himself and the defendant within the  
20 meaning of Article III”); *Wittman v. Saenz*, No. C-02-02893 SI, 2006 WL 279358, at \*11,  
21 2006 U.S. Dist. LEXIS 36045, at \*32-33 (N.D. Cal. Feb. 6, 2006) (denying motion for  
22 preliminary injunction as moot because plaintiff failed to establish standing to seek  
23 injunctive relief).

24 *Third*, AT&T cannot file a meaningful answer because AT&T’s ability to do so  
25 depends upon the application and scope of the state secrets privilege and the *Totten*  
26 doctrine. The allegations in the *Hepting* Complaint speak directly to whether AT&T  
27 assisted the NSA in carrying out certain alleged intelligence activities. Responding to the  
28 Complaint inevitably would require AT&T to confirm or deny factual allegations that are at

1 the heart of the privilege claims on appeal (or again require the United States' assertion of  
2 the same state secrets privilege already on appeal).

3 It is no answer to suggest, as plaintiffs have done, that this can be solved through  
4 "creative solutions"—such as plaintiffs' suggestion that AT&T should file an answer,  
5 perhaps *in camera* and *ex parte*, or perhaps redacted with the "guidance" of the  
6 government. Jt. Case Mgmt. Stmt. at 29-30 & n.19. Plaintiffs' proposals could not produce  
7 a meaningful answer. "The purpose of the defendant's answer is to apprise the plaintiff and  
8 any other opposing parties of which allegations in the complaint are contested and which  
9 allegations are admitted and will not be at issue in the trial." 1 J. Moore *et al.*, *Moore's*  
10 *Federal Practice* § 9.03[3] (3d ed. 2006); *see also* 5 Charles Alan Wright *et al.*, *Federal*  
11 *Practice & Procedure* § 1202 (3d ed. 2006) (pleadings, such as an answer, serve the  
12 functions of "giving notice of the nature of a . . . defense," "stating the facts [a] party  
13 believes to exist," and "narrowing the issues that must be litigated"). Plaintiffs' proposal  
14 could not result in an answer that fulfills these purposes, as AT&T could not confirm or  
15 deny any but the most innocuous factual allegations. Filing an answer would therefore be  
16 an exercise in futility that would not tell the Court or the parties anything.

17 AT&T also could not assert any affirmative defenses, because doing so would be a  
18 representation that such defenses "have evidentiary support," Fed. R. Civ. P. 11(b)(3), and  
19 to do so in any manner other than an indiscriminate laundry list would therefore require  
20 AT&T to suggest a view of underlying facts whose privileged nature is now under review  
21 by the Court of Appeals. As a hypothetical example, if AT&T wished to assert government  
22 contractor immunity, *see Boyle v. United Techs. Corp.*, 487 U.S. 500, 504-13 (1988), how  
23 could it do so without divulging whether it participated in the alleged programs, whether it  
24 did so under contract, or whether the contract in question required conduct alleged by the  
25 plaintiffs? Similarly, if (again, hypothetically) AT&T wished to raise statutory good faith  
26 defenses, *see* 18 U.S.C. §§ 2520(d), 2707(e), how could it do so without divulging whether  
27 the alleged programs exist, whether it participated in them, and whether it had some  
28 specific basis for believing its participation was lawful?

1           Indeed, because AT&T cannot confirm or deny any participation in any alleged  
2 NSA program, the state secrets assertion by the United States prevents AT&T from  
3 asserting any defense based on statutory certifications (if, hypothetically, such certifications  
4 existed), even though this Court has opined that such a defense “protects a  
5 telecommunications provider from suit,” *Hepting*, 439 F. Supp. 2d at 1005, not merely from  
6 liability. Such defenses, if applicable, would suggest that the next logical step would be a  
7 further motion to dismiss the case or motion for judgment based on any certifications that  
8 may exist—even if the United States’ state secrets assertion were rejected on final appeal.  
9 For these reasons, the Court is without jurisdiction to require AT&T to answer the  
10 plaintiffs’ factual allegations or to make any of its own while the Ninth Circuit is  
11 considering the appeals.

12           *Fourth*, the Court lacks jurisdiction to proceed with class certification. Before a  
13 class can be certified, plaintiffs must establish commonality and typicality. Fed. R. Civ. P.  
14 23(a). Those inquiries depend on a fact-intensive examination of the nature of plaintiffs’  
15 claims; the existence and nature of their alleged injuries; and the relationship between their  
16 claimed injuries and those of the other putative class members. *See Coopers & Lybrand v.*  
17 *Livesay*, 437 U.S. 463, 469 (1978) (class certification is “enmeshed in the factual and legal  
18 issues comprising the plaintiff’s cause of action”). But, as AT&T and the United States  
19 will argue to the Ninth Circuit, plaintiffs cannot establish the fact of actual injury without  
20 invading state secrets. Neither the government nor AT&T has confirmed or denied  
21 AT&T’s alleged participation in any NSA surveillance program at any level of generality,  
22 nor have they ever confirmed or denied whether any of the *Hepting* plaintiffs were ever  
23 targeted or encompassed within any such program. Plaintiffs cannot, in a manner  
24 consistent with state secrets, establish standing to pursue their own claims, much less  
25 purport at this stage to represent others with supposedly similar claims.

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1 **III. THIS COURT SHOULD STAY THE MDL PROCEEDINGS PENDING**  
2 **RESOLUTION OF THE *HEPTING* APPEALS.**

3 AT&T agrees with the United States that the Court should as a prudential matter  
4 stay the MDL in its entirety.

5 The procedural history of *Tenet v. Doe*, 544 U.S. 1 (2005), aptly demonstrates the  
6 wisdom of staying proceedings pending appeal in a situation like this one. Although the  
7 district court in *Tenet* concluded that *Totten* did not require the dismissal of the plaintiffs'  
8 claims, it stayed all proceedings pending interlocutory appeal, precisely because the  
9 possibility that the Ninth Circuit's decision would end the case rendered any such  
10 proceedings wasteful: "The Court finds that it would be an inefficient use of judicial and  
11 attorney resources to allow discovery to continue, because the Ninth Circuit's decision in  
12 this case could negate the need for discovery. This case is stayed pending a decision from  
13 the Ninth Circuit on the interlocutory appeal of this Court's Orders." *Doe v. Tenet*, No.  
14 2:99-cv-01597-RSL, slip op. at 4 (W.D. Wash. Mar. 14, 2001) (Ex. B). Ultimately, of  
15 course, the wisdom of the district court's stay order was confirmed: the Supreme Court  
16 ordered that the case be dismissed. *Tenet*, 544 U.S. at 6, 8.

17 The reasons for entering a stay here are even more powerful than they were in  
18 *Tenet*. The assertedly privileged information is the same in each MDL case; if this Court  
19 required any carrier to divulge information concerning the alleged NSA programs or their  
20 alleged participation therein, it would risk mootng the *Hepting* appeals and destroying the  
21 state secrets privilege. "[T]he quintessential form of prejudice justifying a stay" exists  
22 when it "is apparent that absent a stay pending appeal . . . the appeal will be rendered  
23 moot." *In re Pac. Gas & Elec. Co.*, No. C-02-1550 VRW, 2002 WL 32071634, at \*2, 2002  
24 U.S. Dist. LEXIS 27549, at \*8 (N.D. Cal. Nov. 14, 2002) (internal quotations omitted). To  
25 avoid that risk, the Court should take no step in any MDL case that it may not take in  
26 *Hepting* while the appeals are pending.

27 Although in *Hepting* this Court did not agree that the privilege warranted dismissal  
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1 of claims concerning the Terrorist Surveillance Program (“TSP”), that is a different issue  
2 than how the relevant harms should be balanced in considering whether further proceedings  
3 should be stayed pending appellate review of that ruling. The state secrets doctrine itself  
4 furnishes the answer: “[T]he ‘balance has already been struck’ in favor of protecting  
5 secrets of state over the interests of a particular litigant.” *In re United States*, 872 F.2d 472,  
6 476 (D.C. Cir. 1989) (quoting *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982)); *see*  
7 *also Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984)  
8 (national security interests protected by the state secrets privilege “cannot be compromised  
9 by any showing of need on the part of the party seeking the information.”). If that is true  
10 for application of the state secrets privilege, *a fortiori* it must be true when the applicability  
11 of the privilege is under appellate review.

12 Even if the private harms asserted by the plaintiffs could appropriately be weighed,  
13 those harms would be insufficient to overcome the public safety and mootness risks that  
14 would attend continued litigation. Plaintiffs’ private harms consist entirely of alleged  
15 violations of privacy rights. All such alleged violations arise either from the TSP or the  
16 alleged call records program. Yet each of the three courts to consider the call records  
17 program, including this Court, have concluded that it is not a proper subject for continued  
18 litigation, at least at the present time. *See ACLU v. NSA*, 438 F. Supp. 2d 754, 765 (E.D.  
19 Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 916-17 (N.D. Ill. 2006); *Hepting*,  
20 439 F. Supp. 2d at 997-98. And the United States District Court for the Eastern District of  
21 Michigan has already opined that the TSP is unconstitutional. *See ACLU*, 438 F. Supp. 2d  
22 at 782. That ruling is currently on appeal to the Sixth Circuit. Thus, there is no reason to  
23 believe that the harms allegedly arising from the call records program can be reviewed or  
24 remedied by the courts, and the substantive lawfulness of the TSP is already under review  
25 in a sister circuit. There is, in short, no reason to rush forward with efforts to litigate the  
26 MDL cases while the threshold state secrets issues common to all of them are on appeal in  
27 two different Courts of Appeals.

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1           Conducting further proceedings while *Hepting* is on appeal would be wasteful and  
2 ill-advised. The MDL was established primarily because these actions share common  
3 threshold issues that raise sensitive national security concerns—the precise issues now  
4 before the Ninth Circuit in *Hepting*. See *In re NSA Telecomm’s Records Litig.*, 444 F.  
5 Supp. 2d 1332, 1334 (J.P.M.L. 2006). An MDL is designed to promote a “just and  
6 efficient” outcome in the cases that comprise it; the MDL court is accordingly given  
7 “discretion to manage them that is commensurate with the task.” *Allen v. Bayer Corp.* (*In*  
8 *re Phenylpropanolamine (PPA) Prods. Liab. Litig.*), 460 F.3d 1217, 1230-31 (9th Cir.  
9 2006). As the Ninth Circuit has observed, “a trial court may, with propriety, find it is  
10 efficient for its own docket and the fairest course for the parties to enter a stay of an action  
11 before it, pending resolution of independent proceedings which bear upon the case.” *Levy*  
12 *v. Certified Growers of Cal., Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979). A stay is even more  
13 appropriate where the proceedings that bear upon the case are not independent, but rather  
14 part of the same MDL. See *Manual for Complex Litigation (Fourth)* § 15.12 (2004)  
15 (explaining that “depending on the nature of the issue before the appellate court, it may be  
16 appropriate for the trial judge to suspend some portion of the proceedings or alter the  
17 sequence in which further activities in the litigation are conducted”). When an appeal of  
18 such a common issue “may be of valuable assistance to the court in resolving” similar  
19 claims in other, related cases, a stay of those other cases may appropriately be entered even  
20 in circumstances—unlike those here—when “the issues in such proceedings [would not]  
21 necessarily [be] controlling of the action before the court.” *Levy*, 593 F.2d at 863-64; see  
22 also *Nader v. Butz*, 60 F.R.D. 381, 386 (D.D.C. 1973) (staying order requiring *in camera*  
23 disclosure of documents subject to a claim of executive privilege due to pendency of  
24 separate litigation regarding executive privilege).

25           Regardless of how the appeal ultimately is decided, the Ninth Circuit’s ruling in  
26 *Hepting* will have a substantial impact on the manner in which the other actions in the MDL  
27 are litigated. If the Ninth Circuit reverses this Court’s state secrets ruling, it will likely  
28 result in the dismissal of most of the cases in the MDL. If the Ninth Circuit should instead

1 affirm or modify this Court’s ruling, its decision likely will have important implications for  
2 how the litigation in the MDL should proceed. Assuming the MDL survives at all, it would  
3 be far better to brief the state secrets issues in all the non-*Hepting* cases once, with the  
4 benefit of the Ninth Circuit’s ruling, than do to so twice—once while *Hepting* is on appeal  
5 and then again after the Ninth Circuit’s decision.

6       Entering a stay under these circumstances would be consistent with the “express  
7 purpose of consolidating multidistrict litigation for discovery . . . to conserve judicial  
8 resources by avoiding duplicative rulings.” *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202  
9 (7th Cir. 1996); accord *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d at  
10 1229-30; see also *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d  
11 289, 292 n.3 (6th Cir. 2002) (noting that the district court, pursuant to the All Writs Act,  
12 stayed all MDL actions and remaining state court actions pending an appeal regarding  
13 attorney-client privilege and work product waiver issues).

14       A stay of all MDL proceedings would help guard the national security interests at  
15 stake in this MDL. By definition, the privilege exists to protect information that, if  
16 disclosed, could threaten the safety and security of the nation.<sup>4</sup> See, e.g., *United States v.*  
17 *Reynolds*, 345 U.S. 1 (1953); *Kasza*, 133 F.3d 1159. This is a paramount public interest,  
18 which must be afforded great weight in any stay analysis. See, e.g., *Wayte v. United States*,  
19 470 U.S. 598, 611 (1985) (“Few interests can be more compelling than a nation’s need to  
20 ensure its own security.”). When faced with “national defense concerns” where “vital  
21 interests are at stake,” courts accordingly have an obligation to “err on the side of caution.”  
22 *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 655 (Fed. Cl. 2003).

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24 \_\_\_\_\_  
25 <sup>4</sup> These harms can also arise from requiring disclosure of “seemingly innocuous  
26 information” that could be “part of a classified mosaic.” *Kasza v. Browner*, 133 F.3d 1159,  
27 1166 (9th Cir. 1998). “[W]hat may seem trivial to the uninformed, may appear of great  
28 moment to one who has a broad view of the scene and may put the questioned item of  
information in its proper context.” *CIA v. Sims*, 471 U.S. 159, 178 (1985) (alteration  
omitted).

1 Both the DNI and the Director of the NSA have attested that “the risk is great that  
2 further litigation will risk the disclosure of information harmful to the national security of  
3 the United States.” Negroponte Decl. ¶ 3; *accord* Decl. of Keith B. Alexander, *Hepting*  
4 Dkt. 124-3 ¶ 5 (“it is my judgment that any attempt to proceed in the case will substantially  
5 risk disclosure of the privileged information and will cause exceptionally grave damage to  
6 the national security of the United States”). The government’s continuing efforts to prevent  
7 attacks against civilians, here and abroad, could be compromised by further litigation of  
8 plaintiffs’ claims. “Especially in cases of extraordinary public moment,” as the Supreme  
9 Court explained in *Landis v. North American Co.*, 299 U.S. 248, 256 (1936), “the  
10 individual may be required to submit to delay not immoderate in extent and not oppressive  
11 in its consequences if the public welfare or convenience will thereby be promoted.”

12 **CONCLUSION**

13 For the reasons set forth above, this Court should stay all MDL proceedings pending  
14 disposition of the appeals in *Hepting v. AT&T Corp.*

15 Dated: December 22, 2006.

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