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22 UNITED STATES DISTRICT COURT  
 23 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 24 SAN FRANCISCO DIVISION

25 IN RE NATIONAL SECURITY AGENCY )  
 26 TELECOMMUNICATIONS RECORDS )  
 27 LITIGATION, MDL No. 1791 )  
 28 This Document Relates To: )  
 ALL CASES except AL HARAMAIN v. BUSH )  
 07-0109; CENTER FOR CONSTITUTIONAL )  
 RIGHTS v. BUSH 07-1115; UNITED STATES )  
 V. FARBER, ET AL 07-1324; UNITED )  
 STATES V. ADAMS, ET. AL. 07-1323; )  
 UNITED STATES V. PALERMINO, ET AL, )  
 07-1326; UNITED STATES V. VOLZ, ET AL, )  
 07-1396 )

MDL Docket No 06-1791 VRW  
**CLASS ACTION**  
**PLAINTIFFS' REPLY IN SUPPORT OF  
 MOTION FOR ORDER TO PRESERVE  
 EVIDENCE**  
 Judge: The Hon. Vaughn R. Walker  
 Date: November 15, 2007  
 Time: 2:00 p.m.  
 Courtroom: 6, 17th Floor

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## INTRODUCTION

Plaintiffs have now spent over a year trying to get a basic evidence preservation agreement from defendants and the intervenor. Starting from shortly after the *Hepting* case was filed in early 2006, plaintiffs began discussions, first with AT&T and the government and later, after all the cases were consolidated into this multi-district litigation, with all of the carrier defendants. Plaintiffs' goal is simple: to avoid a situation in which plaintiffs are finally entitled to engage in substantive discovery only to find that needed relevant evidence has been destroyed. Given the context of this case – a complex litigation where the evidence relates to communications and communications records of millions of ordinary Americans over a period of many years – a formal stipulation or order should govern the critical issue of evidence preservation. This is especially the case since substantive discovery is, at best, months away.

Plaintiffs have tried multiple times to accommodate the government's concerns about its invocation of the state secrets privilege. Plaintiffs have said that they are willing to await the Ninth Circuit's decision in *Hepting* before engaging in discussions concerning the details of the parties' preservation duties (without conceding that the state secrets privilege applies). They have framed their request as generously as possible, merely asking defendants and the intervenor to agree that the scope of the legal duty is as expressed in the leading caselaw. The specific proposed order is modeled on the "Interim Order Regarding Preservation" in the Manual for Complex Litigation ("MCL"). That interim order is designed to be used "[u]ntil the parties reach agreement on a preservation plan." MCL, Fourth § 40.25, item 3 (a). This seems to be the appropriate model since the parties are not going to address a more detailed preservation plan at least until after the Ninth Circuit provides some clarity on the scope of the state secrets privilege.

Plaintiffs ultimately brought this matter to the court's attention because the government insisted that their invocation of the state secrets privilege meant that neither they nor the carriers could make *any* agreement to preserve evidence. The most the government would say was that they knew that generally "parties to litigation" had obligations to preserve evidence, not that they or the carriers had any obligations or would abide by them. Declaration of Cindy Cohn in Support

1 of Plaintiffs' Motion to Preserve Evidence, Exh. C, (Coppolino email of June 29, 2007). The  
 2 government did offer to make an *ex parte, in camera* presentation to the court on this issue,  
 3 although they resisted plaintiffs' suggestion that the best vehicle for such a presentation was the  
 4 court's ordinary motion schedule.

5 At heart, defendants' and intervenor's position was that because the government has made a  
 6 state secrets privilege assertion over at least some of the technological details, they cannot be held  
 7 to any formal duty to preserve relevant evidence. Yet the state secrets privilege does not allow  
 8 parties to evade basic procedural duties. As plaintiffs noted in their opening brief, "invocation of  
 9 the privilege results in no alteration of pertinent substantive or procedural rules . . . ." *Ellsberg v.*  
 10 *Mitchell*, 709 F.2d 51,64 (D.C. Cir. 1983).

11 In their opposition and joinders, both the government and the carriers take baby steps  
 12 toward agreeing to preserve relevant evidence, while still resisting the imposition of any  
 13 preservation order that could enforce these duties. The Verizon Defendants actually move the  
 14 closest, formally stating in their joinder "that they are obligated to take reasonable steps to  
 15 preserve" potentially discoverable evidence. Verizon Opposition (Docket No. 388) at 1:8-9.<sup>1</sup> Yet  
 16 Verizon still opposes plaintiffs' motion. The government initially repeats its limited assertion that  
 17 it "recognizes[s]" the obligations. Government Opposition (Docket No. 386) at 1:6. It later states  
 18 that the *ex parte, in camera* declaration by an unnamed NSA agent "shows that if any potentially  
 19 relevant information exists as to any allegations . . . appropriate preservation steps, if any, are being  
 20 taken." Govt. Opp. at p. 12:12-15.<sup>2</sup> The AT&T<sup>3</sup> and Sprint Defendants merely join in the  
 21 government's opposition (AT&T Joinder (Docket No. 391); Sprint Joinder (Docket No. 390),

22 <sup>1</sup> All references are to docket numbers in the *In Re National Security Agency Telecommunications*  
 23 *Records Litigation*, MDL case no. 1791-VRW.

24 <sup>2</sup> The government insists in two footnotes that its *ex parte, in camera* filing is not made pursuant to  
 25 50 U.S.C. §1806(f). Govt. Opp. at footnote 1 and 10. Plaintiffs disagree. Situations in which the  
 26 parties are discussing evidence where the government has raised concerns about national security  
 27 are exactly what Section 1806(f) covers, and the government appears to be using the process laid  
 out by Congress, just without naming it. Nonetheless, the court need not resolve this issue now.  
 Plaintiffs do not oppose the government's *ex parte, in camera* filing because it appears to  
 substantially comply with the Section 1806(f) process.

28 <sup>3</sup> Referencing the AT&T Defendants here we include the AT&T, Cingular and BellSouth  
 defendants as defined in footnotes 3 and 5 of the Joint Case Management Statement, docket 61-1.

1 presumably meaning that the unnamed NSA agent's declaration also explains what these carrier  
2 defendants are doing to preserve potentially relevant evidence.<sup>4</sup>

3 Given these small steps, it is not much more to require the defendants and intervenor to  
4 abide by the normal preservation duties applicable in complex litigation, as expressed in plaintiffs'  
5 proposed order. These duties are: 1) identification of the persons responsible at each defendant and  
6 the intervenor for ensuring that evidence is preserved; 2) the institution of a litigation hold; 3) a  
7 standard for preservation so that later disputes can be properly framed, and 4) the availability of  
8 sanctions if the parties breach their duty.

9 The Court may also wish to make more specific requirements of the carriers and  
10 government in an *ex parte, in camera* order (presented only to the affected parties), based on the  
11 presumably more specific information it has received from the government *in camera, ex parte*.  
12 Obviously, plaintiffs are not in a position to list the specifics of such a secret order, but it could  
13 ensure that the information reasonably needed to address plaintiffs' statutory and Constitutional  
14 claims is preserved (for instance, information related to the communications of ordinary citizens  
15 which pass through the split cables referenced in the Klein documents, which are admittedly not  
16 state secrets, and information sufficient to establish which call records belonging to which  
17 customers were turned over by which carriers at approximately which times).<sup>5</sup> Such a secret order  
18 could also eliminate the government's concern that the public order proposed by plaintiffs would  
19 leave them and the carriers without specific guidance about what to preserve. *See Govt. Opp.* at p.

20 \_\_\_\_\_  
21 <sup>4</sup> It seems strange that an unnamed NSA agent could give admissible evidence about what AT&T,  
22 Sprint, and Verizon defendants are doing individually to preserve relevant evidence. Given the  
23 range of information from each carrier that would be relevant in these cases, it is hard to imagine  
24 how one NSA declarant could credibly give admissible testimony about the preservation efforts  
25 taken by the individual carriers. While the *in camera* nature of the declaration makes it difficult to  
be sure, it seems that the unnamed NSA agent's declaration would appear, at best, to be hearsay  
about the efforts taken by the carriers, or perhaps not to address the actions taken by the carriers at  
all. If either of these is the case, we ask that the court require the carrier defendants to present their  
own declarations about efforts to preserve relevant evidence from individuals with appropriate  
knowledge.

26 <sup>5</sup> Given the uncertainty as to what information may be privileged and what information the court  
27 may have to examine in making that determination or as part of the 50 U.S.C 1806(f) process, the  
28 parties must preserve all evidence which might fall within the scope of discovery. *United States v.*  
*Reynolds*, 345 U.S. 1, 10 (1953) (Noting that a court may "require a complete disclosure to the  
judge before the claim of privilege will be accepted . . .")

1 11:20-12:2. What cannot be the case is the Catch-22 that the government wishes to impose on  
2 plaintiffs: on the one hand, that the state secrets privilege prevents a detailed factual determination  
3 of what should be preserved and on the other, that any order short of that cannot be imposed  
4 because it does not provide sufficient factual detail about what should be preserved.

5 Plaintiffs respectfully request that their motion be granted.

### 6 ARGUMENT

7 The government makes a two-part argument in opposition. The government's first  
8 argument fails because it incorrectly asserts that the applicable standard is the one articulated in a  
9 *non-complex* case from the Western District of Pennsylvania, *Capricorn Power Co. v. Siemens*  
10 *Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D. Penn. 2004). *Capricorn Power* expressly  
11 distinguishes itself from complex litigation, stating:

12 The Court recognizes that it has become routine to order the preservation of  
13 evidence prior to the beginning of the discovery period at the initial case  
14 management conference and sometimes even before such a conference in complex  
15 litigation. Manual for Complex Litigation, Fourth § 11.442. The circumstances of  
16 the three motions before the Court do not concern "complex" litigation nor are we at  
17 the initial stages of discovery with all of the attendant circumstances which are  
18 normally present in cases for which the Manual for Complex Litigation is intended  
19 to provide guidance. *Id.* at §§ 10.1, 11.442. Therefore, the Court does not invoke  
20 any of the recommendations of that manual for the present analysis.

21 *Id.* at 434, n.2. Similarly, the government mistakenly relies on a Southern District of New York  
22 case, *Treppel v. Bovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006), which concerned an alleged  
23 attempt to harm the reputation of an individual stock analyst. Plainly, that case was also not  
24 complex litigation.

25 As the plaintiffs explained in their opening brief, the proper place to look for assistance in  
26 determining whether an interim preservation order is appropriate in complex litigation such as this  
27 is the MCL. It says, "[b]efore discovery starts, and perhaps before the initial conference, the court  
28 should consider whether to enter an order requiring the parties to preserve and retain documents,  
files, data, and records that may be relevant to the litigation." MCL, Fourth § 11.442. As noted  
above, plaintiffs' proposed order is modeled on an interim preservation order designed to be used  
"[u]ntil the parties reach agreement on a preservation plan." MCL, Fourth § 40.25, item 3 (a).  
This seems to be the appropriate course until the Ninth Circuit decides the *Hepting* appeal, since

1 plaintiffs have agreed to forgo detailed discussions regarding a preservation plan until then.

2 The second part of the government’s argument extends its erroneous reasoning, claiming  
3 that the motion “cannot be resolved without state secrets” because of the detailed inquiry involved.  
4 Govt. Opp. at p. 6:23. The government makes the “straw man” argument that resolving this motion  
5 would invariably disclose “intelligence sources and methods subject to the state secrets privilege.”  
6 *Id.* at p. 10:19-22. Plaintiffs are not seeking a factually specific preservation order. As noted  
7 above, plaintiffs have expressly modeled their request on the MCL’s “Interim Order Regarding  
8 Preservation”, which is imposed *before* the parties engage in the factual discussion of a  
9 preservation plan. The *Capricorn Power* court observed that such orders are “routine” in complex  
10 cases. *Capricorn Power, supra* at 434, n.2. More importantly, though, such an order does not  
11 require the defendants to reveal *any* information whatsoever to plaintiffs, much less to reveal state  
12 secrets.

13 The risk of spoliation of evidence in a large, complex, litigation such as this is real, and  
14 plaintiffs’ concerns are reasonable. Mindful of the state secrets privilege issue before the Ninth  
15 Circuit, plaintiffs seek a modest preservation order that would simply spell out the parties’ legal  
16 obligations, require identification of responsible persons, and provide plaintiffs with clear recourse  
17 in the event that relevant evidence is destroyed. It may make sense for the Court to supplement  
18 plaintiffs’ proposed public order with a more specific, *ex parte, in camera* Order to give the  
19 defendants and the intervenor more factually detailed assistance in carrying out their preservation  
20 duties.

21 Finally, the government maintains that no hearing should be held because the issues are  
22 “inherently factual.” Plaintiffs disagree, and believe that the core of this dispute is about whether  
23 an interim preservation order is appropriate to ensure that evidence is not destroyed, not what a  
24 specific final preservation order should say. Because of this, plaintiffs respectfully submit that it  
25 may be helpful to the Court to have the parties before it to answer any questions.

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**CONCLUSION**

For the reasons stated above, the plaintiffs respectfully request this Court grant the plaintiffs' motion for an order to preserve evidence.

DATED: November 1, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List.

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