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UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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SAN FRANCISCO DIVISION

16

IN RE NATIONAL SECURITY AGENCY)
 TELECOMMUNICATIONS RECORDS)
 17 LITIGATION, MDL No. 1791)

MDL Docket No 06-1791 VRW

18

This Document Relates To:

Relates to Case No. C-06-0672-VRW

19

Hepting, et. al v. AT&T Corporation, et. al

CLASS ACTION

20

***HEPTING PLAINTIFFS'*
ADMINISTRATIVE MOTION FOR
SCHEDULING ORDER**

21

[CIVIL L.R. 7-11 AND 6-3(C)]

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

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1 Pursuant to Local Rule 6-3(c), the plaintiffs in *Tash Hepting, et al v. AT&T Corp., et al*
2 (N.D. Cal. No. C-06-0672-VRW) hereby make this administrative motion respectfully requesting
3 the Court to issue a scheduling order (1) setting a case management conference; and (2) setting the
4 date by which defendant AT&T must answer the First Amended Complaint (*Hepting* Dkt. 8).

5 **I. Background**

6 The *Hepting* litigation is a class action initially filed in this Court in January 2006 on behalf
7 of all residential customers and subscribers of defendants AT&T Corp. and AT&T Inc. (“AT&T”),
8 alleging, among other things, that AT&T is violating the Fourth Amendment of the United States
9 Constitution and the federal wiretap statutes by conducting, on behalf of the government,
10 warrantless, suspicionless searches and seizures of the domestic and international communications
11 of millions of Americans.

12 Following this Court’s order of July 20, 2006, denying the motions to dismiss of AT&T and
13 the government (*Hepting* Dkt. 308), AT&T and the government filed petitions for permission to
14 appeal with the Ninth Circuit. *See* 9th Cir. App. Case Nos. 06-80109, 06-80110. As of the time of
15 this filing, the Ninth Circuit has not yet acted upon these petitions. In addition, the Judicial Panel
16 on Multidistrict Litigation issued an order transferring *Hepting* to this Court, among other cases.
17 (MDL 1791 Dkt. 1). In the interim, the *Hepting* litigation was stayed until August 8, 2006, and
18 then until September 29, 2006, by prior orders of this Court (*Hepting* Dkt. 330 and 336).

19 Neither AT&T nor the government has moved to further extend the *Hepting* stay, which has
20 now expired. However, on September 1, 2006, this Court vacated “[a]ll pending filing deadlines in
21 cases transferred to this court pursuant to MDL 1791 ... until further order of court following the
22 initial case management conference and issuance of a consolidated case management order.” (MDL
23 1791 Dkt. 17).¹ On August 31, 2006, the Court had noted that it “will calendar an initial case
24 management conference shortly after September 15, 2006.” (MDL 1791 Dkt. 15).

25
26 ¹ Strictly speaking, AT&T filing deadline for providing an answer in the *Hepting* case was not
27 “pending” at the time this Court issued its September 1 order, and AT&T did not list the *Hepting*
28 case among the pending deadlines from which it sought relief (MDL 1791 Dkt. 5). If the Court did
not intend for that order to vacate the stayed deadlines, the *Hepting* plaintiffs respectfully request
this Court treat this brief as a motion for clarification.

1 **II. A Prompt Case Management Conference is Necessary**

2 Plaintiffs respectfully suggest the Court schedule a case management conference to discuss
3 outstanding issues, including:

- 4 • Appointing an FRE Rule 706 Expert.
- 5 • Conducting discovery (including the previously noticed F. R. Civ. P. 30(b)(6)
6 deposition of AT&T Corp. and the discovery discussed in the *Hepting* plaintiffs' July 31
7 brief in response to this Court's order to show cause (*Hepting* Dkt. 317), pp. 7-8).
- 8 • Scheduling the motion for preliminary injunction (allowing plaintiffs sufficient time to
9 conduct their requested discovery).
- 10 • AT&T's production of any certifications or other authorizations that AT&T contends
11 allow AT&T to intercept the communications of its customers.
- 12 • The coordination of pre-trial proceedings for the cases transferred by the MDL panel.

13 **III. The Interests of Justice Require AT&T to Answer the Complaint Promptly**

14 In addition to setting a prompt case management conference, plaintiffs respectfully request
15 that the Court set a date certain by which AT&T must answer the First Amended Complaint. In
16 determining this, the appropriate standard is whether the case should be stayed pending the Ninth
17 Circuit's decision on AT&T and the government's petitions. "The standard for evaluating stays
18 pending appeal is similar to that employed by district courts in deciding whether to grant a
19 preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd on other*
20 *grounds*, 463 U.S. 1328 (1983) (noting the common language of the test for stay pending appeal
21 and the test for a preliminary injunction, citing *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 1018
22 n.3 (9th Cir. 1980)).

23 As explained in detail in the *Hepting* motion for a preliminary injunction (*Hepting* Dkt. 17-
24 22 and 30-32), plaintiffs have already demonstrated that they meet the test for a preliminary
25 injunction, i.e., that they are likely to prevail on the merits and that the balance of hardships tilts
26 sharply in their favor. *See also* the *Hepting* plaintiffs' July 31 brief in response to this Court's order
27 to show cause (*Hepting* Dkt. 317) (discussing test for stay in more detail).

28 Moreover, AT&T and the Government will suffer no harm from this Court setting a

1 deadline for the answer.² As we have respectfully suggested in previous filings (see e.g. *Hepting*
2 Dkt. 329), AT&T can file its complete answer directly in chambers, and can serve and publicly file
3 those portions that do not implicate disputed material on the public record.³ The Court can then
4 determine, after appropriate briefing, whether and to what extent any of the Answer's redacted
5 material are properly redacted. *See generally* 50 U.S.C. § 1806(f) (providing for *in camera* and *ex*
6 *parte* review of "materials relating to the surveillance as may be necessary to determine whether
7 the surveillance of the aggrieved person was lawfully authorized and conducted"); *see also*
8 Plaintiffs' Opp. to Gov't Motion to Dismiss, pp. 21-24 (*Hepting* Dkt. 181); *Halpern v. U.S.*, 258
9 F.2d 36, 43 (2nd Cir. 1958); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2nd Cir.
10 1977); *Spock v. U.S.*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978) (endorsing creative solutions to
11 manage state secret privilege issues).

12 Plaintiffs are suffering ongoing harm to the statutory and constitutional rights, resulting in
13 irreparable injury. As the Court has recognized, "AT&T's alleged actions here violate the
14 constitutional rights clearly established in Keith [*United States v. United States District Court*
15 (*Keith*), 407 U.S. 297 (1972)]." (*Hepting* Dkt. 308 at 68:14-15); *see also* *ACLU v. NSA*, 2006 WL
16 2371463 (E.D. Mich. 2006) (finding government warrantless surveillance program illegal and
17 unconstitutional and granting permanent injunction).

18 Finally, AT&T's arguments about the potential success on the merits of the government's
19 state secrets claim on appeal have been seriously undercut by cases decided since this last was
20 briefed. In addition to this Court's order, both *ACLU v. NSA, supra*, and *Al-Haramain Islamic*
21 *Foundation, Inc. v. Bush*, 2006 WL 2583425 (D.Or. 2006) have rejected the arguments in the
22 government's state secret privilege motions to dismiss.

23
24 ² Indeed, AT&T actually did file an answer to a separate action in the Eastern District of Missouri
25 (*United States v. Gaw et al*, Case No. 4:06 cv 1132 CEJ, Dkt. 30) that has been conditionally
transferred to this Court by the Judicial Panel on Multidistrict Litigation. AT&T's answer is
attached hereto as Exhibit A.

26 ³ Since the state secret privilege belongs to the government, *see United States v. Reynolds*, 345
27 U.S. 1, 7-8 (1953), AT&T may need some guidance determining which paragraphs to redact. It
28 would seem appropriate for the government to file a brief identifying which specific paragraphs of
the Complaint it would object to AT&T answering publicly pending the resolution of any
interlocutory appeal the government intends to file. Upon receipt of the government's papers,
AT&T should be required to immediately file the redacted version.

1 Other than its pending appeals petition, AT&T's primary argument for vacating pending
 2 deadlines was that "numerous filing deadlines will occur in individual cases during the next several
 3 weeks, and the parties will be put to the expense and burden of continuing to litigate these matters
 4 separately notwithstanding their consolidation into the MDL." (MDL 1791 Dkt. 5). This argument
 5 simply does not hold water for the *Hepting* answer. Absent the Court's stay order of August 2,
 6 2006, AT&T's answer would have been due the following day, on August 3, 2006. AT&T has had
 7 the Complaint for well over six months. The Court denied AT&T's motion to dismiss over two
 8 months ago. Presumably, by August 2, 2006, AT&T had a draft of their Answer within one day of
 9 filing, and AT&T will not be put to any significant expense or burden. The Court's order vacating
 10 pending deadlines in the transferred cases should not operate as a stay for the *Hepting* case when
 11 better alternatives exist and when AT&T has not met the applicable legal standard.

12 In sum, given the ongoing and irreparable harm to the plaintiffs and the likelihood that
 13 plaintiffs will succeed on the merits, there is no reason for further delay the answer now that the
 14 stay has expired.

15 **IV. Conclusion**

16 For the reasons stated above, plaintiffs respectfully request that this Court issue a
 17 scheduling order, setting the date by which AT&T shall answer the First Amended Complaint and
 18 setting a case management conference. Plaintiffs respectfully suggest that the deadline be no later
 19 than 10 days after the Court rules on this administrative motion and that the case management
 20 conference be set as soon as the Court's schedule permits.

21 DATED: October 3, 2006

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