[THE NAMES, ADDRESSES AND TELEPHONE NUMBERS OF ALL COUNSEL WHO HAVE SIGNED THIS JOINT STATEMENT ARE LISTED ON THE SIGNATURE PAGES.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re: NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION	MDL Dkt. No. 06-1791-VRW **JOINT CASE MANAGEMENT STATEMENT**
This Document Relates To: ALL ACTIONS	Date: November 17, 2006 Time: 10:30 a.m. Courtroom: 6, 17th Floor Judge: Hon. Vaughn R. Walker

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Pursuant to the Court's Order of October 16, 2006 (Dkt. 49) ("Order"), the parties listed below submit this Joint Case Management Statement in advance of the Case Management Conference set for November 17, 2006.

I. PARTIES JOINING THIS STATEMENT.[1]

A. The Plaintiffs.

Plaintiffs: The plaintiffs joining in this statement include all plaintiffs except those noted immediately below. The plaintiffs have formed several groups, as follows:

- The EFF/ACLU plaintiffs' group, led by the counsel in *Hepting et al v. AT&T* and in *Terkel et al v. AT&T,* represents many of the plaintiffs in this proceeding. The EFF/ACLU plaintiffs' group does not represent the plaintiffs in *Fortnash v. AT&T Corp., Guzzi v. George W. Bush, et al., Marck, et al. v. Verizon Communications, Inc., Payne v. Verizon Communications, Inc.*, and *Roche v. AT&T Corp.*, nor do they represent any of the state government entities involved in this proceeding or any of the plaintiffs who are contesting or opposing transfer. *See* chart at Part III.B., pp. 12-13, *infra*.
- The Payne Group consists of Plaintiff Payne, whose case was originally filed in the Southern District of New York: *Payne v. Verizon Communications, Inc.*, 3:06-cv-6435.
- The plaintiffs in *Riordan v. Verizon Com. Inc.*, No. C-06-3574 VRW; *Campbell v. AT&T, et al.*, No. C-06-3596 VRW; *Chulsky v. Cellco Partnership* (D.N.J.) No. 06-cv-2530; and *Bready v. Verizon Maryland, Inc.*, No. C-06-6313 VRW (the "Removed Plaintiffs") join in this Case Management Statement for the purpose of proposing the procedure for addressing their pending remand motions. *See* part V.A.1.a, pp. 16-20,

[1] A chart listing all cases that have been consolidated, transferred or conditionally transferred to MDL-06-1791 to date is attached as Attachment A to this Statement.

infra.

B. The Defendants.

The defendants joining in this statement include all defendants except Comcast and TDS.[2] The defendants fall generally into the following categories:

- AT&T Defendants (collectively referred to as "AT&T" except where there is a need to distinguish among them).[3]
- Verizon Defendants (collectively referred to as "Verizon" except where there is a need to distinguish among them).[4]
- BellSouth Defendants (collectively referred to as "BellSouth" except where there is a need to distinguish among them).[5]
- Sprint Nextel Corporation Defendants (collectively referred to as "Sprint" except where there is a need to distinguish among them).[6]
- Other telecommunications company defendants.[7]

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[2] Comcast supports a stay pending resolution of the *Hepting* appeal. TDS does not wish to join in this statement at this time.

[3] Current AT&T defendants are: AT&T Inc, AT&T Corp, AT&T Operations, Inc., SBC Long Distance LLC, Pac Bell Telephone Co., AT&T Communications of California, AT&T Teleholdings, AT&T Communications, SBC Communications, Indiana Bell and Illinois Bell. The Cingular entities (Cingular Wireless LLC, New Cingular Wireless Services, Inc. and Cingular Wireless Corporation) are affiliated with AT&T (and with BellSouth).

[4] Current Verizon defendants are: Verizon Communications Inc., Verizon Global Networks, Inc., Verizon Northwest Inc., Verizon Maryland Inc., MCI, LLC, and MCI Communications Services, Inc. In addition, Cellco Partnership, Verizon Wireless (VAW) LLC, and Verizon Wireless Services LLC, are affiliated with Verizon. Several cases purport to name Verizon Wireless, LLC and/or MCI WorldCom Advance Networks, LLC as a defendant, but no such entities exist.

[5] Current BellSouth defendants are: BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Communication Systems, LLC. The Cingular entities (New Cingular Wireless Services, Cingular Wireless) are affiliated with BellSouth (and with AT&T).

[6] Current Sprint defendants are: Sprint Nextel Corporation, Nextel West Corp., Sprint Communications Company L.P. and Sprint Spectrum L.P. Sprint has not been served in the *Electron Tubes* action but has been served in the other actions in which it has been named.

[7] Bright House Networks, LLC, TransWorld Network Corp, Charter Communications, LLC, Comcast Telecommunications, Inc., TDS Communications

(continued…)

These defendants sometimes are collectively referred to as the "Carriers."

C. The Government.

"The Government" refers to the federal defendants sued in their official capacities in these actions and the federal intervenor-defendants (United States of America, National Security Agency, President George W. Bush).

II. INTRODUCTION.

A. The Plaintiffs' introduction.

This MDL proceeding involves cases brought on behalf of customers and subscribers of defendants AT&T, Verizon, MCI, BellSouth, Sprint and their associated entities and subsidiaries, as well as numerous other telecommunications company defendants.[8]

Plaintiffs' claims generally fall into two categories: (1) Claims that defendants, acting on behalf of the government, have unlawfully intercepted the content of domestic and international communications of millions of Americans, including plaintiffs, and (2) claims that the defendants have unlawfully disclosed to the government detailed communications records about millions of their customers, again including plaintiffs. Plaintiffs contend that defendants have received no court order or other judicial authorization, and no executive branch authorization that comports with any congressionally established procedure, allowing such interceptions and disclosures.

The majority of the cases allege that defendants' actions violate federal constitutional and/or statutory provisions. Some also include state law claims. Five of the

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(…continued)
Solutions, Inc., and Hawaiian Telcom Inc. T-Mobile was named in the two *Cross* cases but was dismissed from them. Pursuant to an agreement with the Plaintiffs in the *Dubois* case, Defendant Trans World Network Corp. has not responded to the complaint in *Dubois*, and counsel for Trans World has not entered an appearance in that case or in this proceeding.

[8] Plaintiffs note that the MDL panel will hear argument on Nov. 30, 2006, on whether cases against the U.S. government and its agencies should be transferred to this MDL proceeding. It is therefore premature to address issues that would be raised should those cases be transferred.

cases -- all of which were removed from state court and are the subject of motions to remand -- are based solely on state law.

Plaintiffs seek remedies that include declaratory and corresponding injunctive relief, as well as statutory damages, punitive damages, restitution, and disgorgement. The particular remedies sought vary from case to case.

The United States has intervened in many of the cases in this proceeding to assert that the state secrets privilege requires that the cases be dismissed. Rulings have been issued in two cases.

In *Hepting et al. v. AT&T*, 439 F.Supp.2d 974 (N.D. Cal. 2006) ("*Hepting*"), this Court on July 20, 2006, rejected motions to dismiss brought by both the United States and defendant AT&T and ruled that:

- the state secrets privilege does not categorically bar the action because the subject-matter of the action was not a state secret;
- the state secrets privilege does not prevent AT&T from disclosing whether it received a certification authorizing its assistance to the United States as a defense;
- statutory privileges and the *Totten* doctrine asserted by the United States did not bar the action;
- the *Hepting* plaintiffs have standing to maintain the action;
- immunity defenses asserted by AT&T did not warrant dismissal of the action; and
- plaintiffs can request that the Court revisit the issue of discovery regarding the alleged communications records program.

This Court certified its rulings on the state secrets privilege for interlocutory appeal. (*Hepting* Dkt. 308.) Both the United States and defendant AT&T have petitioned for permission to appeal under 28 U.S.C. § 1292(b). The Ninth Circuit granted these petitions on November 7, 2006; the Ninth Circuit's order is attached as Attachment B.

In *Terkel et al. v. AT&T,* 441 F.Supp.2d 899 (N.D. Il. 2006) ("*Terkel*"), the *Terkel*

plaintiffs filed their complaint in the Federal District Court for the Northern District of Illinois against AT&T Corporation on behalf of a putative class of Illinois subscribers and customers alleging a violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2702(a)(3) based upon the disclosure of records by AT&T to the federal government ("records claim"). The *Terkel* plaintiffs sought only declaratory and injunctive relief. Plaintiffs also filed a motion for a preliminary injunction, a motion for class certification, and a motion for leave to take expedited discovery.

On July 25, 2006, the district court denied the motion to dismiss filed by defendant AT&T, but granted the motion to dismiss, with leave to amend, filed by the intervenor United States. *See Terkel*, 441 F.Supp.2d at 920. The court held that the government's assertion of the state secrets privilege was a bar to the plaintiffs obtaining the discovery they required to prove standing for prospective injunctive relief on their records claim. *Id.* at 901.

On July 31, 2006, the *Terkel* plaintiffs filed their Second Amended Complaint which added a claim alleging the interception and disclosure of the contents of telephone calls in violation of 18 U.S.C. § 2511(1)(a)(1)(c) and (3)(a) of the Act ("content claim"). The *Terkel* plaintiffs also added a demand for damages.

Also on July 31, 2006, *Terkel* plaintiffs filed a Motion for Reconsideration or Clarification, arguing *inter alia*, that the Court should clarify that the dismissal of the records claim was without prejudice. On August 3, 2006, the district court granted the *Terkel* plaintiffs motion for clarification, advising that the dismissal was without prejudice and that the Court was going to allow *Terkel* plaintiffs to continue to include their records claim in their Second Amended Complaint.

In the remainder of plaintiffs' response, plaintiffs propose that the Court order the following litigation steps to go forward:

- For state cases that have been removed, all pending and contemplated remand motions should proceed;
- For defendants other than AT&T, plaintiffs should file and serve separate

consolidated complaints by defendant category: MCI, Verizon, Bellsouth, Sprint/Nextel, and Miscellaneous, as explained further below;

• In all cases, discovery that does not implicate the state secrets privilege should proceed, and for all other discovery, the Court should use creative techniques (screened interrogatories, screened deposition topics, 1806(f), technical advisor, etc.) to allow discovery to proceed cautiously in view of the government's concerns about the disclosure of state secrets;

• AT&T should be ordered to file its Answer to the *Hepting* complaint;

• The Court should order all defendants other than AT&T to file and serve any pleadings in response to plaintiffs' consolidated complaints, and order briefing to proceed on plaintiffs' proposed schedule for the briefing of responsive motions. Plaintiffs are willing, however, to agree to a schedule that staggers the response deadlines for the other defendants, putting the response by MCI first and allowing the others to await the outcome of those motions;

• Once discovery has been completed, the *Hepting* plaintiffs should be permitted to amend their preliminary injunction motion papers against AT&T, and the motion should be calendared for hearing.

B. The Government's introduction.

The very subject matter of the civil actions transferred to MDL-1791 implicates state secrets that the United States Government cannot confirm, deny, acknowledge, or otherwise disclose. This proceeding puts directly at issue facts concerning alleged intelligence activities conducted by the National Security Agency. These actions challenge the lawfulness of alleged NSA activities—in most cases the lawfulness of the alleged participation in alleged NSA activities by the defendant telecommunication carriers and, in some cases, the lawfulness of the Government's alleged actions. The very subject matter of these allegations, and the very proof necessary to decide the plaintiffs' claims, constitute state secrets. As the plaintiffs note, the United States has already asserted the state secrets privilege in two of the transferred actions (*Hepting* and *Terkel*) to protect against the

disclosure of information that might tend to confirm or deny allegations about sensitive national security activities (including the alleged warrantless interception of communications and the alleged collection of call records information) and thereby harm the national security of the United States.

The United States intervened in *Hepting*, moved to dismiss that action on state secrets grounds and, upon this Court's *sua sponte* certification, petitioned the Court of Appeals for interlocutory review of this Court's decision to deny dismissal. In *Terkel*, the district court granted the Government's motion to dismiss, holding that the state secrets privilege barred AT&T from confirming or denying the core allegations necessary for plaintiffs to prove their standing (*i.e.*, whether or not AT&T had disclosed plaintiffs' telephone records to the NSA). Although the district court granted the *Terkel* plaintiffs leave to amend their complaint to add new claims, the law of the case bars the *Terkel* plaintiffs from reasserting their telephone records claim for declaratory or injunctive relief.[9]

The transferred cases raise allegations similar to those raised in *Hepting* and *Terkel* concerning the interception of communications and the production of call record information and, accordingly, implicate the disclosure of state secrets concerning alleged NSA activities. Because the Court of Appeals presently has before it the threshold issue, applicable in all cases, of whether these cases can proceed without risking the disclosure of state secrets, further proceedings here should await the Ninth Circuit's guidance on that privilege issue; indeed, a decision in the *Hepting* appeal may dispose of all claims related to NSA surveillance activities and, hence, the pending cases. Any effort to proceed otherwise will ultimately run into the central state secrets privilege issues raised in *Hepting*.

Despite this, the plaintiffs propose a panoply of litigation steps—as if this were a

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[9] Contrary to Plaintiffs' suggestion above, the district court in *Terkel* did not rule that the *Terkel* plaintiffs may reassert in their Second Amended Complaint the very same claim that the court had just dismissed. Rather, the district court deferred any ruling on that issue or any other issue pending the decision of the JPML regarding transfer. The district court's clarification that its dismissal of the telephone records claim was without prejudice merely confirmed that it was not a decision on the merits (indeed, the state secrets privilege barred any adjudication of the merits).

normal case and not one involving alleged classified activities and as if the *Hepting* appeal were not even pending. First, Plaintiffs demand an Answer to the *Hepting* Complaint, which alleges that AT&T assisted NSA in its activities. There is no point to either AT&T or the Government being put to the task of submitting a redacted Answer when the Government has already asserted privilege over the central allegations in *Hepting* and has provided the Court, *ex parte, in camera*, with a description of the state secrets at issue, and the process of answering would risk the disclosure of privileged information.

Second, Plaintiffs propose to proceed with a wide range of discovery (indeed, before the Carriers and United States have even responded to the allegations in the transferred actions). All of that discovery is directed at proving plaintiffs' allegations about alleged classified activities, and several areas of discovery proposed by plaintiffs quite specifically demand the disclosure of classified information plainly covered by the Government's privilege assertion (such as whether or not carriers received certifications from the Government to assist the NSA).

Third, Plaintiffs (in *Hepting* at least) seek a preliminary injunction that, again quite obviously, puts directly at issue the merits of allegations as to the NSA's and the carrier's actions. Indeed, it is disingenuous for Plaintiffs to suggest that a preliminary injunction motion does not implicate the state secrets privilege, where that very motion repeatedly puts at issue the alleged involvement of AT&T with NSA activities, and where its very purpose is to enjoin AT&T from assisting NSA in alleged activities.

This Court has considered the Government's state secrets privilege assertion in *Hepting*, and its denial of the Government's motion to dismiss is now subject to appellate review. The further proceedings proposed by plaintiffs—particularly their discovery demands—will inevitably lead to an assertion of the state secrets privilege again because the Government must protect against the disclosure of pieces of information that might tend to reveal national security information. And even if some limited steps might be undertaken that would not, in isolation, require a state secrets privilege assertion, there is no point to any further proceedings where their ultimate object is to litigate the lawfulness of

alleged secret intelligence activities and where the central factual issues essential to proceeding could not be developed. For these reasons, discussed further below as to specific issues raised in this statement, the Government submits that the most appropriate course would be for the Court to enter a stay of proceedings pending disposition of the *Hepting* interlocutory appeal before the Ninth Circuit.

C. The Carriers' introduction.

The JPML transferred or conditionally transferred 44 cases to this Court for pre-trial purposes because it found they shared common "factual and legal questions" and that proceeding in a piecemeal fashion would waste the resources of the judiciary and the parties. In the Carriers' view "the just and efficient conduct of this litigation" requires that the litigation be handled in logical stages, not in a manner that will produce only disarray and confusion and needlessly waste party and judicial resources.

The critical threshold issue in these cases is the application of the state-secrets privilege. In the Carriers' view, that issue is dispositive and requires dismissal. But even if it is not dispositive, the privilege clearly will shape the conduct of the litigation and define the parameters in which such litigation may take place. As a result, the most efficient course is to stay all cases before this Court pending the outcome of the appeal in *Hepting*. Even if the outcome of that appeal does not dispose of these cases in their entirety, it clearly will set forth basic principles that will guide the application of the state-secrets privilege in all the cases.

Plaintiffs nevertheless invite the Court to launch immediately into a wide range of litigation activities, all of which implicate issues concerning the state secrets privilege that certain of the plaintiffs, defendants and the Government have placed before the Ninth Circuit for interlocutory review. They suggest that the parties should engage in extensive written discovery and depositions, litigate preliminary injunction and other motions, file responsive pleadings, begin the class certification process, and other activities, all essentially simultaneously. Plaintiffs would undercut the very purpose of MDL coordination by trying to take these steps against some defendants or in some cases but not

others in an effort to "test" new theories or arguments on a selective basis. They do not explain how doing so could possibly be efficient, especially when the Government's and the Carriers' challenges to the scope of permissible discovery are on interlocutory appeal. The plaintiffs cannot identify anything whatsoever that they believe should await appeal. The plaintiffs' suggested course is a recipe for chaos that would be inappropriate for any MDL proceeding and is even more so in a case implicating serious national security concerns.

III. THE STATUS OF THE APPEALS AND THE PROCEEDINGS BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.

A. The status of the interlocutory appeals to the Ninth Circuit (Order ¶ 3(d)).

Joint Statement: On July 20, 2006, the Court denied the Government's and AT&T Corp.'s motions to dismiss one of the cases in this litigation, *Hepting, et al v. AT&T, et al*. *Hepting* (Dkt. 308). In its Order denying the motions, the Court certified the decision for interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* On July 31, 2006, the Government and AT&T Corp. filed separate petitions for appeal in the Ninth Circuit on the grounds that, *inter alia*, the existence of state secrets in the *Hepting* case prevents the plaintiffs there from demonstrating standing and that this issue presents a controlling question of law as to which there is a substantial ground for difference of opinion, the resolution of which could terminate the litigation. *See* Nos. 06-80109, 06-80110 (9th Cir.) On August 9, 2006, the *Hepting* plaintiffs filed an opposition to AT&T Corp.'s petition (they did not oppose the Government's) and a cross-petition seeking permission to appeal this Court's ruling that the state secrets privilege prevented them from conducting discovery regarding AT&T's alleged provision of call record data to the Government. *Id.* On November 7, 2006, the Ninth Circuit entered this order: "The petitions for permission to appeal pursuant to 28 U.S.C. § 1292(b) are granted. The cross-petition for permission to appeal is denied as unnecessary. Within 10 days of this order, petitions shall perfect the appeals pursuant to Federal Rule of Appellate Procedure 5(d)." *See* Attachment B hereto.

B. The status of the cases in which a party has opposed transfer to MDL 1791 (Order ¶ 3(d)).

Joint Statement: The Judicial Panel on Multidistrict Litigation ("Panel") issued its Initial Transfer Order ("ITO") on August 9, 2006, transferring 17 cases.[10] (Dkt. 1). Since that time, the Panel has issued five Conditional Transfer Orders, conditionally transferring an additional 29 cases to this Court. Parties in nine of the conditionally transferred cases have objected to transfer. Specifically:

On August 31, 2006, the Panel issued a Conditional Transfer Order ("CTO-1"), conditionally transferring 21 "tag-along" actions. (Dkt. 37). The plaintiffs in four of the 21 actions subject to CTO-1 opposed transfer and have filed motions to vacate. Those actions are: *Mink v. AT&T Commc'ns*, No. C.A. 4:06-1113 (E.D. Mo.), *Shubert v. Bush*, No. C.A. 1:06-2282 (E.D.N.Y.), *Center for Constitutional Rights v. Bush*, No. C.A. 1:06-313 (S.D.N.Y.), and *Al-Haramain Islamic Foundation, Inc., et al. v. Bush*, No. 3:06-274 (D. Or.). (A fifth case, *Tyler v. AT&T, Inc.*, was removed from CTO-1, as it was dismissed by the United States District Court for the District of Nebraska.) With the exception of *Mink*, the cases subject to CTO-1 in which oppositions have been filed all involve actions brought directly against the United States, its agencies, instrumentalities or employees. The Panel will hear the objections to transfer "without oral argument" on November 30, 2006. *See* Panel's Notice of Hearing Session (Oct. 17, 2006). The remaining 16 actions were transferred on September 25, 2006.

On September 11, 2006, the Panel issued its Second Conditional Transfer Order ("CTO-2") conditionally transferring to this Court one tag-along action. The parties in that action, *Bready v. Verizon Maryland, Inc.*, No. C.A. 1:06-2185, did not oppose CTO-2, and the case was transferred on October 4, 2006 (Dkt. 41).

On September 28, 2006, the Panel issued its Third Conditional Transfer Order

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[10] On August 17, 2006, the Panel vacated its ITO regarding one case, *Potter v. BellSouth Corp.*, after it was dismissed by the United States District Court for the Middle District of Tennessee.

("CTO-3") conditionally transferring to this Court five additional actions: *United States v. Palermino*, No. C.A. 3:06-1405 (D. Conn.); *United States v. Adams*, No. C.A. 1:06-97 (D. Me.); *United States v. Gaw*, No. C.A. 4:06-1132 (E.D. Mo.); *Clayton v. AT&T Commc'ns of the Southwest, Inc.*, No. C.A. 2:06-4177 (W.D. Mo.); *United States v. Farber*, No. 3:06-2683 (D.N.J.). With the exception of *Clayton*, which is a subpoena enforcement action brought by two Commissioners of the Missouri Public Utilities Commission against AT&T, these actions involve lawsuits brought by the United States against state agencies or officials who are seeking to conduct investigations of alleged carrier cooperation with federal intelligence activities. Various Carriers are also defendants in these actions. The state agencies have filed motions to vacate CTO-3, and the oppositions to those motions are due on November 20.

On October 11, 2006, the Panel issued its Fourth Conditional Transfer Order ("CTO-4") conditionally transferring to this Court one more tag-along action, *United States v. Volz*, No. C.A. 2:06-00188 (D. Vt.) (filed Oct. 2, 2006). Defendants filed a notice of opposition to transfer on November 3, with their motion and brief in opposition due November 20.

On November 3, 2006, the Panel issued its Fifth Conditional Transfer Order ("CTO-5") conditionally transferring to this Court one more tag-along action, *Roche v. AT&T Corp.* No. C.A. No. C.A. 0:06-4252 (D. Minn.). Notice of opposition to transfer is due by November 20.

The status of the cases where plaintiffs have objected to transfer is as follows:

Case Name	Transferring Court Case Number	Date Of CTO	Status of Objections/Transfer
Al-Haramain Islamic Foundation, Inc. v. George W. Bush	No. C.A. 3:06-274 (D. Or.)	8/31/2006 (CTO-1)	There will be a hearing "without oral argument" in the JPML on the objections to transfer on November 30, 2006
Center for Constitutional Rights v. George W. Bush	No. C.A. 1:06-313 (S.D.N.Y.)	8/31/2006 (CTO-1)	There will be a hearing "without oral argument" in the JPML on the objections to transfer on November 30, 2006

Case Name	Transferring Court Case Number	Date Of CTO	Status of Objections/Transfer
Clayton. v. AT&T	No. C.A. 2:06-4177 (W.D. Mo.)	9/28/2006 (CTO-3)	Motion to vacate filed on October 30, 2006; responses due by November 20, 2006
Claudia Mink v. AT&T Communications of the Southwest, Inc.	No. C.A. 4:06-1113 (E.D. Mo.)	8/31/2006 (CTO-1)	There will be a hearing "without oral argument" in the JPML on the objections to transfer on November 30, 2006
Roche v. AT&T Corp.	No. C.A. 0:06-4252 (D. Minn.)		Part of CTO-5; notice of opposition to transfer due November 20, 2006
Virginia Shubert v. George W. Bush	No. C.A. 1:06-2282 (E.D.N.Y.)	8/31/2006 (CTO-1)	There will be a hearing "without oral argument" in the JPML on the objections to transfer on November 30, 2006
United States v. Adams	No. C.A. 1:06-00097 (D. Me.)	9/28/2006 (CTO-3)	Motion to vacate filed on October 25, 2006; responses due by November 20, 2006
United States v. Gaw	No. C.A. 4:06-01132 (E.D. Mo.)	9/28/2006 (CTO-3)	Motion to vacate filed on October 30, 2006; responses due by November 20, 2006
United States v. Farber	No. C.A. 3:06-02683 (D.N.J.)	9/28/2006 (CTO-3)	Motion to vacate filed on October 30, 2006; responses due by November 20, 2006
United States v. Palermino	No. C.A. 3:06-01405 (D. Conn.)	9/28/2006 (CTO-3)	Motion to vacate filed on October 30, 2006; responses due by November 20, 2006
United States v. Volz	No. C.A. 2:06-188 (D. Vt.)	10/19/2006 (CTO-4)	Defendants filed notice of objection to CTO-4 on November 3, 2006; motion to vacate due November 20

C. The status of cases removed from state court.

Joint statement: The following cases were removed from state court. Plaintiffs in some cases seek remand; in others, they do not seek remand:

Case Name	Transfer Status	Remand Status
Riordan v. Verizon Com. Inc. No. C-06-3574 VRW (N.D. Cal.)	NA (filed in N.D. Cal.)	Motion fully briefed
Campbell v. AT&T, No. C-06-3596 VRW (N.D. Cal.)	NA (filed in N.D. Cal.)	Motion fully briefed
Chulsky v. Cellco Partnership (D.N.J.) No. 06-cv-2530	CTO-1 – Transfer pending, not opposed	Motion filed – case stayed before opposition due
Bready v. Verizon Maryland, Inc. No. C-06-6313 VRW (D. Md.)	Transfer complete	Motion filed – case stayed before opposition due
Mink v. AT&T Com. of the SW, et al. (E.D. Mo.) No. 4:06-cv-1113	CTO-1 – opposing transfer	Will seek remand upon transfer if ordered
Cross v. AT&T, No. C-06-6224 VRW (S.D. Ind.)	Transfer complete	Not seeking remand
Conner v. AT&T, C-06-5576 VRW (E.D. Cal.)	Transfer complete	Not seeking remand
Clayton v. AT&T Com. of the Southwest, No. 2:06-4177 (W.D. Mo.)	CTO-3 – opposing transfer	Motion for remand already denied by district court (W.D. Mo.)

IV. THE CRITICAL FACTUAL AND LEGAL ISSUES IN DISPUTE.

A. The Plaintiffs' position.

Defendants have not answered any of the complaints in this MDL proceeding and accordingly have not yet stated whether they dispute any factual issues raised by any of the plaintiffs. As explained below in Part VI.B.1., plaintiffs believe that defendant AT&T should now be ordered to answer the *Hepting* complaint.

The principal legal issues in dispute at this time are the legality of the carriers' conduct and the applicability and effects of the state secrets privilege asserted by the United States on the ability of the parties to litigate the claims at issue.

The Government and the defendants present no new arguments in favor of their argument that a stay should be applied here. As they did in August, they object to plaintiffs' proposals for proceeding in this litigation based mainly on their position that the

state secrets privilege bars or significantly inhibits any litigation activities. Once again, however, they fail to give due weight to the fact that this Court has already found that the state secrets privilege does not require dismissal of the *Hepting* complaint.

If the Court is correct, litigation should proceed. The cessation of pre-trial activity urged by the Government and the defendants would instead result in unnecessary delay. Discovery and other pre-trial activities should proceed so that when the merits are reached, the parties can litigate *expeditiously* as well as thoroughly and thoughtfully.

B. The Government's position.

The critical threshold issue in this action is whether proceedings should be stayed pending the *Hepting* appeal. This MDL proceeding presents the same state secrets privilege issues that previously have been raised by the United States in the *Hepting* and *Terkel* actions. It makes little sense to proceed on any front where the Court of Appeals has decided to review this Court's decision with respect to the Government's state secrets privilege assertion in *Hepting* —including whether the very subject matter of that action, and proof necessary to decide standing or the merits of the claims, constitute state secrets. In particular, the Government has asserted in *Hepting* that any information that tends to reveal whether a telecommunications carrier has assisted the Government in a classified intelligence activity cannot be confirmed or denied. The Government has also asserted privilege as to any information that might confirm or deny whether any plaintiff has been subject to alleged NSA intelligence activities, without which plaintiffs could not establish their standing, and has also asserted privilege with respect to information concerning the interception of communications under the Terrorist Surveillance Program, evidence that would be needed to adjudicate claims on the merits. In addition, other alleged NSA activities, such as the alleged collection of call records information, likewise cannot be confirmed or denied. All of these facts would be unavailable under the Government's privilege assertion as to any claim, including alleged statutory violations by the carriers or alleged violations of the First and Fourth Amendments to the Constitution.

Plaintiffs' assertion above—that "the Court has already found that the state secrets privilege does not require dismissal of the *Hepting* complaint" and "*[i]f the Court is correct*, litigation should proceed"—simply disregards the pending appeal, which will assess precisely *whether* the Court is correct.

C. The Carriers' position.

The critical threshold issue in these cases is the applicability of the state secrets privilege and whether the privilege requires that the cases be dismissed. Because the Ninth Circuit has now granted the section 1292(b) petitions in *Hepting* for interlocutory review of that issue (*see* Attachment B), the cases should be stayed pending appeal. The Carriers accordingly support the Government's forthcoming motion for a stay of this litigation.

Even assuming that the outcome of the appeal does not dispose of these cases entirely, the appeal will elucidate the fundamental issues and determine the scope of the privileges afforded to the Government. Accordingly, it is difficult at this juncture to identify the other "critical" legal and factual issues because the Government has asserted, or has expressed its intention to assert, the state secrets privilege with respect to the alleged central facts of all of the cases. Such issues, however, may include, among others, jurisdictional issues (discussed further below), standing, how the state secrets privilege applies in the cases other than *Hepting*, preemption of state laws, whether the conduct alleged falls within the ambit of the various causes of action asserted by the plaintiffs and the potential applicability of various statutory or common law authorizations, immunities and defenses to those causes of action.

V. PENDING AND CONTEMPLATED MOTIONS.

A. The Plaintiffs' position.

1. Pending motions.

In some of the cases, there are pending motions that should be heard.

a. Motions for remand.

Remand motions are either pending, or will be filed once the transfer process is complete, in *Riordan*, *Campbell*, *Bready*, *Chulsky.* and *Mink* (if *Mink* is transferred). Those

cases, their transfer status, and the status of the briefing on the remand motions, is shown in the chart in Part III.C. above.[11]

Of the five cases in which remand is an issue, *Mink* is the only case in which transfer is being contested. Because the remand motions go directly to the issue of the Court's subject matter jurisdiction, the Removed Plaintiffs request that the motions in the cases already before the Court, or in the process of being transferred without opposition in the case of *Chulsky*, be decided without delay and without awaiting the outcome of the transfer decision in the *Mink* or other subsequently tagged cases.[12]

The issues presented on remand are independent of the other issues related to these MDL proceedings. Moreover, until the remand motions are decided, these plaintiffs' claims will remain in suspended animation, unnecessarily prejudicing these plaintiffs by impeding their ability to pursue their claims in state court, if remand is proper, and precluding their active participation in this forum otherwise. For example, plaintiffs contemplate the filing of consolidated complaints within 30 days of the issuance of a case management order by the Court, with responsive pleadings to be filed by Defendants 30 days later. While amended consolidated complaints could be filed promptly as to the state law claims, this process cannot be finalized until the remand motions have been decided, at which time it will be known if the state court claims will be included in this MDL. The Removed Plaintiffs also believe that they could suffer substantial prejudice if other case planning and activities go forward before a ruling on the remand motions but these removed

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[11] Counsel for plaintiffs in two of the removed cases (*Conner, et al. v. AT&T Corp., et al*,. Case No. C-06-5576 VRW and *Cross, et al. v. AT&T Inc, et al*, Case No. C-06- No. C-06-6224 VRW) have informed the Removed Plaintiffs that they do not intend to file remand motions.

[12] The Judicial Panel on Multi-District Litigation will not consider the *Mink* motion to vacate the conditional transfer order until its November 30, 2006 calendar. Should the Panel order the transfer of the case, it is unrealistic to expect the transfer process to be completed in *Mink* until some time in January or February. Counsel for Plaintiff in *Mink* has authorized us to inform the Court that the *Mink* plaintiff does not oppose this scheduling proposal but reserves the right to file her own motion to remand on the issues not already addressed by the other remand motions if her case is in fact transferred to this Court.

cases end up in this MDL.

Defendants, themselves, concede that the majority of the issues raised by Plaintiffs' remand motions can be determined without reference to state secrets, and argue that at least two grounds exist to deny remand without visiting state secrets at all. *See* p. 24, *infra*. While Plaintiffs strongly disagree with Defendants' analysis of whether removal was proper, the Court should resolve those questions immediately so that, if Plaintiffs are to remain in federal court, they can proceed accordingly.

Defendants also argue that a third basis for removal—whether there is jurisdiction under the "acting under" the direction of a federal officer provision of 28 U.S.C. section 1442(a)(1)—cannot be decided without implicating state secrets. Plaintiffs again strongly disagree. The Court can determine whether or not this issue necessarily implicates state secrets only after having the benefit of the full briefing on the remand motions that is already before the Court. The question cannot be decided in the context of a few sentences in a case management statement.

Likewise, there is no reason to refuse a hearing on pending remand motions while awaiting potential transfer of cases initiated by the federal government against state regulators. Even the transfer process for those cases will take several more months: the *Volz* case is not even set for hearing on the November JPMDL calendar, and so will be considered for transfer at the earliest in late January. *See* chart on pp. 12-13, *supra*. Moreover, if those cases were transferred, there is no dispute over the existence of federal jurisdiction as to suits brought by the U.S. government. While those cases may eventually present issues of whether or not various state laws are preempted, defendants neglect the fact that a preemption defense would not confer federal jurisdiction. *See Caterpillar, Inc. v. Williams*, 482 U.S. 383, 393 (1987, 481 U.S. 58, 63-64 (1987); *In re Miles*, 430 F.3d 1083, 1095-96 (9th Cir. 2005) (Berzon, J., concurring in part and concurring in the results) (even if there were an "ironclad" preemption defense in state court, that "does not mean that [the state law claim] is 'completely preempted' in the choice-of-law sense that governs removal

jurisdiction").[13]

Thus, the motions to remand should be set for hearing promptly, with the Court to decide, in the context of full briefing, whether the cases should be remanded and whether the state secrets privilege has any impact on that determination. To this end, the Removed Plaintiffs urge the Court to adopt the briefing schedule set out below. To minimize duplicative briefing, they propose that the Court order that the thorough briefing by plaintiffs, defendants, and the government in the *Riordan* and *Campbell* cases on the common issues of federal question jurisdiction and jurisdiction under 28 U.S.C. section 1442(a)(1) ("acting under" the direction of a federal officer) be adopted as the briefing on those issues in *Chulsky* and *Bready*. Thus, the defendants' additional opposition, any additional statement of interest in opposition filed by the government, and plaintiffs' reply thereto will be limited to addressing issues that turn on the particulars of the state law governing the plaintiffs' claims in *Chulsky* and *Bready* and to questions of diversity jurisdiction (which are at issue in *Chulsky* and *Bready* but not at issue in *Campbell* and *Riordan*). To further minimize the number of briefs, they suggest that defendants file a single opposition brief addressing the relevant issues in *Chulsky* and *Bready*, and that if the government wishes to file a statement of interest, it file a single statement addressed to both cases. Similarly, plaintiffs in *Chulsky* and *Bready*, will file a joint reply. Briefing should proceed as follows:

- Defendants' joint opposition to the motions to remand and any statement of interest by the United States to be filed within 7 days of notice of transfer of the *Chulsky* case to this Court;
- Plaintiff's joint reply to be filed 14 days later; and

Argument on the motions to remand in all cases to be set for 14 days after the date

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[13] Similarly, plaintiffs strongly disagree with defendants' arguments that the government's desire to intervene would render remand "futile." In all events, that subject is already fully briefed and due to be considered at the hearing on the motions to remand, not resolved through a CMC statement.

for filing of the last reply brief.

b. Preliminary Injunction in *Hepting*.

The *Hepting* plaintiffs filed a preliminary injunction motion seeking interim relief on their claims on March 31, 2006. (Hepting Dkt. 16). The motion remains pending.

c. AT&T Inc. Motion to Dismiss in *Hepting*.

AT&T Inc. (Hepting Dkt. 79) moved to dismiss on April 28, 2006, asserting that this Court lacks jurisdiction over AT&T Inc. This motion was heard on June 23, 2006, but has not been decided.

d. Media Motions to Intervene and Plaintiffs' Motion to Unseal

The media intervenors' motions to intervene and unseal documents in *Hepting* (Hepting Dkts. 133 and 139) and the *Hepting* plaintiffs' motion to unseal the exhibits to the Marcus Declaration that are already available on the Internet (Hepting Dkt. 278), which have already been filed, can be heard without implicating the state secrets privilege, because the United States has already admitted that these documents fall outside the privilege.

e. The Government's Motion to Dismiss in *Guzzi*.

In *Guzzi v. Bush, et al. Civil Action No. 06-136 (JEC),* the Government filed a Motion to Dismiss the action on July 18, 2006 (Guzzi Dkt. 8). This motion has yet to be heard or decided.

2. Contemplated motions.

a. Motions to dismiss.

As described below, the EFF/ACLU plaintiffs intend to file either separate consolidated complaints organized by defendant group for each defendant except AT&T, while the *Payne* plaintiffs prefer a single consolidated complaint. *See* Part VI.B.1. (addressing the Court's question about whether plaintiffs intend to file consolidated complaints).

Plaintiffs believe that the other defendants should be compelled to answer or file and serve responsive pleadings to the consolidated complaints on the plaintiffs' proposed

schedule. *Id.*[14] Plaintiffs are, however, willing to agree to a schedule that staggers the response deadlines for the other defendants, putting the response by MCI first and having the others decided thereafter.

In approaching the anticipated motions to dismiss, most of the Court's rulings in *Hepting* appear to be directly applicable to the other telecommunications carrier-defendants,[15] and plaintiffs are willing to enter into appropriate stipulations with defendants to avoid unnecessary relitigation of those issues (without waiver of the parties' respective appellate rights).

However, the issue of whether or not the alleged turnover of telecommunications records is or remains a legitimate state secret must be decided on a defendant-by-defendant basis. For instance, Verizon has tacitly admitted that its recently-acquired subsidiary, MCI, did provide its customers' telephone records to the NSA.[16] Accordingly, this important issue must be litigated regardless of how the Ninth Circuit rules in *Hepting*, and any

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[14] Plaintiffs propose that: their consolidated complaints be due to be filed within 30 days of the Court's issuance of its case management order; defendants and the government, if applicable, be directed to file and serve any pleadings in response to such complaints within 30 days thereafter; plaintiffs' oppositions to any dispositive motions filed and served 30 days after service; and defendants' replies filed and served 14 days after service of plaintiffs' responses. *See* Part VI.B.1.

[15] Specifically, the Court's holdings that: (1) the "categorical *Totten*/*Tenet* bar" does not apply, *Hepting*, 439 F.Supp.2d at 993; (2) "the very subject matter of this action is hardly a secret"warranting dismissal based on the state secrets privilege, *id.* at 994; (3) "plaintiffs have stated sufficient facts to allege injury-in-fact for all their claims" establishing Article III standing, *id*. at 999 ; (4) "even if plaintiffs were required to plead affirmatively that AT&T did not receive a certification authorizing its alleged actions," an allegation that it acted "without judicial or other lawful authorization" is sufficient, *id.* at 1005 ; (5) "even if a common law immunity existed decades ago, applying it presently would undermine the carefully crafted scheme of claims and defenses that Congress established in subsequently enacted statutes," *id*. at 1005; and (6) "neither the history of judicially created immunities for telecommunications carriers nor the purposes of qualified immunity justify allowing AT&T to claim the benefit of the doctrine in this case," *id*. at 1009).

[16] On May 16, 2006, Verizon issued a statement that "until just four months ago [i.e., prior to Verizon's acquisition of long distance carrier MCI], Verizon had three major businesses," and that "Verizon was not asked to provide, nor did Verizon provide, customer phone records from any of these businesses . . . ." *See id*. at 989. Later that day, the Verizon spokesman identified in the statement clarified that its denial "was about Verizon, not MCI." *See Verizon says it isn't giving call records to NSA*, USA Today (May 16, 2006) (available at http://www.usatoday.com/news/washington/2006-05-16-verizon-nsa_x.htm).

motions to dismiss on this ground should go forward as soon as possible.

- Thus Plaintiffs suggest that either all non-AT&T defendants be required to respond to the consolidated complaints, or that only MCI be so required, so that the specific facts concerning that company can be evaluated and decided first.

b. Motion for class certification.

Class certification processes can be initiated, when appropriate, without implicating the state secrets privilege. Plaintiffs may seek to file an amended consolidated complaint against the AT&T defendants prior to seeking class certification.

B. The Government's position.

As noted, the Government's position is that this MDL proceeding should be stayed pending the *Hepting* appeal. Absent a stay, the Government would file a motion to dismiss the transferred cases on state secrets privilege and other grounds. No discovery should proceed until after those motions are resolved. The Government will not stipulate to be bound by the *Hepting* decision in these consolidated actions. It makes little sense, however, for the Government to prepare and file a motion or motions to dismiss, and to assert the state secrets privilege as to the cases consolidated in this proceeding, since the *Hepting* appeal may make such proceedings completely unnecessary and, at the very least, may have a significant effect on the legal landscape. The Government respectfully submits that the Court should not engage in an extensive, significant, and highly burdensome undertaking that would largely replicate the state secrets issues raised in *Hepting*. If the Court does not stay this proceeding, in light of the number of actions and the significance of the state secrets privilege, the Government requests that its response to the complaint(s) be due 60 days after the plaintiffs file a master or otherwise consolidated complaint(s). In addition, the Government does not agree that litigation concerning allegations as to the collection of call records information should proceed or be addressed on a defendant-by-defendant basis. These allegations were addressed by the Court in *Hepting* and the Court's decision as to the matter is now subject to interlocutory review. If the case is not stayed, these allegations should be subject to a motion to dismiss before any discovery proceedings.

Briefing on class certification issues is not possible since any issue of typicality or commonality of alleged class claims would clearly be bound up in the underlying facts as to what alleged injuries plaintiffs have suffered, and whether the actions alleged to have caused those injuries by either NSA or the carriers could be confirmed on denied in light of the Government's state secrets privilege assertion.

The Government does not agree to plaintiffs' proposed limits on its right to brief remand issues in *Bready* and *Chulsky*.

C. The Carriers' position.

Given the singular significance of state secrets to these actions, none of the pending motions should proceed while this key issue is pending appellate review. There is no benefit to be gained from having the parties brief and this court decide motions when the outcome of the appellate process could easily result in the outright dismissal of these cases or, at the least, may well require further briefing and reconsideration of how the state secrets privilege applies to the allegations and circumstances of the non-*Hepting* cases after appellate guidance is received. The plaintiffs' proposed course of unrestrained litigation of these matters could effectively deny the Government its right to the appeal of the decision to recognize its state secrets privilege only partially.

Moreover, the extent of discovery, if any, afforded to the plaintiffs in support of their motion for a preliminary injunction depends heavily on the appellate resolution of the state secrets issue. Equally important, the ability of the carriers to articulate their defenses to such a motion would also depend centrally on the appellate resolution of the state secrets issue. Briefing of the preliminary injunction at this juncture would deny the carriers any ability to offer an effective factual defense. Moreover, plaintiffs' suggestion that briefing on a preliminary injunction motion (or any other of their suggested motions) could occur only in *Hepting* or any other single case is inappropriate: all the cases against all the carrier defendants have been sent to this Court for coordination and consolidation, and attempting to decide the relevant legal issues in the context of only one case against one of the defendants would be neither fair nor efficient.

The Court also could not efficiently decide the jurisdictional issues regarding pending motions to remand prior to the appellate resolution of the state secrets issues. To be sure, the Court could deny remand on the ground that the state law claims implicate significant federal issues under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005). In *Clayton* v. *AT&T*, C.A. 2:06-4177 (W.D. Mo. Oct. 13, 2006) (denying plaintiffs' motion for remand on *Grable* grounds), a federal district court has already denied remand in light of the obvious federal issues central to this case, and this Court could follow that path. Removal of these actions, however, also was based on the allegations that carriers took actions as federal officers. The factual predicate for this ground for removal – whether the carriers acted at the behest of the federal government – is directly controlled by the appellate resolution of the state secrets issue. The remand issue thus could not be resolved *against* the carriers without addressing whether federal officer removal—which is one the principal grounds for removal in each case—is available to them because the appropriateness of federal officer removal directly implicates the alleged relationship between the carriers and the Government which is the subject of the Government's state secrets privilege.

Should the Court not deny the remand motions on *Grable* grounds or stay these proceedings pending the Ninth Circuit's guidance on state secrets in *Hepting*, it would need to address the further ground for denial of the remand motions, namely whether federal statutory and common law completely preempt state law. Efficiency suggests, however, that the Court not rule on the preemption issue in the remand cases until the transfer process is complete and the Court knows whether it will have before it the federal-state cases conditionally transferred to this Court in CTO-3 and CTO-4. In those cases, where the Government has brought suit against state agencies and officials to enjoin their actions, dispositive motions will need to be resolved concerning the appropriate role, if any, that state law plays in these disputes. Thus, the Court will need to consider the issue of preemption across these sets of cases, and its views on preemption in the federal-state cases could prove dispositive of the remand question in all of the cases should the Court agree

that federal statutory or common law completely preempts state law in this context. And remand in these cases would in any event be entirely futile, as the Government indicated in the *Clayton* remand, because the Government could intervene and re-remove any action to re-establish federal jurisdiction, even if remand were granted.

Regarding the pending motions to dismiss AT&T Inc. based on personal jurisdiction, there is no reason for the Court to move forward on this motion at this point, although it could likely do so unless jurisdiction based on specific conduct at issue is invoked. (If plaintiffs do intend to argue specific jurisdiction, that would implicate the subject matter jurisdiction issues raised by the *Totten* bar and state secrets privilege.) Given the fundamental issue regarding subject matter jurisdiction implicated by the state secrets issue on appeal, there is no need for the Court to address prematurely issues of personal jurisdiction over discrete entities.

The class certification process cannot be initiated without implicating state secrets issues. One foundational requirement of class establishment is the typicality of injury requirement, and this inquiry is intimately bound up with facts concerning the plaintiffs' purported injury and the relation of that injury to the injury of the remainder of the purported classes. In these cases, neither the representative plaintiffs nor the purported classes have any concrete or competent evidence about their alleged injuries because of the state secrets privilege. Accordingly, this issue cannot be resolved without the resolution of the appeal of the state secrets privilege. If standing cannot be litigated pending the outcome of the appeal, then *a fortiori* the Court cannot make any necessary findings on typicality or certification. Even were particular individuals to assert standing on specific facts, the typicality of their alleged injuries to the remaining plaintiffs could still not be assessed without confronting state secrets issues.

In any event, there is no reason to require the expedited briefing schedules suggested by the plaintiffs for any of these motions or the limits they propose for briefing of the remand issues in *Bready* and *Chulsky*. Plaintiffs have failed to demonstrate any special urgency to resolving these motions that should put the parties and the court to the extra

burden of deviating from standard briefing schedules. Further, plaintiffs' suggestion that the schedule be staggered in some way so that certain defendants such as MCI can be required to respond to plaintiffs' consolidated complaint first makes no sense and would undercut the purpose of MDL coordination. The plaintiffs' purported rationale for this suggestion—that Verizon has "tacitly admitted" that MCI provided customer records to the NSA—is contrary to fact. Indeed, the very statement that plaintiffs quote expressly stated that "Verizon cannot and will not confirm or deny whether it has any relationship" to the alleged NSA program.

VI. THE SUBJECTS IDENTIFIED IN THE ORDER.

A. Does the government intend to assert the state secrets privilege in all of the cases transferred pursuant to MDL 1791? (Order ¶ 2(a)).

1. The Government's Position.

The Government's position is that further proceedings in this action should be stayed pending resolution of the petition for interlocutory review in *Hepting*. If not stayed, the Government expects to assert the state secrets privilege in all the cases currently transferred (*see* part VI.C.2.b, p. 34, *infra*), but also expects to raise other applicable grounds for dismissing these actions, including plaintiffs' inability to establish standing, which may not require consideration of state secrets privilege in every case or as to every claim.[17]

2. The Plaintiffs' Position.

The government has only intervened in these cases for purposes of raising the state secrets privilege. It has no standing to raise other issues based on the limited nature of its intervention and should not be allowed to do so.

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[17] Plaintiffs' position that the Government cannot raise any issues other than the state secrets privilege is baseless. Where the Government has intervened in these cases, it has done so for the purpose of seeking dismissal, not just to assert the state secrets privilege. Indeed, in both *Hepting* and *Terkel*, the Government raised additional grounds for dismissal, such as standing, the *Totten* bar, and statutory privileges. Moreover, the Government is itself a party to some of the transferred cases; obviously, its participation in those cases also is not limited to the state secrets privilege.

B. Do plaintiffs intend to file consolidated complaints? (Order ¶ 2(b)).

1. The Plaintiffs' position.

The Court asked whether plaintiffs intend to file consolidated complaints. The Court also noted that it is considering the appointment of lead counsel or a steering committee for representation of "parties with similar interests." Order, ¶ 5(b).

a. The EFF/ACLU Group.

As described more fully in the EFF Group's proposed Joint and Agreed Organization Plan (filed separately by plaintiffs today), plaintiffs propose a litigation structure organized by major defendant category. The structure has two main components: (1) an executive committee composed of interim class counsel for each of the major defendants and their affiliated entities (AT&T, Verizon, MCI, BellSouth, Sprint) and for a category of "other defendants"; and (2) co-lead coordinating counsel to maintain overall coordination of the litigation, consisting of the Electronic Frontier Foundation, lead counsel in *Hepting*, and the ACLU of Illinois, lead counsel in *Terkel*.

Non-AT&T Defendants:

The EFF Plaintiffs therefore contemplate the filing of separate consolidated complaints for each of the major defendants MCI, Verizon, BellSouth, Sprint (and their affiliated entities) and for the category of other defendants.[18] As noted above at Part V.A.2., the EFF Plaintiffs believe that the issue of whether or not the alleged turnover of telecommunications records is or remains a legitimate state secret must be decided on a defendant-by-defendant basis.

The EFF Plaintiffs request that the consolidated complaints described above be due to be filed within 30 days of the Court's issuance of its case management order. The EFF

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[18] Plaintiffs will likely need to amend these consolidated complaints if new cases raising different claims are transferred into this proceeding by the MDL panel, or if the cases seeking remand, discussed at Part V.A.1., which raise state law claims, are not remanded. Additional operative complaints might need to be utilized if the MDL panel transfers cases brought by the United States against various state public utility commissions.

Plaintiffs request that defendants (and the government, if it chooses to respond) be directed to file and serve any pleadings to plaintiffs' consolidated complaints within 30 days thereafter, with plaintiffs' responses to any dispositive motions filed and served 30 days after service, and defendants' replies filed and served 14 days after service of plaintiffs' responses. As noted above, plaintiffs would agree to an alternate arrangement where only MCI was required to respond to the consolidated complaint at this time, with the responses of other defendants delayed until further Order of the Court, after a determination of the anticipated motions to dismiss the case against MCI from the defendants and the government.

AT&T Defendants:

The EFF Plaintiffs do not, however, intend to file a consolidated complaint against defendant AT&T at this time, and instead ask that *Hepting* be considered the lead case for those defendants. *See* MANUAL FOR COMPLEX LITIGATION, FOURTH, Sec. 10.123 (Federal Judicial Center 2004) ("Another coordination method is to designate a "lead" case in the litigation; rulings in the lead case would presumptively apply to the other coordinated cases, and the judges in those cases may stay pretrial proceedings in those cases pending resolution of the lead case.").

Plaintiffs believe that it would cause unnecessary delay and possibly undermine the appeal to file a consolidated complaint against AT&T because: a) the Court has already decided the sufficiency of the complaint against AT&T in *Hepting*; b) the parties have sought appeal of the state secrets privilege issues based on the First Amended Complaint; c) *Hepting* involves both interception and stored communications records claims; d) the *Hepting* plaintiffs' motion for preliminary injunction, supported by record evidence, is currently pending for decision by the Court.

The EFF Plaintiffs believe the more appropriate course would be to treat the *Hepting* amended complaint as the controlling complaint with regard to AT&T, at least until the appeal is complete, and to narrowly focus activities in all other cases against AT&T pending completion of appeal of the state secrets privilege issue. Such activities in

the AT&T cases should include discovery (as discussed below), proceedings relating to the preliminary injunction motion, and motions to remand. The AT&T defendants' time to respond to all complaints other than *Hepting* shall be extended until further order of the Court, likely after determination of the Ninth Circuit appeal in *Hepting*.

The EFF Plaintiffs also believe that AT&T should be compelled to file its Answer to the *Hepting* complaint. This Court has already held that information about a certification concerning the interception of communications "would be revealed only at the same level of generality as the government's public disclosures, [and that] permitting this discovery should not reveal any new information on the NSA's activities or its intelligence sources or methods, assuming that the government has been truthful," *Hepting*, 439 F.Supp.2d at 997. It has also said that "the very subject matter of this action is not a 'secret.' " *Id.* at 994.

AT&T's claims that it cannot provide any portion of its Answer without violating state secrets are unwarranted. *Id.* at 996-997 ("[t]he court envisions that AT & T could confirm or deny the existence of a certification authorizing monitoring of communication content through a combination of responses to interrogatories and *in camera* review by the court").

Accordingly, the EFF Plaintiffs believe that even if some portions of the Answer might raise state secrets concerns, the correct response is to follow the Congressionally created processes for handling claims of national security in such cases, provided in Section 1806(f) of the Foreign Intelligence Surveillance Act. *See* 50 U.S.C. § 1806(f); *see also Halpern v. U.S.*, 258 F.2d 36, 43 (2nd Cir. 1958); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2nd Cir. 1977); *Spock v. U.S.*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978) (endorsing creative solutions to manage state secrets privilege issues).

Section 1806(f) provides for *in camera* and *ex parte* review of "materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." *See generally* Plaintiffs' Opp. to Gov't Motion to Dismiss, pp. 21-24 (*Hepting* Dkt. 181). AT&T can file its complete Answer directly in chambers, and can serve and file those portions that do not implicate disputed

material on the public record.[19] AT&T's renewed claim below, that 50 U.S.C. §1806 only applies to situations in which the surveillance is to be used in a criminal case, has been briefed at length by the parties already, and was discussed at length at the hearing on the motions to dismiss in June. Plaintiffs are of course willing to address that issue again should the Court seek additional briefing, but will not do so as part of this already lengthy joint Case Management Conference Statement.

b. The Payne Group.

Plaintiff Payne, whose action was recently transferred from the Southern District of New York, believes it is appropriate to file a single consolidated complaint against all Defendants for the claims that the defendants have unlawfully disclosed to the government detailed communications records of their customers. Plaintiff Payne has submitted a proposed organizational plan submitted herewith as Attachment C.

2. The Government's and the Carriers' position.

a. Master Complaint.

The Government and the Carriers believe that if the Court does not stay proceedings in their entirety, it should require plaintiffs to file a single master complaint. The filing of a single complaint would streamline the litigation and be a more efficient and practical way of presenting the relevant issues that would be addressed by the Government's invocation of the state secrets privilege, both for the Court and for the many parties involved. It is also manifestly feasible given that many of the complaints in cases transferred to this MDL assert claims against multiple carrier defendants. Further, regardless of the number of complaints that the plaintiffs file, any further motions or other proceedings should occur, if at all, on a consolidated basis, not in a piecemeal fashion in *Hepting* or in any other case. If the Court does not stay this proceeding, the Government and the Carriers request that their

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[19] Since the state secrets privilege belongs to the government, AT&T may need some guidance determining which paragraphs to redact. It would seem appropriate for the government to file papers identifying which specific paragraphs of the Complaint it would object to AT&T answering publicly pending the interlocutory appeal.

respective responses to the complaints be due 60 days after the plaintiffs file a master or otherwise consolidated complaint(s).

b. *Hepting* Answer.

No benefit would be served by requiring AT&T to file an answer in *Hepting.* The allegations in the *Hepting* Complaint go to whether AT&T assisted NSA in carrying out certain alleged intelligence activities, and these allegations are at the heart of the Government's state secrets assertion. The Government has already made clear that these allegations implicate state secrets. Moreover, AT&T will be unable to tender affirmative defenses supported by an adequate evidentiary foundation, much less decide which ones are potentially applicable, prior to the resolution of the state secrets issue.

Accordingly, putting AT&T and the Government to the task of redacting facts from the answer is not only pointless but risky. The Government has already provided the Court, *ex parte*, *in camera*, with a description of the state secrets at issue in the Complaint, and answering the Complaint is not necessary to apprise the Court of the underlying privileged facts at stake. Moreover, the process of redaction presents potential risks, since the identification of specific allegations that are—and are not—subject to the state secrets privilege might tend to reveal the underlying privileged information not only in *Hepting* but also, by comparison, in other cases where similar information may or may not be confirmed or denied.

In particular, as should be obvious from the Government's prior privilege assertion, any effort to require any of the carriers to address the issue of whether a certification exists, in whatever form, lies at the heart of the state secrets privilege assertion and the pending appeal in *Hepting*. Indeed, one of the key issues currently subject to appellate review is whether AT&T or any carrier could reveal such a certification at any level of generality. Attempting to do so would not only moot a significant aspect of the appeal but would present the very risks to national security that the Government seeks to prevent through its privilege assertion.

c. Section 1806(f).

Plaintiffs' suggestion that 50 U.S.C. § 1806(f) could be applied in the process of answering the Complaint is meritless. As the Government has already explained, 50 U.S.C. § 1806(f) is not applicable in this action. *See* United States' Reply in Support of the Assertion of the Military and State Secrets Privilege and Motion to Dismiss Or, in the Alternative, for Summary Judgment by the United States (Dkt. 245) at 18-23. In sum, Section 1806(f) was enacted to enable the Government to protect classified intelligence information in a challenge to alleged unlawful surveillance under the Foreign Intelligence Surveillance Act ("FISA") that has already been made known. Section 1806(f) is not a means to discover whether surveillance has occurred in the first place, as plaintiffs are attempting to do here. *See ACLU Foundation v. Barr*, 952 F.2d 457, 468-69 & n.13 (D.C. Cir. 1991) ("The government makes this point, with which we agree, that under FISA it has no duty to reveal ongoing foreign intelligence surveillance.") (citing S. Rep. 95-604, Pt. 1, 95th Cong., 1st Sess., at 59 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3960-61); *In re Grand Jury Investigation*, 431 F. Supp. 2d 584, 591-92 (E.D. Va. 2006) (finding that, in grand jury proceedings, neither the non-target witness nor the potential target was entitled to notice under the FISA of whether there was any warrantless NSA electronic surveillance of the potential target). In this case, the very threshold question of whether or not plaintiffs have been subject to surveillance is a state secret, and plaintiffs cannot use FISA to attempt to confirm their belief that they have been subject to surveillance. *See ACLU Foundation v. Barr*, 952 F.2d at 468-69 & n.13. Furthermore, this statutory provision cannot and does not purport to preempt the constitutionally-based state secrets privilege.[20] If the Court wishes, the Government will brief this issue further.

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[20] Plaintiffs' reliance on *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958) is misplaced as subsequent Second Circuit make clear. In *Clift v. United States*, 597 F.2d 826, 829 (2d Cir.1979), the Second Circuit revisited *Halpern* and rejected the notion that statutory law superseded the state secrets privilege and that *in camera* proceedings involving the Government's state secrets privilege assertion could proceed. *See also Clift v. United States*, 808 F. Supp. 101, 109-111 (D. Conn. 1991) (*Halpern* does not stand for proposition that statutory *in camera* process may supersede state secrets privilege).

In its Order of June 6, 2006 (Dkt. No. 171), the Court did not resolve whether Section 1806(f) is applicable here, *see id*. at 6, and this provision need not be invoked or utilized for purposes of an Answer. If the Court wishes to have an Answer, one could be submitted which states, where applicable, that a response to a particular paragraph would implicate the Government's state secrets privilege assertion. Because of the risk of inadvertent disclosure, the Government would necessarily take a broad view as to such information.

C. What issues in these cases may be resolved without implicating the state secrets privilege, if asserted? (Order ¶ 2(c)).

1. The Plaintiffs' position.

As noted above, plaintiffs believe that the Court can resolve the legality of AT&T's conduct by permitting plaintiffs to pursue their preliminary injunction motion against AT&T[21], and whether the cases removed from state court should be remanded. In addition, when the Court permits dispositive motions as to plaintiffs' intended consolidated complaints against non-AT&T defendants, the Court can decide whether or not the alleged turnover or disclosure of communication records is or remains a legitimate state secret.

Plaintiffs also believe that:

The media intervenors' motions to intervene and unseal documents in *Hepting* (*Hepting* Dkts. 133 and 139) and the *Hepting* plaintiffs' motion to unseal the exhibits to the Marcus Declaration that are already available on the Internet (Hepting Dkt. 278), which have already been filed, can be heard without implicating the state secrets privilege, because the United States has already admitted that these documents fall outside the privilege.

Class certification processes can be initiated, when appropriate, without implicating

[21] Although the preliminary injunction motion against AT&T has already been briefed, plaintiffs believe that the Court should permit plaintiffs to amend their motion papers after completion of their proposed discovery given the likelihood that additional relevant facts will be established and the existence of facts publicly disclosed after the plaintiffs' motion papers were filed.

the state secrets privilege. Plaintiffs may seek to file an amended consolidated complaint against the AT&T defendants prior to seeking class certification.

In the conditionally transferred actions where state government authorities are investigating defendants' activities under state law, it is premature for this Court to address whether the states have authority to engage in such investigation. Instead, if those actions are ultimately transferred, the proper first step is to determine whether the cases brought by the United States should be dismissed, if the state government entities seek dismissal.

The question of whether a spoliation order should be put in place can be addressed immediately.

Once discovery is complete, it may be appropriate for the Court to entertain motions regarding the legal implications of any certification or certifications received by defendants.

2. The Government's position.

a. Motion to dismiss.

If further proceedings are not stayed pending the *Hepting* appeal and, thus, it becomes necessary for the Government to move to dismiss the transferred cases based on the state secrets privilege, then the Government also expects to raise other applicable grounds for dismissing these actions, including plaintiffs' inability to establish standing, which may not require consideration of state secrets privilege in every case or as to every claim. For example, plaintiffs in many of the transferred cases allege that the NSA has intercepted the content of their communications without a warrant, but such plaintiffs do not claim that they are in contact with members or agents of al Qaeda or affiliated terrorist organizations—the communications that fall within the Terrorist Surveillance Program. As a result, such plaintiffs clearly lack standing on the face of their allegations to raise content collection claims. Similarly, any allegations of injury that rely on a subjective chilling effect are foreclosed by *Laird v. Tatum*, 408 U.S. 1 (1972).

b. Federal-state actions.

In addition, some of the actions conditionally transferred to this Court concern whether state government entities have authority to investigate the alleged assistance of

telecommunications carriers in alleged NSA surveillance activities, and this issue of federal-state authority can be addressed without the need to assert the state secrets privilege.[22]

c. Preliminary injunction motion.

The *Hepting* plaintiffs' contention that their motion for a preliminary injunction could be litigated without implicating the Government's assertion of the state secrets privilege is specious. A cursory review of that motion reveals that it puts directly at issue whether AT&T has assisted the Government in alleged NSA intelligence activities and the merits of the lawfulness of those activities—matters that squarely implicate the state secrets privilege now subject to appellate review. For example, the "Statement of Facts" in plaintiffs' motion puts directly at issue facts concerning the Government's alleged warrantless domestic surveillance program. *See* Plaintiffs' Amended Notice of Motion and Motion for Preliminary Injunction; Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction (*Hepting* Dkt. No. 229) at 3. In that section, Plaintiffs put at issue facts concerning:

- AT&T's alleged collaboration with the Government program, *see id.* at 5, and
- The alleged creation of a secure room to facilitate the Government's program. *See id.* at 6.

Further, a threshold issue that must be considered before any injunction could issue is whether the Plaintiffs could even establish their standing to obtain any relief. Here again, the facts necessary to adjudicate whether these plaintiffs have in fact been injured by NSA's alleged actions or are likely to be injured in the future implicate the state secrets privilege; indeed, by itself this warrants dismissal of this case regardless of AT&T's alleged role.

In addition, a preliminary injunction motion, by definition, involves an inquiry into

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[22] *See United States v. Adams, et al.* (C.A. 06-00097 D. Me.)*; United States v. Gaw, et al.* (C.A. 06-01132 W.D. Mo.); *United States v. Farber, et al.* (C.A. 06-02683 D. N.J.); *United States v. Palermino, et. al.* (C.A. 06-01405; and *United States v. Volz et al.* (C.A. 06-00188 D. Vt.); *Clayton et al. v. AT&T et al.*, C.A. 06-4177 (W.D. Mo.).

whether plaintiffs have a likelihood of success on the merits. Addressing the merits not only requires a threshold factual determination as to whether AT&T collaborated with NSA, but also requires the facts needed to adjudicate the legality of the alleged actions under the Constitution and statutory law, including any potential defenses. Plaintiffs repeatedly allege collaboration between AT&T and the Government on the alleged surveillance. *See, e.g. id.* at 17, 18, 19, 22 (alleging arrangement between the Government and AT&T). And the *Hepting* preliminary injunction motion specifically puts at issue whether certifications were provided to AT&T, *see id.* at 21, again implicating a core state secrets issue. Beyond this, the specific facts concerning the alleged classified activities would be essential to deciding the statutory and constitutional claims. Finally, the *relief* sought also implicates the state secrets privilege at issue, because plaintiffs seek to halt AT&T's alleged involvement with NSA activities. In sum, it is mystifying how plaintiffs could assert that their preliminary injunction motion could be adjudicated without implicating the state secrets issues now raised for appeal in *Hepting*.

d. Class certification.

As noted, the Government's position is that briefing on class certification issues is not possible since any issue of typicality or commonality of alleged class claims would clearly be bound up in the underlying facts as to what alleged injuries Plaintiffs have suffered and whether the actions alleged to have caused those injuries by either NSA or the carriers could be confirmed or denied in light of the Government's state secrets privilege assertion.

3. The Carriers' position.

While the overarching issue of the state secrets privilege remains on appeal to the Ninth Circuit, consideration or resolution of other issues would merely waste judicial and party resources. Should the Court nonetheless decide to address certain preliminary issues prior to the Ninth Circuit's ruling, it should do so only to organize and define the scope of the proceeding, which obviously no longer consists of just the *Hepting* case. Such an approach would be the requisite first step in coordinating the cases to fulfill the purposes of

the MDL process rather than proceeding in the helter-skelter fashion the plaintiffs propose in which isolated cases would move forward, while others would not. In particular, the Court could require appointment of a plaintiffs' steering committee and the filing of a consolidated Master Complaint. The Court also could resolve the issue of personal jurisdiction regarding certain corporate defendants, and motions regarding sealing or intervention, as well as potentially the pending motions to remand (though, as discussed in part V.C above, the Court may be unable to fully resolve the remand motions without implicating the state secretes privilege).[23] Resolution of any of these issues, however, could well be rendered moot by the appeal. And most certainly, contrary to the plaintiffs' position, the discovery and factual issues raised by the preliminary injunction motion, or even an answer to any complaint, would implicate the state secrets issues on appeal, as discussed above.

D. What discovery may proceed and how should it be coordinated? (Order ¶ 2(d)).

1. The Plaintiffs' position.

No discovery has yet occurred in this proceeding. Plaintiffs and defendants participated in a F.R.C.P. 26(f) conference on Oct. 30, 2006, and discussed some issues regarding discovery.

The Court has already indicated its willingness to adopt creative approaches to the litigation of this case, as expressly contemplated by precedent. *E.g.*, *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983) (recognizing that the trial judge had discretion to develop procedural innovations to ensure that the government justifies its privilege). For instance,

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[23] Defendants Bright House Networks, LLC ("BHN") and Charter Communications, LLC, ("Charter") whom plaintiffs have included in the classification "other defendants," agree that all further proceedings in these cases should be stayed pending the resolution of the state secrets privilege. However, should the Court decide to address other preliminary issues, these defendants would ask the Court to dismiss the claims against them for, *inter alia*, failure to state claims for relief against them. Neither BHN nor Charter were named in the press reports upon which plaintiffs based their claims, and plaintiffs have failed to allege any particular conduct by either BHN or Charter to suggest that plaintiffs have any basis for naming either company in these cases.

with respect to the purported certifications at issue in *Hepting*, the Court held that discovery could proceed "through a combination of responses to interrogatories and *in camera* review by the court." *Hepting*, 439 F.Supp.2d at 997.

a. Already issued discovery.

1. Some of the plaintiffs in this proceeding have served discovery requests that have not been answered. *E.g.*, *Hepting et al. v. AT&T*, 2006 WL 1581965 (N.D. Cal.), *1 ("discovery cannot commence until the court examines the classified documents to assess whether and to what extent the state secrets privilege applies").

a. The *Hepting* plaintiffs have a pending motion for preliminary injunction addressing only communication content claims against AT&T filed on March 31, 2006, nearly six months ago (Hepting Dkt. 16), which the Court has not scheduled for hearing. In connection with that motion, the *Hepting* plaintiffs served a Rule 30(b)(6) deposition notice and an associated document request on defendant AT&T Corp. tailored to address only issues raised by the preliminary injunction motion, which seeks production of "certifications or purported certifications." (Hepting Dkt 95). Defendant refused to comply with the 30(b)(6) notice, but did not move for a protective order. The Court has not yet permitted discovery to proceed, but has ruled that the state secrets privilege does not prevent AT&T from asserting a certification-based defense. *Hepting*, 439 F.Supp.2d at 996-997.

Plaintiffs seek to move forward with their pending preliminary injunction motion as quickly as possible, and propose: First, plaintiffs' previously noticed discovery should go forward. To the extent that this discovery implicates the government's state secrets concerns, it should proceed under the procedures outlined by the Court in its July 20, 2006 Order, including appointment of an expert pursuant to FRE 706 or a technical advisor as discussed during the August 8, 2006 hearing and the processes outlined in 50 U.S.C. §1806(f). To the extent that plaintiffs seek information that does not implicate state secret concerns (e.g., public statements by AT&T), discovery related to the injunction should go forward as it would in any other case.

Second, the Court should set a briefing schedule and early hearing date for plaintiffs' preliminary injunction motion. This briefing schedule should accommodate the discovery that plaintiffs seek in support of their motion and the filing of an answer by the AT&T defendants.

The United States may assert that the above discovery will implicate the state secrets privilege. In light of the Court's Order of July 20, 2006, however, plaintiffs at a minimum request that they be allowed to submit targeted interrogatories and requests for admissions to defendants, and that defendants be required to produce any certifications or other authorizations purporting to allow them to intercept the communications of their customers, as the Court has already anticipated. *Hepting*, 439 F.Supp.2d at 996-997.[24]

The *Terkel* plaintiffs filed, simultaneously with their complaint, a motion for leave to take limited expedited discovery. The motion referenced seven attached interrogatories directed at identifying whether AT&T had disclosed phone records to the federal government on statutorily approved grounds (including pursuant to "certification") or whether such grounds were absent. In view of the *Terkel* court's ruling on the motion to dismiss, it did not reach the motion for discovery.

b. Rules applicable to all discovery.

2. With respect to all discovery, plaintiffs believe that a combination of "screened" discovery and *in camera* review under the procedures of 50 U.S.C. § 1806(f), discussed above, will appropriately address all potential state secrets privilege concerns. Plaintiffs therefore suggest that it may be appropriate for the Court to screen some of the interrogatories and other written discovery requests, as well as deposition topics, to protect any state secrets that may be at issue.

3. Given the nature and magnitude of this case, plaintiffs should be excused

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[24] The government argues that it will "assert the state secrets privilege again as to any information related to any alleged certification to AT&T or to any carrier for that matter." Part VI.D.2. Plaintiffs suggest that the filing of state-secrets privilege objections in the context of specific discovery is likely to promote the efficient conduct of the litigation.

from the F.R.Civ.P. limits on the number of depositions, interrogatories and other discovery. Plaintiffs believe that the Court should instead set reasonable limits on discovery. If the Court accepts plaintiffs' suggestion that discovery that may implicate state secrets be screened, it will be in a central position to monitor and manage the discovery process. Fact discovery should be completed within 180 days from the entry of an appropriate order. The parties should then have an additional, 90 days for expert discovery. Once discovery is completed, the parties should have a reasonable time in which to prepare and bring dispositive motions.

4. Plaintiffs believe that the Court should immediately apply the proposed Federal Rules amendments governing electronic discovery, which are expected to go into effect on Dec. 1, 2006, to this proceeding. Plaintiffs are presently concerned with issues regarding defendants' preservation of relevant electronic evidence, including access logs and audit trails relating to defendants' databases. "Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes." Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 32 (Sept. 2005), http://www.uscourts.gov/rules/Reports/ST09-2005.pdf ("Summary Report"); id. at 31 ("important for counsel to become familiar with [client information technology] systems before the conference . . . . [to] develop a discovery plan . . . . identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.").

c. Specific discovery that can proceed immediately.

5. Finally, Plaintiffs further believe that significant discovery in this case can be conducted without any implications for state secrets and should proceed immediately.

6. With respect to all defendants, the following discovery, at a minimum, would be appropriate:

a. Discovery raised by any defenses raised in defendants' Answers that do not implicate the Government's state secrets claims, including production of any documents that defendants assert are relevant to a certification-based defense

against plaintiffs' communications content claims.

b. Discovery into public statements by the United States, government officials, or their spokespersons or agents regarding any warrantless interceptions of communications or disclosure of calling or data records held or maintained by any telecommunications carrier or their agents, including the statements themselves as well as all non-privileged internal documents concerning those statements.

c. Discovery into public statements issued by defendants or made by their officers, spokespersons or agents regarding any warrantless interceptions of communications traveling over its networks or disclosure of calling or data records held or maintained by defendants or their agents, including the statements themselves as well as all non-privileged documents concerning those statements.

d. Third-party discovery to other telecommunications carriers concerning public statements issued by them or statements made by their officers, spokespersons or agents regarding any warrantless interceptions of communications traveling over their networks or disclosure of calling or data records held or maintained by those carriers or their agents, including the statements themselves as well as all non-privileged documents concerning those statements.

e. Defendants' responses to the investigations undertaken by public utility commissions nationwide, as well as the responses of other telecommunications providers, and any non-privileged drafts or preparatory materials.

f. Any statements by defendants or other telecommunications carriers or their agents to the Securities and Exchange Commission regarding warrantless interceptions of communications or disclosure of calling or data records, and any non-privileged drafts or preparatory materials.

g. Any waivers or other correspondence from the Director of National Intelligence or his agents in reliance on the authority granted by the President in FR Doc. 06-

4538, 71 Fed. Reg. 27943 (May 12, 2006) and sent to private telecommunications companies exempting them from SEC reporting requirements.

h. Responses by defendants and third-party telecommunications providers or their agents to congressional letters concerning warrantless interceptions of communications or disclosure of calling or data records, and any non-privileged drafts or preparatory materials.

i. Discovery as to how information is routed by defendants and third-party telecommunications providers or their agents, which networks are shared by the defendants and third-party telecommunications providers or their agents, and what information is sent over these networks.

j. Discovery into which defendants, if any, have or had access to other defendants' calling or data records, and which non-party companies have or had access to defendants' calling or data records for purposes of providing billing, customer management or other services to defendants.

k. Written discovery as to the proper entities to be named as defendants.

7. With respect to AT&T:

l. The recent testimony of AT&T's Chief Executive Officer Edward Whiteacre on or about June 22, 2006, before the Senate Judiciary Committee and any non-privileged preparatory materials.

m. Discovery into the AT&T network aimed at confirming which communications travel through the San Francisco facility as well as similar facilities referenced in Mr. Klein's declaration and supporting materials and communications, and in the media. *See, e.g.*, Kim Zetter, *Is the NSA spying on U.S. Internet traffic?*, Salon.com (available at http://www.salon.com/news/feature/2006/06/21/att_nsa/print.html).

n. Any contracts between AT&T and the company that provided the sophisticated machinery referenced in Mr. Klein's declaration, plus all supporting materials

and communications.

o. All documents regarding the San Francisco facility (and similar facilities) referenced in Mr. Klein's declaration and supporting materials and communications provided to AT&T Inc. during the due diligence portion of the merger between AT&T Corp. and AT&T Inc.

p. All versions and drafts of the documents provided by Mr. Klein.

q. If necessary, jurisdictional discovery regarding AT&T Inc. As the Court is aware, if it grants AT&T Inc.'s motion to dismiss, plaintiffs have sought leave to conduct jurisdictional discovery.

2. The Government's position.

Because any discovery would be aimed at proving allegations and claims that inherently require the disclosure of state secrets to adjudicate, and because the Ninth Circuit will soon consider these very issues of privilege, the Court should grant a stay without further discovery at this time.

The Government has set forth above why plaintiffs' motion for a preliminary injunction obviously implicates the state secrets privilege issue pending in the *Hepting* appeal, and any discovery directed toward adjudicating this motion would directly implicate the Government's privilege assertion. We have also set forth above why Section 1806(f) would not apply to proceedings in this case, including discovery proceedings. We focus here on the specific discovery topics Plaintiffs have identified.

First, any discovery as to alleged certifications between the Government and AT&T would clearly implicate the central state secrets privilege question raised in *Hepting* and now subject to appellate review. Plaintiffs' observation that the Court has ruled that the state secrets privilege does not bar a certification-based defense is plainly beside the point, since this very issue is not on appeal. If discovery proceeds, the Government will assert the state secrets privilege again as to any information related to any alleged certifications to AT&T or any carrier for that matter. The Court would then be in the same position as it was in reviewing this privilege assertion in connection with the Government's motion to

dismiss in *Hepting*. There is no apparent point to repeating this process while an appeal is pending. The discovery sought by the *Terkel* plaintiffs also specifically demands that AT&T admit or deny whether it disclosed call records information to the National Security Agency, including pursuant to a certification or some other authority. That, of course, is the central allegation that the Court in *Terkel* dismissed pursuant to the Government's state secrets privilege assertion. Such discovery obviously should not proceed in light of the *Terkel* decision and, at the least, should await the Court of Appeals' decision in *Hepting* on the Government's state secrets privilege assertion.

Second, plaintiffs' suggestion of a Rule 30(b)(6) deposition of an AT&T official "tailored to address only issues raised by the *Hepting* preliminary injunction motion" will again lead to a state secrets privilege assertion. As noted above, the preliminary injunction motion raises most of the merits issues presented by these cases and, thus, the state secrets issue implicated by these cases. Even if somehow limited, such a deposition is fraught with the risk of disclosures that might tend to confirm or deny information that would implicate the Government's state secrets privilege assertion. The Government would have to object to any testimony that might tend to reveal information that cannot be confirmed or denied, and thus such a deposition will inevitably lead to another assertion of privilege—needlessly replicating what has already occurred in *Hepting*, and risking the disclosure of privileged information in the process.

Beyond this, the discovery plaintiffs seek is directed at proving the merits of claims that inherently implicate alleged classified intelligence activities. Any information, even if seemingly innocuous, supposedly non-privileged information, could tend to reveal small details that might tend to confirm or deny information implicated by the state secrets privilege and, thus, could potentially cause serious harm to national security interests of which the plaintiffs are simply not aware. For example, Plaintiffs seek to obtain discovery of statements from telecommunication carriers concerning their alleged involvement in NSA activities. *See, e.g.*, Plaintiffs' Discovery Items c-f, h. All such discovery is intended to prove the underlying claim of the carriers' alleged collaboration with NSA and, thus, all

of it implicates the state secrets privilege assertion on appeal. Plaintiffs' clear intention here is to compare and contrast such statements, attempt to draw inferences from them, and thereby attempt to undercut the Government's state secrets privilege assertion that the involvement of such carriers in NSA activities cannot be confirmed or denied. The Government's state secrets privilege assertion turns on whether the Government has set forth a reasonable basis that national security would be harmed if certain information is disclosed, confirmed, or denied. Plaintiffs are not privy to the facts at issue, nor to the specific national security interests at stake. This is an extremely serious matter, and any discovery directed at trying to undermine an assertion of the state secrets privilege could lead to unknown serious consequences and should not be permitted. There is little reason to embark on such a course where the central issue of privilege is pending on appeal. For this reason, the Government will object on state secrets grounds to any discovery that may undermine its assertion of privilege.

In addition, other discovery sought by plaintiffs clearly seeks to probe into core state secrets issues. Notably, plaintiffs seek discovery into AT&T's network and equipment referenced in the Klein Declaration. *See* Plaintiffs' Discovery Topics m-p. The very purpose of the testimony provided by plaintiffs' declarants is to confirm whether classified intelligence NSA activities are occurring through AT&T, and further discovery into these topics inherently implicates the Government's state secrets privilege assertion. The mere fact that a document about AT&T's network was not classified does not mean that any inquiry into what AT&T does or does not do with its network does not present national security issues. The Government will assert the state secrets privilege as to this area of discovery to protect its privilege assertion.

3. The Carriers' position.

In light of the Government's invocation of the state secrets privilege, no discovery should proceed at this time. Further, in no event should discovery occur in any case until threshold motions to dismiss are resolved in the consolidated cases. Each of the defendants is entitled to seek dismissal of the claims against it, and proceeding forward with discovery

before such motions are resolved would be inefficient and potentially unnecessary. Moreover, permitting discovery before the Ninth Circuit addresses the state secrets issues in *Hepting* inevitably would cause wide-ranging discovery battles and would create the need for repeated motions and possibly appeals as plaintiffs propound discovery requests to which the carriers cannot respond without fear of violating felony criminal provisions of the United States Code. Even seemingly innocuous discovery, such as carriers' prior public statements, would be wasteful and inefficient at this stage, particularly given that the relevance of those statements to the state-secrets privilege is one of the issues implicated by the *Hepting* appeal.

E. Appointment of lead counsel or a steering committee for representation of parties with similar interests (Order ¶ 5(a)).

1. The Plaintiffs' position.

Plaintiff Payne's Position is set forth in Attachment C. The EFF Plaintiffs' position is set out fully in their proposed Joint and Agreed Organization Plan, filed separately.

The Carriers have not yet indicated whether they intend to appoint a lead counsel or a steering committee for representation of parties with similar interests. Given the number of Carriers involved, Plaintiffs believe that such appointments would create efficiencies in the litigation.

2. The Government's position.

Since the Government has not seen the EFF Plaintiffs' organization plan, we cannot comment on it, and reserve the right to file supplemental views on this topic.

3. The Carriers' position.

The Carriers object that certain of the plaintiffs have chosen to withhold their proposal for a steering committee from the Carriers during the process of developing this document, in contravention of the Court's direction to meet and confer regarding this topic. Filing such a document separately does not relieve the plaintiffs of their meet-and-confer obligation. The Carriers reserve the right to file a supplemental response.

The Carriers suggest that this Court design a process for the selection of the

plaintiffs' steering committee that is transparent, protects the rights of all of the parties in all of the cases, and does not allow certain of the plaintiffs to exclude others from the committee. This may involve submissions of applications for court appointment to committee that includes references of the adequacy of the counsel, such as prior experience, ability to staff and finance the litigation, and consideration of prior public comments on the litigation that may prejudice the ability of particular plaintiffs to represent the plaintiffs as a whole. *See Manual for Complex Litigation* (Fourth) § 10.224 (discussing the factors the Court should consider in appointment of plaintiffs' counsel including whether "counsel fairly represent the various interests in the litigation.").

F. Appointment of a technical advisor to assist the court in assessing evidence related to national security (Order ¶ 5(b)).

1. The Plaintiffs' position.

The Court has indicated its intention to consider appointing a technical advisor to assist the Court in assessing evidence related to national security. The *Hepting* plaintiffs have previously expressed their views as to the Court's proposed appointment of an FRE 706 expert or technical advisor. (Hepting Dkt. 317).

Plaintiffs here reiterate their preference for an FRE 706 expert, primarily because FRE 706 contains a built-in procedural framework that aims to ensure accountability and guard against undue *ex parte* expert influence by providing all parties with some degree of access to the expert. Plaintiffs believe that such procedures are necessary and appropriate given the inherent tension between the state secrets privilege and traditional adversary procedures. Nevertheless, plaintiffs also reiterate that appointment of a non-FRE 706 technical advisor would be appropriate if the Court establishes rules and procedures for ensuring accountability and procedural fairness similar to those available for an FRE 706 expert.[25]

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[25] Plaintiffs believe that another viable way to help address this problem is by appointing two experts, one from a list provided by plaintiffs and one from a list provided (continued…)

Plaintiffs also reiterate their agreement with the *Hepting* plaintiffs' suggested candidates for FRE 706 expert or technical advisor: Mr. Kenneth Bass, Mr. Michael Jacobs, and Mr. Louis Fisher. Plaintiffs believe that these candidates would be more appropriate than Judge Laurence Silberman (suggested by the United States) or James Woolsey (suggested by the Court during the Aug. 8 hearing).

It is crucial that any expert or technical advisor appointed by the Court be independent of any potential bias in favor of the government's position in this litigation, where the playing field already tilts in the government's favor. The government knows or has access to any and all information related to the surveillance programs at issue here, and can selectively present those facts to the Court *ex parte* and *in camera*. The government also has access to numerous persons who can provide opinions regarding the nature and importance of the surveillance at issue here, and the consequences of disclosure of any specific item of information about the surveillance. The government can put the opinions of such witnesses before the Court *ex parte* and in secret.

Plaintiffs, by contrast, have no ability to learn the opinions of the government's witnesses or the basis for those opinions, much less to challenge the soundness of those opinions with contrary expert opinion or factual evidence. Thus, it is vital that any expert appointed by the Court be truly independent and capable of critically assessing the government's arguments, and not become a secret rubber-stamp for the government's positions. Further exacerbating the difficulty of choosing a truly independent expert is the fact that most of the qualified experts, by virtue of having a security clearance, will be ex-government employees and in many cases will have maintained continuing ties with the government, and with intelligence agencies in particular, as consultants, employees of defense contractors, or otherwise.

With respect to Judge Silberman, plaintiffs believe that it is not appropriate for one Article III judge to play the role of "expert" or technical advisor to another Article III

(…continued)
by the government.

judge. Only confusion and embarrassment would result from such an unauthorized arrangement. The judicial power to adjudicate issues in this litigation is vested in the first instance in this Court, with appellate review by the Ninth Circuit. There is no proper role for an appellate judge of the U.S. Court of Appeals for the District of Columbia Circuit to advise this Court on the issues in dispute in this litigation, and it would be error to create such an arrangement. Nor, with all due respect, does Judge Silberman bring any expertise that this Court either does not already have or is not capable of readily acquiring.

Plaintiffs also believe that it would be inappropriate for Mr. Woolsey to advise the Court. Mr. Woolsey is a vice president of Booz Allen Hamilton, a prominent national security contractor that does work for the National Security Agency. In particular, Booz Allen Hamilton is a contractor on Project Trailblazer, a billion-dollar project to overhaul the NSA's electronic surveillance data-mining capabilities, capabilities that are at issue in this litigation. Moreover, Mr. Woolsey has publicly stated that "the inherent authority of the president under Article II, under these circumstances, permits the types of intercepts that are being undertaken." Statement of James Woolsey, before the U.S. Senate, Committee on the Judiciary, "Wartime Executive Power and the NSA's Surveillance Authority II," (Feb. 28, 2006) available at http://judiciary.senate.gov/testimony.cfm?id=1770&wit_id=5227. While Mr. Woolsey's business interests and opinions on the ultimate legal issues in this proceeding may not be immediately relevant to the technical expertise that the Court seeks, in combination they are highly likely to create the perception or appearance of bias or impropriety that should be avoided.

2. The Government's position.

The Government continues to oppose appointment of a technical advisor[26] for the reasons set forth in the Response of the United States to the Order to Show Cause, filed

[26] We assume herein that the "technical advisor" would not be an expert appointed under FRE 706 and would not testify or be subject to discovery, but would consult solely with the Court. If that assumption is not correct, the Government would of course object to any such discovery or testimony.

with the Court on July 31, 2006 in the *Hepting* case (Dkt. No. 351) and stated by the Government at the hearing in *Hepting* on August 8, 2006.

In sum, while appellate review of the Court's Order in *Hepting* is pending, the Government urges the Court to defer consideration of the appointment of a technical advisor to assist the Court on state secrets matters. Nonetheless, if the Court elects to address the issue now, the Government opposes such an appointment.[27] The authority to grant access to classified material belongs to the President, through his Executive branch designees. It would be improper for this Court to appoint a technical advisor to assist it in the course of further proceedings with the review of classified information to assess the state secrets privilege, its implications for this case, and whether there is a reasonable danger that disclosure of certain information would harm national security. For further points and authority on the matter, *see* Defendants' Response to the Order to Show Cause at Dkt. 351.

In response to the points plaintiffs raise above on this topic, the Government specifically objects to the procedure proposed by plaintiffs whereby a second expert would be appointed from a list provided by plaintiffs. The Government expresses no opinion as to any of the individuals identified by the plaintiffs or the Court because we oppose the appointment of any expert. The Government's position should not be construed as an explicit or implicit acceptance of any of these individuals. If the Court continues to believe that it might be appropriate to appoint a technical advisor, the Government requests the opportunity to litigate the matter by motion and may, in that context, identify specific objections to any individual appointed. The Government does not consent to granting anyone the necessary security clearances to serve in this role, and this issue should be adjudicated separately.

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[27] If the Court does intend to appoint a technical advisor, the United States requests that the matter first be litigated by motion and, apart from any independent ground for review, that the Court certify any order appointing a technical advisor for immediate appellate review under 28 U.S.C. § 1292(b).

While the Government opposes the appointment of any technical advisor, we note that plaintiffs' criticism of Judge Silberman's credentials to serve in this role is without merit. Since any expert would confer solely with the Court, there is no potential for confusion or embarrassment from this arrangement. In addition, Judge Silberman would not be serving in a role as a D.C. Circuit Court Judge reviewing this Court's decisions, but merely advising the Court. Judge Silberman has had substantial experience with classified intelligence matters through his service on as Co-Chairman of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, and on the Foreign Intelligence Surveillance Court of Review.

3. The Carriers' position.

The Carriers oppose appointment of a technical advisor for the reasons set forth in AT&T Corp.'s Response to July 20, 2006 Order to Show Cause Regarding Appointment of Expert, filed with the Court on July 31, 2006 in the *Hepting* case. *Hepting* Dkt. 326. Moreover, even if the Court does not reject the appointment of a technical advisor at this point, it should at the very least defer further consideration of such an appointment until the Ninth Circuit rules in *Hepting.*

G. What other issues should be addressed to facilitate the just and timely resolution of this litigation? (Order ¶ 2(e)).

1. Service and personal jurisdiction.

Joint statement: Sprint has not been served in the *Electron Tubes* action. Plaintiffs claim that Sprint will either be served or dismissed in this action prior to the November 17 conference. The Verizon defendants have not been served in *Conner*, *Electron Tubes*, *Mahoney* and *Marck*. MCI Communications Services, Inc. has not been served in the *Cross* cases. The AT&T defendants have not been served in *Conner*. The BellSouth defendants have not been served in *Conner* or *Mayer*. All currently named parties have been served in the remaining cases.

AT&T Inc. has challenged personal jurisdiction over it in *Hepting*; the issue has been briefed and argued. Other Carriers also are of the view that certain corporate

defendants are improperly named and not subject to personal jurisdiction. The parties agree that, in the event the cases are not stayed, they will confer in an effort to resolve the objections based on personal jurisdiction.

2. Joinder.

Plaintiffs do not at this time intend to join additional parties not already named in some case that is pending in this MDL, but may seek to do so after discovery on these issues or if investigation reveals facts supporting joinder, including clarification of the corporate structures of the defendants.

Plaintiffs and the Carriers may discuss whether some defendants are superfluous.

3. Electronic Case Filing (ECF).

Joint statement: The Court should require all parties to adhere to procedures that maximize electronic filing. This case uses the Electronic Case Filing ("ECF") system on PACER, found at https://ecf.cand.uscourts.gov/cand/index.html, which allows for the electronic filing of documents. The Court has already ordered use of ECF filings in this MDL proceeding. Dkt. 15. ("All pleadings and submissions in these actions shall be e-filed; no paper copies will be necessary."). Plaintiffs propose that all counsel should be required to register immediately for ECF filing, that ECF filing on PACER in MDL No. 1791 shall be deemed sufficient service on all parties for all documents able to be publicly filed, and that parties are excused from any duty under General Order 45, part (IX)(C)(2) to serve paper copies of any filing in these proceedings,[28] with the exception of filings made under seal.

4. Filings under seal.

a. The Plaintiffs' statement.

In addition to electronic filings, there will likely be a number of filings that must be filed under seal due to potentially confidential material. Plaintiffs propose that Defendants

[28] Currently, the number of parties receiving service of hard-copy documents filed on PACER is approximately 63. This number of copies is extremely burdensome and unnecessary.

be required to serve one copy of any pleading, motion, or other document that is filed under seal on each of Co-Lead Coordinating Counsel, Interim Class Litigation Counsel, and Liaison Counsel (and, in the case of a pleading, motion, or other document relating to an individual constituent action, on Plaintiffs' counsel in that individual action). Given the large number of defendants in this case, Plaintiffs request that they should be required to serve only one liaison counsel for each of the five categories of defendants when filing under seal. These defense liaison counsel could then implement a procedure for notification of filings and distribution of papers to the remaining counsel. Service on the opposing party of moving papers, briefs and exhibits shall be completed on the same day that papers are filed with the Court. Where practicable, service of exhibits shall also be served on the same day as filing with the Court, or if not practicable, by overnight delivery.

b. The Government's statement.

The process for filing sealed documents proposed by plaintiffs does not apply to any information designated by the Government as classified national security information, including any information filed by the Government in connection with its state secrets privilege assertion or for any other reason.

c. The Carriers' statement.

The Carriers are not able to evaluate this specific proposal because we have not been provided a copy of the proposed organizational structure for the plaintiffs that may define the terms used in this section. In principle, there is no opposition to a streamlined process for service of documents referring to sealed material.

5. Assignment to magistrate judge.

Joint statement: No parties consent to assignment of this case to a magistrate judge.

6. Alternative dispute resolution.

Joint statement: The parties have not filed a Stipulation and Proposed Order Selecting an ADR process in this MDL proceeding. On May 11, 2006, the *Hepting* plaintiffs and defendant AT&T addressed ADR in a telephone conference with the ADR coordinator, who concluded that ADR was premature in *Hepting*.

No party believes that ADR is appropriate for any of the cases in this MDL. The parties request that the Court vacate all ADR notices and requirements for all actions involved in this MDL.

7. Initial disclosures (Fed. R. Civ. P. 26(a)).

Plaintiffs are willing to provide disclosures, but only if disclosures are mutual by all parties.

The Government and the Carriers do not believe that this case lends itself to initial disclosures; in any event, the Carriers could not consider such disclosures until the Ninth Circuit rules on the merits of the interlocutory appeal.

8. Pretrial deadlines and trial schedule.

Plaintiffs believe that the case can be brought to trial within 18 months if discovery commences according to the normal rules of this Court.

The Government and the Carriers believe that setting any deadlines or schedule would be premature until the issues now before the Ninth Circuit in *Hepting* are conclusively resolved. Only then will the Court and the parties have any sense of whether the cases can proceed at all and, if so, how.

Dated: November 7, 2006.

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DECLARATION PURSUANT TO GENERAL ORDER 45, § X.B

I, BRUCE A. ERICSON, hereby declare pursuant to General Order 45, § X.B, that I have obtained the concurrence in the filing of this document from the other signatories listed above and below.

I declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on November 7, 2006, at San Francisco, California.

/s/ Bruce A. Ericson
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