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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE NATIONAL SECURITY AGENCY)
TELECOMMUNICATIONS RECORDS)
LITIGATION)
This Document Relates To:)
ALL CASES except *Al-Haramain v. Bush* (07-)
109); *CCR v. Bush* (07-1115); *United States v.*)
18 *Farber* (07-1324); *United States v. Adams*)
(07-1323); *United States v. Palermino*)
19 (07-1326); *United States v. Volz* (07-1396))

No. M:06-cv-01791-VRW
UNITED STATES' OPPOSITION TO
PLAINTIFFS' MOTION FOR AN
ORDER TO PRESERVE EVIDENCE

Judge: Hon. Vaughn R. Walker
Date: November 15, 2007
Time: 2 p.m.
Courtroom: 6 - 17th Floor

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INTRODUCTION

1 Plaintiffs' Motion for an Order to Preserve Evidence ("Pl. Pres. Mot.") misstates the
2 differences between the parties on document preservation issues and seeks to impose a blanket
3 injunctive order on the Government and telecommunication Carrier Defendants ("Carrier
4 Defendants") that is unwarranted under the governing legal standards. The Government and
5 Carrier Defendants recognize that they have legal obligations to preserve potentially discoverable
6 materials. Contrary to the Plaintiffs' claim, however, neither the Government nor any Carrier
7 Defendant has asserted that "the state secrets privilege somehow modifies the preservation
8 obligation." See Pl. Pres. Mem. at 3-5. Instead, the crux of the issue is a practical one, arising
9 from the nature of Plaintiffs' claims and the Government's assertion of the state secrets privilege.
10 The Government proposed a practical solution to that problem, an approach which the Plaintiffs
11 have rejected.

12 As the Court is aware, Plaintiffs' claims put directly at issue alleged classified
13 intelligence activities of the National Security Agency ("NSA"), and the United States has
14 asserted the state secrets privilege in all cases that have not been stayed. Nevertheless, Plaintiffs
15 have demanded that the Carrier Defendants affirm that they are preserving potentially relevant
16 evidence despite the fact that the carriers' role in the alleged foreign intelligence activities at
17 issue—indeed, the very existence of certain alleged activities themselves—could not be
18 confirmed or denied in light of the state secrets privilege assertion by the United States.

19 Document preservation issues are, of course, inherently factual—requiring the
20 identification of information and information systems that may exist, a discussion of their
21 relevance to the claims, and an agreement on the appropriateness of preservation steps. To
22 address this problem—the existence of preservation obligations but no ability to discuss their
23 actual application to the facts of this litigation—the Government proposed a practical solution:
24 without the need for any motion, we would advise the Court through a classified *in camera, ex*
25 *parte* submission of the facts concerning the preservation of potentially relevant evidence that
26 may exist in this case, if any. In this manner, the state secrets privilege would not be
27 compromised by attempting to discuss and resolve preservation obligations. Plaintiffs initially
28

1 appeared to agree with this approach, but ultimately rebuffed it and now seek an unworkable
2 blanket preservation order, without any factual foundation as to whether one is even necessary or
3 would be properly tailored to the claims and any evidence that may be potentially relevant to
4 them.

5 Plaintiffs' motion should be denied. Under the applicable legal standards (nowhere
6 discussed in their motion), Plaintiffs must demonstrate the need for a preservation order by
7 showing that there is an actual, not speculative, risk that evidence may be spoliated, and they
8 must also justify the particular burdens that their order may impose. Plaintiffs fail entirely to
9 establish the need for such an order, but even if they had established such a need, the terms of
10 any order still could not be adjudicated properly without the disclosure of information protected
11 by the state secrets privilege.

12 The Government's proposed approach is far more reasonable. As we have consistently
13 proposed to the Plaintiffs, the United States is submitting with this Opposition, for the Court's *in*
14 *camera, ex parte* review, a classified record concerning how potentially discoverable
15 information, if any, is being preserved. In unclassified terms, the Government's submission
16 shows that, if any potentially relevant information exists as to any allegation—and there may be
17 no such evidence as to some or all the claims, and no evidence as to some or all of the alleged
18 Carrier Defendant participants—then appropriate preservation steps are being taken. If the Court
19 has any questions about the matter, the Government can address them through secure channels.
20 But, in light of the Government's presentation, the Court can and should avoid the need to
21 resolve Plaintiffs' motion and should not impose Plaintiffs' blunt order.^{1/}

22 Finally, the parties also differ as to whether the Court should hold a hearing on Plaintiffs'
23 motion (currently noticed for November 15, 2007). If the Court wishes to hear the unclassified
24 issues raised by this motion at a hearing, the Government would of course be quite willing to

25
26 ¹ To be clear, the Attorney General is not invoking nor conceding that the procedures set
27 forth at 50 U.S.C. § 1806(f) of the Foreign Intelligence Surveillance Act are applicable to this
28 matter in order to permit or enable adjudication of Plaintiffs' motion, as Plaintiffs suggest would
be permissible. *See* Pl. Pres. Mot. at 2, n. 3.

1 address them. But any hearing would either risk the disclosure of privileged information or,
2 more likely, be reduced to a recitation of general legal arguments without the factual context.
3 Particularly where the outcome of the *Hepting* appeal may obviate the need to consider the
4 matter, or impact the scope of any preservation issue, we respectfully submit that no hearing
5 should be held at this time.

6 BACKGROUND

7 Plaintiffs' counsel first raised the issue of a preservation order at hearing on November
8 17, 2006. *See* Declaration of Anthony J. Coppolino, ¶ 2 ("Coppolino Decl.") and Exhibit 1
9 thereto, *Transcript* at 99-102 (11/7/06). Counsel for AT&T and the United States advised the
10 Court that the parties had not yet conferred on the matter and that they could not discuss it further
11 without considering the impact of the state secrets privilege.² *See id.* & *Trans.* at 100, 101.
12 Plaintiffs agreed to confer on the matter. *See id.*, *Trans.* at 102.

13 The parties next conferred in a telephone conference on December 19, 2006. *See*
14 Coppolino Decl. ¶ 3. At that time, the Government expressed its concern that, because the
15 allegations in these cases concern alleged intelligence activities that have not been confirmed or
16 denied, including any alleged role of the Carrier Defendants, the parties would be unable to
17 discuss the specific facts required to develop a preservation order. *See id.*; *see also* Manual for
18 Complex Litigation at § 11.442 (setting forth the kinds of issues parties should discuss).
19 Nonetheless, the parties agreed to continue conferring, and Plaintiffs' counsel agreed to circulate

20
21 ² As counsel for AT&T explained:

22 Again, the devil is in the details. Certainly if . . . our attention is being drawn to
23 Rule 26 and to the upcoming changes to Rule 26, we are familiar with it and
24 we're pleased to abide by it. But there's a lot in there. For example, the new
25 rules contemplate a meet and confer in which we'd sit down and discuss
26 electronic architecture and things like that. We're not in a position to discuss
27 electronic architecture relevant to this case with plaintiff's counsel for state secrets
28 reasons. . . . So, if . . . we're just being told to please follow the preservation
aspects of Rule 26, yes, we understand that. We'll obviously do it.

Trans. at 100 (statement of Mr. Ericson); *see also id.* at 100-01 (statement of Mr. Nichols for the
Government "echo[ing]" Mr. Ericson's comments and making clear that the Government
understood the obligations of Rule 26).

1 a proposed preservation order. *See id.*

2 On January 8, 2007, Plaintiff's counsel transmitted to the Government and counsel for the
3 Carrier Defendants a copy of a proposed preservation order. *See* Coppolino Decl. ¶ 4 and
4 Exhibit 2 thereto. The Government responded on February 8, 2007 and again expressed the
5 Government's concern that the factual discussion needed to develop a preservation order, as
6 outlined in the Manual for Complex Litigation, was not possible in light of the Government's
7 state secrets privilege assertion. *See* Coppolino Decl. ¶ 5 and Exhibit 3 thereto. The
8 Government stated that it was not suggesting that any relevant evidence in this case need not be
9 preserved, but that, because of the Government's state secrets privilege assertion, the parties are
10 unable to discuss "whether and to what extent information that may be relevant exists, where any
11 such information may reside, how it may be preserved, and whether there are any practical
12 burdens arising from plaintiffs' proposed preservation steps—all of which should be undertaken
13 before a preservation order is entered." *See id.* The Government also specifically discussed
14 Plaintiffs' draft order, and noted that it did not describe the type of records the Plaintiffs believe
15 the order should cover, except for a general reference to "information relevant to electronic
16 surveillance," and that, in light of the state secrets privilege assertion, the parties would be left to
17 speculate whether relevant information exists that should be covered by the order and whether
18 any such information could be preserved as Plaintiffs propose without undue disruption.^{3/} *See id.*
19 Based on these concerns, the Government indicated that "the prudent course would be for the
20 Government to address the matter with the Court through an *ex parte, in camera* submission."
21 *See id.*

22 On April 30, 2007, Plaintiffs' counsel again requested confirmation of the Government
23 and Carrier Defendants' preservation obligations. *See* Coppolino Decl. ¶ 6 and Exhibit 4 thereto.
24 The Government responded on June 29, 2007, and reiterated its concern at attempting to reach an
25 understanding on this matter in a vacuum since the parties could not discuss with Plaintiffs the

26 ³ The proposed order transmitted by Plaintiffs appeared to be a "sample" preservation
27 order derived from a treatise or handbook, as indicated by the "1994" proposed date of entry on
28 the last page. *See id.*, Exhibit 2.

1 existence, nature, or scope of any information that might be at issue, as well as the preservation
2 steps that might be applicable. Coppolino Decl. ¶ 7 and Exhibit 4 thereto. The Government
3 stated that it did “understand that parties to litigation have obligations to take steps to preserve
4 their relevant evidence,” and indicated a willingness to discuss the issue further. *See id.*

5 On July 13, 2007, Plaintiffs’ counsel directed renewed questions at both the Government
6 and Carrier Defendants concerning their preservation obligations. Coppolino Decl. ¶ 8 and
7 Exhibit 5 thereto. Plaintiffs indicated that they “are not asking for the government or the carriers
8 to admit, even by implication, that any relevant document exists,” but sought to determine if the
9 parties agreed about the legal requirements to preserve relevant evidence. *See id.* The Plaintiffs
10 specifically asked the Government what it understood its preservation obligations to include, and
11 asked the Carrier Defendants to “provide an affirmative confirmation that they will abide by their
12 duties to ensure that information that is likely to lead to the discovery of admissible evidence in
13 this case is preserved.” *See id.*

14 The Government responded to Plaintiffs’ renewed questions on August 2, 2007, and
15 indicated that attempting to reach a general understanding as to what the law provides would not
16 be appropriate “where there can be no confirmation of any allegation and no meeting of the
17 minds as to how legal requirements may apply in these particular cases.” Coppolino Decl. ¶ 9
18 and Exhibit 6 thereto. Rather than continuing to debate the issue, the Government proposed that,
19 without the need for any motion by the Plaintiffs, and without confirming or denying any
20 allegation or whether relevant documents even exist, the Government would file with the Court
21 for its *in camera, ex parte* review facts concerning the preservation of information (if any) that
22 may be relevant in these lawsuits. *See id.* The Government proposed that Plaintiffs would then
23 have an opportunity to submit their position on the legal requirements concerning document
24 preservation issues, and sought to work with Plaintiffs on a schedule for these submissions. *Id.*

25 Plaintiffs initially appeared to agree to this proposal. *See* Coppolino Decl. ¶ 10 and
26 Exhibit 7 thereto (indicating that Government’s proposal “is generally acceptable to [Plaintiffs],
27 although we will definitely be filing a memorandum.”). In subsequent communications,
28 however, Plaintiffs indicated they would file a motion seeking a preservation order and would

1 notice a hearing on the issue. *See id.*, Exhibits 8 and 9 thereto. On September 10, 2007, the
2 Government proposed to Plaintiffs a stipulation setting forth the background of the issue and
3 proposing a schedule for briefing the Plaintiffs' motion, but leaving the question of whether a
4 hearing on the matter was necessary to the Court. *See* Coppolino Decl. ¶ 12 and Exhibit 10
5 thereto. Plaintiffs declined to enter into this stipulation, *see id.* ¶ 13 and Exhibit 11 thereto, and
6 on that same date filed the instant Motion for an Order to Preserve Evidence.

7 ARGUMENT

8 Plaintiffs' motion, which seeks an indiscriminate "one size fits all" preservation order, is
9 unfounded. The law governing the issuance of preservation orders requires the moving party
10 both to demonstrate that such an order is needed and to address any burdens imposed by specific
11 preservation obligations. The Manual for Complex Litigation also makes clear that preservation
12 issues are inherently factual, and requires the parties to discuss in detail the specific information
13 and information systems that would be subject to preservation obligations.

14 Plaintiffs' motion does not and cannot make the showing required to obtain a preservation
15 order; indeed, they have proffered no evidence suggesting that the parties are not preserving
16 relevant evidence (if any). In addition, in light of the Government's state secrets privilege
17 assertion, it simply is not possible to discuss the key issues relating to a preservation order, such
18 as the identification of any information and information systems that may be relevant, the steps
19 that have been taken to preserve information, and the burdens associated with imposing
20 additional obligations. To address the preservation issue without the need to resolve Plaintiffs'
21 motion, the United States submits for the Court's *in camera*, *ex parte* review facts concerning
22 whether information relevant to the allegations exists and, if so, how it is being preserved. In no
23 event, however, should Plaintiffs' motion for a blanket preservation order be granted, for it is
24 unfounded as a matter of law and cannot be resolved without state secrets.

25 **I. THE LAW REQUIRES PLAINTIFFS TO DEMONSTRATE THE NEED FOR A 26 PRESERVATION ORDER UNDER THE PARTICULAR FACTUAL 27 CIRCUMSTANCES OF THE CASE.**

28 In support of their motion for a preservation order, Plaintiffs cite the Manual for Complex
Litigation and various cases holding that parties have a duty to preserve evidence, *see* Pl. Pres.

1 Mem. at 1. They then observe in a footnote that “[t]he Court has authority to issue such
2 preservation orders.” *See id.*, n 1. But nowhere do Plaintiffs analyze or apply the legal standards
3 for the relief they seek.

4 The law is clear that motions to preserve evidence turn on whether specific facts are put
5 forward which demonstrate that such an order is necessary. In the only pertinent case Plaintiffs
6 cite, *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 434 n. 2
7 (W.D. Pa. 2004), the district court held that “[a]n evaluation of a motion for a preservation order
8 . . . demands application of a separate and distinct test, which can be formulated by molding the
9 factors used in granting injunctive relief with the considerations, policies and goals applicable to
10 discovery.” *Id.* at 433. The court set forth a three part balancing test for deciding such a motion:

- 11 (1) The level of concern the court has for the continuing existence and
12 maintenance of the integrity of the evidence in question in the absence of an
13 order directing preservation of the evidence;
- 14 (2) Any irreparable harm likely to result to the party seeking the preservation
15 of evidence absent an order directing preservation; and
- 16 (3) The capability of an individual, entity, or party to maintain the evidence
17 sought to be preserved, not only as to the evidence’s original form,
18 condition or contents, but also the physical, spatial and financial burdens
19 created by ordering evidence preservation.

20 *Id.* at 433-34. *Accord Treppel v. Bovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006) (utilizing similar
21 test). *See also Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (Ct. Fed. Cl. 2004)
22 (applying two prong test requiring “one seeking a preservation order demonstrate that it is
23 necessary and not unduly burdensome”); *Williams v. Mass. Mutual Life Ins. Co.*, 226 F.R.D. 144,
24 147 (D. Mass. 2005) (same); *Walker v. Cash Flow Consult.*, 200 F.R.D. 613, 617 (N.D. Ill. 2001)
25 (same).^{4/}

26 ⁴ Some courts have held that a party seeking a preservation order must meet the
27 traditional standards for obtaining injunctive relief. *See Madden v. Wyeth*, 2003 WL 21443404,
28 at *1 (N.D. Tex. April 16, 2003); *Pepsi-Cola Bottling Co. of Olean v. Cargill*, 1995 WL 783610,
at *3-4 (D. Minn. Oct. 20, 1995); *Cunningham v. Bower*, 1989 WL 35993, at *1 (D. Kan. Mar.
21, 1989); *Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39, 42-43 (E.D. La. 1966). As
noted in *Capricorn Power*, the balancing test applies the principles of injunctive relief in a
discovery context and requires the moving party to demonstrate the need for an order, balanced
against its potential harm. Regardless of the standard employed by the Court, Plaintiffs’ motion

1 In applying these standards, the court in *Capricorn Power* observed that “where the need
 2 expressed by the moving party for a preservation order is based upon an indefinite or
 3 unspecified possibility of the loss or destruction of evidence, rather than a specific, significant,
 4 imminent threat of loss, a preservation order usually will not be justified.” *Id.* at 435 (emphasis
 5 added). The court went on to hold, based on the “facts currently before the court,” that the
 6 moving party had failed to establish that evidence would be lost or destroyed in part because the
 7 documents at issue in fact had been preserved. *See id.* at 436. The court observed in particular
 8 that the information before it did not adequately address the burdens of maintaining information
 9 on a computer system. *See id.* at 437.

10 The court in *Treppel v. Bovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006), undertook a
 11 similar balancing approach in denying a motion seeking a preservation order. The court held that
 12 the party seeking a preservation order bears the burden of establishing the risk that evidence
 13 would be lost or that inadequate retention procedures were in place, and denied a motion to
 14 preserve evidence because the steps taken to preserve evidence were sufficient under the
 15 circumstances and because it lacked information concerning the burdens such an order would
 16 impose. *See id.* at 370-72. In such circumstances:

Such a blanket preservation order may be prohibitively expensive
 17 and unduly burdensome for parties dependent on computer systems
 18 in their day-to-day operations. In addition, a preservation order
 19 will likely be ineffective if it is formulated without reliable
 20 information from the responding party regarding what
 21 data-management systems are already in place, the volume of data
 22 affected, and the costs and technical feasibility of implementation.

23 *Id.* at 372 (citing Manual for Complex Litigation, Fourth §11.442 at 73 (2004)).^{5/}

24 _____
 25 should be denied.

26 ⁵ The Manual for Complex Litigation cited in *Treppel* makes clear that the specific facts
 27 underlying a preservation order should be addressed before an order is entered. *See* Manual for
 28 Complex Litigation, Fourth § 40.25 (2). The Manual states that “[s]uch an order requires the
 parties to define the scope of the contemplated discovery as narrowly as possible, identify the
 particular computers or network servers affected, and agree on a method for data preservation
” *Id.* Among the points to consider in formulating an effective preservation order are
 whether the order might disrupt the operation of computers and computer networks in the routine
 course of business. *See id.* The Manual observes that “[a] blanket preservation order may be

1 It is thus well-established that a preservation order must be based, at a minimum, on a
2 specific factual showing that such an order is necessary to prevent the imminent destruction of
3 evidence and will not impose an undue burden. Plaintiffs' have presented no evidence regarding
4 either element necessary before the entry of a preservation order.

5 **II. INFORMATION SUBJECT TO THE STATE SECRETS PRIVILEGE IS
6 NEEDED TO ADDRESS PRESERVATION ISSUES HERE, AND PLAINTIFFS'
7 PROPOSED BLANKET ORDER IS OTHERWISE UNFOUNDED.**

8 It should require little elaboration as to why the very nature of the allegations in these
9 cases prevent the parties from discussing and resolving the specific terms of their preservation
10 obligations. In an ordinary case, before such an order is entered, the parties must define with
11 particularity the scope of the discovery sought and specifically address several basic issues,
12 including what different types of potentially relevant information exist; where it is located; how
13 it is being preserved; whether those steps are adequate; or whether additional steps are necessary
14 or would be unduly costly or burdensome. Blanket preservation orders not tailored to the
15 specific evidence that may be at issue, and information systems where it may reside, are not
16 appropriate even in more routine civil litigation. *See Capricorn Power*, 220 F.R.D. at 435
17 (holding that "reflexive, invariable judicial action in response to each motion for preservation of
18 evidence would be impracticable and would trivialize the need for preservation orders in truly
19 justifiable circumstances.").

20 The cases at issue in this proceeding are clearly not routine. Plaintiffs' claims put directly
21 at issue alleged classified intelligence activities of the National Security Agency, and the
22 Government's state secrets privilege assertion seeks to preclude disclosure not only of whether
23 certain alleged activities are occurring, but also whether the Carrier Defendants had any
24 involvement in them. Specifically, the Government has asserted privilege over facts that would
25 be necessary to disprove Plaintiffs' allegations of a "dragnet" of surveillance of the content of

26 _____
27 prohibitively expensive and unduly burdensome for parties dependent on computer systems for
28 their day-to-day operations." *Id.* The Government identified the fact issues identified by the
Manual in support of its view that agreement on the terms of an order was not possible in light of
the states secrets privilege assertion. *See Coppolino Decl., Exhibit 2.*

1 communications of millions of Americans, and over whether or not the NSA has collected
2 telephone communication records from the specific Carrier Defendants, and over whether the
3 Plaintiffs have personally been subjected to any intelligence gathering activity.^{6/}

4 Under these circumstances, the Government advised the Plaintiffs that conferring about
5 basic document preservation issues was not possible. If an alleged activity has not been
6 confirmed but does in fact exist, any indication that documents related to that activity exist and
7 are being preserved would destroy the privilege assertion. If an alleged activity has not been
8 confirmed or denied and, in fact, does *not* exist, there would be no documents to preserve, but
9 neither the Government nor Carriers Defendants could so indicate. Even if the existence of an
10 alleged activity has been confirmed, classified details would be implicated by any attempt to
11 resolve the scope and burden of preservation obligations, including the identification of different
12 types of information that may exist about the alleged activity (since not all may be potentially
13 relevant to particular claims), where such information may be located, how any such information
14 is being preserved, whether those methods are sufficient or whether other steps would pose
15 practical burdens on intelligence operations. Addressing and resolving the preservation
16 obligations here would also require disclosure of whether any Carrier Defendants provided the
17 alleged assistance to NSA, including whether all, some, or none of the Carrier Defendants were
18 involved, what types of potentially relevant information they may possess, if any, where it is
19 located, and how it is being preserved. In short, under the unique circumstances presented in this
20 case, resolving the specific scope of preservation obligations would require the disclosure of
21 intelligence sources and methods subject to the state secrets privilege, even if merely to disprove
22 the existence of potentially relevant evidence or the need for a preservation order.

23
24 ⁶ It bears noting that a threshold question in this litigation, raised by the Government's
25 motions to dismiss or for summary judgment in the *Hepting*, *Verizon*, and *Shubert* cases, is
26 whether this litigation can proceed without risking the disclosure of this information subject to
27 the state secrets privilege, including whether Plaintiffs can even establish their standing without
28 state secrets. Until the question of whether the state secrets privilege may require dismissal of
some or all the pending claims is resolved, imposing Plaintiffs' blanket preservation order is not
appropriate, particularly where, in the meantime, the Government can address preservation issues
with the Court in a secure fashion without the need for an order.

1 It is no answer for Plaintiffs to contend that the parties could avoid these state secrets
2 concerns by simply acknowledging their “legal obligations” to preserve evidence, and impose
3 “litigation holds” as to what they should reasonably know is potentially relevant. *See* Pls. Pres.
4 Mem. at 5-6. The Government and Carrier Defendants know what the law is, but legal
5 obligations to preserve evidence do not exist in a vacuum—they must be applied to particular
6 information and information systems in a particular fashion. Otherwise, the parties cannot confer
7 and address, among other things: (i) the scope of contemplated discovery to be sought; (ii)
8 specific information that may be potentially relevant; (iii) information systems subject to
9 preservation; (iv) preservation steps that have been implemented; (v) additional preservation
10 steps that may be necessary; and (vi) potential costs and burdens of preservation steps. The
11 Federal Rules of Civil Procedure and Manual for Complex Litigation contemplate and require
12 parties to confer on these preservation issues. But that is not possible in this case.⁷

13 Moreover, as discussed below, the preservation order Plaintiffs seek is not a mere
14 acknowledgment of legal obligations, but would impose actual injunctive relief of an unknown
15 scope or dimension on the Government and Carrier Defendants. The proposed order directs that
16 all necessary steps be taken to prevent the destruction or alteration of what parties “know, or
17 reasonably should know, will be relevant evidence in this litigation,” and would further require
18 the Government and Carrier Defendants to halt normal operation of information processing
19 systems on which potentially relevant information may reside, or remove information from those
20 systems and arrange for its duplication for later discovery. *See* Pls. Proposed Preservation Order
21 ¶¶ 1, 3. Under such an order, the Government and Carrier Defendants would know only that they
22 have an obligation to preserve some information of unknown scope in the manner prescribed,
23 without any specific determination as to what information, if it exists, should be preserved nor
24

25 ⁷ The Government would stipulate that the parties are aware of their preservation
26 obligations and, without confirming or denying any allegation or even the existence of any
27 potentially relevant information, that whatever preservation steps might be appropriate are
28 described in the Government’s *in camera, ex parte* submission. But otherwise, Plaintiffs’
proposed blanket preservation order is inappropriate.

1 any assessment of the cost and burden of doing so.^{8/} Plaintiffs' proposed order does not resolve
 2 such issues since any vital factual context is missing. The use of this kind of blunt instrument
 3 with unknown consequences is not supported by the law in normal circumstances. *See Treppel*,
 4 233 F.R.D. at 372; *Capricorn Power*, 220 F.R.D. at 435; Manual for Complex Litigation, Fourth
 5 §11.442 (disapproving of blanket preservation orders).

6 **III. THE GOVERNMENT'S CLASSIFIED SUBMISSION ALLOWS FOR A**
 7 **REASONABLE AND PRACTICAL ALTERNATIVE FOR ADDRESSING**
 8 **PRESERVATION ISSUES.**

9 As a practical way to address the matter, the United States has submitted, for the Court's
 10 *in camera, ex parte* review, a classified record of what information related to the allegations in
 11 this case exists, if any. *See Classified In Camera, Ex Parte* Supplemental Memorandum of the
 12 United States and accompanying Classified Declaration of the National Security Agency.^{9/} This
 13 is a far more reasonable approach under the unique circumstances here than the preservation
 14 order Plaintiffs demand. In unclassified terms, the Government's submission shows that, if any
 15 potentially relevant information exists as to any allegation—and there may be no such evidence
 16 as to some or all the claims, and no evidence as to some or all of the alleged Carrier Defendant
 17 participants—appropriate preservation steps, if any, are being taken. If the Court has any
 18 questions concerning this submission, the Government can address them with the Court through
 19 secure, *in camera, ex parte* proceedings.

20 But in no event could the Plaintiffs' establish the grounds for granting their motion. This

21 ⁸ Plaintiffs' assertion that the "vast majority" of the discovery they seek is against the
 22 carriers, or that Plaintiffs purportedly do not seek NSA records concerning whether or how NSA
 23 "analyzed, reviewed, minded or targeted" any of the communications or records that carriers may
 24 have made available, *see* Pl. Pres. Mem. at 2, is unavailing. First, despite this concession, the
 25 United States as an intervener would be subject to their proposed order without any such
 26 limitation. Second, this concession underscores the point that it is uncertain what the order
 27 would apply to if the allegations were true. Because of the parties' inability to confer about the
 28 matter, they cannot come to basic understandings about what information, if it exists, is
 potentially relevant to establishing claims or defenses. Notwithstanding the practical difficulty
 posed by these issues, the solution is not, as Plaintiffs request, to impose a blanket order on the
 Government and Carrier Defendants.

⁹ The declaration is from a senior NSA official. However, the name of NSA officials are
 protected from disclosure generally under Pub. L. 86-36, codified as a note to 50 U.S.C. § 402.

1 is the first discovery motion of this litigation as to which confirmation or denial of facts
2 encompassed by the state secrets privilege would be necessary for any adjudication but are
3 unavailable. Since the actual production of information to Plaintiffs is not presently at issue, the
4 impact of the privilege on deciding this motion can be avoided for now because any assurances
5 needed on the narrow issue of document preservation can be provided by the Government to the
6 Court without the need to adjudicate the motion. However, to the extent Plaintiffs' request for an
7 injunctive preservation order must be adjudicated, it should be denied because Plaintiffs cannot
8 demonstrate the need for any such order nor address any impact it may have. *See Capricorn*
9 *Power; Treppel, supra.*^{10/}

10 **IV. THE COURT SHOULD DEFER A HEARING ON PLAINTIFFS' MOTION.**

11 Finally, the United States submits that the hearing on Plaintiffs' motion presently
12 scheduled for November 15, 2007 is unnecessary.

13 Preservation issues are inherently factual, and the facts central to resolving this motion
14 could not be aired at a hearing. Among the questions that would need to be addressed are
15 whether the Government and Carrier Defendants even possess potentially relevant evidence,
16 what that evidence may be, where it may be located, what steps, if any, have been taken to
17 preserve it, whether such steps are adequate, and whether other steps would be unnecessary or
18 burdensome as to particular information or information systems. There is little point to holding a
19 hearing since these issues cannot be aired—at least not without the risk of disclosing state
20 secrets.

21 The outcome of the pending appeal in the *Hepting* case also may obviate the need for

22
23 ¹⁰ To reiterate, Plaintiffs' contention that the procedures set forth at 50 U.S.C. § 1806(f)
24 of the Foreign Intelligence Surveillance Act are applicable to this matter is wrong. *See* Pl. Pres.
25 Mot. at 2, n. 3. As the United States has previously set forth at length, Section 1806(f), on its
26 face, applies to an entirely different circumstance that is not presented by Plaintiffs' motion: to
27 address the lawfulness of surveillance acknowledged by the Government against an actual
28 "aggrieved" person as defined by FISA. *See* Reply Memorandum of the United States in Support
of Military and State Secrets Privilege and Motion to Dismiss or for Summary Judgment in the
Verizon Cases, Dkt. No. 340 (MDL-1791) at 40-46. Section 1806(f) is not being invoked by the
Attorney General to address the Plaintiffs' motion, and the Government does not waive the
applicability of the state secrets privilege with respect to the adjudication of this motion.

1 considering the Plaintiffs' motion or alter the scope of the issues before the Court if Plaintiffs'
2 claims are narrowed or limited in some fashion. For these reasons, the Government proposed to
3 Plaintiffs that the parties leave for the Court to decide whether a hearing is needed—now or after
4 the *Hepting* outcome. See Coppolino Decl. ¶ 12 and Exhibit 10 thereto. Plaintiffs nonetheless
5 opted to place this discovery motion on the Court's docket at this time. We submit that a hearing
6 is unnecessary in light of the foregoing, but in any event, any such hearing should be deferred at
7 least until after the Ninth Circuit resolves the *Hepting* appeal.

8 **CONCLUSION**

9 For the foregoing reasons, the Court should deny Plaintiffs' Motion for a Preservation
10 Order.

11 Dated: October 25, 2007

Respectfully submitted,

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