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11

UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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SAN FRANCISCO DIVISION

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MDL NO. 06-1791 VRW

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IN RE:

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**VERIZON'S REPLY IN SUPPORT OF
UNITED STATES' MOTION FOR A STAY
PENDING DISPOSITION OF
INTERLOCUTORY APPEAL IN
HEPTING v. AT&T**

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NATIONAL SECURITY AGENCY

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TELECOMMUNICATIONS

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RECORDS LITIGATION

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This Document Relates To:

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Judge: Hon. Vaughn R. Walker

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ALL CASES

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1 Plaintiffs have failed to provide any apt reason for this Court to permit the broad-ranging
2 discovery and novel *ex parte, in camera* litigation that they seek—all before the Court of Appeals
3 provides critical guidance regarding the core, threshold question that has been the focus of the
4 litigation to date. Permitting Plaintiffs to embark on the course they have charted would threaten to
5 expose information the government contends is shielded by the state-secrets privilege and would
6 impose significant burdens on the parties and judicial system without substantially advancing
7 Plaintiffs’ claims. Rather than commencing discovery (and the collateral litigation that will
8 inevitably arise) and requiring defendants to file answers and other submissions for review by the
9 “Court’s *in camera* eyes” (Pls.’ Opp’n 33) (MDL Dkt. No. 128), the Court should take the
10 preliminary step of adjudicating the merits of the motion to dismiss that Verizon^{1/} proposes to file.
11 Litigating the threshold issues raised in such a motion, along with the government’s likely
12 invocation of the state-secrets privilege, would permit the Court to advance these proceedings
13 without the perils and inefficiencies sure to result from following Plaintiffs’ suggested approach.
14 Accordingly, Verizon respectfully submits that this Court should suspend further litigation of MDL
15 1791 with the exception of resolution of a motion to dismiss that Verizon proposes to file now that it
16 has had an opportunity to review Plaintiffs’ Master Consolidated Complaint.

17 1. In its Joinder in the United States’ Motion for a Stay filed December 22, 2006 (MDL
18 Dkt. No. 101), Verizon agreed with the United States that the Court should stay discovery, the filing
19 of answers, and the resolution of any preliminary injunction motions pending disposition of the
20 *Hepting* appeal. Verizon indicated, however, that it was not then in a position to assess fully

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22 ^{1/} “Verizon” refers to Verizon Communications Inc., Verizon Global Networks Inc., Verizon
23 Northwest Inc., Verizon Maryland Inc., MCI, LLC, MCI Communications Services, Inc., Cellco
24 Partnership, Verizon Wireless (VAW) LLC, and Verizon Wireless Services LLC. Several cases
25 consolidated in this proceeding purport to name Verizon Wireless, LLC or MCI WorldCom
26 Advanced Networks, LLC as defendants, but no such entities exist. Additional Verizon entities are
27 mentioned in Plaintiffs’ Master Consolidated Complaint Against MCI Defendants and Verizon
28 Defendants (MDL Dkt. No. 125) (“Master Consolidated Complaint”), but plaintiffs have taken the
position that the Master Consolidated Complaint is solely an “administrative device” that is not
“intended to change the rights of the parties” (Master Consol. Compl. ¶ 2), and have not amended
the underlying complaints to add the newly named entities or served the newly named entities. By
filing this Reply, defendants do not waive any defense that can be raised pursuant to Rule 12 of the
Federal Rules of Civil Procedure, including defenses based on improper service or lack of personal
jurisdiction.

1 whether it intended to file a dispositive motion as to the claims against it because it had not yet been
2 served with Plaintiffs' Master Consolidated Complaint against the Verizon defendants. Plaintiffs
3 filed master complaints for each of the defendant groups on January 16, 2007. Having now had the
4 opportunity to review those complaints, the Verizon defendants intend, with leave of the Court, to
5 file a motion (or motions) to dismiss the Master Consolidated Complaint. Verizon intends to expand
6 on arguments to dismiss that were presented in *Hepting* and to raise new arguments not addressed in
7 the *Hepting* Order. Verizon's motion will of course take into account this Court's decision in
8 *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006). But Verizon intends to show that,
9 for a number of reasons, the outcome reached in that case does not control resolution of the claims
10 against it. In addition, as Plaintiffs indicated in the Joint Case Management Statement filed by the
11 parties on November 7, 2006 (MDL Dkt. No. 61) ("Joint Statement"), they wish to bring new
12 matters to the Court's attention. (Joint Statement 20-21.) Litigation of Verizon's motion to dismiss
13 therefore would permit the Court to address issues that were not before it or fully addressed in the
14 *Hepting* case, which will facilitate ultimate resolution of this proceeding. Further, depending upon
15 the schedule imposed by the Court of Appeals in *Hepting*, it may be possible for an appeal of this
16 Court's order on Verizon's motion to dismiss to be coordinated with the *Hepting* appeal.^{2/}

17 Accordingly, the Verizon defendants respectfully request that they be granted 60 days after
18 the Court rules on the United States' Stay Motion to file their motion(s) to dismiss. This deadline
19 would allow the United States time to assemble any papers it may wish to file concerning the state-
20 secrets privilege. Plaintiffs could then be given 30 days to file an opposition, and Verizon (and the
21 Government, if applicable) 21 days to file a reply.

22 2. Aside from litigation and resolution of Verizon's motion to dismiss, further litigation
23 of these cases—particularly discovery—should be stayed.^{3/}

24 _____
25 ^{2/} Verizon does not suggest that there is a need to require litigation of motions to dismiss by the
26 other non-AT&T defendants. Until the Court of Appeals provides guidance regarding the
27 application of the state-secrets privilege to these cases, litigation of motions to dismiss that add no
28 new arguments to those already raised in the *Hepting* case or by Verizon in its motion to dismiss
would be unnecessary.

^{3/} In light of Verizon's intent to file a motion to dismiss, it is unnecessary at this time to stay
the time for Verizon to file an answer beyond the deadline for the motion to dismiss. *See* Fed. R.
Civ. P. 12(a)(4). Moreover, for the reasons explained by the defendants and the government in the

1 a. The Court’s power to stay proceedings is “incidental to the power inherent in
2 every court to control the disposition of the [cases] on its docket with economy of time and effort for
3 itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). “A
4 trial court may, with propriety, find it is efficient for its own docket and the fairest course for the
5 parties to enter a stay of an action before it, pending resolution of independent proceedings which
6 bear upon the case.” *Levy v. Certified Growers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979).
7 The Court therefore has discretion to stay proceedings where efficiency and fairness dictate.

8 Plaintiffs suggest that the appropriate legal standard on the Motion of the United States for a
9 Stay Pending Disposition of Interlocutory Appeal in *Hepting v. AT&T Corp.*, No. 06-00672 (MDL
10 Dkt. No. 67) (“Stay Motion”), is the same as that applied to preliminary injunction motions. (Pls.’
11 Opp’n 5-7.) But in the line of cases on which Plaintiffs rely, the requesting party sought an across-
12 the-board stay of all proceedings pending appeal, and in virtually every case the appeal was from a
13 preliminary injunction or dispositive order. *See Lopez v. Heckler*, 713 F.2d 1432, 1433 (9th Cir.
14 1983) (seeking partial stay pending appeal of preliminary injunction); *Abbassi v. INS*, 143 F.3d 513,
15 514 (9th Cir. 1998) (requesting stay of deportation proceedings pending appeal of denial of order
16 denying asylum); *see also Miller v. Carlson*, 768 F. Supp. 1341, 1342 (N.D. Cal. 1991) (applying
17 *Lopez* standard to request for stay pending appeal of preliminary injunction).^{4/}

18 Here, by contrast, Verizon will, with the Court’s permission, file a potentially dispositive
19 motion to dismiss. Accordingly, the Court has ample discretion to defer discovery pending
20 resolution of that motion without engaging in the preliminary injunction inquiry that Plaintiffs seek.
21 *See Alaska Cargo Transp. Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 383 (9th Cir. 1993) (affirming

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23 Joint Statement, none of the defendants should be required to file answers before *Hepting* is resolved
on appeal. *See* Joint Statement at 31-33.

24 ^{4/} Plaintiffs cite two cases that applied the preliminary injunction standard to stay requests
25 pending appeal of non-dispositive orders that did not enter preliminary injunctions. *See WCI Cable,*
Inc. v. Alaska R.R. Corp., 285 B.R. 476, 478 (D. Or. 2002); *United States v. Milligan*, 324 F. Supp.
26 2d 1062, 1066 (D. Ariz. 2004). In both cases, however, the requesting party sought a stay of all
27 proceedings and, unlike Verizon, did not indicate that it would file a motion to dismiss. *Warm*
Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977) (per curiam), is similarly
28 distinguishable, because there the Ninth Circuit considered (and rejected) a request for an *injunction*
of a disputed construction project pending appeal of the district court’s order denying a permanent
injunction.

1 district court’s decision to stay discovery pending resolution of motion to dismiss for lack of subject
2 matter jurisdiction); *United States v. Bourgeois*, 964 F.2d 935, 937 (9th Cir. 1992) (applying abuse
3 of discretion standard to denial of discovery request in criminal case). In fact, the Court took
4 precisely that approach in *Hepting*, deferring litigation of Plaintiffs’ motion for a preliminary
5 injunction, including Plaintiffs’ request for discovery, pending resolution of motions to dismiss filed
6 by AT&T Corp. and the government. See Civil Minute Order (5-17-06) (Dkt. No. 130). Indeed,
7 Verizon’s filing of a motion to dismiss would be the only efficient and appropriate manner to satisfy
8 Plaintiffs’ professed desire “to proceed forward . . . in a careful, step-by-step process in which [the
9 Court] proceeds one stage at a time.” (Pls.’ Opp’n 1.)

10 Plaintiffs argue that because Verizon has represented that “the Ninth Circuit’s rule in the
11 *Hepting* appeal cannot bind them” (Pls.’ Opp’n 2), it “cannot use the pendency of the *Hepting* appeal
12 as a ground for staying the non-AT&T actions” (*id.* n.1). Plaintiffs’ argument distorts not only
13 Verizon’s position but also plain logic and the law. For reasons that Verizon will explain fully in its
14 response to this Court’s Order to Show Cause Why the *Hepting* Order Should Not Apply to All
15 Cases, the Court should not bind Verizon to the *Hepting* Order because Verizon is neither a party in
16 *Hepting* nor in privity with the AT&T defendants in that case.^{5/} Regardless of whether the *Hepting*
17 order formally binds Verizon, however, the Ninth Circuit’s eventual decision on appeal will likely
18 have substantial ramifications for all of the cases in this MDL, because the Court of Appeals will
19 provide critical guidance on the application of the state-secrets privilege in these cases, particularly
20 as to the scope of appropriate discovery, if any. This Court has the discretion to stay proceedings
21 against Verizon “pending resolution of *independent proceedings* which bear upon the case.” *Levya*,
22 593 F.2d at 863 (emphasis added). Verizon’s position is therefore fully consistent both with the
23 understanding that Verizon is not directly bound by *Hepting* and with the fact that the Ninth
24 Circuit’s decision in that case will substantially affect the litigation against Verizon.

25 b. Under the discretionary standard set forth in *Landis* and *Levya*, a stay of
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27 ^{5/} That is why counsel for Verizon explained at the November 17, 2006, Case Management
28 Conference that Verizon should not be bound by a ruling in a case to which it was not a party. See
11/17/06 CMC Tr. (MDL Dkt. No. 77) at 54:13-15 (cited in Pls.’ Opp’n 2-3).

1 discovery in this case—especially as to Verizon, which has not yet filed a motion to dismiss—is
2 plainly appropriate. In the unique circumstances of this case, prudence dictates that this Court stay
3 all discovery pending the outcome of the interlocutory appeal in *Hepting*. Plaintiffs’ Master
4 Consolidated Complaint demonstrates the substantial overlap between the claims against Verizon
5 and those against AT&T in *Hepting*. The Court of Appeals has agreed to determine how the state-
6 secrets privilege applies to the allegations of the *Hepting* complaint. See Order, *Hepting v. United*
7 *States*, Nos. 06-80109 & 06-80110 (Nov. 7, 2006). Until the Court of Appeals resolves the
8 application of the state-secrets privilege to these cases, proceeding with any discovery would not
9 only be inefficient, but it would risk disclosure of sensitive national security information and would
10 invite unnecessary litigation regarding the scope and application of a privilege that inevitably
11 touches upon issues of profound national importance.

12 Plaintiffs’ brief makes clear that the discovery they seek is not appropriate prior to receiving
13 guidance from the Court of Appeals in *Hepting*. To the extent that Plaintiffs seek “public statements
14 by the government and the carriers” (Pls.’ Opp’n 28), that information is already publicly
15 available—as Plaintiffs’ brief amply demonstrates—and thus “the discovery sought is . . . obtainable
16 from some other source that is more convenient, less burdensome, or less expensive,” Fed. R. Civ. P.
17 26(b)(2)(C). In any case, the relevance of public statements by persons outside of the Executive
18 Branch is one of the very issues in the *Hepting* appeal. As courts have explained, “in the arena of
19 intelligence and foreign relations there can be a critical difference between official and unofficial
20 disclosures,” and “the fact that information resides in the public domain does not eliminate the
21 possibility that further disclosures can cause harm to intelligence sources, methods and operations.”
22 *Fitzgibbon v. CIA*, 911 F.2d 755, 765, 766 (D.C. Cir. 1990).^{6/} If the Court of Appeal agrees that
23 such statements are not relevant to whether the plaintiffs’ allegations implicate state secrets, then

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25 ^{6/} Plaintiffs’ rampant speculation about the possibility of congressional hearings is similarly
26 beside the point. (Pls.’ Opp’n 24-25.) No such hearings have occurred, nor is there any reason to
27 assume that they will result in the public disclosure of new information suggesting that Verizon
28 might possess additional, discoverable information. In any event, Plaintiffs are wrong to suggest
that discovery should proceed *now* because secret information might *later* be disclosed. Moreover,
unless disclosed by an authorized source, future news reports and unauthorized (and thus unverified)
statements should not bear on the applicability of the state-secrets privilege. See *Fitzgibbon*, 911
F.2d at 765-66.

1 discovery into those statements may well be inefficient and unnecessary.

2 Permitting the discovery of “network architecture” that Plaintiffs seek (Pls.’ Opp’n 30-31) is
3 similarly ill advised at this time. To the extent such discovery served to confirm or deny the
4 averments of Plaintiffs’ Complaint—which asserts that Verizon and the government have employed
5 specified technology as part of the alleged government surveillance program, *see* Master Consol.
6 Compl. ¶¶ 164-168, 172-176, 185-197—permitting it to go forward would inappropriately reveal
7 information covered by the state-secrets privilege before the Court of Appeals has the opportunity to
8 rule. Plaintiffs’ requests are plainly aimed at discovering documents that the government claims are
9 protected by the state-secrets privilege. Because “such probing in open court would inevitably be
10 revealing,” *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per
11 curiam), the privilege precludes it, at least until the Court of Appeals provides further guidance. For
12 the reasons explained by the government in its reply brief, Plaintiffs’ suggestion that information
13 implicating the state-secrets privilege be submitted for *in camera* review by the Court pursuant to 50
14 U.S.C. § 1806(f) should be rejected.

15 To the extent the requested “network architecture” discovery could be limited so as not to
16 confirm or deny the truth of Plaintiffs’ allegations, the discovery would not, in fact, serve the
17 purpose of advancing his proceeding. Indeed, Plaintiffs make only the vaguest of assertions
18 regarding the expected benefit of this discovery. (Pls.’ Opp’n 30.) Instead of advancing the
19 litigation, the requested discovery would simply burden the defendants and risk divulgence of highly
20 sensitive, proprietary information.

21 Moreover, as a general matter, even if some subset of Plaintiffs’ discovery requests
22 encompassed some limited non-secret information, the heavy presence of the privilege would render
23 the discovery process itself wholly impracticable. The government has made clear that it intends to
24 invoke the state-secrets privilege as to all of Plaintiffs’ proposed discovery, since “any discovery
25 would be aimed at proving allegations and claims that inherently require the disclosure of state
26 secrets to adjudicate.” (Joint Statement 43.) Requiring the government to invoke the privilege in
27 response to each and every discovery request would force the Court to repeat unnecessarily the
28 process of reviewing the privilege assertions just as it already has in *Hepting*. Indeed, permitting

1 discovery before the Ninth Circuit addresses the state-secrets issues in *Hepting* inevitably would
2 cause wide-ranging discovery battles and create the need for repeated motions—as well as possible
3 appeals—as Plaintiffs propound discovery requests to which the carriers cannot respond for fear of
4 violating federal criminal provisions and related laws. In short, “[d]iscovery would . . . be a waste of
5 time and resources” in light of the pervasiveness of privileged material. *Zuckerbraun v. General*
6 *Dynamics Corp.*, 935 F.2d 544, 548 (2d Cir. 1991).

7 c. Balanced against the harm to the defendants and the government that would
8 occur if discovery were permitted are Plaintiffs’ illusory claims of harm from a stay of discovery.
9 Staying the limited discovery that could proceed in these cases *before* a decision by the Court of
10 Appeals will result in *no* harm to Plaintiffs. Plaintiffs devote pages to arguing that a program of
11 surveillance described in certain press accounts is causing them irreparable harm on a “massive
12 scale.” (Pls.’ Opp’n 9.) But even if that were true, Plaintiffs utterly ignore the fact that proceeding
13 with the limited discovery that might conceivably be permissible while *Hepting* is on appeal will
14 generate significant litigation while doing exceedingly little to advance this case to verdict. Even if
15 the allegations of Plaintiffs’ Complaint were true, this Court would be in no position to litigate the
16 merits of this case and obtain any relief for Plaintiffs until the Court of Appeals adjudicates the
17 appeal in *Hepting*.

18 The government has asserted that the facts necessary for Plaintiffs to prove their claims and
19 for the defendants to raise any defenses available to them are shielded by the states-secrets privilege.
20 For the reasons explained by the government and AT&T, until the Court of Appeals determines
21 whether the government is correct in this assertion, no meaningful steps can be taken to advance
22 Plaintiffs’ claims. Taking discovery of press statements and other publicly available information or
23 of certain unclassified network information certainly will not bring Plaintiffs materially closer to
24 prevailing in this case or to preventing their alleged harm.

CONCLUSION

1 For the foregoing reasons, Verizon respectfully requests an order staying any proceedings
2 beyond litigation of its anticipated motion to dismiss.
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5 Dated: February 1, 2006

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