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9
 10 IN THE
 11 UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 13 -- San Francisco Division --
 14

15	<u>In re:</u>)	MDL Dkt. No. 06-1791-VRW
16	NATIONAL SECURITY AGENCY)	REPLY IN SUPPORT OF
17	TELECOMMUNICATIONS RECORDS)	MOTION FOR STAY
18	LITIGATION)	
18	This document relates to:)	Date: February 9, 2007
19	Nos. C-06-6222-VRW;)	Time: 2:00 p.m.
20	C-06-6224-VRW;)	Courtroom: 6, 17th Floor
21	C-06-6254-VRW;)	Judge: Hon. Vaughn R. Walker
21	C-06-6295-VRW;)	
22	C-07-0464-VRW)	

1 1. This is not a motion for preliminary injunction, nor
2 for stay of a final judgment pending appeal. Cf. Fed. R. Civ. P. 62,
3 65. The issue as to the non-AT&T defendants is simply that of a
4 district court's practical management of its pending cases, a matter
5 as to which all district courts have wide discretion. As Justice
6 Cardozo wrote for the Supreme Court,

7 "the power to stay proceedings is incidental to
8 the power inherent in every court to control the
9 disposition of the causes on its docket with
 economy of time and effort for itself, for
 counsel, and for litigants."

10 Landis v. North American Co., 299 U.S. 248, 254 (1936). That
11 inherent power is to be exercised "[e]specially in cases of
12 extraordinary public moment" -- which these cases surely are -- in
13 which

14 "the individual may be required to submit to
15 delay not immoderate in extent and not oppressive
16 in its consequences if the public welfare or
 convenience will thereby be promoted."

17 Id. at 256. In addition, "[t]he Federal Rules of Civil Procedure
18 . . . contain numerous grants of authority that supplement the
19 court's inherent power to manage litigation." Manual for Complex
20 Litigation Fourth § 10.1 (2004) (footnote omitted).

21 2. Plaintiffs are simply mistaken when they contend at
22 elaborate length, Opp. 2-3, 5-23, that this Court must go through a
23 complex and formal "balancing test" before it is allowed to manage
24 its own docket. United States district courts stay proceedings in
25 pending cases for any number of reasons as a matter of course every
26 business day of the year.

27 "A trial court may, with propriety, find it
28 is efficient for its own docket and the fairest
 course for the parties to enter a stay of an

1 action before it, pending resolution of
2 independent proceedings, which bear upon the case
3 In such cases the court may order a stay
4 of the action pursuant to its power to control
its docket and calendar and to provide for a just
determination of the cases pending before it."

5 Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863-64 (9th
6 Cir. 1979) (Kennedy, J.), cert. denied, 444 U.S. 827 (1979).

7 Even if injunction-type balancing were applied, there is no
8 doubt that a stay is called for. The sensitivity of the national-
9 security matters that plaintiffs seek to explore, which implicate the
10 physical security of everyone in this country, is sufficient reason
11 in itself not to proceed without benefit of the appellate process.
12 Courts do not press to "play with fire." Sterling v. Tenet, 416 F.3d
13 338, 344 (4th Cir. 2005), cert. denied, 126 S. Ct. 1052 (2006). In
14 matters of classified and sensitive national-security secrets,
15 particularly those involving intelligence sources and methods, stays
16 pending appeal are the norm. E.g., American Civil Liberties Union v.
17 NSA/CSS, 467 F.3d 590 (6th Cir. 2006) (granting stay of injunction
18 after district court declined to do so); Tenet v. Doe, 544 U.S. 1, 6
19 (2005) (noting that "[t]he District Court certified an order for
20 interlocutory appeal and stayed further proceedings pending
21 appeal").^{1/}

22 3. A glaring fact, which the plaintiffs acknowledge only
23 deep in a footnote, Opp. at 8 n.3, is that the Ninth Circuit itself
24 has stayed its own action in another of these cases in order to await
25

26 ^{1/} See also Al-Haramain Islamic Foundation, Inc. v. Bush, 451 F.
27 Supp. 2d 1215, 1233 (D. Ore. 2006) ("If the parties choose to
28 appeal, and if the appeal is taken, the parties may move to
stay proceedings in the district court."), No. C-07-0109-VRW,
appeal pending, Nos. 06-36083, 06-80134 (9th Cir.).

1 its decision in Hepting. Al-Haramain Islamic Foundation, Inc. v.
2 Bush, No. 06-36083 (9th Cir.), order of Jan. 9, 2007 (attached hereto
3 as Exhibit A). All the more reason for this Court to do the same.

4 4. As the government and AT&T have pointed out, the Ninth
5 Circuit's granting of the appeals in Hepting has divested this Court
6 of jurisdiction as to all matters within the scope of the Hepting
7 appeal, and that scope is enormous. That jurisdictional bar exists
8 both as to Hepting, No. C-06-672-VRW, and also as to Al-Haramain, No.
9 C-07-0109-VRW, which is also on interlocutory appeal. The bar based
10 on appellate jurisdiction does not apply in terms to the other cases.
11 But to proceed with them would be remarkably inappropriate. To do so
12 would undermine rather than promote "economy of time and effort,"
13 Landis, 299 U.S. at 254 -- time and effort of the Court and everyone
14 else. Plaintiffs say they want to proceed with what they call "the
15 rest of the case." Opp. 37. But here as a practical matter there is
16 no "rest of the case." This is not some self-contained discrete
17 discovery dispute. The issue on appeal, state secrets, touches every
18 aspect. It permeates the litigation. It prevents going forward at
19 this stage in any efficient and practical way. Take away what
20 concerns state secrets in this litigation, and nothing is left but
21 disconnected shards and remnants.

22 5. For this Court to proceed in a matter of this sensitive
23 nature while Hepting is on appeal would defeat the entire purpose of
24 28 U.S.C. § 1292(b) -- that of permitting courts of appeals to
25 provide crucial legal guidance on controlling legal issues before
26 district courts engage in what may well turn out to have been not
27 just a risky enterprise, but a total waste of their time. Briefs
28 will be filed in the Hepting appeal only two weeks from the day this

1 Court hears argument on this motion. Further proceedings during the
2 pendency of that appeal could rest only on the implied speculative
3 assumption that the Court of Appeals will not say anything of much
4 moment.

5 6. Plaintiffs' repeated assertions that continuing harm to
6 them is piling up are both insubstantial and moot. The Attorney
7 General has stated that the Terrorist Surveillance Program has been
8 placed within the prescribed procedures of the Foreign Intelligence
9 Surveillance Court. Doc. 127. To await the Ninth Circuit's ruling
10 in orderly fashion, just as that court itself is doing in the
11 Al-Haramain appeal, will cause no significant harm to anyone.^{2/}

12 CONCLUSION

13 For the reasons stated herein and previously, the motion
14 for stay should be granted.

15 Respectfully submitted,

16 /s/ John G. Kester

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29 February 1, 2007

30 _____
31 ^{2/} With respect to plaintiffs' conception of an immensely complex,
32 burdensome and questionable procedure under 50 U.S.C. § 1806(f),
33 the Sprint defendants adopt the discussion in the reply filed by
34 AT&T.