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UNITED STATES DISTRICT COURT

14

FOR THE NORTHERN DISTRICT OF CALIFORNIA

15

SAN FRANCISCO DIVISION

16

TASH HEPTING, GREGORY HICKS,  
 CAROLYN JEWEL and ERIK KNUTZEN, on  
 17 Behalf of Themselves and All Others Similarly  
 18 Situated,

No. C-06-0672-VRW

**CLASS ACTION**

19

Plaintiffs,

**PLAINTIFFS' OPPOSITION TO AT&T'S  
 ADMINISTRATIVE MOTION FOR  
 INTERIM STAY**

20

v.

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

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AT&T CORP., et al.,

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Defendants.

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1 Plaintiffs have alleged serious and ongoing irreparable harm to their statutory and  
2 constitutional rights, and to the rights of millions of other Americans, through ongoing dragnet  
3 surveillance of their telephone calls and Internet activity. Plaintiffs have supported these  
4 allegations with credible evidence of AT&T's active participation in this surveillance, by providing  
5 its customers communications to the government without a warrant or other sufficient legal  
6 process. AT&T contends that its actions are lawful; plaintiffs strongly disagree and seek to move  
7 forward to stop this illegal surveillance as soon as possible. Regardless of the outcome, it will  
8 benefit the parties and the public to set the stage for a speedy resolution of this dispute..

9 Instead, however, AT&T invokes the government's state secrets privilege and presents an  
10 administrative motion (Dkt. 310) asking this Court to stop the plaintiffs' case cold—in its  
11 entirety—by issuing a temporary stay pending the Court's decision on its motion for a stay (Dkt.  
12 324) pending the Ninth Circuits' ruling on AT&T's and the government's separate interlocutory  
13 appeals of this Court's July 20th Order. *Hepting v. AT&T*, 2006 WL 2038464 (N.D. Cal. 2006).

14 An interim stay is both unnecessary and unjust. It is unnecessary because, as explained in  
15 detail in plaintiffs' July 31 brief in response to the order to show cause (Dkt. 317), significant  
16 portions of the case can move forward without risk to the government's asserted state secrets, and,  
17 as explained below, AT&T's concerns about answering in light of the government's claimed  
18 privilege, if the Court deems them sufficient, can be addressed without the need for a stay. It is  
19 unjust because plaintiffs should have the opportunity to have as much of the litigation as possible  
20 ready to proceed promptly upon the appeals courts' decision.

21 For the reasons set forth below, AT&T's administrative motion for a temporary order  
22 staying further proceedings in this matter pending this Court's ruling on AT&T's July 31st motion  
23 to stay should be denied.

24 **A. AT&T Is Not Entitled to Invoke the State Secret Privilege**

25 AT&T has admitted, as it must, that “Defendants, as private parties, can neither invoke nor  
26 waive the state-secrets privilege—only the government can.” Defendants’ Reply ISO Admin.  
27 Motion To Set Hearing Dates (Dkt. 107, p. 3:11-12); *see also United States v. Reynolds*, 345 U.S.  
28 1, 7-8 (1953). Yet the only basis for the temporary stay sought by AT&T is the concern that

1 further proceeding may result in disclosure of purportedly state secret material pending an  
2 interlocutory appeal. AT&T Admin. Mot., p. 1 (Dkt. 310). Simply put, this is the government's  
3 argument to make, not AT&T's.

4 While the government has separately sought a stay (Gov't Response to OSC, (Dkt. 315-  
5 1)), the government also sees "no apparent reason why the [stay] matter should now be calendared  
6 as a separate motion." *Id.* at p. 4 n.4. Plaintiffs likewise believe that the question of what portions  
7 of this case, if any, should be stayed is best addressed through the parties' responses to the July  
8 20th Order, not AT&T's separately calendared motion for a stay, nor AT&T's proposed interim  
9 stay pending the newly calendared motion.

10 **B. This Litigation Should Not Be Stayed**

11 AT&T proposes to stay this proceeding *in its entirety* until this Court rules on its motion for  
12 a stay. Proposed Order, p. 2 (Dkt. 312). AT&T noticed its motion for a stay (Dkt. 324) for a  
13 hearing on September 14th, meaning that the proposed interim stay would halt the proceeding for  
14 at least six weeks. Even the government, whose privilege is at issue, has not sought to delay a  
15 ruling on what aspects of the case should be stayed until mid-September.

16 As discussed more fully in the plaintiffs' response to the Court's July 20th order, this  
17 proceeding should not be stayed because neither the government nor AT&T can meet the legal  
18 standard for a stay. However, for purposes of the present administrative motion, the Court need not  
19 delve deeply into these legal tests, for AT&T has shown neither irreparable harm nor any hardship  
20 *to AT&T*. As discussed above, AT&T's motion focuses solely on the possibility of harm to the  
21 government's interest.

22 Furthermore, if necessary, this Court can mitigate the only possible harm identified that  
23 might arise without an interim stay by allowing AT&T to initially provide its answer to the  
24 Complaint *in camera* on an *ex parte* basis.

25 1. Legal Standard for a Stay

26 AT&T's administrative neither presents nor addresses the legal standard for a stay. "The  
27 standard for evaluating stays pending appeal is similar to that employed by district courts in  
28 deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th

1 Cir. 1983), *rev'd on other grounds*, 463 U.S. 1328 (1983) (noting the common language of the test  
 2 for stay pending appeal and the test for a preliminary injunction, *citing Nevada Airlines, Inc. v.*  
 3 *Bond*, 622 F.2d 1017, 1018 n.3 (9th Cir. 1980)).

4 In the Ninth Circuit, there are two legal tests for the issuance of a preliminary injunction: a  
 5 showing of either “(1) a combination of probable success and the possibility of irreparable harm, or  
 6 (2) that serious questions are raised and the balance of hardship tips in its favor.” *Prudential Real*  
 7 *Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000); *accord Republic of*  
 8 *the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc); *Hoopa Valley Tribe v.*  
 9 *Christie*, 812 F.2d 1097, 1102 (9th Cir. 1987). These tests are “not separate” but rather represent  
 10 “the outer reaches ‘of a single continuum.’” *Los Angeles Memorial Coliseum Commission v.*  
 11 *National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

12 AT&T has not advanced a single argument that anyone faces harm or even hardship arising  
 13 from proceeding with those aspects of the litigation that do not implicate state secrets.<sup>1</sup> Yet  
 14 numerous aspects manifestly do not implicate state secrets (i.e. selecting a Rule 706 expert, holding  
 15 the scheduled Case Management Conference or ruling on the pending motions to unseal). Nor has  
 16 AT&T advanced any argument that the government faces harm from any event anticipated in the  
 17 near future other than its pending Answer to the complaint.<sup>2</sup> As explained below, AT&T’s pending  
 18 answer to the complaint does not require any interim stay, let alone a stay of the entire litigation  
 19 that AT&T desires.

## 20 2. The Pending Answer to the Complaint Does Not Require An Interim Stay

21 The only purported harm that AT&T suggests requires an interim stay is that on “August 3,  
 22 2006 AT&T would, under normal operation of the Federal Rules of Civil Procedure, be required to  
 23 file an answer to plaintiffs’ First Amended Complaint.” Admin. Mot. For Interim Stay, p. 1:17-19.

24 \_\_\_\_\_  
 25 <sup>1</sup> AT&T also fails to make any such argument in its July 31st motion for a stay (Dkt. 324).

26 <sup>2</sup> Indeed, it is difficult to see how even the government faces imminent harm, since it is entitled to  
 27 object to the disclosure of purportedly state secret evidence during the discovery process. The  
 28 parties can then litigate the propriety of such objections as necessary. *See Ellsberg v. Mitchell*, 709  
 F.2d 51, 56 (D.C. Cir. 1983). (state secret privilege is designed to “block *discovery* in a lawsuit of  
 any information that, if disclosed, would adversely affect national security.” (emphasis added)).

1 Even if this concern were AT&T's to raise, it does not require an interim stay.

2 If the Court considers this argument sufficient to warrant keeping AT&T's Answer out the  
3 public docket, the plaintiffs respectfully suggest that the Court mitigate these concerns by allowing  
4 AT&T to initially file its Answer to the Complaint pursuant to Section 1806(f) of the Foreign  
5 Intelligence Surveillance Act. *See* 50 U.S.C. § 1806(f); *Fitzgerald v. Penthouse Intern, Ltd.*, 776  
6 F.2d 1236, 1238, n.312 (4th Cir. 1985) (advising courts to use "creativity and care" in devising  
7 procedures to promote the ultimate resolution on the merits); *see also Halpern v. U.S.*, 258 F.2d 36,  
8 43 (2nd Cir. 1958); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2nd Cir. 1977);  
9 *Spock v. U.S.*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978) (endorsing creative solutions to manage state  
10 secret privilege issues).

11 Section 1806(f) provides for *in camera* and *ex parte* review of "materials relating to the  
12 surveillance as may be necessary to determine whether the surveillance of the aggrieved person  
13 was lawfully authorized and conducted." *See generally* Plaintiffs' Opp. to Gov't Motion to  
14 Dismiss, pp. 21-26 (Dkt. 181). Until such time as this Court rules on the extent and scope of any  
15 stay, AT&T can initially file its complete Answer directly in chambers pursuant to these  
16 procedures. In addition, a redacted Answer showing those portions of AT&T's answer that do not  
17 implicate disputed material can be placed on the public record and served. Since the state secret  
18 privilege belongs to the government, AT&T may need some guidance determining which  
19 paragraphs to redact. It would seem appropriate for the government to file a brief identifying which  
20 specific paragraphs of the Complaint it would object to AT&T answering publicly pending the  
21 resolution of any interlocutory appeal the government intends to file. Upon receipt of the  
22 government's papers, AT&T should be required to immediately file the redacted version.

23 Under these procedures, neither AT&T nor the government would face any harm, let alone  
24 the irreparable harm or extreme hardship required for a stay. At the same time, the plaintiffs, who  
25 are suffering the irreparable harm of ongoing statutory and constitutional violations (*see Burlington*  
26 *N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991)), would not have their case  
27 unnecessarily delayed, and the plaintiffs would be put on notice of at least the affirmative defenses  
28 AT&T intends to raise that can be publicly disclosed at this stage.

**C. Conclusion**

For the reasons set forth above, this Court should deny AT&T's administrative motion for an interim stay.

DATED: August 1, 2006

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 1, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the following non-CM/ECF participants:

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