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 13
 14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**

16)	No. M:06-cv-01791-VRW
17	IN RE NATIONAL SECURITY AGENCY)	
18	TELECOMMUNICATIONS RECORDS)	MOTION OF UNITED STATES FOR A
19	LITIGATION)	STAY PENDING DISPOSITION OF
20	<u>This Document Relates To:</u>)	INTERLOCUTORY APPEAL IN
21	ALL ACTIONS)	HEPTING v. AT&T CORP.
22)	
23)	Judge: Hon. Vaughn R. Walker
24)	Date: January 11, 2006
25)	Time: 2:00 p.m.
26)	Courtroom: 6, 17 th Floor

27 **Motion of the United States**
 for Stay Pending Interlocutory Appeal
 28 **MDL No. 06-1791-VRW**

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1 **NOTICE OF MOTION AND MOTION TO STAY PROCEEDINGS PENDING APPEAL**
2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on Thursday, January 11, 2006, at 2:00 p.m. (or any
4 earlier date set by the Court), before the Honorable Vaughn R. Walker, in Courtroom 6,
5 17th Floor, 450 Golden Gate Avenue, San Francisco, California, Defendants United States of
6 America, National Security Agency and George W. Bush (hereafter the "United States") will
7 move and hereby do move the Court to enter a stay in this MDL proceeding pending resolution
8 of the appeal of this Court's Opinion and Order of July 20, 2006, denying motions to dismiss in
9 *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (the "Order"). On November 7,
10 2006, the United States Court of Appeals for the Ninth Circuit granted the Government's petition
11 for interlocutory review of the Order. See *Hepting v. United States*, Nos. 06-80109, 06-80110
12 (9th Cir.) (order granting appeal) (attached hereto as Exhibit A).

13 A stay of this MDL proceeding is warranted because the outcome of the *Hepting* appeal
14 will have a direct bearing on the issues presented in the transferred cases and will provide
15 guidance as to how the cases involved in this proceeding should be addressed. This motion is
16 based on this notice of motion and motion, the memorandum that follows, all pleadings and
17 records on file in this action, and any other arguments and evidence presented to this Court at or
18 before the hearing on this motion.

19 **ISSUE TO BE DECIDED**

20 Should this Court enter a stay of the MDL proceeding pending resolution of the
21 interlocutory appeal of the Court's Order in *Hepting*?

INTRODUCTION

1 The Federal Defendants respectfully request that this Court stay proceedings in *In re*
2 *National Security Agency Telecommunications Records Litigation* (MDL Docket No. 1791)
3 (“MDL”) pending interlocutory review by the Court of Appeals of this Court’s decision denying
4 motions to dismiss in *Hepting v. AT&T Corp.*, No. C-06-0672-VRW.

5 This MDL proceeding gathers together more than 30 actions, all of which share “factual
6 and legal questions regarding alleged Government surveillance of telecommunications activity
7 and the participation in (or cooperation with) that surveillance by individual telecommunications
8 companies.” *In re National Security Agency Telecommunications Records Litigation*, 444 F.
9 Supp. 2d 1332 (J.P.M.L. 2006). The cases consolidated in this proceeding challenge the
10 lawfulness of alleged intelligence activities conducted by the National Security Agency (NSA),
11 including the lawfulness of alleged assistance in those activities by the defendant
12 telecommunication carriers. The two central allegations addressed in the *Hepting* Order are
13 again presented in these consolidated cases: (i) whether the NSA intercepted the content of the
14 plaintiffs’ communications without a warrant, *see Hepting*, 439 F. Supp. 2d at 996; and (ii)
15 whether the NSA was provided with records concerning the plaintiffs’ communications, *see id.*
16 at 997.

17 The very subject matter of the claims raised by the cases in this MDL proceeding is a
18 state secret. The state secrets privilege—which has already been asserted in the *Hepting* and
19 *Terkel*¹ cases transferred to this proceeding—prohibits the adjudication of cases where the
20 existence of alleged intelligence sources and methods would be confirmed or denied, or where
21 information concerning the alleged activities that would be necessary to litigate these allegations
22 cannot be disclosed without harm to national security. All of the cases now pending in this MDL
23 proceeding thus present the threshold question, already presented in *Hepting*, of whether the
24 claims can proceed at all. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (“[I]f the
25

26 ¹ *See Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006).
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1 ‘very subject matter of the action’ is a state secret, then the court should dismiss the plaintiff’s
2 action based solely on the invocation of the state secrets privilege.” (quoting *United States v.*
3 *Reynolds*, 345 U.S. 1, 11 n.26 (1953)).

4 Although this Court disagreed with the United States that *Hepting* must be dismissed
5 because of the United States’ assertion of the state secrets privilege, the Court certified its
6 decision for interlocutory review, and the Court of Appeals has now granted the Government’s
7 petition for review. The Ninth Circuit therefore will resolve a number of issues relevant to all of
8 the cases in this MDL proceeding, and the most appropriate and efficient course is to await the
9 Ninth Circuit’s guidance on those issues. Indeed, in certifying the *Hepting* Order for
10 interlocutory appeal, the Court found that “the state secrets issues resolved herein represent
11 controlling questions of law as to which there is a substantial ground for difference of opinion
12 and that an *immediate appeal may materially advance ultimate termination of the litigation.*”
13 *See Hepting*, 439 F. Supp. 2d at 1011 (emphasis added). That appeal (which deprives this Court
14 of jurisdiction to proceed on the key issues in *Hepting*) may dispose of all cases in this
15 proceeding. At the very least, the appeal should provide significant guidance concerning the
16 application of the state secrets privilege to all of the cases presently before this Court. Any effort
17 to proceed before the appeal is decided will run quickly into the same state secret privilege
18 issues that are now before the Court of Appeals in *Hepting*, and without the benefit of the Ninth
19 Circuit’s decision.

20 BACKGROUND

21 A. The *Hepting* Case

22 As this Court is aware, plaintiffs in *Hepting* allege that AT&T Corp. and AT&T Inc.
23 (hereafter “AT&T”) assisted the NSA in the warrantless interception of communications and the
24 collection of records about communications. *See Hepting*, 439 F. Supp. 2d at 978. The *Hepting*
25 plaintiffs claim that these alleged actions violated several federal statutory provisions, including,
26 *inter alia*, the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1809; the Electronic

1 Communications Privacy Act of 1986 (ECPA), 18 U.S.C. § 2511; the Stored Communications
2 Act, 18 U.S.C. § 2702; and the Communications Act of 1934, 47 U.S.C. § 605. *See id.* at 979.

3 The *Hepting* plaintiffs also allege that the NSA and AT&T violated their rights under the First
4 and Fourth Amendments to the United States Constitution. *See id.*

5 On May 13, 2006, the United States moved to intervene in *Hepting* and filed a motion to
6 dismiss or, alternatively, for summary judgment, based on an assertion of the military and state
7 secrets privilege. *See Hepting*, 439 F. Supp. 2d at 979. The United States filed public
8 declarations from the Director of National Intelligence, John D. Negroponte (Negroponte Decl.)
9 and the Director of the NSA, Lt. Gen. Keith B. Alexander (Alexander Decl.), along with
10 classified declarations by these officials for the Court's *ex parte*, *in camera* review. In their
11 public declarations, Director Negroponte and Lt. Gen. Alexander described in general terms the
12 information subject to the Government's claim of privilege, including information about the
13 Terrorist Surveillance Program and information that might confirm or deny AT&T's alleged
14 assistance to the NSA on intelligence matters. Director Negroponte and Lt. Gen. Alexander
15 expressly concluded that any confirmation or denial of the existence, scope, or potential targets
16 of alleged intelligence activities, as well as AT&T's purported involvement in such activities,
17 would cause exceptionally grave damage to national security. *See* Public Negroponte Decl.
18 ¶¶ 11-12; Public Alexander Decl. ¶¶ 7-8.

19 On July 20, 2006, this Court issued an Opinion and Order in *Hepting* denying the
20 Government's motion to dismiss on state secrets grounds, reserving judgment on the
21 Government's motion for summary judgment, and certifying its decision for immediate
22 interlocutory review under 28 U.S.C. § 1292(b). On July 31, 2006, the Government filed a
23 petition for interlocutory review in *Hepting*, which was granted by the Court of Appeals on
24 November 7, 2006.

25 The Court decided a number of issues in the *Hepting* Opinion that are directly relevant to
26 the other cases in this proceeding, and that will now be reviewed on appeal. First, because an

1 alleged covert relationship between the Government and a telecommunications carrier is at issue,
2 the Court considered whether to apply the categorical bar to suit established by the Supreme
3 Court in *Totten v. United States*, 92 U.S. 105 (1876), and in *Tenet v. Doe*, 544 U.S. 1 (2005).
4 *See Hepting*, 439 F. Supp. 2d at 991-92. The Court found that *Totten* and *Tenet* are “not on point
5 to the extent they hold that former spies cannot enforce agreements with the government because
6 the parties implicitly agreed that such suits would be barred,” and that this implicit notion of
7 equitable estoppel is not present here since “AT&T, the alleged spy, is not the plaintiff” and the
8 actual plaintiffs made no secrecy agreement with the Government. *See id.* at 991.

9 The Court then found *Totten and Tenet* to be inapplicable because “AT&T and the
10 government have for all practical purposes already disclosed that AT&T assists the government
11 in monitoring communication content.” *Hepting* at 991-92. The Court cited public statements
12 by the Government acknowledging the existence of the Terrorist Surveillance Program to target
13 certain one-end foreign communications where the Government has a reasonable basis to
14 conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda,
15 or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda. *Id.*
16 at 992. The Court concluded that “it is inconceivable that this program could exist without the
17 acquiescence and cooperation of some telecommunications provider.” *Id.* The Court observed
18 that “[c]onsidering the ubiquity of AT&T telecommunications services, it is unclear whether this
19 program could even exist without AT&T’s acquiescence and cooperation.” *Id.* Citing the
20 *Hepting* plaintiffs’ Complaint, the Court noted “AT&T’s history of cooperating with the
21 government” on classified contracts and that “thousands of its employees hold government
22 security clearances.” *Id.* (citing First Amended Complaint in *Hepting* ¶ 29). The Court also took
23 judicial notice of the fact that AT&T spokespersons stated recently, in response to reports on the
24 alleged NSA programs, that it has “an obligation to assist law enforcement and other
25 government agencies responsible for protecting the public welfare, whether it be an individual or
26 the security interests of the entire nation.” *Id.* (citing an AT&T Press Releases). The Court

1 then concluded that the *Totten/Tenet* doctrine does not apply because “the government has
2 disclosed the general contours of the ‘terrorist surveillance program,’ which requires the
3 assistance of a telecommunications provider, and AT&T claims that it lawfully and dutifully
4 assists the government in classified matters when asked.” *Id.* at 993.

5 The Court turned next to whether the “very subject matter of this action” is a state secret
6 and whether, for this reason, further proceedings would harm national security. *See Hepting*,
7 439 F. Supp. 2d at 993 (*citing Kasza*, 133 F.3d at 1170). The Court sought to distinguish this
8 action from other cases that had been dismissed because the very subject matter was a state
9 secret, *see id.* at 993-94, and concluded that, in contrast to these cases, “the very subject matter
10 of this action is hardly a secret” because “public disclosures by the government and AT&T
11 indicate that AT&T is assisting the government to implement some kind of surveillance
12 program,” *id.* at 994.

13 Next, the Court declined to decide whether *Hepting* should be dismissed on the ground
14 that the state secrets assertion will preclude evidence necessary for the *Hepting* plaintiffs to
15 establish a *prima facie* case or for the defendants to raise a valid defense to the claims, finding
16 that plaintiffs would be entitled to some discovery. *See id.* at 994. In drawing this conclusion,
17 the Court stated that it was following the approach of the courts in *Halkin v. Helms*, 598 F.2d 1
18 (D.C. Cir. 1978) (“*Halkin I*”), *Halkin v. Helms*, 690 F. 2d 977 (D.C. Cir. 1982) (“*Halkin II*”),
19 and *Ellsberg v. Mitchell*, 70 F.2d 51 (D.C. Cir. 1983), which the Court read to allow discovery to
20 proceed, at least at the outset of the case. *See Hepting*, 494 F. Supp. 2d at 994.

21 The Court then assessed separately the question of whether AT&T’s receipt or non-
22 receipt of a certification authorizing its alleged assistance to the government is a state secret. *See*
23 *id.* at 995. In discussing this point, the Court distinguished the particular claims at stake in
24 *Hepting*. *See id.* at 996 (and chart). With respect to the alleged interception of the content of
25 communications, the Court stated that it “cannot conclude that the existence of a certification
26 regarding the ‘communication content’ program is a state secret.” *Id.* The Court again based

1 this conclusion on the fact that the Government had publicly disclosed whose communications it
2 monitors (members of agents of al Qaeda) and where those communicating parties are located
3 (one party is outside the United States). Because of this acknowledgment, the Court held that
4 “the state secrets privilege will not prevent AT&T from asserting a certification-based defense,
5 as appropriate, regarding allegations that it assisted the government in monitoring
6 communication content.” *Id.* The Court envisioned that AT&T could “confirm or deny the
7 existence of a certification authorizing monitoring of communication content through a
8 combination of responses to interrogatories and in camera review by the court” and that,
9 “[u]nder this approach, AT&T could reveal information at the level of generality at which the
10 government has publicly confirmed or denied its monitoring of communication content.” *Id.* at
11 997.

12 Turning to the alleged disclosure of communications records, the Court noted that neither
13 the Government nor AT&T has confirmed or denied this alleged activity, but nonetheless
14 declined to dismiss this claim on the ground that the Government or telecommunication carriers
15 “might disclose, either deliberately or accidentally, other pertinent information about the
16 communication records program as this litigation proceeds,” and that “such disclosures might
17 make this program’s existence or non-existence no longer a secret.” *Id.* at 997-98. The Court
18 stated that it would not require AT&T to disclose what relationship, if any, it has with this
19 alleged program, and also declined to permit discovery into the alleged communications records
20 program, but indicated that the plaintiffs can revisit this issue in the future. *Id.*

21 The Court also rejected dismissal of the case on the ground that plaintiffs lacked
22 standing, which the Government asserted could not be demonstrated because the state secrets
23 privilege prevents plaintiffs from establishing actual injury and because plaintiffs had pleaded
24 themselves out of the scope of the Terrorist Surveillance Program. *See id.* at 1001. The Court
25 ruled that the privilege would not bar plaintiffs from receiving evidence tending to establish
26 AT&T’s alleged participation in communication content monitoring. *Id.*

1 Finally, the Court held that “the state secrets issues resolved [in its opinion] represent
 2 controlling questions of law as to which there is a substantial ground for difference of opinion
 3 and that an immediate appeal may materially advance ultimate termination of the litigation,” and
 4 certified its Order for immediate appellate review under 28 U.S.C. § 1292(b). *Id.* at 1011. The
 5 United States filed its petition for interlocutory review on July 31, 2006, challenging the Court’s
 6 determinations, *inter alia*, that this case is not foreclosed by the *Totten* doctrine, that the very
 7 subject matter of this action is not a state secret, that plaintiffs’ allegations were sufficient to
 8 challenge content collection, that the state secrets privilege did not foreclose plaintiffs’ ability to
 9 establish their standing, and that the state secrets privilege did not preclude discovery into
 10 whether AT&T received a certification from the Government as to the alleged activities. The
 11 defendants in *Hepting*, AT&T Corp. and AT&T Inc., filed their own petition for interlocutory
 12 review. The plaintiffs in *Hepting* did not oppose the United States’ petition for review and
 13 cross-petitioned for review of the Court’s decision with respect to the alleged collection of
 14 communication records. On November 7, 2006, the Ninth Circuit granted the United States’ and
 15 AT&T’s petition, and denied plaintiffs’ cross-petition as “unnecessary.”

16 **B. The Consolidated Cases**

17 The cases consolidated in this MDL proceeding make the very same kinds of claims, and
 18 thus present the very same state secrets issues, as the *Hepting* case. The consolidated cases
 19 challenge either the alleged collection of call records information and/or the alleged interception
 20 of the content of communications, or both.² Most of these cases are class actions with putative

21 ² See, e.g. *Bissitt v. Verizon* (06-cv-220) (D.R.I.) (Compl. ¶¶ 1, 29, 39, 45, 47,
 22 challenging alleged disclosure to NSA of the “contents of their communications and/or records
 23 pertaining to their communications”); *Campbell v. AT&T Communications of California*,
 24 06-cv-3596) (N.D. Cal.) (Compl. ¶¶ 19-23, challenging alleged disclosure to NSA of the calling
 25 records); *Bready v. Verizon*, (06-cv-2185) (D. Md.) (Compl. ¶¶ 13, 40, 46, challenging alleged
 26 program to monitor and or intercept the telephone and or internet communications, and or
 27 records of those communications of defendants’ subscribers); *Crockett v. Verizon Wireless et al.*,
 28 (06-cv-345) (D. Hawaii) (Compl. ¶ 19, challenging alleged programs to intercept content of
 communications and to provide NSA access to customer records); *Cross v. AT&T
 Communications, Inc. et al.* (06-cv-847) (D. Ind.) (Compl. ¶ 35, challenging alleged programs to
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1 classes that overlap substantially with the putative classes in other cases, including *Hepting*.
 2 Indeed, some Complaints appear to have taken language and claims verbatim from the *Hepting*
 3 Complaint.^{3/} Thus, there can be no dispute that the consolidated cases present the same issues
 4 that are now subject to appellate review in *Hepting*.

5 ARGUMENT

6 It is well-established that a district court has the discretionary power to stay proceedings
 7 in its own court. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). In particular, “[a] trial
 8 court may, with propriety, find it is efficient for its own docket and the fairest course for the
 9 parties to enter a stay of an action before it, pending resolution of independent proceedings which
 10 bear upon the case.” *Levy v. Certified Growers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir.
 11 1979); *see also Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th
 12 Cir. 1983).

13 Where it is proposed that a pending proceeding be stayed, the competing interests
 14 which will be affected by the granting or refusal to grant a stay must be weighed.
 15 Among those competing interests are the possible damage which may result from
 the granting of a stay, the hardship or inequity which a party may suffer in being
 required to go forward, and the orderly course of justice measured in terms of the

16 intercept content of communications and to provide NSA access to customer records);
 17 *Harrington v. AT&T Inc.* (1:06-374) (W.D. Tex.) (Compl. ¶¶ 3, 4, challenging alleged provision
 18 of customer communication records); *Herron v. Verizon Global Networks Inc. et al.*,
 19 06-cv-2491) (E.D. La.) (Compl. ¶ 4, challenging alleged disclosure of phone call information to
 20 NSA); *Joll v. AT&T Corp. et al.* (06-cv-2680) (N.D. Ill.) (Compl. ¶ 26, challenging alleged
 disclosure by defendants to NSA of communications and/or record or other customer
 information); *Terkel v. AT&T Corp. et al.* C 2837) (N.D. Ill.) (2d Am. Compl. ¶¶ 21-25,
 21 challenging alleged provision of telephone call contents and records to NSA); *Trevino v. AT&T*
Corp. et al. (2:06-cv-209) (S.D. Texas) (Compl. ¶ 4, challenging alleged disclosure by AT&T to
 22 NSA of the contents of its customer communications as well as detailed communications
 records); *Waxman v. AT&T Corp.* (06-cv-2900) (N.D. Ill.) (Compl. ¶¶ 10-11, 13, challenging
 23 AT&T’s alleged disclosure to NSA of call records information).

24 ³ *See, e.g., Derosier v. Cingular Wireless et al.*, (06-cv-917) (W.D. Wash.) (Compl. ¶ 4,
 25 alleging that the “Government did not act – and is not acting – alone” and making identical
 26 allegations as to the interception and analysis of telephone and internet communications and
 class allegations); *Dolberg v. AT&T Corp. et al.* (9:06-78) (D.Mont.) (same); *Fuller v. Verizon*
Communications et al., (06-cv-77) (D. Mont.) (same); *Mahoney v. Verizon Communications, Inc.*
 (06-244) (D. RI) (identical allegations and language) (same).

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1 simplifying or complicating of issues, proof, and questions of law which could be
2 expected to result from a stay.

3 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2004) (citing *CMAX, Inc. v. Hall*, 300
4 F.2d 265 (9th Cir. 1962)).

5 The United States respectfully submits that the most appropriate course at this time is to
6 stay this MDL proceeding pending disposition of the *Hepting* appeal. The United States has
7 sought appellate review regarding, *inter alia*, critical and threshold issues that are directly
8 applicable in all the consolidated cases, and which ultimately go to the question of whether claims
9 challenging alleged classified NSA intelligence activities can proceed at all without risking the
10 disclosure of state secrets and thereby harming national security. It is beyond doubt that the
11 privilege issues raised by the *Hepting* appeal are directly relevant to the claims raised in these
12 consolidated cases; any argument to the contrary would lack credibility. The outcome of the
13 *Hepting* appeal may result either in the dismissal of the pending cases or, at the least, may provide
14 key guidance to the resolution of the identical state secrets privilege issues, and it clearly would
15 be inefficient to proceed in this matter given the potential impact of that appeal.

16 Any different course—that is, further district court proceedings while the *Hepting* appeal
17 is pending—would require the same assertion of privilege and would risk disclosure of the very
18 privileged information whose protection is now at issue before the Court of Appeals. The
19 plaintiffs seek to proceed immediately on multiple fronts that will inevitably require the
20 Government to assert precisely the same privilege claim raised by the *Hepting* appeal. Such
21 proceedings would not only be pointless in light of the *Hepting* appeal, but would risk disclosures
22 of the very privileged information at stake while appellate review is pending.^{4/}

23 ⁴ Although the Government does not seek a stay of any order or injunction pending
24 appeal, the Government would also satisfy the balancing test utilized by the Ninth Circuit for
25 such a stay if those standards were applicable. In staying an order pending appeal, the Court
26 would weigh certain factors along “a single continuum”: at one end of the continuum, the
27 moving party is required to demonstrate probable success on the merits and the possibility of
28 irreparable harm, and at the other end, the party is required to show that serious questions have
29 been raised and the balance of hardships tips sharply in the moving party’s favor. *Artukovic v.*

1 Indeed, because the Court of Appeals has granted interlocutory review of the Court's
 2 Order in *Hepting*, this Court is divested of jurisdiction in *Hepting* over the issues involved in that
 3 appeal. *See City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001)
 4 (holding that the “issuance of an order by a court of appeals permitting an appellant to bring an
 5 interlocutory appeal” “divests the district court of jurisdiction over the particular issues involved
 6 in that appeal”); *accord Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990)
 7 (“[A]n appeal of an interlocutory order does not ordinarily deprive the district court of
 8 jurisdiction except with regard to the matters that are the subject of the appeal.”); Manual for
 9 Complex Litigation § 15.12 (4th ed. 2004). Since all of the claims in *Hepting* put at issue
 10 AT&T’s alleged collaboration with the NSA, thereby directly implicating the Government’s state
 11 secrets privilege assertion and related threshold issues (which are all issues on appeal), the key
 12 steps in the *Hepting* action cannot proceed at all now that an appeal has been taken. Because the
 13 subject matter of the remaining consolidated cases are identical to the issues raised in
 14 *Hepting*—indeed, even plaintiffs have indicated that *Hepting* should be designated as the lead
 15 action—there is little point to proceeding with claims in other cases until those key threshold
 16 questions are decided by the Court of Appeals.

17 **I. SERIOUS ISSUES OF PRIVILEGE ARE RAISED BY THE HEPTING APPEAL**
 18 **AND HAVE A DIRECT BEARING ON ALL CASES IN THIS MDL**
 19 **PROCEEDING.**

20 As this Court recognized in certifying its July 20 Order in *Hepting* for appeal, that
 21 Order—and thus the appeal from it—raises serious and substantial issues that will have a direct

22 *Rison*, 784 F.2d 1354, 1355 (9th Cir. 1986); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.),
 23 *rev’d in part on other grounds*, 463 U.S. 1328 (1983). The “relative hardship to the parties” is
 24 the “critical element” in deciding at which point along the continuum a stay is justified. *Lopez*,
 25 713 F.2d at 1435 (internal quotation marks omitted). The public interest is an additional factor.
 26 *Artukovic*, 784 F.2d at 1355. As set forth herein, deeply serious questions presented by the
 27 *Hepting* appeal are applicable here, and the Government faces serious and irreparable harm to its
 28 interests because further proceedings risk the disclosure of information that should be protected
 for national security reasons. Indeed, the Sixth Circuit recently granted the United States a stay,
 pending appeal, of a district court’s order enjoining the Terrorist Surveillance Program. *See*
ACLU v. NSA, Nos. 06-2095, 06-2140, 2006 WL 2827166 (6th Cir. Oct. 4, 2006).

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1 bearing on the state secrets issues presented in the consolidated cases. In *Hepting*, the United
2 States submitted to this Court public and classified declarations from the Director of National
3 Intelligence and the NSA Director which demonstrated that adjudicating each of plaintiffs' claims
4 would require confirmation or denial of the existence, scope, and potential targets of alleged
5 intelligence activities, as well as AT&T's purported involvement in such activities. The
6 declarations made clear that such information cannot be confirmed or denied without causing
7 exceptionally grave damage to national security; indeed, the most basic factual allegation
8 necessary for plaintiffs' case—whether AT&T has engaged in certain conduct at the behest of the
9 NSA—can neither be confirmed nor denied by AT&T or the United States. Accordingly, every
10 key step in *Hepting*—for plaintiffs to demonstrate their standing by establishing that AT&T
11 engaged in conduct that injured them, for plaintiffs to prove their claims, for AT&T to defend
12 against them, or for the United States to represent its interests—would immediately confront
13 privileged information.

14 The United States respectfully believes the Court erred in its review of the National
15 Intelligence Director's claim of state secrets privilege, including in particular with regard to
16 whether or not AT&T had provided to the NSA communications content under the Terrorist
17 Surveillance Program. The Court started with the fact that the President has announced the
18 existence and rough contours of the Terrorist Surveillance Program. The Court then
19 hypothesized, with no support in the record, that this program could not be undertaken without
20 cooperation by members of the communications industry. The Court next noted that AT&T is a
21 large industry participant, cooperates with the Government when requested to do so through
22 lawful means, and has stated that it engages in classified contracts. The Court then put these
23 points together in its own fashion, overrode the national security judgment of the Director of
24 National Intelligence, and concluded that it should not be a state secret for AT&T to confirm
25 through this litigation that, if true, it is indeed assisting the NSA in carrying out the Terrorist
26 Surveillance Program. The Court reached these conclusions, moreover, even though the *Hepting*

1 plaintiffs' allegations were facially insufficient to support their standing to challenge the TSP,
2 because they did not claim to communicate with members or agents of al Qaeda or affiliated
3 terrorist organizations. And the Court directed that discovery from AT&T might follow.

4 The central issue on appeal in *Hepting* is whether the Court improperly overrode the
5 judgment of the Executive as to the protection of national security information, and thereby erred
6 in failing to dismiss the *Hepting* complaint. In particular, nearly everything in the Court's July 20
7 Opinion flowed from the Court's step (which the United States respectfully submits was
8 improper) of drawing speculative inferences from the public record in a manner inconsistent with
9 the assertion of the state secrets privilege. Thus, for example, the Court rejected the argument
10 that the complaint must be dismissed because plaintiffs will not be able to demonstrate standing.
11 But in analogous circumstances, other cases have been dismissed in light of state secrets privilege
12 claims. In *Halkin I*, for example, the D.C. Circuit upheld an assertion of the state secrets privilege
13 regarding the identities of individuals subject to NSA surveillance, despite significant public
14 disclosures about the surveillance activities at issue. *See* 598 F.2d at 8, 10. And a similar state
15 secrets assertion with respect to the identities of individuals subject to CIA surveillance was
16 upheld in *Halkin II*, 690 F.2d at 991 (D.C. Cir. 1982). As a result of the state secrets privilege,
17 the D.C. Circuit held in both *Halkin I* and *Halkin II* that the plaintiffs were incapable of
18 demonstrating that they had standing to challenge the alleged surveillance. *See id.* at 997; *see*
19 *also id.* at 999-1000 ("[T]he absence of proof of actual acquisition of appellants' communications
20 is fatal" to their claims).^{5/}

21 ⁵ The Court's suggestion that *Halkin* supports the proposition that proceeding to
22 discovery is appropriate before dismissal on state secret grounds is not accurate. In *Halkin I*, the
23 Government opposed discovery by the plaintiffs and, in response to inquiries from the court,
24 asserted the state secrets privilege to bar disclosure of whether plaintiffs were subject to
25 surveillance. That privilege assertion was *upheld* in its entirety without further proceedings. *See*
26 598 F.2d at 6-7, 8-11. Indeed, the court in *Halkin I* stated that "[n]o amount of ingenuity of
27 counsel in putting questions on discovery can outflank the government's objection that
28 disclosure of this fact is protected by privilege," and thus, that "affording additional discovery
for the government to parry plaintiffs' requests would be fruitless." *Halkin I*, 598 F.2d at 6-7. As
noted, this finding in *Halkin I* led to dismissal on precisely the same grounds in *Halkin II*. *See*
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1 Thus, a key issue on appeal is whether the plaintiffs could even establish standing without
2 the disclosure of state secrets. This is not just an issue of whether plaintiffs have pled a sufficient
3 injury but, as in *Halkin*, concerns whether facts needed to decide whether plaintiffs actually have
4 standing are available. It is irrelevant that plaintiffs in *Hepting* allege that their communications
5 are encompassed within a “dragnet” of surveillance; the threshold state secrets issue is whether
6 the facts needed to establish that plaintiffs have had (or are likely to have) their communications
7 intercepted cannot be disclosed. This critical standing question is presented in all of the cases
8 consolidated in this MDL proceeding, and thus the *Hepting* appeal will resolve, or at least be
9 highly relevant to, litigation of plaintiffs’ standing in these actions.

10 Another serious question raised in the *Hepting* appeal is whether the Court erred to the
11 extent it believed that the doctrine in *Totten v. United States*, 92 U.S. 105 (1875), is limited to
12 situations involving adjudication of alleged espionage agreements between the parties. *Totten*
13 establishes that “public policy forbids the maintenance of any suit in a court of justice, the trial of
14 which would inevitably lead to the disclosure of matters which the law itself regards as
15 confidential, and respecting which it will not allow the confidence to be violated.” *Totten*, 92
16 U.S. at 107; *Tenet v. Doe*, 544 U.S. 1 (2005). This rule has been applied well beyond the limited
17 context posited by the Court. See *Weinberger v. Catholic Action of Haw./Peace Ed. Project*, 454
18 U.S. 139, 146-47 (1981) (citing *Totten* in holding that “whether or not the Navy has complied
19 with [NEPA] ‘to the fullest extent possible’ is beyond judicial scrutiny in this case,” where,
20 “[d]ue to national security reasons,” the Navy could “neither admit nor deny” the fact that was
21 central to the suit, *i.e.*, “that it propose[d] to store nuclear weapons” at a facility); see also *Kasza*,
22 133 F.3d at 1170 (relying in part on *Totten* to dismiss even though a classified espionage
23 relationship was not at issue). This issue is of obvious significance in this MDL proceeding,
24 where dozens of the consolidated actions are brought against telecommunication providers

25 690 F.2d at 997. Moreover, the discovery which occurred in *Halkin II* as to the defunct
26 surveillance program at issue was pointless since the protection of state secrets ultimately
27 precluded the establishment of standing in that case.

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1 alleged to be assisting the NSA in intelligence activities.

2 An additional issue raised by the *Hepting* appeal is whether the Court misapplied the
3 standard for determining whether the very subject matter of a case is a state secret. The United
4 States will contend on appeal that this question is resolved not by looking to whether certain
5 information about the general subject of the lawsuit is public or whether a particular program has
6 been confirmed, but rather to whether the evidence needed to decide the specific claims
7 inherently risks the disclosure of state secrets. *See Kasza*, 133 F.3d at 1170 (finding the very
8 subject matter of the case to be a state secret by examining whether the evidence needed for
9 plaintiffs to establish a *prima facie* case and any further proceeding, including trial, would
10 jeopardize national security); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1237 (4th Cir.
11 1985) (“due to the nature of the question presented in this action and the proof required by the
12 parties to establish or refute the claim, the very subject of this litigation is itself a state secret”)
13 (emphasis added). The claims raised in the consolidated cases (including *Hepting*) directly put at
14 issue whether or not there is a classified relationship between the NSA and telecommunication
15 carriers and, beyond that, other potential classified facts about the operation of alleged
16 intelligence programs. Again, review of this question by the Court of Appeals will have a direct
17 bearing on all the consolidated cases in this MDL proceeding.

18 A further issue on appeal is whether the Court erred in declining to decide whether the
19 evidence needed for plaintiffs to establish their *prima facie* case, or for defendants to present a
20 defense, implicates state secrets. As noted above, an assertion of the state secrets privilege
21 requires the Court to assess first whether disclosure of the information reasonably could cause
22 harm to national security, and then to look ahead to whether the privileged information would be
23 needed to either prove or defend against the claims on the merits. If state secrets are needed by
24 either plaintiffs or defendants, the case cannot proceed. This inquiry must be made at the
25 threshold, before any discovery, by examining the state secrets privilege *ex parte*, *in camera*, and
26 the elements of proof for the claims. In *Hepting*, as well as in all of the other cases in this MDL

1 proceeding, litigation of the plaintiffs' claims would require confirmation or denial of whether the
2 alleged NSA and carrier activities are occurring, whether they apply to plaintiffs, and if, so, *how*
3 they might have occurred to determine if the particular statutory or constitutional requirements
4 have been violated. The *Hepting* appeal will thus bear directly on this issue (common to all cases
5 transferred here) as well.

6 Lastly, the Court's treatment in *Hepting* of allegations concerning the alleged collection of
7 call records is also an issue before the Court of Appeals. The United States is not aware of any
8 case in which a Court agreed that allegations implicated state secrets that could not be confirmed
9 or denied but, nonetheless, declined to dismiss a claim because more information might get
10 disclosed in the future (indeed, perhaps *accidentally*). The only other district court to have ruled
11 in a case challenging alleged assistance by a telecommunications carrier in providing
12 communications records to the NSA dismissed those claims on state secrets grounds. In *Terkel v.*
13 *AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006)—a case that has been transferred to this MDL
14 proceeding—the district court was “persuaded that requiring AT&T to confirm or deny whether it
15 has disclosed large quantities of telephone records to the federal government could give
16 adversaries of this country valuable insight into the government's intelligence activities. Because
17 requiring such disclosures would therefore adversely affect our national security, such disclosures
18 are barred by the state secrets privilege.” *Id.* at 917.⁶ We believe the same result was required
19 here, and will urge the Court of Appeals to hold that the communications records claims should
20 have been dismissed. That issue is also presented in most (if not all) cases in this proceeding, and
21 the outcome of the appeal will thus have a substantial effect on those cases. Indeed, the *Hepting*
22 plaintiffs have argued that appellate review of the Court's ruling regarding their call records
23 claims would materially advance termination of the lawsuit and that state secrets issues should
24 not be considered piecemeal. *See Hepting Plaintiffs' 1292(b) Cross Petition at 9.*

25 ⁶ *See also ACLU v. NSA*, 438 F. Supp. 2d 754, 765 (E.D. Mich. 2006) (upholding state
26 secrets privilege as to alleged call records collection and granting the Government's motion for
27 summary judgment with respect to this claim) (appeal pending).

* * *

1 All of the foregoing issues present serious questions of law that the Court of Appeals will
2 consider as part of the *Hepting* appeal, and all of those issues are presented in the various cases
3 transferred to this MDL proceeding. The United States respectfully submits that it would be
4 inefficient and burdensome to proceed in this Court, with over 30 different actions, while an
5 appeal on the very threshold questions at issue in these cases is now pending before the Court of
6 Appeals.

7 Indeed, further proceedings in these consolidated actions will immediately require
8 precisely the same privilege assertion raised in *Hepting*. Most obviously, if these cases are not
9 stayed, the United States would be required to intervene (where it is not a party) and move to
10 dismiss these consolidated actions on state secrets grounds, precisely as it did in *Hepting*. It
11 would make little sense to require the United States to take those steps when the outcome of the
12 appeal may make them unnecessary—or at the very least will provide substantial guidance
13 regarding the applicable legal framework.

14 **II. FURTHER PROCEEDINGS IN THIS MDL ACTION WILL ALSO RISK**
15 **SERIOUS HARM TO THE GOVERNMENT’S NATIONAL SECURITY**
16 **INTERESTS.**

17 The need for a stay is underscored further by plaintiffs’ demands to proceed on multiple
18 tracks that will unquestionably implicate the privilege issues raised by the *Hepting* appeal and
19 risk the disclosure of privileged information. Plaintiffs propose a panoply of litigation steps—as
20 if this case did not involve alleged classified activities, and as if the *Hepting* appeal were not even
21 pending. But in any matter of privilege, particularly one involving the state secrets privilege to
22 which the “utmost deference” is due, *Kasza*, 133 F.3d at 1166, a stay is required to avoid
23 “disclosure of the very thing the privilege is designed to protect,” *Reynolds*, 345 U.S. at 8. Courts
24 are “not required to play with fire and chance further disclosure—inadvertent, mistaken, or even
25 intentional—that would defeat the very purpose for which the privilege exists.” *Sterling v. Tenet*,
26 416 F.3d 338, 344 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052 (2006). Neither, of course,

1 should the Government be required to take such a chance. The law is clear, moreover, that where
2 the very issue on appeal is whether information should be protected, further proceedings that
3 might disclose that information should not be conducted. Where a movant has “raised ‘specific
4 privilege claims,’” such as here, “and there exists a ‘real possibility . . . that privileged
5 information would be irreparably leaked’ . . . if it turns out that the district court erred,” the
6 movant has “shown a ‘real possibility’ that he will be irreparably harmed by the disclosure . . .
7 pursuant to the district court’s order.” *United States v. Griffin*, 440 F.3d 1138, 1142 (9th Cir.
8 2006).⁷ Here, plaintiffs propose to proceed on a number of fronts that will implicate and risk the
9 disclosure of the very information subject to the state secrets privilege assertion now being
10 reviewed in *Hepting*.

11 **A. Hepting Answer**

12 First, plaintiffs demand an Answer to the *Hepting* Complaint, which alleges that AT&T
13 assisted the NSA in the alleged activities. But putting AT&T and the Government to the task of
14 redacting facts from the Complaint is pointless, since the appeal may make an Answer
15 unnecessary. Moreover, the Government has already provided the Court, *ex parte, in camera*,
16 with a description of the state secrets at issue in the Complaint, and answering the Complaint is
17 not necessary to apprise the Court of the underlying privileged facts at stake. Such a course is
18 also risky. The process of redaction presents potential risks, since the identification of specific
19 allegations that are and are not subject to the state secrets privilege might tend to reveal the
20 underlying privileged information not only in *Hepting* but also, by comparison, in other cases in
21 this MDL proceeding, where similar information may or may not be confirmed or denied. Rather
22 than forcing the Government and AT&T to publicly choose among a list of allegations in a long

23
24 ⁷ See also *Center for National Security Studies v. U.S. Dep’t of Justice*, 217 F. Supp. 2d
25 58, 58 (D.D.C. 2002) (finding that “disclosure of the names of the detainees and their lawyers”
26 pursuant to the Freedom of Information Act “would effectively moot any appeal,” and therefore
granting a stay pending appeal); *Providence Journal Company v. FBI*, 595 F.2d 889 (1st Cir.
1979) (granting stay pending appeal to preserve status quo of not disclosing information at issue
in FOIA case).

1 Complaint ,the state secrets privilege assertion already lodged is the safest and most efficient way
2 for the Government to identify state secrets for the Court.

3 **B. Discovery/Preliminary Injunction Motion**

4 Plaintiffs in these consolidated actions propose to proceed with a wide range of discovery
5 directed at proving their allegations about classified activities, and several areas of discovery
6 proposed by plaintiffs quite specifically demand the disclosure of classified information covered
7 by the Government's privilege assertion (such as whether or not carriers received certifications
8 from the Government to assist the NSA). Indeed, the very purpose of such discovery is to prove
9 facts over which the United States has asserted the state secrets privilege.

10 *Hepting Preliminary Injunction Motion*: First, plaintiffs (in *Hepting* at least) seek
11 discovery in connection with a preliminary injunction motion that quite obviously puts directly at
12 issue whether AT&T has assisted the Government in alleged NSA intelligence activities and the
13 merits of the lawfulness of those activities—matters that squarely implicate the state secrets
14 privilege assertion now subject to appellate review. *See* Plaintiffs' Amended Notice of Motion
15 and Motion for Preliminary Injunction; Plaintiffs' Memorandum of Points and Authorities in
16 Support of Motion for Preliminary Injunction (Dkt. No. 149) at 3, 5; *see also id.* at 17, 18, 19, 22
17 (repeatedly alleging collaboration between AT&T and the Government). In particular, the
18 *Hepting* plaintiffs' motion specifically puts at issue whether certifications were provided to
19 AT&T, *see id.* at 21, and the alleged creation of a secure room to facilitate the alleged activities,
20 *see id.* at 6—again implicating the Government's state secrets privilege assertion. Because the
21 *Hepting* preliminary injunction motion requires an assessment of plaintiffs' likelihood of success
22 on the merits, the facts needed to address a range of issues in this case—from plaintiffs' standing
23 to the legality of alleged wiretapping under the Constitution and statutory law—are all implicated
24 by the motion and discovery related thereto. Finally, the relief sought by the *Hepting* motion
25 most definitely implicates state secrets, since it seeks to halt AT&T's alleged involvement with
26 NSA activities. For all these reasons, discovery related to the *Hepting* motion, and litigation of

1 the motion itself, unquestionably would implicate state secrets and would risk disclosure of the
2 privileged information.

3 *Rule 30(b)(6) Deposition:* Plaintiffs seek a Rule 30(b)(6) deposition of an AT&T official
4 which they contend would be tailored to address only issues raised by the *Hepting* preliminary
5 injunction motion. But such a deposition would plainly implicate the state secrets privilege issues
6 on appeal. As noted, the preliminary injunction motion raises most of the merits issues presented
7 by these cases. Even if somehow limited to purportedly non-privileged issues, any deposition is
8 fraught with the risk of disclosures, directly or inadvertently or by implication, that might tend to
9 confirm or deny information subject to the state secrets privilege. The United States would again
10 have to assert privilege in order to protect information at issue in the *Hepting* appeal and thereby
11 replicate a process that has already occurred.

12 *Carrier Certifications:* Plaintiffs also wish to seek discovery as to alleged certifications
13 between the United States and carriers, again implicating a key state secrets privilege question
14 raised in *Hepting* and now subject to appellate review. If such discovery proceeds, the United
15 States would again be required to assert the state secrets privilege as to any information related to
16 any alleged certifications. The Court would then be in the same position as it was in reviewing
17 this privilege assertion in connection with the United States' motion to dismiss in *Hepting*. There
18 is no point to repeating this process during the appeal. While the Court in *Hepting* found that "the
19 state secrets privilege will not prevent AT&T from asserting a certification-based defense, as
20 appropriate, regarding allegations that it assisted the government in monitoring communication
21 content," and envisioned that AT&T could confirm or deny the existence of a certification
22 authorizing monitoring of communication "at the level of generality at which the government has
23 publicly confirmed or denied its monitoring of communication content," *Hepting* 439 F. Supp. 2d
24 at 997, the United States respectfully disagrees with this assessment and believes that any attempt
25 to go down this road would risk disclosing information subject to the state secrets privilege. Even
26 if some purportedly non-confirmatory statements could be developed at some "level of

1 generality,” the risk is great that proceeding as the Court envisions would nonetheless indirectly
2 confirm or deny classified facts and cause harm to the national security.

3 *Network Information:* Other specific discovery sought by plaintiffs clearly seeks to probe
4 into core state secrets issues. For example, plaintiffs state that they seek discovery into AT&T’s
5 network and equipment referenced in the Klein Declaration in *Hepting*. The very purpose of the
6 testimony provided by plaintiffs’ declarants is to confirm whether classified intelligence NSA
7 activities are occurring through AT&T, and further discovery into these topics inherently
8 implicates the Government’s state secrets privilege assertion. The Government would again be
9 required to assert the state secrets privilege as to this area of discovery to protect its privilege
10 assertion.

11 *Statements of Carriers and Government:* Plaintiffs also seek discovery of statements from
12 telecommunication carriers concerning their alleged involvement in NSA activities. *See, e.g.,*
13 Joint Case Management Statement (MDL Dkt. No. 61) at 40-42. All such discovery is intended
14 to prove the underlying claim of the carriers’ alleged collaboration with the NSA and, thus, all of
15 it implicates the state secrets privilege assertion on appeal. Even if such statements appeared
16 innocuous, any discovery intent on probing into the underlying issues in this case could lead to
17 serious consequences and should not be permitted. Moreover, the carriers cannot waive the state
18 secrets privilege; therefore any statements the carriers may have made cannot undercut the
19 privilege assertion and would thus be useless to plaintiffs. In any event, the relevance of such
20 statements to the state secrets analysis is an issue on appeal in *Hepting*, and the Court should not
21 embark on any such discovery until the appeal is decided.

22 * * *

23 For the foregoing reasons, the preliminary injunction motion and discovery proceedings
24 proposed by the plaintiffs would not only be unnecessarily burdensome while the *Hepting* appeal
25 is pending, but would threaten to expose the very type of privileged information at issue in the
26

1 *Hepting* appeal.^{8/} In order to avoid unwarranted litigation, and preserve the significant issue of
2 privilege on appeal, a stay of these proceedings is the most appropriate course.

3 **III. THE PUBLIC INTEREST ALSO FAVORS A STAY PENDING APPEAL.**

4 Finally, the public interest weighs in favor of a stay of these proceedings pending the
5 *Hepting* appeal. At issue is nothing less than the disclosure of information that might cause
6 exceptionally grave harm to the national security. While the Court and plaintiffs may disagree
7 with that assessment, it remains the matter in dispute on appeal in *Hepting*. “[N]o governmental
8 interest is more compelling than the security of the nation,” *Haig v. Agee*, 453 U.S. 280, 307
9 (1981), and that is what is at issue here. Where courts have found that, upon an assertion of the
10 state secrets privilege, the “greater public good” may lie in dismissal of the case, *see Kasza*, 133
11 F.3d at 1167, the public interest is best served by staying further proceedings until the Court of
12 Appeals decides that very question.

13 **CONCLUSION**

14 For these reasons, the Court should enter a stay of all aspects of the MDL litigation
15 pending resolution of the *Hepting* appeal.

16 Dated: November 8, 2006

17 Respectfully submitted,

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22
23

24 ⁸ In addition, plaintiffs also propose briefing on their motions for class certification. But
25 this too is not possible pending the *Hepting* appeal, since any issue of typicality or commonality
26 of alleged class claims would clearly be bound up in the underlying facts as to what, if any,
alleged injuries plaintiffs have actually suffered—allegations that cannot be confirmed or denied
in light of the Government’s state secrets privilege assertion.

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