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14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 In re:

19 NATIONAL SECURITY AGENCY
20 TELECOMMUNICATIONS RECORDS
21 LITIGATION

23 This Document Relates To:

24 ALL ACTIONS
25

MDL Dkt. No. 06-1791-VRW

**REPLY MEMORANDUM IN SUPPORT
OF JOINDER IN UNITED STATES'
MOTION TO STAY PROCEEDINGS
PENDING DISPOSITION OF
INTERLOCUTORY APPEALS IN
*HEPTING v. AT&T CORP.***

Date: February 9, 2007
Time: 2:00 p.m.
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

TABLE OF CONTENTS

1

2 INTRODUCTION 1

3 ARGUMENT 2

4 I. THIS COURT LACKS JURISDICTION TO TAKE ANY ACTION
5 CONCERNING THE MATTERS INVOLVED IN THE APPEAL..... 2

6 II. DISCLOSURE IS NOT AVAILABLE UNDER 50 U.S.C. § 1806(F) AND,
7 IN ANY EVENT, WOULD UNJUSTIFIABLY IMPOSE AN
8 EXCEPTIONAL BURDEN ON AT&T AND UNWARRANTED RISK TO
9 NATIONAL SECURITY..... 5

10 A. Section 1806(f)'s *In Camera, Ex Parte* Procedures Do Not Apply
11 Here 5

12 B. *In Camera, Ex Parte* Disclosures Cannot Be Justified In Light Of
13 The Substantial Risks And Burdens Created By Such A Process..... 7

14 III. PLAINTIFFS' REMAINING PROPOSALS ARE UNSOUND. 11

15 CONCLUSION 12

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

Al-Haramain Islamic Found., Inc. v. Bush,
451 F. Supp. 2d 1215 (D. Or. 2006),
appeal docketed, No. 06-36083 (9th Cir. Dec. 22, 2006).....5

Britton v. Co-op Banking Group,
916 F.2d 1405 (9th Cir. 1990).....2

Chiron Corp. v. Abbott Labs.,
No. C-93-4380 MHP, 1996 WL 15758, 1996 U.S. Dist. LEXIS 317
(N.D. Cal. Jan. 3, 1996).....8

CIA v. Sims,
471 U.S. 159 (1985) 11

City of Los Angeles v. Santa Monica Baykeeper,
254 F.3d 882 (9th Cir. 2001)2, 3, 4

Ellsberg v. Mitchell,
709 F.2d 51 (D.C. Cir. 1983)..... 10

In re Grand Jury Proceedings of the Special April 2002 Grand Jury,
347 F.3d 197 (7th Cir. 2003).....7

Halkin v. Helms,
598 F.2d 1 (D.C. Cir. 1978).....6

Hepting v. AT&T Corp.,
No. 06-672-VRW, 2006 WL 1581965, 2006 U.S. Dist. LEXIS 41160
(N.D. Cal. June 6, 2006)..... 11

Hoffman v. Beer Drivers & Salesmen’s Local Union No. 888,
536 F.2d 1268 (9th Cir. 1976)4

In re Nat’l Sec. Agency Telecommc’ns Records Litig.,
444 F. Supp. 2d 1332 (J.P.M.L. 2006)8

In re Phenylpropanolamine (PPA) Prods. Liab. Litig.,
460 F.3d 1217 (9th Cir. 2006)8

Kasza v. Browner,
133 F.3d 1159 (9th Cir. 1998)..... 11

Kotrous v. Goss-Jewett Co. of N. Cal.,
No. Civ. S021520, 2005 WL 2452606, 2005 U.S. Dist. LEXIS 43010
(E.D. Cal. Oct. 4, 2005).....8

Landis v. N. Am. Co.,
299 U.S. 248 (1936)8

1 Levya v. Certified Grocers of Cal., Ltd.,
593 F.2d 857 (9th Cir. 1979) 8

2

3 Masalosalo by Masalosalo v. Stonewall Ins. Co.,
718 F.2d 955 (9th Cir. 1983) 4

4 Sterling v. Tenet,
416 F.3d 338 (4th Cir. 2005),
5 cert. denied sub nom. Sterling v. Goss,
126 S. Ct. 1052 (2006) 9

6

7 United States v. Falvey,
540 F. Supp. 1306 (E.D.N.Y. 1982) 6

8 United States v. Ott,
827 F.2d 473 (9th Cir. 1987) 6

9

10 United States v. Reynolds,
345 U.S. 1 (1953) 9, 10

11 United States v. Thorp,
655 F.2d 997 (9th Cir. 1981) 5

12

13 **STATUTES**

14 50 U.S.C. § 1801(k) 5

15 50 U.S.C. § 1806(f) passim

16 **LEGISLATIVE HISTORY**

17 H. Conf. Rep. 95-1720 (1978) 6

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1 **INTRODUCTION**

2 As AT&T explained in its initial Joinder, this Court is jurisdictionally barred in
3 *Hepting* from conducting any proceeding that relates to the state secrets and *Totten* issues
4 that are currently pending before the Ninth Circuit. In their Opposition to Government
5 Motion to Stay Proceedings (Dkt. 128) (“Opp’n”), Plaintiffs modify their previous positions
6 to avoid the most obvious points of conflict with this principle. For example, they disavow
7 certain prior requests, such as litigating their motion for a preliminary injunction or
8 requiring AT&T or the government to produce to them discovery that would implicate state
9 secrets. *Compare* Jt. Case Mgmt. Stmt. (Dkt. 61-1) at 33, 38-39 (requesting this), *with*
10 Opp’n at 36 (disavowing this). And other prior requests, such as litigating class
11 certification, are simply not mentioned.

12 Nonetheless, they continue to urge the Court to press as close to state secrets as
13 possible while the *Hepting* appeal is pending through the use of a subsection of FISA that
14 they appear to regard as a procedural panacea. Plaintiffs urge this Court, in effect, to
15 litigate this matter *in camera* and *ex parte* using the procedures in 50 U.S.C. § 1806(f). But
16 § 1806(f) by its own terms does not apply here. At most, it is a limited mechanism that
17 permits a court to evaluate the legality of “electronic surveillance” if and when the
18 existence of that surveillance already has been established. It does not provide
19 authorization to require the production of “any information that the government asserts is
20 secret,” Opp’n at 22 (emphasis added); it does not contemplate or authorize the filing of
21 Answers *ex parte* and *in camera*; and it does not permit discovery to confirm the existence
22 of suspected but undisclosed and unconfirmed surveillance. A survey of the several dozen
23 decisions nationwide in which the procedures of § 1806(f) have been employed reveals not
24 one in which it has been used as Plaintiffs suggest.

25 As a practical matter, preparing the sort of submissions Plaintiffs seem to envision
26 would (assuming there were in fact any underlying intelligence activity at issue) be a
27 burdensome and logistically difficult undertaking that would pose significant risks to
28 national security with little corresponding benefit to the litigation. These burdens and risks

1 are especially unjustified when the pending Ninth Circuit appeals will likely impact
2 virtually every aspect of how this litigation can be conducted, if at all. To proceed in the
3 manner proposed by Plaintiffs would risk mootng the appeal, would contravene important
4 state secrets principles that require the utmost caution to be employed when litigation risks
5 compromising national security secrets, and would betray this Court’s “intention to proceed
6 in a careful, step-by-step manner.” Opp’n at 7.

7 Plaintiffs also seek to conduct various other forms of discovery that they claim do
8 not implicate state secrets. But this discovery would not advance the litigation measurably;
9 it too could be mooted by the Ninth Circuit appeal; and none of it would in any way affect
10 the supposed “irreparable harm” that is the focus of Plaintiffs’ Opposition. Because this
11 Court is jurisdictionally disabled from proceeding with any litigation of substance, the *only*
12 possible benefit to Plaintiffs is that *if* they prevail in the Ninth Circuit, the litigation *might*
13 proceed marginally more quickly on remand. This game is hardly worth the candle. The
14 appropriate course is to stay the MDL proceedings until the *Hepting* appeal has been
15 resolved.

16
17 **ARGUMENT**

18 **I. THIS COURT LACKS JURISDICTION TO TAKE ANY ACTION
19 CONCERNING THE MATTERS INVOLVED IN THE APPEAL.**

19 As explained in AT&T’s joinder, “the filing of a notice of interlocutory appeal
20 divests the district court of jurisdiction over the particular *issues* involved in that appeal.”
21 *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001)
22 (emphasis added); *see* Mem. of Law in Support of Joinder in United States’ Mot. to Stay
23 Proceedings Pending Disposition of Interlocutory Appeals in *Hepting v. AT&T Corp.* (Dkt.
24 100) (“Joinder Mem.”), at 3-4. The jurisdictional bar is not limited only to amending or
25 rescinding the actual written *order* on appeal but rather to the substance of the *issues*
26 involved in the appeal: the district court cannot act in a manner that might moot, and
27 therefore render “obsolete,” the appeal. *Britton v. Co-op Banking Group*, 916 F.2d 1405,
28 1412 (9th Cir. 1990). Here, the *Hepting* appeal involves the scope of the Government’s

1 state secrets privilege, including Plaintiffs’ ability to establish their standing, and the
2 applicability of the *Totten* bar. This Court lacks jurisdiction to take any action in *Hepting*
3 that might risk disclosure of the information that the Ninth Circuit could conclude is
4 protected. *See* Joinder Mem. 5-9.

5 Implicitly acknowledging this point, Plaintiffs no longer seek to litigate their motion
6 for a preliminary injunction; to take discovery from any “governmental or AT&T officials
7 involved in the wiretapping”; or even to receive the fruits of the discovery that they still
8 argue should go forward. Instead, they suggest that discovery should be provided to the
9 Court alone through an unprecedented form of wholesale *ex parte, in camera* litigation
10 under § 1806(f). *See generally* Opp’n at 36; *id.* at 35 (same concession with regard to
11 certifications); *id.* at 35-36 (same concession with respect to discovery regarding allegations
12 in the Klein declaration); *see infra* at Part II (explaining why this procedure would be
13 inappropriate).¹ They do not propose to receive the Answer that they would have
14 Defendants file. *Id.* at 32-34. And they have abandoned any argument that the parties
15 should litigate class certification, *cf.* Jt. Case Mgmt. Stmt. at 22, 33-34 (seeking same); their
16 request to litigate motions regarding the legal implications of certifications, *see id.* at 34;
17 and the appointment of an expert or technical advisor, *see id.* at 47.

18 Nonetheless, Plaintiffs seem to argue that this Court has jurisdiction to proceed with
19 the *Hepting* litigation—even as to matters that would moot the appeal, or that are the
20 subject of it—so long as the Court refrains from reconsidering, rescinding or modifying its
21 July 20, 2006 order. Opp’n at 38-39 (discussing *City of Los Angeles v. Santa Monica*
22 *Baykeeper*, 254 F.3d 882 (9th Cir. 2001)). This is wrong, as we have explained. *See*
23 Joinder Mem. at 5-9. *City of Los Angeles* does not hold otherwise; indeed, it reaffirms the

24 ¹ At times, Plaintiffs seem to suggest that the § 1806(f) process might permit the Court to
25 disclose *to them* materials that have been designated as state secrets. For instance, they
26 suggest that the Court may turn over to Plaintiffs information about the existence of
27 certifications. Opp’n at 36. Even if § 1806(f) were an available procedure here—which it
28 is not, *see infra* at Part II.A.—any such disclosure falls squarely within the scope of the
government’s state secrets assertion, and therefore is jurisdictionally barred pending
resolution of the appeal. *See* Joinder Mem. at 7.

1 hornbook rule that once a court of appeals grants permission to file an interlocutory appeal,
2 “jurisdiction is transferred from a district court to a court of appeals,” thereby “divest[ing]
3 the district court of jurisdiction over the particular issues in that appeal.” 254 F.3d at 885-
4 86.² Plaintiffs offer no justification for their proposed rule that a district court is forbidden
5 from mooted an appeal by reconsidering, rescinding or modifying the order on appeal, but
6 that it can do so any other way—including, as here, by ordering the disclosure of the very
7 material that the government has designated as state secrets. Opp’n at 39. Such a rule
8 would undermine the jurisdiction of the Court of Appeals, and contravenes the clear logic
9 of the jurisdictional bar.

10 Plaintiffs also suggest that the ““rule of exclusive appellate jurisdiction is a creature
11 of judicial prudence . . . and is not absolute.”” Opp’n at 38 (quoting *Masalosalo by*
12 *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir. 1983)). This does not mean,
13 as Plaintiffs would have it, that a district court retains total flexibility to act as it sees fit
14 pending the appeal. That proposed rule is inconsistent with the authority mandating that the
15 district court has no jurisdiction to address the issues that are on appeal. *See* Joinder Mem.
16 at 3. *Masalosalo* and its predecessors address the converse question—they mean that
17 district courts may proceed with matters that will *not* moot the appeal, and that they retain
18 the power to act when necessary to preserve the status quo. *See, e.g., Hoffman v. Beer*
19 *Drivers & Salesmen’s Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) (holding
20 that a district court could alter the terms of an injunction while an appeal was pending
21 because, “as the days pass, new facts are created by the parties and the maintenance of the
22 status quo requires new action”). This principle militates squarely in favor of a stay here,
23 because permitting Plaintiffs to conduct discovery into matters asserted by the United States
24 to include state secrets could *modify* the status quo by compromising such secrets, which is

25 _____
26 ² *City of Los Angeles* focused on what a district court has the power to do while a request
27 for interlocutory appeal is pending in a court of appeals, *see* 254 F.3d at 886; it said nothing
28 to limit the scope of the well-recognized jurisdictional bar that arises once an appeal is
pending before the court of appeals.

1 indeed the point of the requested discovery. Consequently, when an issue of privilege is on
2 appeal, the district court lacks jurisdiction to order disclosure or otherwise jeopardize the
3 confidentiality of the assertedly privileged information. *See United States v. Thorp*, 655
4 F.2d 997, 999 (9th Cir. 1981); *see also* Joinder Mem. at 3-4 & n.3 (discussing same).

5
6 **II. DISCLOSURE IS NOT AVAILABLE UNDER 50 U.S.C. § 1806(f) AND, IN ANY EVENT, WOULD UNJUSTIFIABLY IMPOSE AN EXCEPTIONAL BURDEN ON AT&T AND UNWARRANTED RISK TO NATIONAL SECURITY.**
7

8 For every piece of discovery that is jurisdictionally barred or protected by the state
9 secrets privilege or *Totten*, Plaintiffs now suggest that AT&T should be required to submit
10 responses *in camera* and *ex parte*, under the auspices of 50 U.S.C. § 1806(f). Opp’n at 18-
11 22, 32-36. But § 1806(f) does not apply here. And, even if it did, Plaintiffs’ proposal
12 ignores the substantial risks and burdens that would be involved in the proceeding that they
13 suggest—risks and burdens that cannot be justified at this juncture given the possibility that
14 they will be rendered unnecessary by the *Hepting* appeal.

15 **A. Section 1806(f)’s *In Camera*, *Ex Parte* Procedures Do Not Apply Here.**

16 Plaintiffs argue at length that 50 U.S.C. § 1806(f) makes available (and indeed,
17 mandates the Court to require) the *in camera*, *ex parte* disclosure of discovery responses
18 and an Answer to the *Hepting* complaint. Opp’n at 18-22. By its plain terms, however,
19 § 1806(f) is not meant to be used as Plaintiffs suggest, as a device to facilitate civil
20 litigation to confirm suspected but unconfirmed surveillance in allegedly ongoing
21 intelligence programs. Section 1806(f)’s purpose is instead to permit one whose
22 communications were electronically surveilled to have a court determine the legality of that
23 surveillance. Thus, § 1806(f) may be invoked only by an “aggrieved person,” *see Al-*
24 *Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1231 (D. Or. 2006), *appeal*
25 *docketed*, No. 06-36083 (9th Cir. Dec. 22, 2006), which is defined as “a person who is the
26 target of an electronic surveillance or any other person whose communications were subject
27 to electronic surveillance,” 50 U.S.C. § 1801(k). The § 1806(f) procedure is for the limited
28 purpose of “determin[ing] whether the surveillance of the aggrieved person was lawfully

1 authorized and conducted.” 50 U.S.C. § 1806(f); *accord* H. Conf. Rep. 95-1720, at 4060-
2 61 (1978) (§ 1806 is an “in camera procedure for determining legality”; noting that “[t]he
3 conferees agree that an in camera and ex parte proceeding is appropriate for determining the
4 lawfulness of electronic surveillance in both criminal and civil cases”). In short, only one
5 who was “the target of” or “subject to” electronic surveillance can invoke § 1806(f),³ and
6 only for the limited purpose of having the court determine the legality of that known
7 surveillance. *See generally* U.S.’ Reply in Support of the Assertion of the Military and
8 State Secrets Privilege (*Hepting* Dkt. 245) (“U.S. Reply re Mot. to Dismiss”) at 18-23.
9 Plaintiffs’ effort to invoke § 1806(f) therefore fails, for a series of reasons.

10 *First*, Plaintiffs have not shown that they are “aggrieved persons” who were
11 subjected to electronic surveillance within the meaning of FISA, *see supra* note 3, and so at
12 the threshold fall outside of § 1806(f). Nor will they ever be able to make this showing,
13 given the extent to which the state secrets privilege protects the identity of surveillance
14 targets from discovery, Negroponte Decl. ¶ 12 (*Hepting* Dkt. 124-1); Alexander Decl. ¶ 8
15 (*Hepting* Dkt. 124-2); *see Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978)—and they
16 certainly cannot show this while the appeal is pending, given the centrality of this question
17 to the state secrets assertion that is on appeal. Plaintiffs would expand § 1806(f) beyond its
18 narrow, defined purpose, and treat it as authorizing wide-ranging intrusions into the state
19 secrets privilege in order to identify government surveillance targets, based on nothing
20 more than mere allegations of government surveillance activity. Nothing in the text or
21 legislative history of § 1806(f) supports Plaintiffs’ proposed use of § 1806(f). And
22 Congress plainly could not have intended § 1806(f) to function this way: the pernicious

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24

25 ³ *See United States v. Falvey*, 540 F. Supp. 1306, 1310 n.10 (E.D.N.Y. 1982) (noting that
26 one of the defendants “is not an aggrieved person” because “there is no indication in the
27 logs that [his] conversations were intercepted”); *see also United States v. Ott*, 827 F.2d 473,
475 n.1 (9th Cir. 1987) (“Because [the defendant’s] communications were subject to
28 surveillance, he is an aggrieved person with standing to bring a motion to suppress pursuant
to section 1806(e).”).

28

1 implications of providing a statutory mechanism for initiating civil lawsuits to determine
2 the existence of suspected clandestine surveillance are too obvious to bear elaboration.

3 Plaintiffs have not pointed to a single case in which § 1806(f) procedures were used
4 in the manner they propose. *Cf. In re Grand Jury Proceedings of the Special April 2002*
5 *Grand Jury*, 347 F.3d 197, 203 (7th Cir. 2003) (court could not find any case in which
6 § 1806(f) *in camera* submissions were provided to the aggrieved person). A survey of the
7 more than three dozen cases in which § 1806(f) has been cited in federal courts since the
8 passage of FISA in 1978 reveals no such case. There is no basis whatsoever to conclude
9 that § 1806(f) was meant to “narrow” the state secrets privilege in the radical and
10 unprecedented manner proposed by Plaintiffs. Opp’n at 19. There is no indication, in the
11 statute or its legislative history, that Congress intended such an extraordinary incursion into
12 the constitutionally rooted authority of the executive branch to safeguard military and
13 intelligence secrets. *See* U.S. Reply re Mot. to Dismiss (Dkt. 245) at 20-21.

14 *Second*, Plaintiffs erroneously suggest that the Court is *required* to conduct *in*
15 *camera, ex parte* review now. *See* Opp’n at 19. The text of the statute points in precisely
16 the opposite direction. The court “shall” conduct such review *only* “as may be necessary to
17 determine whether the surveillance of the aggrieved person was lawfully authorized and
18 conducted.” 50 U.S.C. § 1806(f). But here, no such review is “necessary” at the present
19 time. On the contrary, there is no cause to conduct any such review, because even if
20 Plaintiffs were “aggrieved persons” (and even if the Court determined that the alleged
21 surveillance occurred and was not “lawfully authorized and conducted”), no such
22 determination could be revealed (publicly or to Plaintiffs) while the Ninth Circuit is
23 considering the scope of the state secrets assertion.

24
25 **B. *In Camera, Ex Parte* Disclosures Cannot Be Justified In Light Of The
Substantial Risks And Burdens Created By Such A Process.**

26 Even if the § 1806(f) procedure were available here, there are compelling reasons
27 not to employ it in advance of a final determination of the proper scope and application of
28 the state secrets privilege in this case. Plaintiffs ask that materials implicating state secrets

1 be produced to, and held by, the Court. This makes clear that even employing the § 1806(f)
2 mechanism in the manner suggested by the Plaintiffs would not meaningfully advance the
3 litigation, permit resolution of disputes concerning the privileged materials or information,
4 or, therefore, alleviate or diminish the supposedly irreparable harm that Plaintiffs claim to
5 be suffering while the appeal is pending. The thrust of Plaintiffs’ claim is that the case
6 should go forward because the balance of harms tips sharply in their favor.⁴ Opp’n at 9-22.
7 However, there is *no* possibility that Plaintiffs’ claimed harm could be alleviated pending
8 the appeal because, as Plaintiffs properly concede, there can be no litigation of a

9 _____
10 ⁴ Plaintiffs are mistaken to argue that the rigid test that applies to a request for staying an
11 injunction applies here. Opp’n at 5-7. Rather, the standard for a stay pending appeal is
12 substantially more discretionary. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)
13 (“[T]he power to stay proceedings is incidental to the power inherent in every court to
14 control the disposition of the causes on its docket with economy of time and effort for itself,
15 for counsel, and for litigants. How this can best be done calls for the exercise of judgment,
16 which must weigh competing interests and maintain an even balance.”); *Levy v. Certified*
17 *Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (“A trial court may, with
18 propriety, find it is efficient for its own docket and the fairest course for the parties to enter
19 a stay of an action before it, pending resolution of independent proceedings which bear
20 upon the case.”); *see also Kotrous v. Goss-Jewett Co. of N. Cal.*, No. Civ. S021520, 2005
21 WL 2452606, at *5, 2005 U.S. Dist. LEXIS 43010 (E.D. Cal. Oct. 4, 2005) (granting stay
22 pending interlocutory appeal: “A district court has inherent discretion to control the
23 disposition of the causes on its docket in a manner which will promote economy of time
24 and effort for itself, for counsel, and for litigants.”); *Chiron Corp. v. Abbott Labs.*, No. C-
25 93-4380 MHP, 1996 WL 15758, at *1, 1996 U.S. Dist. LEXIS 317 (N.D. Cal. Jan. 3, 1996)
26 (considering request for stay pending interlocutory appeal and citing *Landis*). This is for
27 good reason. Whereas the standard for *staying* an injunction mirrors the standard for
28 *granting* the injunction—both concern the same irreparable injury and balancing of
harms—the decision whether to stay litigation pending an appeal raises a very different set
of issues, specifically, the efficient management of the court’s docket. Indeed, in the
context of MDL proceedings like these, in which sensitive national security issues are at
stake, a district court’s discretion to manage its docket is at its height. *See In re Nat’l Sec.*
Agency Telecommc’ns Records Litig., 444 F. Supp. 2d 1332, 1334 (J.P.M.L. 2006)
 (“Centralization under Section 1407 is necessary in order to eliminate duplicative
discovery, prevent inconsistent pretrial rulings (particularly with respect to matters
involving national security), and conserve the resources of the parties, their counsel and the
judiciary.”); *see also In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217,
1232 (9th Cir. 2006) (“[M]ultidistrict litigation is a special breed of complex litigation
where the whole is bigger than the sum of its parts. The district court needs to have broad
discretion to administer the proceedings as a whole, which necessarily includes keeping the
parts in line.”).

1 preliminary injunction, much less an ultimate resolution of the merits. And the § 1806(f)
2 process they propose would impose substantial burdens on the parties and risks to national
3 security.

4 Plaintiffs ignore the considerable practical difficulties inherent in the procedures
5 they propose. If one accepts (for the sake of argument only) Plaintiffs’ assumption that one
6 or more Defendants have participated in classified intelligence activities of the type they
7 have alleged, then even the preparation of discovery responses or an Answer—which
8 Plaintiffs treat as the simplest of tasks, *see* Opp’n at 32-36—would be immensely
9 burdensome. For Plaintiffs’ proposed procedure to work, defense counsel would need to
10 have high-level security clearances. If such clearances were granted, counsel could review
11 the relevant documents (if any) only in special secure facilities outside of their law offices,
12 and *ex parte, in camera* submissions of the type Plaintiffs envision could be prepared only
13 on secure computer systems in such facilities. Any communication about these materials—
14 between lawyers and clients, or even between lawyers in a single office—could occur only
15 in secure facilities, or using secure phone lines and specialized phone equipment not
16 generally available within private law offices. Transmitting any classified materials—
17 whether to the client, to the government for the review that Plaintiffs propose, *see* Opp’n at
18 33, or to the Court—would require access to secure government communication channels
19 or hand-delivery by federal agents. Storage of the resulting materials, if any, would require
20 access to Sensitive Compartmented Information Facilities (SCIFs). In short, the process
21 that Plaintiffs propose would entail extraordinary burdens and is not, as they appear to
22 believe, a matter of typing up drafts and emailing them around over the public Internet.

23 Even strict adherence to these security procedures could not remove the risk to
24 national security posed by *in camera* review. As the Fourth Circuit recognized in *Sterling*
25 *v. Tenet*, so-called creative solutions, “whatever they might be, still entail considerable risk.
26 Inadvertent disclosure . . . even in camera [] is precisely the sort of risk that *Reynolds*
27 attempts to avoid.” 416 F.3d 338, 348 (4th Cir. 2005), *cert. denied sub nom. Sterling v.*
28 *Goss*, 126 S. Ct. 1052 (2006); *see United States v. Reynolds*, 345 U.S. 1, 10 (1953) (when

1 the validity of the privilege is clear, “the court should not jeopardize the security which the
2 privilege is meant to protect by insisting upon an examination of the evidence, even by the
3 judge alone, in chambers”); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 n.31 (D.C. Cir. 1983)
4 (“[E]x parte, in camera examination of the requested material by the trial judge [] is not
5 entirely safe.”). Put otherwise, even were it appropriate to balance the potential harms to
6 the parties in determining whether to grant the stay, the procedure that Plaintiffs propose
7 carries significant risks to national security and contravenes important principles regarding
8 the extreme care with which state secrets issues are supposed to be handled by the courts.
9 *See Reynolds*, 345 U.S. at 11 (“[E]ven the most compelling necessity cannot overcome the
10 claim of privilege if the court is ultimately satisfied that military secrets are at stake.”).

11 These risks to national security and burdens to litigants would result in no real,
12 immediate benefit to the Plaintiffs. Filing an Answer *in camera*, for instance, serves no
13 purpose: as we have explained, the whole point of filing an Answer is to ““apprise the
14 plaintiff and any other opposing parties which of the allegations in the complaint are
15 contested,”” Joinder Mem. at 8. In seeking to require AT&T to prepare an Answer,
16 Plaintiffs simply dispute that the information that would appear would constitute state
17 secrets. Opp’n at 32. This argument is foreclosed by the jurisdictional bar. Plaintiffs next
18 seek to require production under § 1806(f), *id.* at 32-33, but § 1806 has nothing whatsoever
19 to do with the filing of an answer. As noted above, its purpose is limited to certain
20 disclosures to permit a court to adjudicate the lawfulness of known surveillance. Finally,
21 Plaintiffs suggest a full “trial *in camera*,” *id.* at 34, presumably with disclosure of any
22 certifications to Plaintiffs. This unquestionably falls within the jurisdictional bar. And at
23 the end of the day, this entire exercise would be for naught if the Ninth Circuit determines
24 that the state secrets privilege applies. Under those circumstances, and given the burdens
25 and risks that necessarily would attend the process that Plaintiffs propose, the prudent
26 course is for this Court to stay proceedings.

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1 **III. PLAINTIFFS' REMAINING PROPOSALS ARE UNSOUND.**

2 Finally, Plaintiffs suggest other topics that, they claim, do not implicate state secrets
3 at all. Opp'n at 27-31. They seek discovery, for instance, into certain public statements, *id.*
4 at 28-30, and AT&T's "network architecture," *id.* at 30-31, among other things. Certain of
5 these requests are obviously out of bounds. This Court is jurisdictionally foreclosed, for
6 instance, from revealing to Plaintiffs the existence of certifications because that information
7 falls within the scope of the government's state secrets assertion.⁵ Other proposals, such as
8 the discovery into network architecture, are transparently aimed at ascertaining information
9 about whether AT&T participated in purported government surveillance activities. The
10 claim that this discovery is necessary "to determine class membership" is a fig leaf;
11 Plaintiffs do not even attempt to explain why network architecture is necessary to establish
12 class membership, *see* Opp'n at 30-31, nor, even if it were, why such discovery is not
13 protected by the state secrets assertion. *See CIA v. Sims*, 471 U.S. 159, 176 (1985)
14 (recognizing that publicly available information cannot be disclosed if it could confirm or
15 deny the identity of an intelligence source); *see also Kasza v. Browner*, 133 F.3d 1159,
16 1166 (9th Cir. 1998) ("if seemingly innocuous information is part of a classified mosaic, the
17 state secrets privilege may be invoked to bar its disclosure"). Similarly, Plaintiffs' request
18 for information about the alleged San Francisco facility "as well as similar facilities," *see*
19 Opp'n at 31, is, if Plaintiffs' allegations were to be credited, in essence a direct request for
20 information concerning sources and methods of intelligence-gathering by the NSA. In any
21 event, given the likelihood that this discovery will be in vain, there can be no current
22 justification for ordering the production of such closely held, proprietary information.

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25 ⁵ *See* Opp'n at 35 (proposing discovery of certifications); *but cf. Hepting v. AT&T Corp.*,
26 No. 06-672-VRW, 2006 WL 1581965, at *2, 2006 U.S. Dist. LEXIS 41160 (N.D. Cal. June
27 6, 2006) ("[T]he privilege as claimed prevents the disclosure of any certification. And
because the 'legal process' could not require AT&T to disclose a certification if the state
secrets privilege prevented such disclosure, discovery on the certification issue cannot
proceed unless the court determines that the privilege does not apply with respect to that
issue.").

1 As to the remainder of Plaintiffs' requests, there is no reason to proceed with this
2 discovery at this time. Certain of the other requested discovery is unnecessary on any
3 standard—for instance, the request that Defendants be put to the burden of producing
4 publicly available regulatory filings to Plaintiffs. *See* Opp'n at 29 pts. 3, 4. And none of
5 this discovery could meaningfully advance the litigation because of the jurisdictional bar
6 raised by the pendency of the Ninth Circuit appeal. At most, it would represent expensive
7 busy work, all with the potential to be rendered moot by the Ninth Circuit's decision. And
8 even if the Ninth Circuit resolved the appeal in a fashion that permitted the litigation to
9 continue, everything that Plaintiffs seek to do now could occur in short order after the Ninth
10 Circuit renders judgment and provides guidance to the parties and this Court.

11 **CONCLUSION**

12 For the reasons set forth above and in AT&T's Joinder Memorandum, this Court
13 should stay all MDL proceedings pending disposition of the appeals in *Hepting v. AT&T*
14 *Corp.*

15 Dated: February 1, 2007.

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