

1 BRENDAN V. SULLIVAN, JR.  
 JOHN G. KESTER  
 2 GILBERT O. GREENMAN  
 WILLIAMS & CONNOLLY LLP  
 3 725 Twelfth Street, N.W.  
 Washington, D.C. 20005  
 4 Tel.: (202) 434-5000  
 Fax: (202) 434-5029  
 5 jkester@wc.com  
 gggreenman@wc.com  
 6  
 7 Attorneys for Sprint Nextel Corp.,  
Sprint Communications Co. L.P.,  
Sprint Spectrum L.P. and  
 8 Nextel West Corp.

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

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

TABLE OF CONTENTS

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.....ii

RESPONSE.....1

    1. Due Process.....1

    2. Different Facts.....5

    3. Plaintiffs' Acknowledgments.....7

    4. Conflict Between Hepting and Terkel.....7

    5. Intervening Developments.....8

    6. Uncertainty of Hepting Ruling.....9

CONCLUSION.....11

TABLE OF AUTHORITIES

Page

Cases:

1  
2  
3  
4 In re Air Crash Disaster, 720 F. Supp. 1505  
5 (D. Colo. 1989), rev'd sub nom. Johnson v.  
6 Continental Airlines Corp., 964 F.2d 1059  
7 (10th Cir. 1992).....3  
8  
9 Al-Haramain Islamic Found., Inc. v. Bush,  
10 451 F. Supp. 2d 1215 (D. Ore. 2006),  
11 appeal pending, Nos. 06-36083, 06-80134  
12 (9th Cir.).....8  
13  
14 Arizona v. California, 460 U.S. 605 (1983).....4  
15  
16 Blonder-Tongue Labs., Inc. v. University of  
17 Ill. Found., 402 U.S. 313 (1971).....3  
18  
19 El-Masri v. Tenet, 437 F. Supp. 2d 530  
20 (E.D. Va. 2006), appeal pending sub nom.  
21 El-Masri v. United States, No. 06-1667  
22 (4th Cir.).....6  
23  
24 Hansberry v. Lee, 311 U.S. 32 (1940).....2  
25  
26 Harbor Ins. Co. v. Essman, 918 F.2d 734  
27 (8th Cir. 1990).....4  
28  
29 Hardy v. Johns-Manville Sales Corp., 681 F.2d 334  
30 (5th Cir. 1982).....2,3  
31  
32 Headwaters Inc. v. U.S. Forest Service, 399 F.3d  
33 1047 (9th Cir. 2005).....2  
34  
35 Hepting v. AT&T Corp., No. 06-17132 (9th Cir.).....10  
36  
37 Hepting v. United States, No. 06-17137 (9th Cir.).....10  
38  
39 Johnson v. Manhattan Ry., 289 U.S. 479 (1933).....4  
40  
41 Kourtis v. Cameron, 419 F.3d 989 (9th Cir. 2005).....2,3  
42  
43 Marshak v. Treadwell, 240 F.3d 184 (3d Cir. 2001).....3  
44  
45 Martin v. Wilks, 490 U.S. 755 (1989).....2  
46  
47 Messenger v. Anderson, 225 U.S. 436 (1912).....3  
48  
49 Overseas Shipbuilding Group, Inc. v. Skinner,  
50 767 F. Supp. 287 (D.D.C. 1991).....4  
51  
52 Richards v. Jefferson County, 517 U.S. 793 (1996).....2

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

Shaw v. Hahn, 56 F.3d 1128 (9th Cir.),  
cert. denied, 516 U.S. 964 (1995).....2

Society of Separationists, Inc. v. Herman,  
939 F.2d 1207 (5th Cir. 1991), aff'd,  
959 F.2d 1283 (5th Cir. 1992) (en banc).....4

Terkel v. AT&T Corp., 441 F. Supp. 2d 899  
(N.D. Ill. 2006).....7

Totten v. United States, 92 U.S. 105 (1876).....6

United States v. Mendoza, 464 U.S. 154 (1984).....9

Constitutional Provisions:

United States Constitution, Article III.....1

Fifth Amendment.....2

Statutory Provisions:

28 U.S.C. § 1292.....8

1 By order filed November 22, 2006, this Court directed all  
2 parties to all the cases herein to show cause "why the Hepting order  
3 [entered July 20, 2006, Doc. 308 (in No. C-06-672-VRW), concerning  
4 application of the state secrets privilege in an action brought  
5 against AT&T] should not apply to all cases and claims to which the  
6 government asserts the state secrets privilege." Doc. 79 at 2.

7 The Sprint defendants<sup>1/</sup> are parties in five of these cases.  
8 At this juncture, the United States has not intervened or asserted  
9 the state secrets privilege in any of them, although there is reason  
10 to believe that it might well do so in some manner at an appropriate  
11 time. For now, as to these defendants, the question presented in the  
12 abstract by the order to show cause appears both contingent and  
13 premature, and not in a posture calling for an immediate answer by an  
14 Article III federal court.

15 Be that as it may, there are a number of independent  
16 reasons why this Court's July 20, 2006, order in a case against AT&T  
17 should not bind these defendants. To minimize repetition of  
18 submissions by others, we list here briefly several reasons why  
19 Hepting should not and does not apply, also incorporating by  
20 reference pertinent authorities submitted by the United States and  
21 the other defendants.

22 1. Due Process.

23 At the time of this Court's order in Hepting, July 20,  
24 2006, the Sprint defendants were not parties before this Court. The  
25 actions against Sprint were not conditionally transferred here by the  
26

---

27 <sup>1/</sup> The Sprint defendants are Sprint Nextel Corp., Sprint  
28 Communications Co. L.P., Sprint Spectrum L.P. and Nextel West  
Corp.

1 MDL Panel until August 31, 2006, and not docketed in this Court until  
2 September 25, 2006, and January 25, 2007. Docs. 37, 133. "It is a  
3 principle of general application in Anglo-American jurisprudence that  
4 one is not bound by a judgment in personam in a litigation in which  
5 he is not designated as a party or to which he has not been made a  
6 party by service of process." Hansberry v. Lee, 311 U.S. 32, 40  
7 (1940). "The right to a full and fair opportunity to litigate an  
8 issue is, of course, protected by the due process clause of the  
9 United States Constitution." Hardy v. Johns-Manville Sales Corp.,  
10 681 F.2d 334, 338 (5th Cir. 1982); see also Shaw v. Hahn, 56 F.3d  
11 1128, 1131 (9th Cir.), cert. denied, 516 U.S. 964 (1995). The Sprint  
12 defendants have had no opportunity, much less a "full and fair  
13 opportunity," to be heard on either the facts or the law.

14 (a) Collateral Estoppel. -- Plainly collateral estoppel  
15 can have no application. These defendants were not and are not  
16 parties to Hepting, nor in privity with AT&T. And there was no final  
17 judgment. See Kourtis v. Cameron, 419 F.3d 989, 994 (9th Cir. 2005).

18 "We have in this nation a deep-rooted historic tradition  
19 that everyone should have his own day in court." Headwaters Inc. v.  
20 U.S. Forest Service, 399 F.3d 1047, 1050 (9th Cir. 2005) (internal  
21 quotation marks omitted). Therefore even after a final determination  
22 "[a] judgment or decree among parties to a lawsuit resolves issues as  
23 among them but it does not conclude the rights of strangers to those  
24 proceedings." Martin v. Wilks, 490 U.S. 755, 762 (1989); accord,  
25 e.g., Richards v. Jefferson County, 517 U.S. 793, 798 (1996); Kourtis  
26 v. Cameron, 419 F.3d at 995.

27 Although a prior final determination may bind someone in  
28 privity with a party, "parallel legal interests alone, identical or

1 otherwise, are not sufficient to establish privity. . . . Both  
2 identity of interests and adequate representation are necessary.”  
3 Kourtis v. Cameron, 419 F.3d at 998 (emphasis in original; internal  
4 quotation marks omitted). No allegation has been made that the  
5 Sprint defendants controlled in any way AT&T’s conduct of the Hepting  
6 litigation. See, e.g., Marshak v. Treadwell, 240 F.3d 184, 196 (3d  
7 Cir. 2001) (Alito, J.) (collateral estoppel inapplicable even though  
8 defendant had testified in prior case and “had an interest in the  
9 outcome”); Hardy, 681 F.2d at 339 (no collateral estoppel against  
10 asbestos defendants which had not participated in nor controlled  
11 prior litigation); In re Air Crash Disaster, 720 F. Supp. 1505, 1521  
12 (D. Colo. 1989) (in multidistrict litigation, trial did not  
13 collaterally estop parties whose cases were transferred later), rev’d  
14 on other grounds sub nom. Johnson v. Continental Airlines Corp., 964  
15 F.2d 1059 (10th Cir. 1992).

16 “[L]itigants . . . who never appeared in a prior  
17 action -- may not be collaterally estopped without  
18 litigating the issue. They have never had a  
19 chance to present their evidence and arguments on  
20 the claim. Due process prohibits estopping them  
despite one or more existing adjudications of the  
identical issue which stand squarely against their  
position.”

21 Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S.  
22 313, 329 (1971).

23 (b) Law of the Case. -- “Law of the case” also has no  
24 bearing. Law of the case does not apply to someone else’s case.  
25 “[T]he phrase, law of the case” refers “to the effect of previous  
26 orders . . . in the same case.” Messenger v. Anderson, 225 U.S. 436,  
27 444 (1912) (Holmes, J.) (emphasis supplied).  
28

1            "[L]aw of the case is an amorphous concept. As  
2            most commonly defined, the doctrine posits that  
3            when a court decides upon a rule of law, that  
4            decision should continue to govern the same  
5            issues in subsequent stages in the same case."

6            Arizona v. California, 460 U.S. 605, 618 (1983) (emphasis supplied).  
7            By definition, law of the case applies "only during the pendency of  
8            . . . a single proceeding." Society of Separationists, Inc. v.  
9            Herman, 939 F.2d 1207, 1214 (5th Cir. 1991) (emphasis in original;  
10            internal quotation marks omitted), aff'd on another point, 959 F.2d  
11            1283 (5th Cir. 1992) (en banc). When two cases are "altogether  
12            separate proceedings," then "the law of the case" does not apply to  
13            the second case even if issues decided in the prior case were  
14            identical. Id. See also, e.g., Harbor Ins. Co. v. Essman, 918 F.2d  
15            734, 738 (8th Cir. 1990) ("Because the instant case is not the same  
16            case . . . the law of the case doctrine does not apply."); Overseas  
17            Shipbuilding Group, Inc. v. Skinner, 767 F. Supp. 287, 296 (D.D.C.  
18            1991) ("it is hornbook law that the law of the case doctrine operates  
19            as a form of issue preclusion within the same case") (emphasis in  
20            original).

21            To be sure, all these cases were transferred to this Court  
22            to ensure consistent and efficient adjudication of similar issues,  
23            and what might turn out to be similar facts. But the five cases in  
24            which the Sprint defendants are parties remain separate causes of  
25            action, with different plaintiffs and defendants. "[C]onsolidation  
26            is permitted as a matter of convenience and economy in  
27            administration, but does not merge the suits into a single cause, or  
28            change the rights of the parties, or make those who are parties in  
                 one suit parties in another." Johnson v. Manhattan Ry., 289 U.S.  
                 479, 496-97 (1933). Indeed, the plaintiffs themselves have



1 surveillance is hardly the kind of 'secret' that the Totten<sup>2/1</sup> bar and  
2 the state secrets privilege were intended to protect or that a  
3 potential terrorist would fail to anticipate." Id. at 31. "[P]ublic  
4 disclosures by the government and AT&T indicate that AT&T is  
5 assisting the government to implement some kind of surveillance  
6 program." Id. at 34. "[S]ignificant amounts of information about  
7 . . . AT&T's intelligence relationship with the government are  
8 already nonclassified or in the public record." Id.<sup>3/</sup>

9 The record as to the Sprint defendants, however, is  
10 strikingly different. In the pertinent master complaint:

11 -- There is no allegation that any of these  
12 defendants ever stated that it assists the government on  
13 classified matters, nor that any of them has an  
14 "intelligence relationship" with the government.

15 -- There is no allegation that the United States  
16 made any specific disclosures referring to these  
17 defendants.

18 -- There is no allegation that these defendants  
19 made statements or disclosures regarding involvement in any  
20 alleged communications-monitoring or call-records programs.  
21 In fact, the complaint filed in one of these cases  
22 explicitly alleges that "Sprint has declined to say whether  
23 [the] NSA has approached it or how it might have  
24

---

25 <sup>2/</sup> Totten v. United States, 92 U.S. 105 (1876).

26 <sup>3/</sup> But see El-Masri v. Tenet, 437 F. Supp. 2d 530, 538 (E.D. Va.  
27 2006) ("Nor is the strength of the government's [state secrets]  
28 privilege somehow diminished by . . . media, government or other  
reports . . . ."), appeal pending sub nom. El-Masri v. United  
States, No. 06-1667 (4th Cir.).

1 responded." Doc. 1 (in C-06-6295-VRW) ¶ 26; see also id.  
2 ¶ 24 (acknowledging that Sprint made "no official comment"  
3 in response to allegations in the press).<sup>4/</sup>

### 4 3. Plaintiffs' Acknowledgments.

5 Plaintiffs themselves have acknowledged what they call the  
6 "dramatically different" circumstances of the array of different  
7 defendants in these proceedings. Plaintiffs' counsel explained to  
8 this Court that "the factual issues for each of the defendants are  
9 actually quite different." Tr. Nov. 17, 2006, at 24. The different  
10 carriers, counsel stated, "had different interactions with the  
11 government." Id. "[T]he telecommunications companies have said  
12 different things about their involvement, some pretty dramatically  
13 different things." Id. at 26 (emphasis supplied). "[T]he story for  
14 each telecommunications company is likely to be dramatically  
15 different and they should be handled differently." Id. (emphasis  
16 supplied). See also id. at 25 (suggesting that "it's better to look  
17 at what each of these telcos did and said independently"); id. at 24  
18 ("different network architectures" and "different structures as  
19 telecommunications companies"); cf. Plaintiffs' Opp. to Gov't Motion  
20 To Stay, Doc. 128, at 2 ("the facts relevant to the balancing test  
21 are different for different defendants").

### 22 4. Conflict Between Hepting and Terkel.

23 There are more than thirty cases transferred to this Court  
24 in these proceedings. Hepting v. AT&T Corp. is not the only one in  
25 which a motion to dismiss has been ruled upon. In Terkel v. AT&T  
26

---

27 <sup>4/</sup> See also Terkel v. AT&T Corp., 441 F. Supp. 2d 899, 911-12, 915  
28 (N.D. Ill. 2006), No C-06-5340-VRW (citing and quoting public  
statements of Verizon, BellSouth and Qwest).

1 Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006), now transferred to this  
2 Court as No. C-06-5340-VRW, the District Court held that the state  
3 secrets privilege does indeed apply to the alleged program, at least  
4 with respect to alleged disclosure of call records. "[T]he Court has  
5 . . . concluded that the state secrets privilege covers any  
6 disclosures that affirm or deny the activities alleged in the  
7 complaint." Id. at 918. The court granted the government's motion  
8 to dismiss, while allowing leave to amend.<sup>5/</sup>

9 Hepting has no more claim to govern all the other cases than  
10 does Terkel or, for that matter, Al-Haramain, No. C-07-0109-VRW.<sup>6/</sup>  
11 The conflicts in reasoning and result among those rulings confirm the  
12 inappropriateness of extending Hepting to other cases.

#### 13 5. Intervening Developments.

14 This Court presciently observed last July, "The court . . .  
15 recognizes that legislative or other developments might alter the  
16 course of this litigation." Doc. 308 (in C-06-672-VRW) at 36. On  
17 January 17, 2007, the Attorney General announced that any electronic  
18 surveillance that had occurred previously under the Terrorist  
19

---

20 <sup>5/</sup> See also, e.g., 441 F. Supp. 2d at 916 (observing that Hepting  
21 "saw no need to dismiss the latter [content-monitoring]  
22 allegations at present. This Court does not necessarily agree  
23 . . . ."); id. at 917 ("such disclosures [concerning  
24 participation] are barred by the state secrets privilege").

24 <sup>6/</sup> Not one but three of these cases arrive carrying lengthy  
25 and differing district court opinions that explore the state  
26 secrets privilege. In Al-Haramain Islamic Foundation, Inc. v.  
27 Bush, 451 F. Supp. 2d 1215 (D. Ore. 2006), No. C-07-0109-VRW,  
28 yet another district court offered its own analysis, denying a  
motion to compel discovery in the face of invocation of the  
state secrets privilege, and certifying its order for  
interlocutory appeal under 28 U.S.C. § 1292(b). The Ninth  
Circuit granted review, Nos. 06-36083, 06-80134 (9th Cir.), and  
stayed further action pending decision of Hepting, No. 06-86083  
(9th Cir.) (order of Jan. 9, 2007).

1 Surveillance Program will now be conducted pursuant to orders issued  
2 by the Foreign Intelligence Surveillance Court. Doc. 127. Those  
3 orders, their terms and their scope have not been disclosed. Any  
4 future assertion of the privilege may be affected by such orders and  
5 any accompanying alterations in alleged activities.<sup>7/</sup>

6 Further, because the United States has not yet intervened  
7 nor asserted the state secrets privilege as to the Sprint  
8 defendants,<sup>8/</sup> the manner and scope of any such future assertion cannot  
9 be determined or addressed.<sup>9/</sup> This Court at such time will be able to  
10 consider the unique facts material to the Sprint defendants in the  
11 concrete context of a fact-specific invocation of the state secrets  
12 privilege, if and when the United States actually presents such an  
13 assertion.<sup>10/</sup>

#### 14 6. Uncertainty of Hepting Ruling.

15 This Court's July ruling denying the motions in Hepting  
16 does not unquestionably resolve the legal issues, both by its own  
17

---

18 <sup>7/</sup> The government has continued to file documents ex parte and  
19 under seal to which these defendants are not privy. Whether any  
20 of those might affect the circumstances assumed in the Hepting  
ruling is not known.

21 <sup>8/</sup> "[F]urther proceedings in these consolidated actions will  
22 immediately require precisely the same privilege assertion  
23 raised in Hepting." Motion of United States for Stay, Doc.  
67-1, at 17.

24 <sup>9/</sup> The Director of National Intelligence who executed the  
25 declaration supporting the government's motion to dismiss in  
Hepting has resigned. Whether his successor would submit a  
26 declaration different in any respect cannot be known.

27 <sup>10/</sup> The United States were it to assert the privilege in those cases  
28 could not be collaterally estopped. United States v. Mendoza,  
464 U.S. 154, 162-63 (1984). To hold the Sprint defendants but  
not the United States barred from contesting the July Hepting  
ruling would be anomalous.

1 terms and because it is on appeal. It is not an exposition of the  
2 law so free from doubt that contributions from new parties,  
3 elucidating the facts of their own cases and their own legal  
4 arguments, can appropriately be dismissed in advance of being made.

5 In the same opinion in which it denied the motions in  
6 Hepting, this Court candidly acknowledged that the

7 "issues resolved herein represent controlling  
8 questions of law as to which there is a  
substantial ground for difference of opinion,"

9 Doc. 308 (in No. C-06-672-VRW) at 70, and certified its order for  
10 interlocutory appeal. And in its recent January 2007 ruling in two  
11 other cases,<sup>11/</sup> this Court reiterated its own earlier acknowledgment,  
12 adding explicitly that

13 "the court's ruling in Hepting does not determine  
14 unequivocally the effect of the state secrets  
15 privilege, particularly with respect to the  
present cases."

16 Doc. 130 at 13. Recognizing the same important legal doubt, the  
17 Court of Appeals granted leave to appeal, as it also did in Al-  
18 Haramain, and briefs are due this month. Nos. 06-17132, 06-17137  
19 (9th Cir.). When a ruling recognizes such limitations and is under  
20 appellate review, that is all the more reason, both for practical  
21 reasons and out of fairness, not to hold parties in other cases  
22 automatically bound and cut off from any opportunity to add whatever  
23 perspectives they might bring.

24 Should the Court of Appeals reverse the ruling as to AT&T  
25 in Hepting and order dismissal, it is likely that dismissal of all  
26 actions against the Sprint defendants also would be required. Even  
27

28 <sup>11/</sup> Campbell v. AT&T Communications, No. C-06-3574-VRW, and Riordan  
v. Verizon Communications Inc., No. C-06-3596-VRW.

1 if the Court of Appeals were to affirm, its decision likely would  
2 provide significant guidance concerning the appropriate legal  
3 standards, procedures and analysis to be applied to any future  
4 assertion of the state secrets privilege with respect to defendants  
5 in other cases, superseding the law as stated in July in Hepting.  
6 The appellate decision whatever its holding surely will be relevant  
7 to any future proceedings. Last July this Court had no choice but to  
8 rule partly in the dark, without appellate guidance. There is no  
9 reason to extend such a ruling automatically and prematurely when  
10 illumination from the Court of Appeals is in the offing.

11 CONCLUSION

12 For the reasons stated, this Court should not apply the  
13 July 2006 Hepting ruling to the actions brought against the Sprint  
14 defendants.

15 Respectfully submitted,

16 /s/ John G. Kester

17 BRENDAN V. SULLIVAN, JR.  
18 JOHN G. KESTER  
19 GILBERT O. GREENMAN

20 WILLIAMS & CONNOLLY LLP  
21 725 Twelfth Street, N.W.  
22 Washington, D.C. 20005  
23 Tel.: (202) 434-5000  
24 Fax: (202) 434-5029  
25 jkester@wc.com  
26 ggreenman@wc.com

27 Attorneys for Sprint Nextel Corp.,  
28 Sprint Communications Co. L.P.,  
Sprint Spectrum L.P. and Nextel  
West Corp.

February 1, 2007