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13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION

17
 18 In re:
 19 NATIONAL SECURITY AGENCY
 TELECOMMUNICATIONS RECORDS
 20 LITIGATION
 21
 22 This Document Relates To:
 23 ALL ACTIONS
 24

MDL Dkt. No. 06-1791-VRW

**RESPONSE OF CINGULAR AND
 BELLSOUTH TO ORDER TO SHOW
 CAUSE RE: APPLICATION OF
 HEPTING ORDER [DKT. 79]**

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

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1 This Court has asked “[a]ll parties to SHOW CAUSE in writing why the *Hepting*
2 order should not apply to all cases and claims to which the government asserts the state
3 secrets privilege.” Dkt. 79. For the reasons set forth herein, **CINGULAR WIRELESS**
4 **LLC**, now known as **AT&T MOBILITY LLC**, **NEW CINGULAR WIRELESS**
5 **SERVICES, INC.**, and **CINGULAR WIRELESS CORPORATION**, now known as
6 **AT&T MOBILITY CORPORATION**,¹ as well as **BELLSOUTH CORP.**,
7 **BELLSOUTH TELECOMMUNICATIONS, INC.** and **BELLSOUTH**
8 **COMMUNICATIONS SYSTEMS, LLC** (collectively, “Cingular and BellSouth”)
9 respectfully submit that this Court cannot and should not apply the *Hepting* order to bind
10 carriers, including Cingular and BellSouth, which were not parties to the *Hepting* litigation.

11 As this Court is well aware, the only defendants named in the *Hepting* complaint are
12 AT&T Inc. and AT&T Corp. The cases against Cingular and BellSouth were transferred to
13 this MDL only *after* the issuance of this Court’s *Hepting* July 20, 2006 Order (“*Hepting*
14 Order”) and six months *after* the complaint in *Hepting*.

15 Like the Sprint Defendants, Cingular and BellSouth were not parties to the *Hepting*
16 Order, and it would violate fundamental norms of due process to deny them a full and fair
17 opportunity to be heard. In order to reduce redundant arguments, Cingular and BellSouth
18 reply upon, and hereby incorporate by reference, the Sprint Defendants’ Response to this
19 Court’s Order to Show Cause for the further explanation of its position.²

20 Cingular and BellSouth are now subsidiaries of AT&T Inc. as the result of the
21 recent merger of AT&T Inc. and BellSouth, which was finalized after the *Hepting* Order
22 was entered and after the filing of the complaints in this MDL. Although the various
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24 ¹ The name change for Cingular Wireless LLC to AT&T Mobility LLC was accepted and
25 filed by the Delaware Secretary of State effective January 8, 2007. The name change for
26 Cingular Wireless Corporation to AT&T Mobility Corporation was accepted and filed by
the Delaware Secretary of State effective January 8, 2007.

27 ² The Sprint Defendants include Sprint Nextel Corp., Sprint Communications Co. L.P.,
Sprint Spectrum L.P. and Nextel West Corp.

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1 Cingular and BellSouth entities are conducting business under new names and are now
 2 subsidiaries of AT&T Inc., a holding company, they remain distinct legal entities. Cingular
 3 and BellSouth should not be estopped from presenting their arguments to dismiss the
 4 complaints because of the consummation of the merger after the *Hepting* order was entered.
 5 *See, e.g., Hawthorne Savings F.S.B. v. Reliance Ins. Co. of Ill.*, 421 F.3d 835, 856 n.22 (9th
 6 Cir. 2005) (collateral estoppel did not bar successor-in-interest from challenging litigation
 7 bond ordered against acquired company prior to merger, even though the court had
 8 reaffirmed the bond after the merger: “Collateral estoppel is inappropriate if there is any
 9 doubt as to whether an issue was actually litigated in a prior proceeding.”) (internal
 10 quotation marks and citations omitted), *amended on other grounds*, 433 F.3d 1089 (9th Cir.
 11 2006); *Lumpkin v. Envirodyne Indus., Inc.*, 159 B.R. 814, 818 (N.D. Ill. 1993) (refusing to
 12 apply non-mutual offensive collateral estoppel against a parent corporation based on prior
 13 conduct by a newly-acquired subsidiary). Consequently, it would be improper to apply the
 14 *Hepting* Order to Cingular and BellSouth.

15 For the reasons set forth in this Response and those presented by the Sprint
 16 Defendants, this Court should not apply the July 2006 *Hepting* Order to the actions brought
 17 against Cingular and BellSouth.

18 Dated: February 1, 2007.

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