

1 ELECTRONIC FRONTIER FOUNDATION  
 CINDY COHN (145997)  
 2 cindy@eff.org  
 LEE TIEN (148216)  
 3 tien@eff.org  
 KURT OPSAHL (191303)  
 4 kurt@eff.org  
 KEVIN S. BANKSTON (217026)  
 5 bankston@eff.org  
 CORYNNE MCSHERRY (221504)  
 6 corynne@eff.org  
 JAMES S. TYRE (083117)  
 7 jstyre@eff.org  
 454 Shotwell Street  
 8 San Francisco, CA 94110  
 Telephone: 415/436-9333  
 9 415/436-9993 (fax)

10 Attorneys for Plaintiffs

11 [Additional counsel appear on signature page.]

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

14	TASH HEPTING, GREGORY HICKS,	)	No. C-06-00672-VRW
	CAROLYN JEWEL and ERIK KNUTZEN, on	)	
15	Behalf of Themselves and All Others Similarly	)	<u>CLASS ACTION</u>
	Situated,	)	
16		)	ADMINISTRATIVE MOTION FOR
	Plaintiffs,	)	DESIGNATION OF INTERIM CLASS
17		)	COUNSEL
	vs.	)	
18		)	
	AT&T CORP., et al.	)	
19		)	
	Defendants.	)	
20		)	

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1 PLEASE TAKE NOTICE THAT pursuant to Local Rule 7-11 and Fed. R. Civ. P. 23(g), the  
2 Electronic Frontier Foundation (“EFF”) makes this motion to be designated interim class counsel for  
3 the *Hepting* action, and other related, coordinated, or consolidated cases in the Northern District of  
4 California. EFF’s motion is supported by all counsel in the *Hepting* action who are able to devote  
5 resources to this litigation, as requested and overseen by EFF.

6 **I. PROCEDURAL HISTORY**

7 On January 31, 2006, the *Hepting* plaintiffs filed a class action against AT&T Inc. and  
8 AT&T Corp. (collectively, “AT&T”), alleging that the defendants are engaged in a massive  
9 warrantless eavesdropping program, at the behest of the United States government. The *Hepting*  
10 case has two major factual components: the illegal interception of communications in transit by  
11 AT&T and the illegal disclosure of stored communications data by AT&T. After further factual  
12 investigation and analysis, on March 31, 2006, the *Hepting* plaintiffs filed a motion for preliminary  
13 injunction supported by testimony from a former AT&T employee and from an expert in the  
14 telecommunications industry arising from the first of these two factual components.

15 On April 28, 2006, the United States filed a statement of interest and both corporate  
16 defendants moved to dismiss the complaint. On May 13, 2006, the government filed a motion to  
17 dismiss plaintiffs’ complaint or, in the alternative, for summary judgment based on the state secrets  
18 privilege. On May 17, 2006, the Court heard argument on motions regarding the content and origin  
19 of certain documents – with defendants moving to compel the return of the documents and to seal the  
20 record. *See* Civil Minute Order, dated May 17, 2006. The Court denied the defendants’ motions,  
21 ordering the parties to meet and confer on producing a redacted version of these documents, and set  
22 an expedited schedule for the dismissal motions. *Id.* The *Hepting* plaintiffs have opposed the  
23 defendants’ motions for dismissal and the government’s state secrets motion for dismissal; a hearing  
24 is currently scheduled for June 23, 2006.

25 On May 11, 2006, an article appeared in the *USA Today*, reporting that the National Security  
26 Agency was engaged in a classified program to amass a database including information about the  
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1 calling records of millions of Americans. Verizon MDL Motion at 4.<sup>1</sup> This article focused on the  
2 second of the two factual components of the *Hepting* case and specifically mentioned the case and  
3 the EFF's role in it. Following that article, at least 31 complaints have been filed across the country  
4 against the telecommunications companies focusing on the facts raised in the *USA Today* article.  
5 These complaints are now the subject of an MDL proceeding. One of these actions was filed on  
6 May 30, 2006, in the Northern District of California, *Roe, et al. v. AT&T Corp., et al.*, Case No. C-  
7 06-03467-VRW. This Court found *Roe* to be a related action on June 8, 2006. Two other actions  
8 were filed in state court, and have since been removed to the Northern District of California. *See*  
9 *Riordan, et al. v. Verizon Commc'ns, Inc.*, Case No. C-06-03574-JSW (removed from state court on  
10 June 5, 2006); and *Campbell, et al. v. AT&T Commc'ns of Cal., et al.*, Case No. C-06-03596-VRW  
11 (removed from state court on June 6, 2006).

## 12 **II. RULE 23(g) CONTEMPLATES THE DESIGNATION OF INTERIM** 13 **CLASS COUNSEL**

14 Amendments to Rule 23(g) in 2003 specifically recognize the need to designate interim class  
15 counsel in certain situations. Rule 23(g)(2)(A) provides that “[t]he court may designate interim  
16 counsel to act on behalf of the putative class before determining whether to certify the action as a  
17 class action.” Traditional procedures in which “all papers and documents are served on all attorneys,  
18 and each attorney files motions, presents arguments, and examines witnesses, may waste time and  
19 money, confuse and misdirect the litigation, and burden the court unnecessarily.” Manual for  
20 Complex Litigation §10.22, pp. 24-28 (4th ed. 2004). Where, as here, there are many parties and  
21 duplicative actions, coordinating counsel early in the litigation avoids these problems.

### 22 **A. Designating Interim Class Counsel Is Appropriate to Protect the** 23 **Interests of Class Members**

24 Designating interim class counsel is appropriate where “overlapping, duplicative, or  
25 competing class suits are pending before a court, so that appointment of interim counsel is necessary

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26 <sup>1</sup> “Verizon MDL Motion” refers to the Memorandum in Support of Defendants Verizon  
27 Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.’s Motion for  
28 Transfer and Coordination Pursuant to 28 U.S.C. §1407, filed May 24, 2006, with the Judicial Panel  
on Multidistrict Litigation.

1 to protect the interests of class members.” *Donaldson v. Pharmacia Pension Plan*, Case No. 06-3-  
2 GPM, 2006 U.S. Dist. LEXIS 28607, at \*\*2-3; 2006 WL 1308582 (S.D. Ill. May 10 2006). The  
3 commentary to Rule 23 anticipated that when duplicative suits are filed, interim counsel can ensure  
4 that someone “prepare[s] for the certification decision” and “make[s] or respond[s] to motions before  
5 certification.” Fed. R. Civ. P. 23(g) advisory committee’s note.

6 Here, as noted above, many potentially dispositive motions have already been filed – and  
7 responded to – in the *Hepting* action. EFF has already litigated key collateral issues involving both  
8 defendants and the media, including the use of key evidence and the sealing issues. EFF has also, at  
9 the Court’s request, negotiated redactions to publicly-filed documents with defendants. *Roe*  
10 plaintiffs, in recently filed papers with the MDL panel, acknowledge that *Hepting* has “involved  
11 extensive motion practice and hearings” and “has progressed much further than every other action.”  
12 See *Roe* Plaintiffs’ Memorandum in Support of Motion for Transfer and Coordination to the  
13 Northern District of California Pursuant to 28 U.S.C. §1407, filed June 13, 2006, at 3. The *Roe*  
14 plaintiffs also acknowledge that the extensive motion practice has given the *Hepting* plaintiffs  
15 “extensive knowledge about the statutory issues and the government’s ‘state secret’ assertions since  
16 the case was filed six months ago.” *Id.* All of these reasons support designating EFF as interim  
17 class counsel.

18 **B. Recently Filed Duplicative Actions Make Designation of Interim Class**  
19 **Counsel Necessary**

20 Another factor making the designation of interim class counsel necessary is that duplicative  
21 lawsuits have now been filed – months after the *Hepting* case was filed – requiring coordination of  
22 resources. The commentary to Rule 23 notes that “in some cases . . . there may be rivalry or  
23 uncertainty that makes formal designation of interim counsel appropriate.” One court has noted that  
24 where ““there are a number of overlapping, duplicative, or competing suits pending in other courts,  
25 designation of interim counsel clarifies responsibility for protecting the interests of the class during  
26 precertification activities. . . .” *Donaldson*, 2006 U.S. Dist. LEXIS 28607, at \*\*3-4.

27 Here, several of the recent cases have now been filed in or removed to the Northern District  
28 of California, each of which is less inclusive, both factually and legally, than the *Hepting* action.

1 The *Roe* action only includes a limited subset of the factual allegations of the *Hepting* complaint,  
2 specifically those involving public revelations made in the *USA Today* article and alleging causes of  
3 action under the Electronic Communications Privacy Act of 1986 (“ECPA”), 18 U.S.C. §2702(a)(3)  
4 and the Federal Communications Act of 1934, 47 U.S.C. §605, both of which are alleged in the  
5 *Hepting* action. The *Hepting* complaint is broader, also alleging violations of the First and Fourth  
6 Amendments of the United States Constitution, the Foreign Intelligence Surveillance Act (“FISA”),  
7 50 U.S.C. §1809, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.  
8 §2511(3), and additional ECPA violations, including 18 U.S.C. §2702(a)(1). The individual actions,  
9 *Campbell* and *Riordan*, also center around the factual allegations first revealed publicly in the *USA*  
10 *Today* article, but seek only injunctive relief under the California Constitution and California’s  
11 Public Utility Code.<sup>2</sup>

### 12 C. EFF Is the Most Appropriate Interim Class Counsel

13 In designating counsel, the court may consider: (1) counsel’s work identifying or  
14 investigating potential claims in the action; (2) counsel’s experience in handling class actions,  
15 complex litigation, and claims of the type asserted in the action; (3) counsel’s knowledge of the  
16 applicable law; and (4) the resources counsel will commit to the case. Fed. R. Civ. P.  
17 §23(g)(1)(C)(i). The court may also consider “any other matter pertinent to counsel’s ability to  
18 fairly and adequately represent the interests of the class.” Fed. R. Civ. P. §23(g)(1)(C)(ii).

19 As discussed above, EFF and their supporting counsel have undertaken significant work  
20 investigating and developing the facts and identifying potential claims in this action. In addition,  
21 EFF and their supporting counsel also have significant experience in handling class actions and other  
22 complex litigation. EFF is a non-profit organization, formed in 1990, that has participated in  
23 significant litigation involving privacy and electronic surveillance. EFF’s expertise in privacy law  
24 and electronic media is near unrivaled, having been counsel or *amicus curiae* in cases spanning four

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26 <sup>2</sup> The question of whether *Campbell* and *Riordan* are related to *Hepting* is currently pending  
27 before this Court. The plaintiffs in those cases are likely to seek remand to the California state  
28 courts, and until these questions are answered by this Court, it may be premature to join these cases  
in the case management order at this time.

1 circuits, many district courts, and the FISA court.<sup>3</sup> Given EFF's particular expertise in this area of  
2 law, it is more than adequate to serve as interim class counsel for cases pending in the Northern  
3 District of California.

4 Firms working with EFF on the litigation comprise several of the largest and most  
5 specialized firms in complex litigation. For example, Lerach Coughlin Stoia Geller Rudman &  
6 Robbins LLP ("Lerach Coughlin") a 160-lawyer firm that specializes in securities, consumer,  
7 insurance, healthcare, human rights, employment discrimination, and antitrust class actions. Cohn  
8 Decl., Ex. B. Lerach Coughlin attorneys have been responsible for recoveries of more than \$45  
9 billion for plaintiffs. Similarly, Heller Ehrman has an extensive practice that bridges many areas of  
10 law, including litigation, business and intellectual property capabilities. Cohn Decl., Ex. C. Heller  
11 Ehrman has more than 700 attorneys and professionals in 12 cities nationwide and abroad. Other  
12 supporting counsel to EFF include Traber & Voorhees, who also specialize in class actions and  
13 multi-plaintiff cases, and the Law Offices of Richard R. Wiebe. Cohn Decl., Exs. D-E. These firms,  
14 in combination with EFF, have sufficient experience in handling class actions and other complex  
15 litigation similar to this action. Likewise, the size and number of firms supporting EFF means that  
16 sufficient resources are available to litigate this case.

### 17 **III. CONCLUSION**

18 For all the reasons stated above, plaintiffs respectfully request that the Court enter the  
19 [Proposed] Case Management Order Number 1, submitted concurrently with this motion.

20 DATED: June 14, 2006

ELECTRONIC FRONTIER FOUNDATION

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/s/

CINDY COHN

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24 <sup>3</sup> Examples of EFF's involvement in relevant cases include *Snow v. DirecTV, Inc.*, Case No.  
25 05-13687, 2006 U.S. App. LEXIS 13561, 2006 WL 1493817 (11th Cir. June 1, 2006); *United States*  
26 *v. Councilman*, 418 F.3d 67 (1st Cir. 2005); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir.  
27 2002); *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457 (5th Cir. 1994); *In re*  
28 *Sealed Case No. 02-001*, 310 F.3d 717 (U.S. Foreign Intell. Surveil. Ct. Review 2002). See also  
Declaration of Cindy A. Cohn in Support of Administrative Motion for Designation of Interim Class  
Counsel ("Cohn Decl."), Ex. A.

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CINDY COHN  
LEE TIEN  
KURT OPSAHL  
KEVIN S. BANKSTON  
CORYNNE MCSHERRY  
JAMES S. TYRE  
454 Shotwell Street  
San Francisco, CA 94110  
Telephone: 415/436-9333  
415/436-9993 (fax)

TRABER & VOORHEES  
BERT VOORHEES  
THERESA M. TRABER  
128 North Fair Oaks Avenue, Suite 204  
Pasadena, CA 91103  
Telephone: 626/585-9611  
626/577-7079 (fax)

LERACH COUGHLIN STOIA GELLER  
RUDMAN & ROBBINS LLP  
REED R. KATHREIN  
JEFF D. FRIEDMAN  
SHANA E. SCARLETT  
MARIA V. MORRIS  
100 Pine Street, Suite 2600  
San Francisco, CA 94111  
Telephone: 415/288-4545  
415/288-4534 (fax)

LERACH COUGHLIN STOIA GELLER  
RUDMAN & ROBBINS LLP  
ERIC ALAN ISAACSON  
655 West Broadway, Suite 1900  
San Diego, CA 92101  
Telephone: 619/231-1058  
619/231-7423 (fax)

LAW OFFICE OF RICHARD R. WIEBE  
RICHARD R. WIEBE  
425 California Street, Suite 2025  
San Francisco, CA 94104  
Telephone: 415/433-3200  
415/433-6382 (fax)

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HELLER EHRMAN LLP  
ROBERT D. FRAM  
MICHAEL M. MARKMAN  
333 Bush Street, Suite 3100  
San Francisco, CA 94104-2878  
Telephone: 415/772-6000  
415/772-6268 (fax)

Attorneys for Plaintiffs

I, Shana E. Scarlett, am the ECF User whose ID and password are being used to file this ADMINISTRATIVE MOTION FOR DESIGNATION OF INTERIM CLASS COUNSEL. In compliance with General Order 45, X.B., I hereby attest that Cindy A. Cohn has concurred in this filing.

DATED: June 14, 2006

\_\_\_\_\_/s/\_\_\_\_\_  
SHANA E. SCARLETT

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

\_\_\_\_\_/s/  
SHANA E. SCARLETT  
  
LERACH COUGHLIN STOIA GELLER  
RUDMAN & ROBBINS LLP  
100 Pine Street, 26th Floor  
San Francisco, CA 94111  
Telephone: 415/288-4545  
415/288-4534 (fax)  
E-mail: shanas@lerachlaw.com