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Wireless Services LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE:)
NATIONAL SECURITY AGENCY)
TELECOMMUNICATIONS)
RECORDS LITIGATION)
This Document Relates To:)
ALL CASES)
_____)

MDL NO. 06-1791 VRW

**VERIZON'S RESPONSE TO THE ORDER
TO SHOW CAUSE WHY THE HEPTING
ORDER SHOULD NOT APPLY TO ALL
CASES**

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

1 Verizon^{1/} hereby responds to the Court's Pretrial Order No. 1, which ordered the parties "to
2 SHOW CAUSE in writing why the *Hepting* order should not apply to all cases and claims to which
3 the government asserts the state secrets privilege" in this multidistrict litigation. The Court should
4 decide the application of the state-secrets privilege to the cases against Verizon in connection with a
5 motion to dismiss by Verizon and a formal assertion of the state-secrets privilege by the government
6 in those cases. Only in the specific context of such a motion will the Court be in a position to
7 determine in a concrete setting whether the reasoning in its July 20, 2006 order in *Hepting v. AT&T*
8 *Corp.*, No. 3:06-cv-00672-VRW ("Hepting Order"), applies to the cases against Verizon.

9 ARGUMENT

10 The Court should not mechanically apply the *Hepting* Order to the cases against Verizon in
11 the abstract. As an initial matter, Verizon was not a party to *Hepting*, so the Court's *Hepting* Order
12 could not be binding as to Verizon as a matter of due process. Moreover, independent litigation of
13 the applicability of the state-secrets privilege is necessary in light of the different allegations and
14 circumstances regarding AT&T Corp. and the Verizon defendants. Indeed, in its order denying the
15 motions to remand filed in the *Campbell* and *Riordan* cases, the Court acknowledged that its "ruling
16 in *Hepting* does not determine unequivocally the effect of the states secrets privilege" in other cases.
17 1-18-07 Order (MDL Dkt. No. 130) at 13. The United States has not yet asserted the state-secrets
18 privilege as to the Verizon cases. Likewise, neither Verizon nor the Plaintiffs have briefed the effect
19 of the assertion of that privilege on the cases against Verizon given the particular factual allegations
20 and circumstances at issue. Instead of applying the *Hepting* Order without the benefit of any such

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22 ^{1/} "Verizon" refers to Verizon Communications Inc., Verizon Global Networks Inc., Verizon
23 Northwest Inc., Verizon Maryland Inc., MCI, LLC, MCI Communications Services, Inc., Cellco
24 Partnership, Verizon Wireless (VAW) LLC, and Verizon Wireless Services LLC. Several cases
25 consolidated in this proceeding purport to name Verizon Wireless, LLC or MCI WorldCom
26 Advanced Networks, LLC as defendants, but no such entities exist. Additional Verizon entities are
27 mentioned in Plaintiffs' Master Consolidated Complaint Against MCI Defendants and Verizon
28 Defendants (MDL Dkt. No. 125) ("Master Consolidated Complaint"), but plaintiffs have taken the
position that the master complaint is solely an "administrative device" that is not "intended to
change the rights of the parties" (Master Consol. Compl. ¶ 2), and have not amended the underlying
complaints to add the newly named entities or served the newly named entities. By responding to
the Court's Order To Show Cause, defendants do not waive any defense that can be raised pursuant
to Rule 12 of the Federal Rules of Civil Procedure, including defenses based on improper service or
lack of personal jurisdiction.

1 submissions, the Court should instead allow, at the appropriate time, full briefing on Verizon's
2 motion to dismiss following the government's formal assertion of the state-secrets privilege in the
3 Verizon cases.^{2/} In briefing such a motion, Verizon would certainly have to take account of this
4 Court's decision in *Hepting* and explain why it is distinguishable. It also intends to focus on aspects
5 of the state-secrets privilege that were not fully addressed in the *Hepting* Order. It is only in the
6 concrete context of litigating such a fully briefed motion that the Court can most sensibly apply its
7 *Hepting* Order to the Verizon cases.

8 1. As Plaintiffs appear to concede in their opposition to the government's motion for a
9 stay, Verizon clearly is not bound by the Court's order in *Hepting* because Verizon is not a party in
10 that case and it is not in privity with the AT&T defendants in *Hepting*. It is, of course, black-letter
11 law that a party generally cannot be bound by a decision issued in a case to which it was not a party
12 whether through the application of collateral estoppel or "law of the case." As the Supreme Court
13 explained in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313
14 (1971):

15 Some litigants—those who never appeared in a prior action—may not be collaterally
16 estopped without litigating the issue. They have never had a chance to present their
17 evidence and arguments on the claim. Due process prohibits estopping them despite
one or more existing adjudications of the identical issue which stand squarely against
their position.

18 *Id.* at 329. Indeed, the Supreme Court and the Ninth Circuit have consistently adhered to this basic
19 principle of due process. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It
20 is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy
21 and therefore has never had an opportunity to be heard."); *Baker v. General Motors Corp.*, 522 U.S.
22 222, 238 n.11 (1998) ("In no event, we have observed, can issue preclusion be invoked against one
23 who did not participate in the prior adjudication."); *Grayson v. McGowan*, 543 F.2d 79, 81 (9th Cir.

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25 ^{2/} As set forth in Verizon's reply to the Motion of United States for a Stay Pending Disposition
26 of Interlocutory Appeal in *Hepting v. AT&T Corp.*, Verizon is prepared to proceed with a motion to
27 dismiss. If the Court were instead to decide that no further litigation should occur until the Court of
28 Appeals provides guidance regarding the application of the state-secrets privilege in the *Hepting*
appeal, there would no reason to make any determination about the applicability of the *Hepting*
Order or its reasoning to the cases against Verizon until the Court of Appeals provided that
guidance.

1 1976) (“To permit the offensive use of the prior determination against [Defendant], who was not a
2 party in the first action, not represented there, not directing or controlling that litigation, and not in
3 privity with [the defendant in the prior action], would be to impermissibly deny appellee his due
4 process right to a full and fair opportunity to litigate his claims”). And, although the government
5 had intervened in *Hepting*, that does not provide a basis for applying the state-secrets determination
6 in *Hepting* even to the United States (and certainly not to Verizon)^{3/} in other cases because, among
7 other things, “nonmutual offensive collateral estoppel is not to be extended to the United States.”
8 *United States v. Mendoza*, 464 U.S. 154, 158 (1984).

9 Similarly, the “law of the case” cannot apply to a *different* case. *See, e.g., Arizona v.*
10 *California*, 460 U.S. 605, 618 (1983) (“[L]aw of the case is an amorphous concept. As most
11 commonly defined, the doctrine posits that when a court decides upon a rule of law that decision
12 should continue to govern the same issues in subsequent stages *in the same case*.” (emphasis
13 added)). Although the various cases against the carriers have all been transferred to this Court for
14 purposes of efficient resolution, that does not transform them into the same case. *See, e.g., Johnson*
15 *v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933) (“[C]onsolidation is permitted as a matter of
16 convenience and economy in administration, but does not merge the suits into a single cause, or
17 change the rights of the parties, or make those who are parties in one suit parties in another.”). That
18 conclusion is evident from the fact that the Court ordered the plaintiffs to file *separate* complaints
19 against each set of carrier defendants.

20 That Verizon cannot be bound by a case to which it was not a party is “part of our deep-
21 rooted historic tradition that everyone should have his own day in court.” *Richards v. Jefferson Cty.*,
22 517 U.S. 793, 798 (1996) (internal quotation marks omitted). This tradition is drawn from “clear
23 experience with the general fallibility of litigation and with the specific distortions of judgment that
24 arise from the very identity of the parties.” 18A Charles Alan Wright et al., *Federal Practice &*

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26 ^{3/} Although the decision whether to assert the privilege belongs to the government, the Court
27 nonetheless must consider the position of individual defendants whom the privilege leaves unable to
28 present a full and fair defense. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (“[I]f the
privilege deprives the *defendant* of information that would otherwise give the defendant a valid
defense to the claim, then the court may grant summary judgment to the defendant.” (internal
quotation marks omitted) (emphasis in original)).

1 *Procedure* § 4449 (2006). Thus, Verizon is entitled to its “day in court.”^{4/} In particular, Verizon
2 should be able to explain, *inter alia*, why the government’s expected assertion of the state-secrets
3 privilege will render Verizon largely unable to defend itself and therefore requires dismissal of the
4 cases against it. To deny Verizon that opportunity in a case seeking a massive damages award based
5 on a decision made in a different case involving different allegations and circumstances to which it
6 was not a party would violate basic norms of fundamental fairness

7 2. Factual differences among the various carrier defendants involved in this multidistrict
8 litigation—including among the nine different Verizon entities sued—also require that the Court
9 decide the application of the state-secrets privilege following briefing on motions to dismiss and
10 assertions of the privilege by the government. Although Verizon, respectfully, does not share the
11 Court’s view that the size of a company or general statements by a company regarding its
12 willingness to assist the government are relevant to the application of the state-secrets privilege in
13 these cases, the Court’s *Hepting* Order relied on those factual issues, *see Hepting v. AT&T Corp.*,
14 439 F. Supp. 2d 974, 991-93 (N.D. Cal. 2006) (relying on size and public statements of AT&T),
15 which may well differ among the carriers. Additionally, the Court’s conclusion that the plaintiffs in
16 *Hepting* might be able to establish standing despite the assertion of the state-secrets privilege relied
17 in part on the “Klein and Marcus declarations,” which the Court indicated “provide at least some
18 factual basis for plaintiffs’ standing” and which are relevant (if at all) only to the claims against the

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20 ^{4/} Although a party in a subsequent case may be bound by a prior decision if it was in privity
21 with a party to that decision, Verizon and AT&T were not in “privity.” “Privity—for the purposes
22 of applying the doctrine of *res judicata*—is a legal conclusion designating a person so identified in
23 interest with a party to former litigation that he represents precisely the same right in respect to the
24 subject matter involved.” *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (internal quotation
25 marks omitted). “[P]arallel legal interests alone, identical or otherwise, are not sufficient to establish
26 privity.” *Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1054 (9th Cir. 2005). Instead, “[a]
27 non-party can be bound by the litigation choices made by his virtual representative, only if certain
28 criteria are met: a close relationship, substantial participation, and tactical maneuvering all support a
finding of virtual representation; identity of interests and adequate representation are necessary to
such a finding. *Id.* at 1053-54 (internal quotation marks omitted). Here, Verizon and AT&T do not
meet any of the criteria necessary for a finding of virtual representation. There is no “close
relationship” between AT&T and Verizon such that they are legally accountable to one another. *See*
id.; *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1171 (9th Cir. 2000). Verizon did not
participate at all—much less substantially—in the *Hepting* litigation such that it should be bound by
the judgments therein. The roughly parallel legal interests of AT&T and Verizon alone are
insufficient to bind Verizon to the *Hepting* Order.

1 AT&T defendants. *Id.* at 1001.

2 Indeed, the Court itself observed during the November 17, 2006 hearing that there were
3 numerous factual distinctions among the carrier defendants that might have to be “analyzed
4 individually, telecommunications company by telecommunications company.” 11-17-06 Hr’g Tr. at
5 32; *id.* at 30-31 (“[T]he practices and policies of the telecommunications companies differ. They’re
6 not uniform.”); *id.* at 31-32 (“But those statements are not the same by these other
7 telecommunications companies. The policies of the other telecommunications companies appear not
8 to be the same as AT&T. The statements of the government with respect to these other
9 telecommunications companies are not identical to the statements made against or made in
10 AT&T.”).

11 Plaintiffs likewise have taken the position that the carriers are differently situated. Plaintiffs’
12 counsel, for example, has stated that “the factual issues for each of the defendants are actually quite
13 different” and that “the story for each telecommunications company is likely to be dramatically
14 different and they should be handled differently.” *Id.* at 24, 26; *see also id.* at 24 (carriers “had
15 different interactions with the government”); *id.* at 25 (suggesting that “it’s better to look at what
16 each of these telcos did and said independently”); *id.* at 24 (carriers have “different network
17 architectures” and “different structures as telecommunications companies”).

18 In addition to the different allegations about the different carrier defendants, it is also
19 possible that the government may rely upon different classified facts in making its assertions of the
20 state-secrets privilege in the various cases. Without seeing the government’s submissions, the Court
21 cannot assess the application of the privilege to the cases involving carrier defendants other than
22 those in *Hepting*. Indeed, developments since the government’s submission in *Hepting*, such as the
23 Attorney General’s recent announcement that electronic surveillance previously conducted under the
24 Terrorist Surveillance Program will now occur pursuant to one or more orders of the FISA Court,
25 may effect the scope and applicability of the state-secrets privilege. *See* Letter from Alberto R.
26 Gonzalez, Attorney General of the United States, to Patrick Leahy, Chairman, Committee on the
27 Judiciary, United States Senate, and Arlen Specter, Ranking Minority Member, Committee on the
28 Judiciary, United States Senate (Jan. 17, 2007). Thus, only after the government has made its formal

1 assertions of the privilege can the Court perform its role of assessing whether the assertion of the
2 privilege precludes further litigation.

3 3. Finally, an independent assessment of the impact of the government's assertion of the
4 state-secrets privilege to the Verizon cases is necessary because Verizon intends to focus its motion
5 on aspects of the state-secrets privilege that were not fully addressed in the *Hepting* Order.^{5/} For
6 example, the Court's *Hepting* Order principally addresses the contentions that dismissal of the
7 claims against AT&T is required under *Totten v. United States*, 92 U.S. 105 (1875), or because the
8 "very subject matter of the action" is a state secret. *See Hepting*, 439 F. Supp. 2d at 986-994.
9 Verizon, however, intends to demonstrate that even if the very subject matter of the claims against it
10 were not a state secret (and it is), no further proceedings on these claims would be possible because
11 it is clear *now* that the state-secrets privilege will prevent Verizon from defending itself in numerous
12 ways and that it will likewise prevent Plaintiffs from establishing a *prima facie* case against Verizon.
13 *See, e.g., Kasza*, 133 F.3d at 1166 (court must enter judgment for the defendant "if the privilege
14 deprives the *defendant* of information that would otherwise give the defendant a valid defense to the
15 claim" or if "the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged
16 evidence" (internal quotation marks omitted) (emphasis in original)).

17 In *Hepting*, the Court "decline[d] to decide at this time whether this case should be dismissed
18 on the ground that the government's state secrets assertion will preclude evidence necessary for
19 plaintiffs to establish a *prima facie* case or for AT&T to raise a valid defense to the claims."
20 *Hepting*, 439 F. Supp. 2d at 994. Verizon intends to demonstrate that the Court is obligated, at the
21 outset of the case, to look ahead and make a predictive judgment regarding whether the case can be
22 litigated in light of the government's invocation of state secrets. For this reason alone, any decision
23 by the Court regarding the application of the state-secrets privilege to the claims against Verizon
24 should wait until briefing on a motion to dismiss in those cases is completed.

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27 ^{5/} Verizon also anticipates that it will raise defenses that are unrelated to the state-secrets
28 privilege. There can be no dispute that Verizon is entitled fully to brief and litigate these other
defenses.

CONCLUSION

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For the foregoing reasons, the Court should decline at this time to make any determination regarding the applicability of its *Hepting* Order to the cases against Verizon. Such a determination should be made only following briefing on a motion to dismiss by Verizon and the formal assertion of the state-secrets privilege by the government in the Verizon cases.

Dated: February 1, 2007

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