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

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18 TASH HEPTING, GREGORY HICKS,
CAROLYN JEWEL and ERIK KNUTZEN
19 on Behalf of Themselves and All Others
Similarly Situated,
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Plaintiffs,
21
vs.
22 AT&T CORP., AT&T INC. and DOES 1-20,
23 inclusive,
24 Defendants.

No. C-06-0672-VRW

**MOTION OF DEFENDANT AT&T
CORP. TO FILE DOCUMENTS
UNDER SEAL**

[Civ. L.R. 7-11, 79-5]

Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

Filed concurrently:
1. Declaration of Bruce A. Ericson
2. Proposed Order

1 **NOTICE OF MOTION AND MOTION TO FILE DOCUMENTS UNDER SEAL**
2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that pursuant to Northern District of California Civil
4 Local Rules 7-11 and 79-5, defendant **AT&T CORP.** (“AT&T”) hereby moves the Court
5 for an Order allowing it to file under seal the following documents: (1) Motion of
6 Defendant AT&T Corp. to Compel Return of Confidential Documents; Supporting
7 Memorandum (the “Confidential Motion”), and (2) the Declaration of James W. Russell in
8 Support of Motion of Defendant AT&T Corp. to Compel Return of Confidential
9 Documents (the “Confidential Russell Declaration”). AT&T respectfully submits that good
10 cause exists for the filing of these documents under seal.

11 This motion is based on the following Memorandum of Points and Authorities, the
12 Declaration of Bruce A. Ericson in Support of Motion of Defendant AT&T Corp. to File
13 Documents Under Seal, the documents in the Court file, and the Confidential Motion and
14 Confidential Russell Declaration.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION.**

17 This action arises from plaintiffs’ allegations that AT&T assists the government in
18 carrying out a surveillance program to prevent terrorist attacks on the United States. In
19 support of a motion for preliminary injunction that plaintiffs filed on April 5, 2006,
20 plaintiffs filed under seal the declaration of a former AT&T employee. The employee’s
21 declaration attaches three documents containing confidential and proprietary information
22 (the “Confidential Documents”) that he took from AT&T.

23 The Confidential Documents were taken outside of the discovery process. They
24 contain confidential and proprietary AT&T information. AT&T therefore has filed the
25 Confidential Motion requesting that the Court order plaintiffs to return the documents and
26 make no further use of them unless and until they are obtained by proper means. The
27 Confidential Motion and the Confidential Russell Declaration describe in detail the nature
28 and content of the Confidential Documents—information that the Court needs to make an

1 informed ruling on the Confidential Motion. But as a consequence, the Confidential
2 Motion and the Confidential Russell Declaration contain highly sensitive information that,
3 if disclosed, could result in harm to AT&T and to its customers—harm completely
4 unrelated to the allegations in plaintiffs’ complaint. Putting these documents in the public
5 record would undermine the purpose of the Confidential Motion.

6 **II. ARGUMENT.**

7 Northern District Civil Local Rule 79-5(b) provides that counsel seeking to file
8 documents under seal may file a motion under Local Rule 7-11 and may lodge with the
9 Court documents for which sealing is requested. Civil Local Rule 79-5(a) provides that the
10 Court may order documents sealed if they are “privileged or protectable as a trade secret or
11 otherwise entitled to protection under the law” AT&T has lodged the documents that
12 are the subject of this motion in the manner provided for in Local Rule 79-5(b). There is
13 good cause for keeping the documents under seal.

14 This Court has the power to seal records to protect confidential and proprietary
15 business information. Both federal and California law recognize that courts should protect
16 trade secrets or other confidential commercial information by reasonable means, and that
17 allowing the filing under seal of documents containing such information is one of these
18 means. *See* Civil Local Rule 79-5(a); Fed. R. Civ. P. 26(c)(7) and (8) (a court may enter an
19 order protecting the confidentiality of “a trade secret or other confidential research,
20 development or commercial information,” including a direction that documents or
21 information be filed under seal); Cal. Civ. Code §3426.5 (“a court shall preserve the secrecy
22 of an alleged trade secret by reasonable means, which may include granting protective
23 orders in connection with discovery proceedings, holding in-camera hearings, sealing the
24 records of the action, and ordering any person involved in the litigation not to disclose an
25 alleged trade secret without prior court approval”).

26 Though the courts recognize a general right to inspect and copy public records and
27 documents, including judicial records, the Supreme Court has stated that this right is
28 limited. “It is uncontested, however, that the right to inspect and copy judicial records is

1 not absolute. Every court has supervisory power over its own records and files, and access
2 has been denied where court files might have become a vehicle for improper purposes.”
3 *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). In discussing examples
4 of improper purposes, the Court indicated that courts are not to serve as “sources of
5 business information that might harm a litigant’s competitive standing.” *Id.* As the Ninth
6 Circuit has put it,

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8 The law, however, gives district courts broad latitude to grant protective
9 orders to prevent disclosure of materials for many types of information,
10 including, but not limited to, trade secrets or other confidential research,
11 development, or commercial information. *See* Fed. R. Civ. P. 26(c)(7).
12 Rule 26(c) authorizes the district court to issue “any order which justice
13 requires to protect a party or person from annoyance, embarrassment,
14 oppression, or undue burden.” The Supreme Court has interpreted this
15 language as conferring “broad discretion on the trial court to decide when a
16 protective order is appropriate and what degree of protection is required.”
17 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 81 L.Ed.2d
18 17 (1984).

19 *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

20 The Confidential Documents in this action would, if made public, harm AT&T’s
21 competitive standing by disclosing proprietary processes and techniques developed through
22 investment of substantial AT&T resources. Allowing public access to the Confidential
23 Documents would make the Court a “vehicle for improper purposes” in other ways as well.
24 As is apparent from the Confidential Russell Declaration, making the Confidential
25 Documents public would expose AT&T to a variety of physical and electronic threats,
26 including disruption of service, interception of data and theft of AT&T customer
27 information. Exposure to these threats would harm both AT&T as well as its customers,
28 which include businesses, federal, state and local government, and private individuals like
the plaintiffs. Declaration of Bruce A. Ericson in Support of Motion to File Documents
under Seal ¶5.

The Confidential Documents contain detailed non-public information about critical
communications infrastructure operated by AT&T. *Id.* ¶3. The information contained in
the Confidential Documents is confidential and proprietary, and has value to AT&T not

1 generally known to the public or AT&T's competitors. *Id.*¶4. AT&T takes great care in
2 preserving the confidentiality of the Confidential Documents. *Id.*¶5. Public disclosure of
3 the Confidential Documents could create great risk to AT&T's ability to provide services
4 and carry out its business activities. *Id.* The Confidential Motion and Confidential Russell
5 Declaration describe the contents of the Confidential Documents in great detail, and putting
6 them into the public record of this Court would injure AT&T in the same way as making
7 the Confidential Documents themselves public. *Id.*¶6.

8 In *Nixon*, the Supreme Court asserted that "the decision as to access is one best left
9 to the sound discretion of the trial court, a discretion to be exercised in light of the relevant
10 facts and circumstances of the particular case." *Nixon*, 435 U.S. at 599. In *Phillips*, the
11 Ninth Circuit said much the same thing. *Phillips*, 307 F.3d at 1211. The relevant facts and
12 circumstances of this case argue for sealing the Confidential Motion and the Confidential
13 Russell Declaration. Doing so will protect the interests of both AT&T and those that rely
14 on its services.

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1 **III. CONCLUSION.**

2 For the foregoing reasons, AT&T submits that good cause exists for the filing of the
3 Confidential Motion and the Confidential Russell Declaration under seal and respectfully
4 requests that the Court so order.

5 Dated: April 10, 2006.

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15 By _____ /s/ Bruce A. Ericson
16 Bruce A. Ericson

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