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12 UNITED STATES DISTRICT COURT
 13
 14 NORTHERN DISTRICT OF CALIFORNIA

15 TASH HEPTING, GREGORY HICKS,)	No. C-06-00672-VRW
CAROLYN JEWEL and ERIK KNUTZEN, on)	
16 Behalf of Themselves and All Others Similarly)	<u>CLASS ACTION</u>
Situated,)	
)	NOTICE OF MOTION AND
)	ADMINISTRATIVE MOTION TO LODGE
)	DOCUMENTS WITH THE COURT
18 vs.)	PURSUANT TO CIVIL LOCAL RULES 7-11
)	AND 79-5
19 AT&T CORP., et al.)	
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1 TO: DEFENDANTS AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that plaintiffs will, and hereby do, move for administrative
3 relief pursuant to Civil Local Rules 7-11 and 79-5(d). Plaintiffs are moving for a preliminary
4 injunction against defendants AT&T Corporation and AT&T Inc. (collectively "AT&T"). In
5 plaintiffs' view, none of the information in plaintiffs' preliminary injunction papers is a trade secret
6 and there is no proper basis for sealing any of the information in plaintiffs' preliminary injunction
7 papers. Nevertheless, in order to allow defendants a reasonable opportunity to review the
8 information and to seek to establish that any portion of it is sealable, plaintiffs are lodging under seal
9 their memorandum of points and authorities and the supporting declarations and exhibits of Mark
10 Klein and J. Scott Marcus. Pursuant to Local Rule 79-5(d), plaintiffs request that the documents
11 they are lodging under seal be unsealed and made part of the public record in this action if after five
12 days defendants do not file a declaration establishing that the documents are properly sealable, or if
13 the Court determines that notwithstanding any such declaration the information is not sealable.

14 This motion is based on this notice of motion and motion, memorandum of points and
15 authorities, the amended motion for preliminary injunction and all associated papers filed therewith,
16 and the pleadings and papers on file in this action.

17 **I. MEMORANDUM OF POINTS AND AUTHORITIES**

18 **A. Background**

19 Plaintiffs are moving for a preliminary injunction against AT&T to enjoin its participation in
20 a massive, government-directed domestic spying scheme. Plaintiffs' motion papers include a
21 supporting memorandum and the supporting declarations and exhibits of Mark Klein and
22 telecommunications network expert J. Scott Marcus. Mr. Klein is a former AT&T employee, and in
23 his declaration he attaches and discusses certain AT&T documents. These documents were
24 imprinted "proprietary" but not "confidential" by AT&T. Telecommunications expert Mr. Marcus
25 discusses these same AT&T documents and Mr. Klein's declaration in his own declaration.
26 Plaintiffs' memorandum in support of their preliminary injunction motion discusses and refers to
27 these AT&T documents and to the Klein and Marcus declarations. Thus, all of the potentially
28

1 sealable information in plaintiffs’ preliminary injunction papers ultimately derives from the Klein
2 declaration and its exhibits.

3 For the reasons set forth below, none of the information should be sealed. Nevertheless,
4 plaintiffs are lodging under seal their memorandum and the declarations and exhibits of Mr. Klein
5 and Mr. Marcus so that defendants may have a reasonable opportunity to seek to demonstrate under
6 Civil Local Rule 79-5 that any portion of these documents is properly sealable and should be sealed.

7 There is currently no Rule 26(c) discovery protective order in this action.

8 **B. To Overcome the Strong Presumption of Public Access to Judicial**
9 **Records, It Is Defendants’ Burden to Demonstrate a Compelling**
10 **Justification for Any Sealing that They Seek**

11 The “presumption of openness . . . is at the foundation of our judicial system” *CBS, Inc. v.*
12 *United States Dist. Court*, 765 F.2d 823, 826 (9th Cir. 1985) (unanimous opn. by Kennedy, J.). In
13 particular, there is “a strong presumption in favor of access to court records.” *Foltz v. State Farm*
14 *Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *see also Nixon v. Warner Commc’ns, Inc.*,
15 435 U.S. 589, 597-99 (1978) (discussing the common law right of public access).

16 The presumption of public access to documents filed in judicial proceedings can be overcome
17 only if the party seeking to have them sealed carries the burden of demonstrating “sufficiently
18 compelling reasons for doing so.” *Foltz*, 331 F.3d at 1135; *see also id.* at 1130.

19 The party seeking sealing may not rely on generalized allegations of harm. Instead, it bears
20 the burden of showing, for each particular document that it seeks to have filed under seal, the
21 specific harm that will result if the document is not withheld from public scrutiny. *Foltz*, 331 F.3d at
22 1130 (party seeking to prohibit public access bears the burden of establishing “specific prejudice or
23 harm” “for each particular document”); *accord* Fed. R. Civ. Proc. 26(c) (discovery protective orders
24 limiting public disclosure may be issued only “for good cause shown” by the party seeking to
25 prohibit disclosure).

26 The Local Rules likewise put the burden of justifying the sealing on the party seeking to have
27 information sealed. The party seeking sealing must file a declaration establishing that the designated
28 information is sealable, and that any proposed sealing is narrowly tailored. Civil Local Rule 79-5(d).
If defendants fail to file a declaration, or file a declaration but fail to carry their burden of

1 establishing that the information should be sealed, then the Court makes the documents part of the
2 public record. *Id.*

3 If a declaration is filed, the Court must determine whether the reasons given for denying the
4 public the right to access court documents are sufficiently compelling to justify keeping the
5 documents from the public. *Foltz*, 331 F.3d at 1135. In order to find that a document is properly
6 sealable, the Court's order must articulate compelling reasons justifying sealing that are supported
7 by specific factual findings. *Id.*; *Hagestad v. Tragesser*, 49 F.3d 1430, 1434-35 (9th Cir. 1995).

8 **C. Plaintiffs' Preliminary Injunction Papers Should Not Be Sealed**
9 **Because the Information in Question Is Not a Trade Secret**

10 A trade secret is information that “[d]erives independent economic value, actual or potential,
11 from not being generally known to the public or to other persons who can obtain economic value
12 from its disclosure or use.” Cal. Civ. Code §3426.1(d). The information in the Klein declaration
13 and its exhibits is not a trade secret. There is no indication that its economic value, if any, derives
14 from not being generally known to the public or that others could obtain economic value from its
15 disclosure or use.

16 Moreover, it is generally known that AT&T engages in surveillance of the communications
17 of its customers, including the domestic surveillance on behalf of the National Security Agency that
18 is at issue in this lawsuit. Declaration of Cindy Cohn, Ex. B (Dionne Searcey, Shawn Young, and
19 Amol Sharma, *Wiretapping Flap Puts Phone Firms Under Fire*, Wall St. J., Feb. 7, 2006, at B3).
20 Even if AT&T's surveillance were not generally known and were not known to AT&T's competitors
21 (who themselves are conducting surveillance on behalf of the government, *see id.*), AT&T would
22 derive no “independent economic value” from the secrecy of its surveillance or of the details of how
23 it conducts that surveillance. AT&T enjoys a natural monopoly in the “market” for conducting
24 surveillance on its customers at the government's behest, as its customers' communications
25 necessarily pass through its hands. Its competitors derive no economic value from knowing that
26 AT&T and the government are conducting surveillance of AT&T's customers and cannot seek to
27 usurp AT&T in performing that function.
28

1 **D. There Is an Overriding Public Interest in Filing These Documents in**
 2 **the Public Record**

3 Even if AT&T could assert some purported private interest in sealing information in the
 4 Klein declaration and its exhibits, it still could not carry its heavy burden of justification. There is a
 5 great and overriding public interest in the public filing of plaintiffs' preliminary injunction papers
 6 because of the great public concern about the question of indiscriminate suspicionless warrantless
 7 domestic surveillance that is at the heart of this case. The public right of access to judicial records
 8 and proceedings serves many important interests, including the people's interest that decision
 9 making by all branches of government be exposed to public scrutiny and political debate, and the
 10 people's interest in ensuring that the judicial branch fulfill its role as a check on unbridled executive
 11 power. "The Supreme Court has noted that the American view of the right to inspect and copy court
 12 documents . . . embraces as an interest compelling disclosure 'the citizen's desire to keep a watchful
 13 eye on the workings of public agencies' and 'a newspaper publisher's intention to publish
 14 information concerning the operation of government.'" *In re McClatchy Newspapers, Inc.*, 288 F.3d
 15 369, 374 (9th Cir. 2001) (citation omitted). These interests are at their zenith in a lawsuit such as
 16 this alleging a program of massive constitutional violations by the highest levels of the executive
 17 branch, where this Court will be called upon to examine the legitimacy of the executive's actions.

18 Judge Easterbrook has well explained the public interest in public access to court filings:

19 "Judicial proceedings in the United States are open to the public – in criminal cases
 20 by constitutional command, and in civil cases by force of tradition. What happens in
 21 the halls of government is presumptively open to public scrutiny. Judges deliberate
 22 in private but issue public decisions after public arguments based on public records.
 23 The political branches of government claim legitimacy by election, judges by reason.
 24 Any step that withdraws an element of the judicial process from public view makes
 25 the ensuing decision look more like fiat; this requires rigorous justification."

26 *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (single-judge opn. by Easterbrook, J., sitting as
 27 motions judge) (citations omitted).

28 Such views are not new:

 "Justice Oliver Wendell Holmes wrote that public access to civil judicial proceedings
 was 'of vast importance' because of 'the security which publicity gives for the proper
 administration of justice. . . . It is desirable that the trial of [civil] causes should take
 place under the public eye, not because the controversies of one citizen with another
 are of public concern, but because it is of the highest moment that those who
 administer justice should always act under the sense of public responsibility, and that

1 every citizen should be able to satisfy himself with his own eyes as to the mode in
2 which a public duty is performed.’ Consistently, [the California Supreme Court in
3 the same era] wrote that ‘[i]n this country it is a first principle that the people have
4 the right to know what is done in their courts. The old theory of government which
5 invested royalty with an assumed perfection, precluding the possibility of wrong and
6 denying the right to discuss its conduct of public affairs, is opposed to the genius of
7 our institutions in which the sovereign will of the people is the paramount idea; and
8 the greatest publicity to the acts of those holding positions of public trust, and the
9 greatest freedom in the discussion of the proceedings of public tribunals that is
10 consistent with truth and decency are regarded as essential to the public welfare.’”

11 *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1198 n.14 (1999). In *NBC*,
12 the California Supreme Court unanimously held that “the First Amendment right of access applies to
13 civil proceedings,” *id.* at 1209, and noted that this First Amendment right of access has been
14 extended to court filings as well as to hearings in the courtroom, *id.* at 1208 n.25.

15 Whatever minimal private interest in sealing that defendants may assert cannot outweigh the
16 need for public access to the evidence on which the Court will base its decision whether to
17 preliminarily enjoin the massive government-directed domestic spying scheme at issue in this case.

18 **II. CONCLUSION**

19 Pursuant to Local Rule 79-5(d), plaintiffs request that the memorandum of points and
20 authorities and the declarations and exhibits of Mark Klein and J. Scott Marcus that they are lodging
21 under seal be unsealed and made part of the public record in this action if five days after the filing of
22 this motion defendants have not filed a declaration in support of sealing. If defendants do file a
23 declaration in support of sealing, plaintiffs respectfully request for the foregoing reasons that the
24 Court deny the proposed sealing and determine that the information is not sealable.

25 DATED: April 5, 2006

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/s/ CINDY COHN
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I, Reed R. Kathrein, am the ECF User whose ID and password are being used to file this NOTICE OF MOTION AND ADMINISTRATIVE MOTION TO LODGE DOCUMENTS WITH THE COURT PURSUANT TO CIVIL LOCAL RULES 7-11 AND 79-5. In compliance with General Order 45, X.B., I hereby attest that Cindy Cohn has concurred in this filing.

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