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

17  
 18 TASH HEPTING, GREGORY HICKS,  
 CAROLYN JEWEL and ERIK KNUTZEN  
 19 on Behalf of Themselves and All Others  
 Similarly Situated,  
 20  
 Plaintiffs,  
 21  
 vs.  
 22 AT&T CORP., AT&T INC. and DOES 1-20,  
 23 inclusive,  
 24 Defendants.

No. C-06-0672-VRW

**AT&T'S OPPOSITION TO MOTION  
 FOR ORDER SHORTENING TIME  
 FOR HEARING ON MOTION OF  
 LYCOS, INC. AND WIRED NEWS  
 FOR ORDERS PERMITTING  
 INTERVENTION AND UNSEALING  
 DOCUMENTS**

**[CIVIL L.R. 6-3(c), DKT. 140]**

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1 **I. INTRODUCTION.**

2 Defendant **AT&T CORP.** (“AT&T”) and specially appearing defendant **AT&T**  
3 **INC.** (collectively, “Defendants”) hereby oppose the motion of Lycos, Inc. and Wired  
4 News (collectively, “Wired”) for an order shortening time for hearing (“OST Motion,”  
5 Dkt. 140) Wired’s motion for orders permitting intervention and unsealing documents  
6 (“Motion to Unseal,” Dkt. 139). There is no reason to hear the Motion to Unseal at all: the  
7 Court has already decided the sealing issue. There is certainly no reason to grant Wired’s  
8 request to hear this motion earlier than contemplated by the Local Rules. Wired seeks to  
9 have the Motion to Unseal heard on June 23, 2006, six days earlier than permitted by Civil  
10 Local Rule 7-2(a). The Court should deny the OST Motion. If, however, the Court wishes  
11 to consider the sealing issue again and wishes to hear it on June 23, the Court should take  
12 the six days away from Wired and give it to AT&T, so that AT&T receives the full time to  
13 which it is entitled under Civil Local Rule 7-3(a). To be sure, that will leave Wired with  
14 three days to prepare its reply, but that is only fair: Wired’s delay is not AT&T’s fault.

15 Wired is a day late and a dollar short. It has been on this case, leaking AT&T  
16 proprietary documents to the world, since early April. The sealing issue it belatedly seeks  
17 to raise has dominated this litigation for almost two months and has been thoroughly  
18 briefed—both by the parties and by others in the press. And the Court has already decided  
19 the issue. Nonetheless, Wired waited almost a week after the Court ruled, and four days  
20 after other members of the press filed their motions to unseal, before filing its Motion to  
21 Unseal. Now Wired seeks to rush both the parties and the Court by having its Motion  
22 briefed and heard on a schedule that would deprive AT&T of time to oppose the motion.

23 Wired also has not complied with Civil Local Rule 6-3, which requires that a  
24 movant provide in a sworn declaration both the reasons for hearing its motion on shortened  
25 time, and the substantial harm or prejudice that will result from hearing the motion on the  
26 normal 35-day calendar. Wired has provided neither. Because Wired has not explained  
27 why the expedited relief it seeks is merited, its OST Motion should be denied.

28

1 **II. BACKGROUND AND PROCEEDINGS TO DATE.**

2 Plaintiffs filed this action on January 31, 2006. Dkt. 1. On April 5, 2006, plaintiffs  
3 filed under seal their amended motion for preliminary injunction. Dkt. 30 (“Preliminary  
4 Injunction Motion”). With it, plaintiffs filed, also under seal, the declaration of Mark Klein  
5 (“Klein Declaration,” Dkt. 31) and the declaration of plaintiffs’ purported expert, J. Scott  
6 Marcus (“Marcus Declaration,” Dkt. 32). Attached to the Klein Declaration were certain  
7 AT&T documents that contain proprietary and trade secret information (the “Klein  
8 Documents”). (Dkts. 30-32 and the Klein Documents are collectively referred to as the  
9 “Sealed Documents.”) On April 7, Wired published a statement by Klein purportedly  
10 disclosing a number of matters set forth in the Sealed Documents. *See* Ericson Declaration  
11 (Dkt. 43) ¶ 25 & Ex. J.

12 Over the next several weeks, the parties and *amici* filed no fewer than eight briefs  
13 debating whether the Sealed Documents should remain under seal.<sup>1</sup>

14 On May 17, 2006, the Court held a lengthy hearing on the Sealed Documents.  
15 Immediately before the hearing, the *San Francisco Chronicle*, *Los Angeles Times*, the  
16 Associated Press, *San Jose Mercury News*, Bloomberg News and *USA Today* (collectively,  
17 the “Press”) filed a motion more expansive than Wired’s motion seeking to have all sealed  
18 records unsealed. Dkt. 129. Counsel for the Press appeared at the May 17 hearing and  
19 attempted to argue the sealing issues. Transcript of May 17, 2006 Hearing (“Tr.,”  
20 Dkt. 138), at 3. Counsel for Wired also appeared at the hearing. *Id.*

21 At the hearing, and following extensive argument by all parties, the Court noted that  
22 “the best course of action is to preserve the status quo” and ordered that “plaintiffs,  
23 plaintiffs’ counsel and their consultants not further disclose [the Klein] documents to

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24 <sup>1</sup> On April 10, AT&T filed its motion to compel return of confidential documents. Dkt. 41.  
25 Plaintiffs filed their opposition on May 1. Dkt. 99. AT&T filed its reply on May 5. Dkt.  
26 117. On April 12, AT&T filed its memorandum in support of filing documents under  
27 seal. Dkt. 51. Plaintiffs filed their opposition on April 17. Dkt. 61. AT&T filed its reply  
28 on April 21. Dkt. 71. In addition, the Center for Constitutional Rights and the American  
Civil Liberties Union filed a brief as *amici curiae* on April 24, 2006. Dkt. 77. AT&T  
filed its response to *amici* on April 28, 2006. Dkt. 84. The matters were argued May 17.

1 anyone or any entity without further order of the Court.” Tr. 27-28. Following the hearing  
2 the Court ordered that “[a]ll papers heretofore filed or lodged under seal shall remain under  
3 seal pending further order of court. Counsel for plaintiffs and AT&T are directed to confer  
4 and to submit by May 25, 2006, jointly agreed-upon redacted versions of the preliminary  
5 injunction motion (Doc #30) and the Klein declaration (Doc #31).” Civil Minute Order  
6 dated May 17, 2006 (Dkt. 130). The Court declined to hear the Press or Wired at that time,  
7 ruling that “[t]he court will entertain motions to intervene only on written application  
8 therefor with appropriate notice and service on all parties; *if necessary*, the court will  
9 consider applications to shorten time for any such motions to intervene.” Dkt. 130, at 2  
10 (emphasis added).

11 Two days later, on May 19, 2006, the Press filed a new motion seeking to (i) unseal  
12 all documents filed under seal in this case, and (ii) disclose the redacted contents of the  
13 government’s filings, as well. Press Motion to Unseal, Dkt. 133. The Press timely filed its  
14 motion to be heard on June 23, the same day the Court set for hearing Defendants’ and the  
15 government’s motions to dismiss. Wired, on the other hand, filed its Motion to Unseal on  
16 May 23, almost a week after the Court decided the issues posed by Wired’s motion, and  
17 four days after the Press filed their motion.

18 Meanwhile, pursuant to the Court’s Minute Order, Plaintiffs and AT&T met and  
19 conferred, reaching agreement on redacting the text of the Klein Declaration and the  
20 preliminary injunction memorandum. Accordingly, on May 25, plaintiffs filed lightly  
21 redacted versions of each (Dkt. 146-47), mooted in large part the relief Wired seeks.

22 **III. ARGUMENT.**

23 Wired says it filed its OST Motion pursuant to Civil Local Rule 7-11. OST Motion  
24 at 1. The relief it seeks – an order shortening time – is, however, governed by Civil Local  
25 Rule 6-3 (“Motion to Change Time”). Civil Local Rule 6-3(a) requires the moving party to  
26 “submit a declaration that,” among other things:

- 27  
28 (1) Sets forth with particularity, the reasons for the requested . . .  
shortening of time; [and] . . . .

1 (3) Identifies the substantial harm or prejudice that would occur if the  
2 Court did not change the time . . . .”

3 Wired’s declaration fails to do either. *See* Alger Declaration, Dkt. 140.

4 **A. Wired Has Not Explained With Particularity Why It Needs to Shorten Time.**

5 The parties, *amici* and the Press have already briefed *ad nauseam* the issues raised  
6 in the Motion to Unseal. The Court has heard extensive argument and given the issues  
7 careful consideration, and has appropriately ruled that sealing is needed to preserve  
8 AT&T’s trade secrets and the security of its network. As the chief leaker of AT&T’s trade  
9 secrets, Wired has obviously been keeping abreast of the litigation. Yet, it offers no good  
10 reason (as required by Local Rule 6-3(a)(1)) for why it is so late or why, if it is to be heard,  
11 its delay should come out of AT&T’s opposition time rather than Wired’s reply time.

12 The most Wired says (and this not in a declaration, but in its merits brief) is that the  
13 Motion to Unseal should be heard “*prior* to the hearing on June 23, 2006, so that the public  
14 is aware of the facts presented to the Court relating to the motions of the AT&T entities and  
15 the government.” OST Motion at 3 (emphasis in original). That begs several questions.  
16 First, why is the public entitled to hear evidence *before* the Court hears the merits motions?  
17 Second, if this new and hitherto unknown “right” to preview evidence is so important, why  
18 did Wired wait so long to raise it?

19 Wired cites no authority dictating that its motion be heard on shortened time. All it  
20 offers is the Seventh Circuit’s observation in *Grove Fresh Distribution, Inc. v. Everfresh*  
21 *Juice Co.*, 24 F.3d 893 (7th Cir. 1994), that “[t]o delay or postpone disclosure undermines  
22 the benefit of public scrutiny and may have the same result as complete suppression.” OST  
23 Motion at 2 (citing *Grove Fresh*, 24 F.3d at 897). That has no relevance here. There has  
24 been no delay: the Court has already decided the issues raised in the Motion to Unseal.

25 **B. Wired Has Not Identified Any Substantial Harm or Prejudice.**

26 Wired also has not identified the “substantial harm or prejudice that would occur if  
27 the Court did not change the time” for hearing the Motion to Unseal. L.R. 6-3(a)(3).

28 Again, the Alger Declaration is silent on this point, as is Wired’s brief. Hearing the Motion

1 to Unseal on the normal 35-day calendar will not prejudice Wired (or the public it purports  
2 to represent). These issues have been pending for months. The Court has already ruled on  
3 these issues. Because Wired has not articulated and cannot articulate any substantial harm  
4 or prejudice that will befall anyone if the Court hears the Motion to Unseal pursuant to the  
5 normal schedule of Civ. L.R. 7-2(a), the OST Motion fails to satisfy Civ. L.R. 6-3(a)(3).

6 **IV. CONCLUSION.**

7 The Court should deny Wired's motion for an order shortening time, Dkt. 140.  
8 Alternatively, if the Court wishes to hear the Motion to Unseal on June 23, it should let  
9 AT&T oppose that motion on June 6 and require Wired to file its reply by June 9. Wired's  
10 delay should prejudice Wired, not AT&T.

11 Dated: May 26, 2006.

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