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 8  
 9

10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN FRANCISCO DIVISION  
 13

14 TASH HEPTING, GREGORY HICKS, )  
 CAROLYN JEWEL and ERIK KNUTZEN, on )  
 15 Behalf of Themselves and All Others Similarly )  
 Situated, )  
 16 )  
 Plaintiffs, )  
 17 )  
 v. )  
 18 )  
 AT&T CORP., et al. )  
 19 )  
 Defendants. )  
 20 )  
 21 )  
 22 )

CASE NO. CV-06-0672-VRW  
**REPLY MEMORANDUM IN  
 SUPPORT OF MOTIONS FOR  
 LEAVE TO INTERVENE AND  
 UNSEAL RECORDS**

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Date: June 23, 2006  
 Time: 9:30 a.m.  
 Place: Courtroom 6, 17th Floor  
 [The Hon. Vaughn R. Walker]

**Complaint Filed:** January 31, 2006

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1 **I. INTRODUCTION.**

2 AT&T's Opposition to these motions to intervene and to unseal records makes neither a  
3 factual nor a legal showing why the declarations filed with plaintiffs' preliminary injunction  
4 motion and the other records which are the subject of these motions should remain sealed. Its  
5 opposition fails to overcome what the Ninth Circuit has called the "strong presumption in favor  
6 of access." (Kamakana v. City and County of Honolulu, 2006 U.S. App. LEXIS 12101, at \*10.)  
7 AT&T nowhere establishes any of the fundamental elements of a "trade secret" and doesn't even  
8 try to argue that there is an actual or potential economic market in intercepting communications  
9 and turning them over to the government. Even if there was a valuable "trade secret" in how  
10 AT&T intercepted communications – and AT&T makes no such showing – the basics of that  
11 "trade secret" have been widely publicized by both Wired News and a host of general  
12 circulation newspapers, including those seeking unsealing here.

13 In short, the proverbial cat is out of the bag, and there is no reason why the documents  
14 which are the subject of this motion should not be unsealed. The public interest in unsealing is  
15 at its zenith here, and the commercial or proprietary interests of AT&T in sealing are, at this  
16 point, nil.

17 The motions to intervene and unseal should be granted.<sup>1</sup>

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20  
21 <sup>1</sup> The day before this Reply Brief was to be filed, plaintiffs filed an administrative  
22 motion to file their Opposition to the Motion to Dismiss under seal, stating "AT&T has  
23 maintained that information discussed in plaintiffs' Opposition is trade secret information."  
24 (Docket No. 183 [motion to seal], 184 [Markman Declaration], 185 [proposed order], and 181  
25 and 182 [notice of manual filing]. That Opposition should, for the reasons discussed *infra*, not  
26 be sealed. Plaintiffs' counsel has indicated that the only alleged "trade secret" information  
27 referred to in the Opposition is the Klein and Marcus material which was also discussed in the  
28 preliminary injunction papers, and that plaintiffs themselves would not otherwise have tried to  
file the motion under seal. (Olson Reply Decl. ¶4.) For reasons discussed *infra*, none of that  
material should be sealed and, *a fortiori*, there is no reason the entire opposition should be sealed  
merely because one party contends that part of it should be sealed. Indeed, the fact that plaintiffs  
are trying to file an entire 60-page Opposition under seal in deference to AT&T's trade secret  
contention illustrates the problems being created by AT&T's insistence on sealing all of the  
Klein and Marcus material.

1 **II. THE PRESS' MOTION TO INTERVENE SHOULD BE GRANTED, IN LIGHT**  
2 **OF ABUNDANT CASE LAW AFFIRMING THE RIGHT OF THE PRESS AND**  
3 **PUBLIC TO INTERVENE IN ORDER TO VINDICATE THE RIGHT OF**  
4 **ACCESS TO INFORMATION.**

5 It is well settled that the press has the right to intervene in order to vindicate its right, and  
6 the public's, of access to information. As the Ninth Circuit explained in San Jose Mercury  
7 News, Inc. v. United States District Court, 187 F.3d 1096, 1100 (9th Cir. 1999), "Nonparties  
8 seeking access to a judicial record in a civil case may do so by seeking permissive intervention  
9 under Rule 24(b)(2)." San Jose Mercury News cites numerous cases for that elementary  
10 proposition: see, e.g., Hagestad v. Tragesser, 49 F.3d 1430, 1432 (9th Cir. 1995) [permissive  
11 intervention granted to nonparty pressing federal common law right of access]; Beckman  
12 Industries v. International Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992) [approving permissive  
13 intervention as method for challenging protective order under Rule 26(c)]; Phillippines v.  
14 Westinghouse Elec. Corp., 949 F.2d 653, 657 (3rd Cir. 1991) [permissive intervention granted to  
15 non-party newspaper pressing both First Amendment and common law right of access].

16 Indeed, the landmark U.S. Supreme Court cases affirming the right of access to court  
17 proceedings were all pressed by newspapers. (See, e.g., Richmond Newspapers v. Virginia, 448  
18 U.S. 555 (1980) [finding right of access to criminal trials]; Press-Enterprise Co. v. Superior  
19 Court, 464 U.S. 501 (1984) [right of access to jury voir dire]; Press-Enterprise Co. v. Superior  
20 Court, 478 U.S. 1 (1986) [right of access to preliminary hearings].)

21 AT&T makes two arguments against intervention; neither has merit. First, AT&T argues  
22 that the press' interests are adequately represented by plaintiffs. (Opp. at 4.) Not so. Indeed,  
23 San Jose Mercury News illustrates why and how the press' interests are not adequately  
24 represented by a party to a lawsuit. In that case, the plaintiffs sued a municipality alleging  
25 maintenance of a hostile work environment. The defendants hired an expert to investigate the  
26 allegations. The plaintiffs sought production of the report; the district court ordered production  
27 of the report but the parties stipulated to a protective order which kept it from becoming public.  
28 (San Jose Mercury News, *supra*, 187 F.3d at 1098.) Thus, while the plaintiffs may have sought  
production of the report at one time, they eventually agreed to a protective order as a price for

1 obtaining the report. (Id. at 1101.) The facts of San Jose Mercury News are typical: the parties  
2 to a lawsuit are concerned first and foremost with their own interests and winning the case, not  
3 with the public's right of access to information. The press, on the other hand, is concerned with  
4 its and the public's right of access to information, and has no desire to take sides in a dispute.  
5 Accordingly, the press' interest here is independent of the parties' and permissive intervention is  
6 proper, as the courts have consistently held.<sup>2</sup>

7 The record of this case illustrates the above point that the interests of the press and  
8 parties are different. AT&T points out that the plaintiffs and AT&T met and conferred, as  
9 directed by the Court, and "reached agreement on redacting the text of the Klein Declaration and  
10 the Preliminary Injunction Memorandum. Accordingly, on May 25, plaintiffs filed lightly  
11 redacted versions of each (Dkt. 147, 149). . ." (AT&T's Opposition, Docket 160, at 3:13-16.)  
12 While it is true that the parties met on this issue, it is not true, as AT&T asserts, that the plaintiffs  
13 are representing the press' interests. Plaintiffs agreed to a redacted version of the Klein  
14 Declaration which still falls far short of what should be made public. Indeed, plaintiffs  
15 themselves support the press' motion (Docket No. 161), but for reasons of their own –  
16 presumably because they have been filing briefs on the merits – plaintiffs have not briefed this  
17

18  
19 <sup>2</sup> AT&T cites only one case in which a media entity was denied leave to intervene. That  
20 case, United States v. Western Processing Co., Inc., 133 F.R.D. 157, 158-59 (W.D. Wash. 1990),  
21 is a 16-year-old district court decision from Washington which in one paragraph which cited no  
22 case law found that the issue of whether a Special Master should grant a protective order "is  
23 merely a tangential element of the discovery process and is not itself an issue related to the  
24 claims and defenses in the main contribution/allocation action." (Id. at 159.) Western  
25 Processing is not persuasive in light of the Ninth Circuit's subsequent decisions in Beckman and  
26 San Jose Mercury News, and it is in any event distinguishable because the records sought here  
27 are far more than "a tangential element of the discovery process," they are important declarations  
28 filed in connection with a preliminary injunction motion. The other cases cited by AT&T on the  
intervention issue either granted intervention or did not involve press efforts to seek access to  
information. Indeed, Avirgan v. Hull, 118 F.R.D. 257 (D.D.C. 1987) granted intervention as of  
right to the Village Voice newspaper where, even though it "agreed substantially with plaintiffs'  
position, the Village Voice articulated at the hearing the interests of the press seeking access to  
Robinette's deposition sufficiently independent of plaintiff to warrant granting intervention as of  
right." (Id. at 258 fn. 2.) Avirgan supports granting intervention both as of right under Rule  
24(a) and permissively under Rule 24(b).

1 motion while the press has. In short – as is invariably the case – the parties have tended to their  
2 own interests and left it to the press to vindicate the public’s right of access to information.

3 AT&T also argues – apparently both as a reason to deny intervention and to deny the  
4 unsealing motion – that the press is guilty of “dilatatory conduct.” (Opposition at 7.) The Ninth  
5 Circuit has squarely rejected AT&T’s “delay” argument. In San Jose Mercury News, *supra*, the  
6 newspaper waited 12 weeks after the entry of a protective order before seeking to intervene. The  
7 Ninth Circuit commented: “delays measured in years have been tolerated where an intervenor is  
8 pressing the public’s right of access to judicial records.” (187 F.3d at 1101, citing Beckman, 966  
9 F.2d at 471 (affirming intervention 2 years after settlement); Public Citizen v. Liggett Group,  
10 858 F.2d 775, 785 (1st Cir. 1988). Accordingly, intervention should be granted here, where the  
11 press waited, at most, a few weeks before formally seeking to intervene.<sup>3</sup>

12 Finally, AT&T argues that granting intervention to the press “may unnecessarily protract  
13 these proceedings.” (Opposition at 6.) We respectfully submit that delay is neither the desired  
14 nor the likely outcome of intervention. Indeed, in San Jose Mercury News the newspaper could  
15 have appealed the denial of a motion for permissive intervention but it instead sought – and  
16 obtained – mandamus relief from the Ninth Circuit. The Ninth Circuit recognized, “In cases  
17 involving a request by the press for access to judicial records, this court has recognized that the  
18 delay entailed by a direct appeal can constitute an irreparable injury.” (San Jose Mercury News,  
19 *supra*, 187 F.3d at 1099.) The court held, “the decay of newsworthiness would constitute an  
20 injury better addressed by a writ of mandamus than by a direct appeal.” (*Id.* at 1100.) The press  
21 wants, and is entitled to, access to the records in question now, not later, and its intervention will  
22 not inject undesirable delay into these proceedings.<sup>4</sup>

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24 <sup>3</sup> The press filed its papers an hour before the first hearing in this case on May 17, after  
25 its counsel had been told the day before that AT&T would be seeking to close the May 17  
26 hearing. Olson Reply Declaration paragraph 2.

27 <sup>4</sup> AT&T’s citation to DVD Copy Control Ass’n Inc. v. Bunner (2003) 31 Cal. 4<sup>th</sup> 864  
28 (AT&T Opposition at 5:12-18) is inapposite. That case involved an injunction against non-  
media internet web-site operators who allegedly knew or had reason to know that trade-secret  
DVDs had been acquired by improper means. (*Id.* at 870.) Bunner is distinguishable on several



1 **III. AT&T HAS MADE NEITHER A LEGAL NOR A FACTUAL SHOWING**  
2 **JUSTIFYING SEALING.**

3 **A. This Court Has Made No Finding That Permanent Sealing Is Appropriate.**

4 AT&T's first argument on the merits of sealing is that the Court has already permanently  
5 decided the question. (Opposition at 6-8.) Both the Court's comments at the May 17 hearing  
6 and its Minute Order following that hearing belie this contention. At argument, the Court  
7 evinced a desire to temporarily preserve the status quo and, far from deciding that the  
8 preliminary injunction motion, the Klein Declaration and exhibits or the Marcus Declaration  
9 (Docket #s 31, 32) merited permanent sealing, it directed the parties to agree on unsealing most  
10 or all of the documents. Indeed, AT&T concedes that the Court directed the parties to file a  
11 public version of the documents and AT&T characterizes the resulting public version as "lightly  
12 redacted." The Court would not have told the parties to agree on making at least some of the  
13 Klein Declaration and preliminary injunction motion public if it had concluded the entire  
14 documents merited sealing.

15 The Court's order that the parties agree on a public version, and AT&T's characterization  
16 of the result as "lightly redacted," is significant. It shows that AT&T originally tried to seal the  
17 entirety of documents which, at most, might merit "light redacting." Moreover, the Marcus  
18 Declaration (Docket # 32) remains sealed in its entirety though it would seem to cover the same  
19 subject matter as documents which are now, in AT&T's words, "lightly redacted."

20 AT&T asserts that the press was "rebuffed" by the Court at the May 17 hearing.  
21 (Opposition at 7.) Again, the record is to the contrary. The press' counsel was engaged on May  
22 16 and E-filed a brief an hour before the May 17; the court apparently (and understandably) had  
23 not seen the brief before the May 17 argument and neither asked for nor received argument on

24 \_\_\_\_\_  
25 grounds: it involved a misappropriation of trade secrets (a program called DeCSS that decrypted  
26 movies stored on DVDs and enabled users to copy and distribute those movies) by the website  
27 operator not present here, the web site operator knew or had reason to know the secrets were  
28 acquired by improper means (no such allegation is made here), and it did not involve court  
records as to which there is a strong presumption of access. The press here has not "disregarded  
AT&T's property rights" (AT&T Opp. at 5) and in any event Bunner says nothing about either  
court records or press intervention, the point on which AT&T cites Bunner.

1 the merits of sealing from the press. Rather, the Court’s May 17 order simply kept papers under  
2 seal “pending further order of court,” it directed the parties to attempt to agree upon public  
3 redacted versions of the Klein Declaration and preliminary injunction motion (Docket Numbers  
4 30 and 31), and to “specifically identify the portions, if any, of these documents that each party  
5 believes are sealable.” The Court also specifically directed that those seeking to intervene file a  
6 written application to do so.

7           Accordingly, both the Court’s comments on May 17 and its written order reflect that it  
8 was only beginning – and not ending – the process of deciding whether any documents merited  
9 permanent sealing. Tellingly, the Court’s May 17 Minute Order made no finding (as would be  
10 required by Local Rule 79-5 and the case law) that any portion of the documents filed by AT&T  
11 or the other parties was in fact a trade secret or otherwise protectable. In fact, the Court  
12 observed that “there is a great deal of information” in the preliminary injunction motion that  
13 “can probably be unsealed” and directed the parties to meet with an eye toward unsealing most  
14 or all of it. (Transcript of May 17 hearing at 29:8-15.) Most of the motion has now been filed  
15 publicly. (Docket No. 149.) If the Court’s May 17 order had been for permanent sealing, the  
16 plaintiffs obviously would not have filed the public redacted versions of the Klein Declaration  
17 and preliminary injunction motion as they did on May 25 (Docket Nos. 147 and 149).

18           In a related argument, AT&T complains that it shouldn’t have to justify sealing and that  
19 the press seeks to impose “the labor of Sisyphus on AT&T.” This argument lacks merit both  
20 factually and legally. First, AT&T has never established that any portion of the records which  
21 remain sealed are in fact entitled to sealing, and it would not impose “the labor of Sisyphus” on  
22 the team of at least nine lawyers representing AT&T to require a showing that overcomes what  
23 the Ninth Circuit has recently (and repeatedly) called the “strong presumption in favor of  
24 access”. (See Kamakana v. City and County of Honolulu, 2006 U.S. App. LEXIS 12101 at \*10,  
25 citing Foltz v. State Farm Mutual Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003) [“‘strong  
26 presumption in favor of access’ is the starting point”].)

1 Indeed, it is common for documents once sealed to be unsealed at the behest of press  
2 intervenors. (Kamakana, supra, 2006 U.S. App. LEXIS 12101 at \*2 [“during the litigation  
3 scores of documents were filed under seal in accord with a stipulated protective order”];  
4 Magistrate Judge after exhaustive review “unsealed virtually all of the pleadings and documents”  
5 upon motion of newspaper intervenor after case settled]; Foltz, supra, 331 F.3d at 1138 [on  
6 motion by intervenors after settlement of lawsuit, Ninth Circuit finds district court abused its  
7 discretion in sealing discovery materials].) In short, no finding has been – or should be – made  
8 that anything filed in this court merits further sealing.

9 **B. AT&T Makes No Showing, Legally or Factually, That Either the**  
10 **Preliminary Injunction Motion or the Declarations Filed in Connection With**  
11 **It Contain Protectable Trade Secrets.**

12 AT&T accuses the press of “misconstru[ing] the law applicable to sealing” and spends  
13 three pages attempting to distinguish the unsealing cases cited by the press on the grounds that  
14 none involved protectable trade secrets. (Opposition at 8-11.) But AT&T cites not one case  
15 which holds that court records were properly sealed because of trade secrets. While Kamakana,  
16 supra, did acknowledge in dicta that trade secrets might in an appropriate case be a compelling  
17 enough reason to justify sealing court records (2006 U.S. App. LEXIS at \*11), the Court’s  
18 holding affirmed a decision unsealing “virtually all of the pleadings and documents” in the case.  
19 AT&T attempts to distinguish the raft of cases cited in the press’ Opening Brief on the grounds  
20 that “all are distinguishable because the information sought to be sealed in those cases did not  
21 rise to the level of a trade secret and because the parties’ other grounds for sealing were  
22 particularly weak.” (AT&T Opposition at 9-10.) But those exact words describe the situation  
23 here: AT&T nowhere sets forth the elements of a trade secret and nowhere describes, even in  
24 general terms, how the sealed material in this case might meet those elements. Nor does AT&T  
25 cite a single case which found that a protectable trade secret merited sealing. Its failure to cite a  
26 single case affirming the sealing of trade secret material is fatal to its opposition to this motion to  
27 unseal.  
28

1                   **1.     The “Compelling Reasons” Standard, and the Strong Presumption of**  
2                   **Access, Applies.**

3                   AT&T attempts to distinguish the Kamakana case on the grounds that a “compelling  
4 reasons” standard applies only to dispositive motions but only a “good cause” standard applies to  
5 other motions. (Opposition at 9.) AT&T’s argument fails for three reasons. First, the  
6 distinction made in Kamakana is between “a ‘sealed discovery document [attached] to a non-  
7 dispositive motion’” – as to which a good cause showing might be enough because “those  
8 documents are often ‘unrelated, or only tangentially related, to the underlying cause of action’” –  
9 and documents which relate to “the resolution of a dispute on the merits,” including dispositive  
10 motions, as to which the “strong presumption in of access to judicial records” applies.  
11 (Kamakana, supra, 2006 U.S. App. LEXIS 12101 at \* 12 to \*14.)

12                   Under Kamakana, non-discovery documents submitted in connection with a preliminary  
13 injunction motion are certainly subject to the strong presumption in favor of access and the  
14 “compelling reasons” standard applies. “We adopted this principle of disclosure because the  
15 resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the  
16 interest in ensuring that ‘public’s understanding of the judicial process and of significant public  
17 events. (Id. at \*12; see also Leucadia, Inc. v. Applied Extrusion Technologies, 998 F.2d 157,  
18 164 (3rd Cir. 1993) [applying presumptive right of access to non-discovery motions including  
19 preliminary injunction motions]; Cal. Rules of Court 243.1 Advisory Committee Comment  
20 [distinguishing between discovery motions and documents submitted to the court as a basis for  
21 adjudication].)

22                   Second, it appears that the Klein and Marcus documents have now been referred to in  
23 plaintiffs’ Opposition to the Motion to Dismiss, which is undoubtedly “dispositive.” Third,  
24 given that there has been no showing made of a trade secret and that any such material has now  
25 been publicly disclosed, AT&T could not meet even a lesser “good cause” showing if that were  
26 the standard (and that is not the standard).

27                   The “strong presumption of access” applies, and it has not been overcome.  
28

1                   **2.     No Showing of Trade Secrets, and in Any Event Widespread**  
2                   **Disclosure Defeats Trade Secret Claim.**

3                   A trade secret must (1) “[d]erive independent economic value, actual or potential, from  
4 not being generally known to the public or to other persons who can obtain economic value from  
5 its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the  
6 circumstances to maintain its secrecy.” (See California Civil Code section 3426.1(d), part of the  
7 Uniform Trade Secrets Act.)

8                   AT&T has not established either of these fundamental elements of a trade secret. First,  
9 AT&T has not even attempted to argue that splitting a fiber optic cable to allow the government  
10 to intercept private communications – the general subject of the Klein and Marcus Declarations  
11 and the preliminary injunction motion (Docket #s 30, 31 and 32) – is a valuable trade secret.  
12 Indeed, given that there are now approximately 20 lawsuits throughout the country claiming that  
13 telecommunications providers other than AT&T do the same thing and cooperate with the  
14 government in the alleged spying program, it is difficult to see how “building a better wiretap”  
15 could be a commercially valuable trade secret.

16                   Second, even if the technology had once been commercially valuable, it is no longer: the  
17 technology has been disclosed to the world at large by being posted by Wired News and other  
18 media. (See Exhibit A to Karl Olson Reply Declaration filed herewith, “Whistle-Blower’s  
19 Evidence, Uncut,” Wired News May 22, 2006, going into extensive detail about “a diagram  
20 showing the splitting of the light signal, a portion of which is diverted to ‘SG3 Secure Room,’  
21 i.e., the so-called ‘Study Group’ spy room,” and describing in detail the equipment in the splitter  
22 cabinet including various Sun devices, Juniper M40e and M160 backbone routers, various tables,  
23 and a Narus STA 6400 which “consists of standalone traffic analyzers that collect network and  
24 customer usage information in real time directly from the message . . . These analyzers sit on the  
25 message pipe into the ISP (internet service provider) cloud rather than tap into each router or ISP  
26  
27  
28

1 device.”)<sup>5</sup> In short, there is nothing “secret” about the material AT&T wants to keep sealed – it  
2 has been disclosed to the world at large.

3 Unable to dispute the fact that most, if not all, of the Klein Declaration and exhibits  
4 thereto have now been made public, AT&T bitterly complains about this state of affairs,  
5 comparing the press to a child who murders his parents. (Opposition at 11.) AT&T’s over-the-  
6 top rhetoric is entirely misplaced. The press has done nothing wrong and violated no court  
7 orders. Reporting on matters of the utmost public interest – even AT&T concedes that “what the  
8 government allegedly is doing, or not doing, in the area of foreign surveillance” is a matter of  
9 understandable interest to the press and public (Opposition at 12) – is the time-honored function  
10 of the press and one at the heart of the First Amendment. It may be inconvenient for AT&T, but  
11 it is not unlawful. (See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 528 (2000) [affirming right of  
12 press to publish information even if it was given to press by someone who acted illegally].)<sup>6</sup>

13 AT&T’s argument on this point is especially misplaced given its own lack of effort to  
14 maintain its alleged secrets. A trade secret must be “the subject of efforts that are reasonable  
15 under the circumstances to maintain its secrecy.” (Uniform Trade Secrets Act, Cal. Civil Code  
16 section 3426.1(d)(2).) AT&T’s Opposition nowhere explains what, if any, measures it took to  
17 prevent Mr. Klein from disclosing its alleged secrets to others, i.e., whether he signed a non-  
18 disclosure agreement or the terms thereof, and it is similarly silent on whether it has sought any  
19

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20  
21 <sup>5</sup> The Wired News May 22 posting occurred after this Court’s May 17 Order, and was  
22 followed by several newspaper accounts which reported thereon. Thus, even if AT&T had any  
trade secrets on May 17 – a point we vigorously dispute – it no longer has them.

23 <sup>6</sup> AT&T cites USA Today’s online link to copies of materials that may have been “the  
24 same as those at the heart of the lawsuit against AT&T.” (Opp. at 3:8-12; Ericson Decl., Ex. A;  
25 Opp. at 5:1-7.) AT&T’s suggestion that USA Today or any other newspaper acted improperly is  
26 misplaced. The press linked to Wired News’ documents, there is no contention that either Wired  
27 or the press obtained the materials illegally and this Court did not forbid the press from  
28 publishing information in its possession. Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559  
(1976) [prior restraints are “the most serious and least tolerable” infringement on free speech];  
New York Times Co. v. United States (1971) 403 U.S. 713, 714 [Supreme Court lifts prohibition  
on publishing the “Pentagon Papers,” citing the heavy presumption that prior restraints are  
constitutionally impermissible].

1 legal recourse against Mr. Klein for disseminating its alleged trade secrets to the world at large  
2 and the World Wide Web. AT&T's silence in this regard dooms its argument. (See, e.g., In re  
3 Providian Credit Card Cases, 96 Cal. App. 4th 292, 308 [citing company's failure to give alleged  
4 trade secret material heightened "Confidential" designation].

5 AT&T's arguments against this motion suffer from inconsistency. On the one hand,  
6 AT&T argues that "[t]he isolated pieces of information that the Press and other members of the  
7 media have leaked to the public are not the same as the material that remains under seal."  
8 (Opposition, Docket No. 160, at 12:3-5.) On the other hand, AT&T argues that the parties have  
9 agreed on a "lightly redacted" version of the Klein Declaration and preliminary injunction  
10 motion and that "the process worked" without the press' involvement.

11 Neither of AT&T's arguments hold water. The public redacted version of the Klein  
12 Declaration (Docket 147) which resulted from the meeting between plaintiffs and AT&T is a  
13 document with significant redactions making it difficult to read but which, on its face, reveals  
14 that no true "trade secrets" would be revealed in a completely unsealed version. For example,  
15 paragraph 8 of the still-redacted Klein Declaration (Document number 147) says that between  
16 1998 and 2003 Mr. Klein worked in an AT&T office located on a "redacted" street in a  
17 "redacted" city as one of a "redacted" number of Computer Network Associates in the office.  
18 The site manager was a management-level technician with the title of "redacted" (hereafter  
19 referred to as FSS # 1). How is the street or the city where Mr. Klein worked for five years a  
20 trade secret? How is the title of his site manager a trade secret particularly when we know his  
21 abbreviation, FSS #1? AT&T never explains any of this.

22 And even if such prosaic and obvious information was once a trade secret – a point the  
23 press must vigorously contest – it surely isn't a trade secret any more. Wired News on May 22  
24 stated, "In San Francisco, the 'secret room' is Room 641A at 611 Folsom Street, the site of a  
25 large SBC phone building, three floors of which are occupied by AT&T. High-speed fiber-optic  
26 circuits come in on the eighth floor and run down to the 7th floor where they connect to routers  
27 for AT&T's WorldNet service, part of the latter's vital 'Common Backbone.' In order to snoop  
28

1 on these circuits, a special cabinet was installed and cabled to the ‘secret room’ on the 6th floor  
2 to monitor the information going through the circuits. (The location code of the cabinet is  
3 070177.04, which denotes the 7th floor, aisle 177 and bay 04.) The ‘secret room’ itself is  
4 roughly 24-by-48 feet, containing perhaps a dozen cabinets including such equipment as Sun  
5 servers and two Juniper routers, plus an industrial-size air conditioner.” (Exhibit A to Karl  
6 Olson Reply Declaration filed herewith, page 4 of 8.)

7 Thus, we already know the “location code of the cabinet”, but AT&T – for reasons we  
8 find difficult to fathom – is still telling the Court that it has a “trade secret” in the block and city  
9 on which a large AT&T facility in San Francisco is located. Similarly, AT&T is still trying to  
10 redact Mr. Klein’s declaration’s reference to the “location code” (Docket No. 147, paragraph 27,  
11 page 5 of Klein Declaration), even though that same information is revealed by the Wired article.

12 In short, the redacted version of the Klein Declaration at this point serves only to make it  
13 difficult to read and to keep the public from assessing Mr. Klein’s veracity and whether Wired  
14 and the press are publishing the same version of the declaration that was filed in court. The  
15 redactions do not, however, protect any legitimate trade secrets, and AT&T does not even  
16 attempt an explanation of how the still-redacted information contains protectable trade secrets in  
17 light of what has now been made public. The entire declaration, along with the entire  
18 preliminary injunction motion papers (Docket No. 149) and the still-sealed Marcus Declaration  
19 (Docket No. 32), should be made public.

20 Having conceded that the horse is pretty much out of the barn, AT&T argues in cryptic  
21 fashion that “[t]he isolated pieces of information that the Press and other members of the media  
22 have leaked to the public are not the same as the material that remains under seal.” (Opposition  
23 at 12.) But AT&T doesn’t even attempt to explain how what Wired and the print media have  
24 already disclosed differs from what is filed under seal. Indeed, it doesn’t even come forth with  
25 any declaration from AT&T personnel attempting to explain the difference, if any, between what  
26 is filed under seal and what has now been disclosed.



1 A party seeking to overcome the “strong presumption in favor of access” (Kamakana,  
2 supra, 2006 U.S. App. LEXIS 12101 at \*10) bears the burden of overcoming this strong  
3 presumption by meeting the “compelling reasons” standard and must “articulate compelling  
4 reasons supported by specific factual findings.” (Id. at \*10.) A court must “conscientiously  
5 balance the competing interests” and “base its decision on a compelling reason and articulate  
6 the factual basis for its ruling, without relying on hypothesis or conjecture.” (Id. at \*11, citing  
7 Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995).) AT&T makes neither a specific nor  
8 even a generalized showing of any trade secret or of the difference, if any, between what has  
9 been publicly disclosed and what remains filed under seal.

10 Finally, AT&T asserts that the interests it seeks to protect are “at most of tangential  
11 interest to the press or the public, but those interests are important to AT&T.” (Opp. at 13.)  
12 Once again, AT&T’s argument lacks either factual or legal merit. Factually, it cannot be said  
13 that the public has no interest in knowing how or whether its telephone calls or Internet usage are  
14 being intercepted or spied upon by the government or the nation’s largest telecommunications  
15 provider.

16 AT&T’s paternalistic “this isn’t really all that interesting” argument lacks legal merit as  
17 well. U.S. District Judge King of the Central District of California recently explained in  
18 eloquent terms the public and press’ interest in access to court records:

19 “The public interest in access to the court records addressed in  
20 these cases does not turn on how titillating a story is, how many  
21 newspapers a company sells, how many articles are published  
22 about a story, or how many members of the public come forward  
23 to express their personal interest in learning more details about it.  
24 The presumption of access exists because the citizens are entitled  
25 to observe, monitor, understand and critique their courts – even in  
the most mundane of cases that excite *no* media interest – because  
what transpires within our courtrooms belongs to our citizens in a  
fundamental way. This is why we require not just a showing of  
some possible reason to justify closure of the court to the public,  
but a showing of a *compelling* one.”

26 (State of California ex rel. Lockyer v. Safeway, Inc., 355 F. Supp. 2d 1111, 1125 (C.D. Cal.  
27 2005) [unsealing, on motion of newspaper, all of a Mutual Strike Assistance Agreement entered  
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1 into between grocery stores and rejecting claims of confidentiality; emphasis in original].) In  
2 short, AT&T’s “this isn’t all that interesting” argument fails both factually and legally.

3 **IV. NATIONAL SECURITY INTERESTS DO NOT JUSTIFY CLOSURE OR**  
4 **SEALING.**

5 The press’ Opening Brief on this motion (Docket No. 133, pages 11-16) explained the  
6 importance of public access to these proceedings and the fact that these access principles – and  
7 the “compelling reasons” standards enunciated by the Ninth Circuit in Kamakana and other cases  
8 – apply if the Court decided to review the government’s classified memorandum and  
9 declarations. AT&T “leave[s] it to the government to defend its privilege” and states that access  
10 to the government’s *ex parte, in camera* submissions “is the government’s fight rather than  
11 AT&T’s fight.” (Opposition, Docket No. 160, at 12:11-17.) The government, meanwhile, has  
12 apparently not opposed the press’ motion.

13 We will, therefore, not repeat the points advanced in our opening brief. The central point  
14 is this: “[T]he mere assertion of national security concerns by the Government is not sufficient  
15 reason to close a hearing or deny access to documents.” (United States v. Moussaoui, 65 Fed.  
16 Appx. 881, 887, 2003 U. S. App. LEXIS 9170 at \*9 (4th Cir. 2003). The reason is as old as the  
17 Republic: “Democracies die behind closed doors. The First Amendment, through a free press,  
18 protects the people’s right to know that their government acts fairly, lawfully, and accurately...  
19 When government begins closing doors, it selectively controls information rightfully belonging  
20 to the people. Selective information is misinformation. The Framers of the First Amendment  
21 ‘did not trust any government to separate the true from the false for us.’” (Detroit Free Press v.  
22 Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).) Those principles apply to, and should govern, this  
23 Court’s review of any classified material including the classified memorandum and classified  
24 declarations of Messrs. Negroponte and Alexander.

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1  
2 **CONCLUSION**

3 AT&T cites not a single case which has affirmed a court record sealing on grounds of a  
4 trade secret, and it makes neither a general nor the required specific showing of how the sealed  
5 records were a trade secret in the first place or how they could be now in the face of widespread  
6 disclosure of the Klein material. The public has a paramount public interest in knowing whether  
7 and how its calls or Internet usage may have been intercepted, and AT&T has shown no  
8 commercial interest – much less a compelling one – in keeping sealed the material in question.  
9 The motions to intervene and to unseal records should be granted.

10 Dated: June 9, 2006

LEVY, RAM & OLSON LLP

11  
12 By: /s/ *Karl Olson*  
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