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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:
NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS
LITIGATION

MDL Docket No 06-1791 VRW
ORDER

This Document Relates To:

ALL CASES

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On May 19, 2006, members of the news media – the *San Francisco Chronicle*, *Los Angeles Times*, The Associated Press, *San Jose Mercury News*, Bloomberg News and *USA Today* (collectively “media entities”) – moved pursuant to FRCP 24(b)(2) to intervene and unseal “all sealed documents” filed in Hepting v AT&T Corp, 06-672. Doc #133-1 at 1. On May, 23, 2006, Lycos, Inc and Wired News moved to intervene and unseal documents on similar grounds. Doc #139. The court heard argument on these motions on December 21, 2006. For reasons discussed below, the court GRANTS the media entities’ motions to intervene but DENIES their motions to unseal documents.

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2 On April 5, 2006, plaintiffs in Hepting v AT&T Corp, 06-
3 672, filed under seal an amended motion for preliminary injunction.
4 Doc #30. Along with this motion, plaintiffs filed under seal the
5 declarations of Mark Klein (Doc #31) and J Scott Marcus (Doc #32).
6 Attached to the Klein declaration were certain AT&T documents that
7 allegedly contain proprietary and trade secret information. See
8 Doc #31, Ex A, B, C. Over the next several weeks, the parties and
9 amici filed a number of briefs concerning whether the Klein
10 documents should remain under seal. See, e g, Doc ##33, 61, 71,
11 77, 84, 112, 114, 115.

12 At a hearing on May 17, 2006, the court heard argument
13 regarding the sealing of the Klein documents. Shortly before the
14 hearing, the media entities moved to have all sealed records
15 unsealed. Doc #129. Counsel for the media entities appeared at
16 the May 17 hearing and attempted to argue the sealing issues. Doc
17 #138 at 4, 61 (transcript). At the hearing, the court noted that
18 "the best course of action is to preserve the status quo" and
19 ordered that "plaintiffs, plaintiffs' counsel and their consultants
20 not further disclose [the Klein] documents to anyone or any entity
21 without further order of the court." Doc #138 at 27-28.

22 Following the hearing, the court ordered that "[a]ll
23 papers heretofore filed or lodged under seal shall remain under
24 seal pending further order of court. Counsel for plaintiffs and
25 AT&T are directed to confer and to submit by May 25, 2006, jointly
26 agreed-upon redacted versions of the Preliminary Injunction Motion
27 (Doc #30) and the Klein declaration (Doc #31)." Doc #130. The
28 court declined to hear argument from the media entities, ruling

1 that "[t]he court will entertain motions to intervene only on
2 written application therefor with appropriate notice and service on
3 all parties * * *." Doc #130 at 2.

4 Two days later, on May 19, 2006, the media entities filed
5 their motion to unseal. Doc #133. Meanwhile, pursuant to the
6 court's minute order, plaintiffs and AT&T reached agreement on
7 redacting the text of the Klein declaration and the preliminary
8 injunction memorandum; accordingly, on May 25, 2006, plaintiffs
9 filed redacted versions of each (Doc ##147, 149). On June 22,
10 2006, plaintiffs filed a redacted version of the Marcus
11 declaration. Doc #277.

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13 II

14 A

15 The media entities seek to intervene under FRCP 24(b)(2),
16 which permits, under certain circumstances, the intervention of a
17 non-party in ongoing litigation. A non-party seeking to intervene
18 (applicant) bears the burden to demonstrate that it meets the
19 requirements of FRCP 24(b) for intervention. Petrol Stops
20 Northwest v Continental Oil Co, 647 F2d 1005, 1010 (9th Cir 1981).
21 In ruling on a motion to intervene, however, "a district court is
22 required to accept as true the non-conclusory allegations made in
23 support of [the] intervention motion." Southwest Center for
24 Biological Diversity v Berg, 268 F3d 810 (9th Cir 2001).

25 Section (b) of FRCP 24 governs permissive intervention:

26 Upon timely application, anyone may be permitted to
27 intervene in an action: * * * when an applicant's claim
28 or defense and the main action have a question of law or
fact in common.

1 FRCP 24(b).

2 If the applicant meets these criteria under FRCP 24(b),
3 the determination whether to permit intervention is committed to
4 the discretion of the court. In exercising this discretion, FRCP
5 24(b) instructs courts to "consider whether the intervention will
6 unduly delay or prejudice the adjudication of the rights of the
7 original parties." FRCP 24(b). See also Donnelly v Glickman, 159
8 F3d 405, 409 (9th Cir 1998). The court may grant an applicant
9 permissive intervention for a limited purpose: for example, to
10 gain access to discovery materials under seal. San Jose Mercury
11 News, Inc v United States Dist Court - Northern Dist (San Jose),
12 187 F3d 1096, 1100 (9th Cir 1999). The Ninth Circuit has also
13 approved permissive intervention under FRCP 24(b) to allow a non-
14 party to seek the modification of a protective order, even if that
15 protective order was the product of an agreement between the
16 original parties. See Beckman Industries, Inc v International Ins
17 Co, 966 F2d 470, 473 (9th Cir 1992).

18 AT&T opposes intervention, contending that the EFF and
19 ACLU would adequately represent the media entities' interest in
20 unsealing the documents and that intervention would unnecessarily
21 protract the litigation. Doc #160 at 3-5. The court disagrees.
22 As the media entities note, courts routinely permit the media to
23 intervene for the purpose of unsealing judicial records. Moreover,
24 the existing plaintiffs assert that the media entities provide a
25 distinct "point of view" not necessarily represented in the
26 litigation. See Lockyer, 450 F3d at 445. Accordingly, the court
27 finds that the media entities satisfy the requirements set forth in
28 FRCP 24(b).

1 B

2 The court turns to the media entities' argument that the
3 court should unseal documents attached to plaintiffs' motion for
4 preliminary injunction. The public's common law right of access in
5 civil cases "creates a strong presumption in favor of access." San
6 Jose Mercury News, Inc v United States District Court, 187 F3d
7 1096, 1102 (9th Cir 1999); see also Foltz v State Farm Mut Auto Ins
8 Co, 331 F3d 1122, 1135 (9th Cir 2003) ("In this circuit, we start
9 with a strong presumption in favor of access to court records.").
10 Overcoming this presumption requires a showing of compelling
11 reasons for denying access. Foltz, 331 F3d at 1135; San Jose
12 Mercury News, 187 F3d at 1102. Yet the public's right of access
13 has its limits; indeed, a presumption of access does not extend to
14 "sealed discovery document[s] attached to * * * non-dispositive
15 motion[s]." Kamakana v City & County of Honolulu, 447 F3d 1172,
16 1179 (9th Cir 2006) (citing Phillips v General Motors, 307 F3d
17 1206, 1212 (9th Cir 2002)).

18 The decisive issue here is whether a motion for a
19 preliminary injunction constitutes a dispositive motion. AT&T
20 portrays this question as premature, arguing that a motion is not
21 dispositive until the motion actually disposes of the case. See
22 Doc #160 ("Perhaps someday it will have [dispositive] status; today
23 it does not"). Lending credence to this reasoning, AT&T observes
24 that the courts in Kamakana, Foltz and Phillips dealt with sealing
25 issues after the district court had ruled on the underlying
26 motions. *Id.* But these cases fail to mention - let alone
27 emphasize - the fact that the district court had disposed of the
28 case. The framework established by the courts in Kamakana, Foltz

1 and Phillips centers on the *potential* outcome of the motion. As
2 such, the court does not read these cases as mandating that a
3 motion actually dispose of a case before it may be considered a
4 dispositive motion.

5 The media entities principally rely on Leucadia, Inc v
6 Applied Extrusion Technologies, Inc, 998 F2d 157 (3rd Cir 1993), in
7 asserting that a preliminary injunction motion is dispositive and
8 thus triggers the presumption of the public's right of access.
9 Although the Leucadia court unsealed documents attached to a
10 preliminary injunction motion, it did so pursuant to the Third
11 Circuit's more exacting standard, which extends the right of access
12 to all "pretrial motions of a nondiscovery nature, *whether*
13 *preliminary or dispositive.*" Id at 164 (emphasis added). Hence,
14 the Leucadia decision is inapplicable here; indeed, to the extent
15 it pertains to the present motions, the decision's reasoning
16 undermines the media entities' argument, as the case distinguishes
17 between preliminary and dispositive motions.

18 In the absence of explicit guidance on this issue, the
19 court looks to the underlying rationale for distinguishing between
20 dispositive and non-dispositive motions. The Ninth Circuit imposes
21 a heightened standard for dispositive motions because "the
22 resolution of a dispute on the merits, whether by trial or summary
23 judgment, is at the heart of the interest in ensuring the 'public's
24 understanding of the judicial process and of significant public
25 events.'" Kamakana, 447 F3d 1172, 1179 (quoting Valley
26 Broadcasting, 798 F2d at 1294. See also Foltz, 331 F3d at 1135-36
27 (supporting access to motions for summary judgment because they
28 "adjudicate[] substantive rights and serve[] as a substitute for

1 trial." (quoting Rushford v The New Yorker Magazine, 846 F2d 249,
2 252 (4th Cir 1988)). By contrast, the Ninth Circuit asserts that
3 the public's interest in non-dispositive motions is comparatively
4 modest because "those documents are often 'unrelated, or only
5 tangentially related, to the underlying cause of action.'" Kamakana,
6 447 F3d 1172, 1179 (citing Seattle Times co v Rhinehart,
7 467 US 20, 33 (1984)).

8 According to the media entities, the rationale
9 articulated in Kamakana compels the inference that a preliminary
10 injunction is dispositive because such a motion "inevitably
11 involve[s] consideration of the merits of a dispute." Doc #133 at
12 5. But this argument misconstrues the discussion in Kamakana,
13 which emphasizes the "resolution of a dispute on the merits," not
14 the mere "consideration" of the merits. The media entities
15 similarly place undue emphasis on the Kamakana court's
16 characterization of non-dispositive motions (that such motions "are
17 often unrelated, or only tangentially related, to the underlying
18 cause of action."). Disregarding the term "often," the media
19 entities proclaim that plaintiffs' preliminary injunction motion
20 must be dispositive because it is not "tangentially related to the
21 underlying cause of action." *Id.* The court rejects this attempt
22 to forge an independent requirement out of the Kamakana court's
23 dicta.

24 In view of the Ninth Circuit's reasoning, the court
25 concludes that a preliminary injunction motion is not dispositive
26 because, unlike a motion for summary adjudication, it neither
27 resolves a case on the merits nor serves as a substitute for trial.
28 Accordingly, due to the court's prior finding, the usual

1 presumption of the public's right of access is rebutted and the
2 media entities must present "sufficiently compelling reasons" why
3 the court should reconsider its May 17, 2006, order, maintaining
4 the status quo regarding sealing.

5 Two considerations weigh against unsealing the documents
6 at the present juncture in the litigation: first, the parties
7 already released redacted versions of the documents at issue.
8 Although the media entities understandably seek unbridled access,
9 the disclosure in part vindicates the interests they assert in
10 their motions to unseal. Second, the present posture of the case
11 warrants caution. In certifying the Hepting order for appeal
12 pursuant to 28 USC § 1292(b), the court recognized that its order
13 posed issues for which "there is a substantial ground for
14 difference of opinion." See Doc #308 at 70, 06-672. In view of
15 this uncertainty, the court declines to disturb the existing
16 compromise between the parties. The court nevertheless recognizes
17 the distinct perspective the media entities offer to this
18 litigation. Because the court may revisit this issue at a later
19 point in the litigation, the court grants the media entities'
20 motions to intervene.

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III

In sum, the court GRANTS the media entities' motions to intervene for the purpose of unsealing judicial records in MDL 1791 but DENIES their motions to unseal documents at the present time.

IT IS SO ORDERED.



VAUGHN R WALKER

United States District Chief Judge