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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

**DECLARATION OF BRUCE A.
ERICSON IN SUPPORT OF
MOTION OF DEFENDANT AT&T
CORP. TO COMPEL RETURN OF
CONFIDENTIAL DOCUMENTS**

Date: To be set by the Court
Time: To be set by the Court
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

Filed concurrently:

- 1. Motion and Memo
- 2. Declaration of James W. Russell
- 3. Proposed Order
- 4. Administrative Motion

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1 I, **BRUCE A. ERICSON**, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and
3 admitted to practice before this Court, and am a partner of the law firm of Pillsbury
4 Winthrop Shaw Pittman LLP, counsel for movant/defendant **AT&T CORP.** (“AT&T”) and
5 also for specially appearing defendant **AT&T INC.**, which is not a party to this motion
6 (AT&T and AT&T Inc. are collectively referred to as the “defendants”). I have personal
7 knowledge of the facts stated herein and, if called as a witness, I could and would
8 competently testify thereto.

9 2. On Thursday, March 30, 2006, I, along with my colleague, David L.
10 Anderson, received a telephone call from plaintiffs’ counsel Lee Tien of the Electronic
11 Frontier Foundation. Mr. Tien told us that plaintiffs were planning to file a motion for
12 preliminary injunction that day and he solicited defendants’ stipulation as to the handling of
13 what he described as certain “AT&T proprietary” documents in plaintiffs’ possession.

14 3. Not having any idea what Mr. Tien was talking about, we asked Mr. Tien
15 what he meant by “AT&T proprietary” documents. He said that plaintiffs had obtained
16 from a former AT&T employee three documents, totaling something under 100 pages and
17 marked “AT&T Proprietary.” He said they pertained to AT&T facilities and he mentioned
18 some sort of facility at a particular location. Until Mr. Tien’s call, I had been unaware that
19 plaintiffs possessed AT&T documents of this sort.

20 4. Mr. Tien described the documents as highly technical in nature and said that
21 plaintiffs had employed the assistance of an unidentified expert to assist them in analyzing
22 and understanding the documents.

23 5. Mr. Tien explained that plaintiffs intended to base their motion for
24 preliminary injunction in part on a declaration from the former AT&T employee himself or
25 herself and on the three “AT&T proprietary” documents that the former employee had
26 provided to plaintiffs. Mr. Tien did not explain the relevance of these documents or make
27 any proffer as to why these documents were necessary or relevant to plaintiffs’ allegations.

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1 6. Because the documents were marked “AT&T Proprietary,” Mr. Tien said he
2 thought that AT&T would assert that the documents were confidential. He therefore was
3 calling to request a stipulation that plaintiffs could file the documents under seal pursuant to
4 Civil Local Rule 79-5(d). He conceded that Rule 79-5(d) does not exactly fit this situation
5 because there is no protective order in place and because the documents had not been
6 produced by defendants or deemed “confidential” by defendants, but he suggested that this
7 procedure nevertheless would cover the situation. He said we would see the documents
8 when they were filed via this procedure.

9 7. We asked Mr. Tien how he happened to come into possession of these
10 “AT&T proprietary” documents. Mr. Tien said that all this would be explained in the
11 former employee’s forthcoming declaration. He added that the documents had been
12 provided to plaintiffs’ counsel “confidentially” by a “retired” AT&T employee who had
13 obtained the documents during the course of his employment with AT&T. He said that the
14 former employee had come to plaintiffs’ counsel and had retained his own counsel. He said
15 the former employee’s name would appear in the moving papers in support of plaintiffs’
16 preliminary injunction motion.

17 8. We asked Mr. Tien how long he had been in possession of the “AT&T
18 proprietary” documents. He answered, “a couple of months.”

19 9. Mr. Tien said that in his view and the view of his expert the “AT&T
20 proprietary” documents would provide evidence of involvement in the matters alleged in
21 plaintiffs’ complaint. He also said that he understood that defense counsel might need to
22 discuss this matter with the United States Department of Justice (“DOJ”).

23 10. Mr. Anderson and I said that in light of Mr. Tien’s statements, we thought
24 we would wish to discuss this matter with the DOJ to see whether the documents were
25 something that we as defense counsel should even review. We added that we were not sure
26 that the procedures of Rule 79-5 would suffice if indeed it turned out that Mr. Tien’s view

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1 of the documents was correct. In any event, we said, that would be a judgment for DOJ to
2 make, not private defense counsel.

3 11. We then proceeded to talk to Mr. Tien about ancillary matters, such as
4 hearing dates, page limits and discovery. Mr. Tien reiterated that he wanted to file his
5 preliminary injunction motion that day and therefore wanted to hear back from us by 2 p.m.
6 We asked him to postpone his filing temporarily, explaining that we were not sure we could
7 resolve things by 2 p.m. We offered to stipulate to his preferred hearing date so that
8 plaintiffs would not lose that date if they held off filing their motion for a few days.

9 12. After speaking with Mr. Tien, Mr. Anderson and I, along with our co-
10 counsel at Sidley Austin LLP, contacted attorneys with the DOJ in Washington, D.C. We
11 did so to apprise the DOJ of the situation and to give the DOJ an opportunity to review the
12 documents and decide whether they were “classified” or otherwise not suited for treatment
13 under Rule 79-5. The DOJ lawyers indicated that they wished to review the documents. I
14 understand that thereafter plaintiffs’ counsel arranged to deliver a set of the documents to
15 the DOJ in Washington, D.C.

16 13. Just before 5 p.m. on March 30, 2006, Ms. Cohn sent us a proposed
17 stipulation, a true and correct copy of which is attached hereto as Exhibit A.

18 14. We had some problems with plaintiffs’ draft stipulation. After discussions,
19 I emailed Mr. Tien with my proposed re-draft of a stipulation on Friday, March 31, 2006,
20 around 1:57 p.m. A true and correct copy of my draft stipulation is attached hereto as
21 Exhibit B. As discussed further below, plaintiffs did not respond regarding the draft
22 stipulation until Wednesday, April 5, 2006, when they rejected it.

23 15. Shortly before I emailed our counterproposal, plaintiffs began e-filing their
24 preliminary injunction papers. Between approximately 1:49 p.m. and 4:25 p.m. that
25 afternoon, they filed what became docket entries 17 through 22.

26 16. That day, plaintiffs’ counsel posted a press release titled “EFF Motion in
27 AT&T Surveillance Case Draws Government's Eye” on their website. A true and correct
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1 copy of the press release is attached hereto as Exhibit C. I am informed and believe that
2 plaintiffs' counsel have also spoken with the media on these subjects. A true and correct
3 copy of a March 31, 2006 article entitled "Sensitive documents surface in AT&T-NSA spy
4 lawsuit" that appeared on C-Net News.com is attached hereto as Exhibit D.

5 17. On Tuesday, April 4, 2006, at around 1:04 p.m. I received via email a letter
6 from the DOJ addressed to Ms. Cohn and Mr. Tien. A true and correct copy of the letter is
7 attached hereto as Exhibit E.

8 18. On April 4, 2006, at around 2:26 p.m. I emailed and later faxed to plaintiffs'
9 counsel a letter regarding the confidentiality of the "AT&T proprietary" documents. In my
10 letter, I confirmed that documents were confidential and proprietary AT&T documents and
11 asked plaintiffs to return them to AT&T and to refrain from filing them without leave of
12 Court.

13 19. On April 5, 2006, at around 11:49 a.m. I received via email a letter from Ms.
14 Cohn. A true and correct copy of Ms. Cohn's letter is attached hereto as Exhibit F. Ms.
15 Cohn noted that events had "overtaken most of the draft stipulation" that I had circulated on
16 March 31. She also rejected my request to return the documents to AT&T and to refrain
17 from filing them.

18 20. On April 5, 2006, between approximately 4:43 pm and 5:37 pm plaintiffs'
19 counsel e-filed and e-served docket entries 28 through 36. Docket entry 35 attached as
20 Exhibit B thereto my letter to plaintiffs' counsel (see paragraph 22 above) explaining why
21 the "AT&T proprietary" documents should not be made public. My letter thus has now
22 been made public. On April 7, 2006, a reporter from the *San Francisco Chronicle* called to
23 question me about the letter; I declined to speak to him.

24 21. Also late on the afternoon of April 5, 2006, I was hand-served with several
25 manually filed documents, including the declarations of Mark Klein and J. Scott Marcus.
26 The declaration of Mr. Klein attaches the "AT&T proprietary" documents as Exhibits A
27 through C thereto. Both declarations make extensive references to the documents.

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