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IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE GMAIL LITIGATION	Case No. 5:13-md-02430-LHK **REPLY IN SUPPORT OF NON-PARTY PRESS ORGANIZATIONS' MOTION FOR AN ORDER TO INTERVENE AND OPPOSITION TO PARTIES' MOTION TO SEAL** Date: n/a Time: n/a Department: Courtroom 8 – 4th Floor Judge: Hon. Lucy H. Koh

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I. INTRODUCTION

Google's Response does not alter the fact that the parties have failed to show compelling reasons to seal materials relating to class certification, or even good cause to do so. The strong presumption of public access to court records should apply, and the Court should deny the parties' motions to seal in their entirety.

II. THE PARTIES' MOTIONS TO SEAL SHOULD BE DENIED

A. The Hearing on Class Certification Demonstrated That More Information is Sealed Than is Necessary in This Matter

In its Response, Google relies on the fact that "the Court and the parties recently conducted a two-hour hearing on Plaintiffs' class certification motion that was open to the public and proceeded with no restrictions on the use or presentation of confidential information." (*See* Def. Google's Response to Non-Party Press Organizations' Motion to Intervene and Opp'n to Parties' Motions to Seal ("Response") at 2). Google contends that the lack of restrictions on what parties may say in Court—as opposed to what Parties may file with the Court—"dispell[s] any purported concern that the Media Intervener's might have about their ability to understand (and report on) the issues raised in class certification." (*Id.*).

To the contrary, the fact that Google touts the parties' ability to discuss previously undisclosed information in open court demonstrates its lack of a compelling interest, or even good cause, in sealing such material. Moreover, allowing parties to seal materials they file on the Court's electronic docket, but to discuss the same topics openly during a court hearing, makes the parties—rather than the Court—the final arbiter of what information should ultimately be disseminated to the public. Such a practice turns the longstanding presumption in favor of public access on its head. Instead of the Court applying strict standards to determine if particular material should be sealed, the parties would operate against a backdrop of secrecy and choose to selectively reveal previously sealed material when it suits their strategy at argument.

In fact, the Media Intervenors understand that several new factual issues came to light at the hearing on class certification, including an allegation that in 2010 Google began scanning emails before they reached users, rather than after. *See* Joel Rosenblatt, BLOOMBERG, Google

Fights E-Mail Privacy Group Suit it Calls Too Big, Feb. 27, 2014, *available at* http://www.bloomberg.com/news/2014-02-27/google-fights-e-mail-privacy-group-suit-it-calls-too-big.html. That allegation goes to the heart of this litigation, yet it does not appear in the public record. *Id.* (quoting Sean Rommel as saying "It is factually inaccurate to say that the location and the timing of that interception is in the public record.").

Google contends that allowing Plaintiffs "every opportunity to present their class certification theories as they saw fit, with no limitations or restrictions on the scope of information that they could discuss" during a two-hour hearing negates any impediment the sealing of its docket entries may have on the Media Intervenors' ability to understand and report on issues in the case. (*See* Response at 8). The Media Intervenors strongly disagree.

The public interest in this case is exceptionally high. The Media Intervenors—who together represent the interests of hundreds of media outlets located throughout the country—rely on the Court's electronic docket to keep them informed of the relevant facts in this matter, which they disseminate to the wider public. Although some members of the public and some members of media organizations attended the class certification hearing, the public's ability to learn what happened in open court does not – and should not – depend on court attendance to learn the critical factual allegations at the heart of this nationwide class action lawsuit that affects millions. Such facts should be available to the public, through the Court's electronic docket.

In fact, this Court has previously pushed back on similarly overbroad sealing requests in the past, including Google's prior attempts to seal information it relied on in open-court hearings. In the *Dunbar* litigation, Google sought to seal portions of Plaintiff's Motion for Leave to Amend, including a statement that "Google scans Plaintiffs' email to acquire meaning and content." (Administrative Mot. to File Under Seal, Sept. 4, 2012, ECF No. 208; Order re: Administrative Motions to Seal at 5, Dec. 12, 2012, ECF No. 227). Google contended the filing described proprietary procedures and revealed confidential information and business-decision strategy—the same rationales it relies on here. (*See* Administrative Mot. to File Under Seal, Sept. 4, 2012, ECF No. 208, at 2). This Court was "not persuaded" by these arguments. (Order re: Administrative Motions to Seal at 5, Dec. 12, 2012, ECF No. 227).

Google is once again attempting to withhold facts from the public docket, while selectively touting the fact that previously confidential material was introduced in the recent Court hearing. Not only do these actions undercut Google's arguments that such material should be sealed in the first place, they improperly place the parties—rather than the Court—in charge of deciding which factual allegations are contained in the public record, and are contrary to the strong presumption that records filed in a civil case are open to the public.[1]

B. Google Has Not Demonstrated Compelling Reasons for Sealing

The public's right of access to court proceedings "is grounded in the First Amendment and in common law, and extends to documents filed in pretrial proceedings as well as in the trial itself." *CBS, Inc. v. District Court*, 765 F.2d 823, 825 (9th Cir. 1985). "[C]ourts have a duty to conduct a thorough and searching review of any attempt to restrict public access." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). "Unless a particular court record is one traditionally kept secret, a strong presumption in favor of access is the starting point." *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (internal quotation marks and citation omitted).

To overcome the strong presumption that civil litigation documents are public, the moving party must present "compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure." *Id.* at 1178-79 (citations omitted). "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Id.*

Although there is a narrow exception for non-dispositive motions, which may be sealed on a showing of "good cause," the more stringent "compelling reasons" standard should be applied to the Parties' sealing motions. This Court and others have recognized that "there may be

[1] This is particularly troubling when Plaintiffs adopt Google's argument for sealing without question. *See* Motion of Non-Party Press Organizations for an Order to Intervene and Opposition to Parties' Motion to Seal ("Motion") at 11 (noting that "[r]ather than provide any explanation for the reasons for its sealing requests, plaintiffs only reason is that Google had marked the documents as confidential. In other words, plaintiffs are allowing Google to unilaterally determine whether to seal the documents." (citations omitted)).

circumstances in which a motion for class certification is case dispositive." *High-Tech Employee Antitrust Litig.*, No. 11- 02509, 2013 WL 163779, at *2 n.1 (N.D. Cal. Jan. 15, 2013). Those circumstances exist when "a denial of class status means that the stakes are too low for the named plaintiffs to continue the matter." *Id. See also Rich v. Hewlett-Packard Co.*, No. 06-03361-JF, 2009 WL 2168688, at *1 (N.D. Cal. July 20, 2009). This is such a case.

In addition, the heightened standard of "compelling reasons" should be applied because the Ninth Circuit's reasons for distinguishing between dispositive and non-dispositive motions are not true in this instance. In *Kamakana*, the Ninth Circuit explained that there are "good reasons to distinguish between dispositive and non-dispositive motions." 447 F.3d at 1179. "Specifically, the public has less of a need for access to court records attached only to non-dispositive motions because those documents are often 'unrelated or only tangentially related, to the underlying cause of action.'" *Id.* (citations omitted). In this case, the material the parties seek to seal is not tangential to the cause of action—it is at the very heart of it. *See also Labrador v. Seattle Mortg. Co.*, No. 08-2270-SC, 2010 WL 3448523, at *2 (N.D. Cal. Sept. 1, 2010) (finding "many of the concerns" identified in *Kamakana* are present in a class certification motion and that if the Court sealed a Defendant's opposition and ruled in favor of it, "the grounds for the ruling would be kept secret from the public" (citations omitted)).

The parties have failed to show the material they seek to seal may become a vehicle for improper purposes, or that sealing is required to prevent judicial documents from being used as sources of business information that might harm a litigant's competitive standing. *See Apple, Inc. v. Samsung Elecs. Co.*, No. 11-01846, 2013 WL 3958232, at *3 (N.D. Cal. July 29, 2013). Accordingly, they fail to meet the sustentative standard for sealing these materials.

Moreover, even if the Parties had shown a potentially compelling reason in support of sealing, their recent actions in open court demonstrate these requests are not narrowly tailored, as required by Local Civil Rule 79-5. Under that rule, a request must "be narrowly tailored to seek sealing only of sealable material." Local Civil Rule 79-5. But Google has shown, in touting the free exchange of information that occurred at the hearing on class certification, that the company is not concerned with the breadth of the statements made in open court. (*See* Response at 2, 8). In

doing so, Google suggests that one standard—of complete access—applies to oral statements on class certification, while at the same time taking the position that a far different standard should apply to its written statements on the matter. The fact that Google champions both of these standards undercuts any argument that Google's motion to seal its written statements is narrowly tailored.

C. Google Has Not Demonstrated Good Cause for Sealing

The motions to seal should be denied, even if this Court were to determine that the motion for class certification is non-dispositive. Neither Google nor Plaintiffs have demonstrated good cause to seal the court filings, nor have they provided any evidence that the information at issue constitutes trade secrets. Both parties have wholly failed to comply with the Court's procedural and substantive requirements for sealing.

Even under the "good cause" standard, the party opposing disclosure has the burden of proving "specific prejudice or harm will result if the protective order is not granted." *In re Roman Catholic Archbishop of Portland in Oregon,* 661 F.3d 417, 424 (9th Cir. 2011). The parties have failed to satisfy even this lower showing. In fact, much of the information that Google seeks to seal relates to the general operation of an email service that is used by millions of people worldwide. Google does not specifically allege how this information provides independent economic value. Likewise, Google does not discuss any efforts that it has taken to maintain the secrecy of this information. Throughout the litigation, Google has argued that its users and members of the general public are widely aware of their practices, sufficient to legally consent to them. (*See* 30(b)(6) Dep. of Google, by Aaron Rothman, ECF No. 89-8) ("I believe that there's tons of sources out there that exist for non-Gmail users to understand that Gmail does automatically process content within the system").

In addition, even if the parties had put forth a plausible "good cause" for sealing, their recent actions demonstrate their requests are not narrowly tailored, as required under Local Civil Rule 79-5. By asserting a standard of complete access to oral statements about class certification, but seeking to seal a large category of documents on the exact same topic, involving the same information, Google cannot show that its request is narrowly tailored.

This Court should reject the Parties' attempts to circumvent the Ninth Circuit's well-established presumptions in favor public access to civil litigation documents. The Media Intervenors respectfully request that the Court deny all pending motions to seal documents related to the class certification proceedings. (Docket Nos. 87, 88, 101, 123, 112, and 106).

III. CONCLUSION

For the foregoing reasons, the Media Intervenors respectfully request that the Court grant their Motion to Intervene and deny the Parties' motions to seal.

DATED this 7th day of March 2014.

Respectfully submitted,

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