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GOOGLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE INC. GMAIL LITIGATION

Case No. 5:13-md-02430 LHK (PSG)

DEFENDANT GOOGLE INC.'S RESPONSE TO NON-PARTY PRESS ORGANIZATIONS' MOTION TO INTERVENE AND OPPOSITION TO PARTIES' MOTIONS TO SEAL

Dept.: Courtroom 8 - 4th Floor
Judge: Hon. Lucy H. Koh

I. INTRODUCTION

Non-Party Press Organizations' Motion to Intervene and Opposition to Parties' Motions to Seal (ECF No. 136) (the "Motion to Intevene"), filed by the self-styled "Media Intervenors" offers no valid reason why Google's pending motions to seal should be denied. Google's current motions involve the *same* categories of confidential information that the Court has already addressed in its prior sealing orders, which the Court found to be sealable even under the "compelling reasons" standard that the Media Intervenors seek to impose. Further, Google's sealing requests are based on the *same* careful, line-by-line analysis and detailed evidentiary

support that the Court has already deemed sufficient to meet the requirement of "particularity" in its sealing orders throughout this case. The Media Intervenors never objected to any of these prior sealing orders, and they have published numerous accounts of the Gmail cases pending before this Court without ever claiming that the limited sealing of confidential material has somehow hindered their ability to report on the issues raised. Yet now, after a year and a half of litigation and multiple sealing orders that have established the appropriate treatment of confidential information in this case, the Media Intervenors ask the Court to reverse itself by denying motions to seal that involve the same information that has already been approved for sealing repeatedly in this case. There is no basis for this extraordinary (and belated) request.

The Media Intervenors claim that Google's pending sealing motions must be supported by "compelling reasons" (and not the lower threshold of "good cause") because class certification is, in their view, a "dispositive motion." While Google believes that its sealing requests satisfy even the higher "compelling reasons" standard, the Media Intervenors' argument on this issue should be rejected because it is simply wrong as a matter of law. As this Court has recognized, the "vast majority" of courts considering the issue have held that class certification proceedings are not dispositive and thus are not governed by the "compelling reasons" standard that applies to summary judgment and other dispositive motions. The Media Intervenors offer no persuasive case law to the contrary, relying instead on general (and undisputed) platitudes about the importance of public access and isolated snippets from cases that are taken out of context and do not directly address the issue at hand.

In any case, the issue raised by the Media Intervenors is largely immaterial because the categories of information at issue in Google's pending motions have *already* been approved for sealing by the Court under the "compelling reasons" standard, as mentioned above. Moreover, 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—dispelling any purported concern that the Media Intervenors might have about their ability to understand (and report on) the issues raised on class certification.

For all these reasons, Google respectfully requests that the Court grant Google's pending

sealing motions notwithstanding the Media Intervenors' objections.

II. ARGUMENT

A. Google's Pending Motions Involve The Same Information That The Court Has Already Approved For Sealing Under The "Compelling Reasons" Standard.

The Media Intervenors insist that Google must present "compelling reasons" in order to justify its pending sealing requests, but they ignore the multiple prior orders in this case in which the Court has *already* found that the categories of information at issue are appropriately sealed even under this heightened standard.

In the *Dunbar* matter (prior to its coordination as part of the current MDL proceeding), the Court recognized the "strong presumption in favor of access" to court records and held that Google was required to demonstrate "compelling reasons" to seal portions of Plaintiff's Third Amended Complaint "because the TAC forms the 'foundation' of Plaintiff's lawsuit against Google." (Order re: Renewed Administrative Mots. To Seal at 2, 3, Aug. 14, 2013, ECF No. 290 (citations omitted).) Applying that standard, Court granted all of Google's sealing requests related to the TAC, finding that "Google has narrowed its sealing requests and set forth with particularity its basis for sealing portions of the TAC . . . " (ECF No. 290 at 4.)

In the current coordinated MDL proceeding, the Court continued to test Google's sealing requests against the heightened standard of "compelling reasons." In allowing portions of the Consolidated Complaint to be filed under seal (over Plaintiffs' objections), the Court found Google's sealing requests to meet the stringent "compelling reasons" standard for two reasons. First, the Court explained:

> This Court has previously credited Google's concern about the competitive harm that could result from disclosure of the precise operation of Gmail. The Court accepted Google's theory that Google's competitors could copy its email delivery mechanisms if information about these mechanisms were made public. Accordingly, the Court has previously found that *extraordinary circumstances* justified sealing such information . . .

(Order Granting Google's Administrative Mot. to File Under Seal at 5, Sept. 25, 2013, ECF No. 68 (emphasis added) (citations omitted).)

Second, the Court considered Google's request to seal information that "Google contends

could lead to a breach in the security of the Gmail system." (*Id.*) After considering Google's evidence in support of its sealing requests, the Court "credit[ed] Google's concern that 'Google's ability to combat spammers, hackers, and others who propagate these unwanted or harmful materials would be impaired if those individuals had visibility into Google's defenses.'" (*Id.*) The Court thus concluded that "*compelling reasons* support sealing of this material." (*Id.* at 6 (emphasis added).)

In this order, the Court specifically rejected Plaintiffs' arguments that Google's sealing requests would deprive the public of information needed to understand the Gmail practices at issue—the same basic complaint now being lodged by the Media Intervenors:

> The Court rejects Plaintiffs' contention that Google is attempting to conceal allegedly unlawful practices through this Administrative Motion to Seal. The Court, having reviewed the redacted Consolidated Complaint, ECF No. 40-3, concludes that *redactions do not impair the public's ability to understand Plaintiffs' central allegation*, that Google engaged in unlawful interceptions of emails in transit separate and apart from processes related to the functioning of Gmail, such as spam control or antivirus protection, for the purposes of creating user profiles and providing targeted advertising. *The redactions only go to specific components of the Gmail delivery process that are not likely to materially increase the public's understanding of the alleged wrongdoing in this case.*

(*See* ECF No. 68 at 6 n.1 (emphasis added).)

Google's current sealing motions involve these *same* narrow categories of information that the Court approved for sealing: (1) material regarding "the precise operation of Gmail" that would allow "Google's competitors [to] copy its email delivery mechanisms" if revealed, and (2) information that could "lead to a breach in the security of the Gmail system" if made publicly available, (*id.*). (*See* Decls. of Han Lee (Oct 29, 2013, ECF No. 88-1 at 5-23; Nov. 21, 2013, ECF No. 103 at 5-8; Jan. 9, 2014, ECF No. 123-1 at 5-13) and Stacey Kapadia (Nov. 21, 2013, ECF No. 101-1 at 5-7) (describing categories of information sought for sealing in Google's current motions).) Indeed, several of the documents at issue in Google's current sealing motions were *already* approved for sealing in the Court's prior orders. (*See* Order Granting-in-Part Plf.'s & Google's Administrative Mots. to File Under Seal at 3-4, Aug. 18, 2013, ECF No. 292 (previously approving the sealing of Exhibits H, K and N to the Declaration of Proposed Class

Counsel Sean F. Rommel in Support of Plaintiffs' Consolidated Motion for Class Certification.) Moreover, Google's pending requests are supported by the same sort of detailed, line-by-line analysis that the Court has previously found sufficient to meet the "particularity" requirements for sealing.

The Media Intervenors provide no basis why the Court should reach an entirely different result from its prior sealing orders and reject Google's pending sealing requests, when the current motions involve the *same* categories of information that the Court previously approved for sealing (and in some cases the same specific documents) and the *same* sort of detailed evidentiary support that has been deemed sufficient throughout this case. To the contrary, Google's pending motions to seal should be granted, consistent with the established law of the case approving the sealing of the information at issue.

B. Media Intervenors Ask The Court To Apply The Wrong Standard.

While Google believes that its current sealing requests satisfy the heightened standard of "compelling reasons," the correct standard for considering sealing materials related to class certification proceedings is the lower threshold of "good cause." The Media Intervenors' insistence to the contrary is unsupported by any valid case law.

Under Ninth Circuit precedent, "a particularized showing of '*good cause*' under Federal Rule of Civil Procedure 26(c) is sufficient to preserve the secrecy of sealed discovery documents attached to *non-dispositive* motions." *In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.,* 686 F.3d 1115, 1119 (9th Cir. 2012) (emphasis added). As this Court has recognized, the "vast majority of other courts within this circuit" have held that this "good cause" standard applies to sealing requests in class certification proceedings because class certification does not dispose of the merits of an action. *See In re High-Tech Emp. Antitrust Litig.*, No. 11-cv-2509, 2013 U.S. Dist. LEXIS 6606, at *8-9 (N.D. Cal. Jan. 15, 2013) (collecting cases). *See also Gaudin v. Saxon Mortg. Servs., Inc.*, No. 11-cv-1663, 2013 U.S. Dist. LEXIS 82059, at *5 (N.D. Cal. Jun. 11, 2013) (applying "good cause" standard and stating "[t]he Court agrees that [good cause] is the proper standard, because class certification is not a dispositive motion"); *Dugan v. Lloyds TSB Bank, PLC*, No. 12-cv-2549, 2013 U.S. Dist. LEXIS 51162 (N.D. Cal. Apr. 9, 2013)

(applying "good cause" standard where a case could still proceed if class certification were denied and the motion was therefore not dispositive). *Compare Keirsey v. Ebay, Inc.*, No. 12-cv-1200, 2013 U.S. Dist. LEXIS 147573, at *5-7 (N.D. Cal. Oct. 11, 2013) (holding that a motion for approval of a classwide settlement is "dispositive" because it necessarily ends the case and recognizing the authorities that apply the "good cause" standard to an "*opposed* motion for class certification") (emphasis in original).

While the Court has observed that, in some circumstances, class certification might be "case dispositive" if "a denial of class status means that the stakes are too low for the named plaintiffs to continue the matter," *In re High-Tech*, 2013 U.S. Dist. LEXIS 6606, at *8 n.1 (quotation omitted), that exception does not apply here given the substantial remedies available to individual claimants. Under the Electronic Communications Privacy Act claim at issue, claimants can recover (1) damages in the amount of $100 per day of violation or $10,000, whichever is greater; (2) attorney's fees and costs; and (3) punitive damages. *See* 18 U.S.C. § 2520.[1] These statutory recoveries provide ample incentives for plaintiffs (and plaintiffs' attorneys) to pursue individual claims regardless of whether a class is certified. In similar circumstances, courts have held that the availability of statutory damages and attorneys' fees awards is sufficient to incentive named plaintiffs and their lawyers to pursue individual claims, even absent the certification of a class. *See Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 06-cv-2671, 2012 U.S. Dist. LEXIS 123102, at *19-20 (S.D. Cal. Aug. 28, 2012) (denying certification because the statutory claims at issue provided sufficient incentive for plaintiffs to pursue individual claims, where the statute provided for damages "in the amount of $4,000 for each particular occasion" and "attorneys' fees and costs."); *Rowden v. Pac. Parking Sys., Inc.*, 282 F.R.D. 581, 586-87 (C.D. Cal. 2012) (denying certification where claim provided sufficient incentives for individual claims based on statutory damages "between $100 and $1000," as well as recovery of attorney's fees, costs, and punitive damages). Similarly here, the denial of certification of Plaintiffs' claims would not be "dispositive" because it would not resolve

[1] The available remedies under the California, Maryland, and Florida statutes are similar. *See* Cal. Penal Code § 637.2; Md. Code Ann., Cts. & Jud. Proc. § 10-410; Fla. Stat. § 934.10.

anyone's claims on the merits and would not prevent any individual Plaintiff from further litigating his claim.

For confirmation, the Court need look no further than the statements of Plaintiffs' own counsel, who have repeatedly indicated that they intend to proceed with Plaintiff Dunbar's claims on an individual basis regardless of whether any class is certified—making clear that the current class certification proceedings may not dispose of the claims at issue. For example, at a November 29, 2012 case management conference in the *Dunbar* matter, counsel indicated that if certification is denied, Mr. Dunbar's claim is still "going to proceed forward on an individual capacity . . . " (Somvichian Decl. in Supp. of Google's Opp'n to Plfs.' Consolidated Mot. for Class Certification, attached as Ex. E to Lee Decl., Nov. 21, 2013, ECF No. 105, Ex. U at 53:3-5.) At a January 8, 2013 case management conference in the *Dunbar* matter, counsel reiterated that even if certification is denied, the "case is going to be tried . . . as an individual case anyway . . . " (*Id*., Ex. V at 13:9-10.) These unambiguous statements make clear that class certification may not be "dispositive" in this case.

The Media Intervenors' arguments to the contrary ignore the actual circumstances of this case and depend on mischaracterizations of the case law. In particular, they ask the Court to ignore the "good cause" standard applied by the "vast majority of other courts within this circuit," *In re High-Tech*, 2013 U.S. Dist. LEXIS 6606, at *8 n.1, because (they say) the Supreme Court declared that class certification proceedings are "dispositive" in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997). But the *Amchem* decision has nothing to do with the proper standard for sealing materials; it addressed the entirely separate issue of how the elements of Rule 23 should be applied in the context of a class action settlement. *Id*. at 619 ("We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification."). The isolated statement on which the Media Intervenors rely ("class certification issues are dispositive") is a stray reference from the background section of the decision (not the Court's substantive analysis), which simply explains why the Court opted not to address the separate issue of Article III standing given the particular procedural posture of the matter. *Id*. at 592. The Supreme Court did not purport to rule that class certification proceedings should be

deemed "dispositive" for purposes of considering a motion to seal (or for any other purpose, for that matter). The Media Intervenors' misleading suggestion to the contrary is simply wrong.

If anything, the Media Intervenors' legal authorities demonstrate why the "compelling reasons" should not be applied in this case. The majority of Media Intervenors' case citations involve the sealing of a courtroom to exclude the public from live proceedings. *Oregonian Publ'g Co. v. United States Dist. Ct.*, 920 F.2d 1462 (9th Cir. 1990) (closure of a criminal proceeding); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (reversing order excluding the press and public from a murder trial); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501 (1984) (involving trial court's decision to exclude press from individual voir dire proceedings); *Waller v. Georgia*, 467 U.S. 39 (1984) (involving closure of courtroom for suppression hearing in criminal matter); *Press Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986) (involving motion to exclude public from preliminary hearing in a criminal case); *NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.*, 20 Cal. 4th 1178 (1999) (involving exclusion of public from courtroom); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982) (involving closure of courtroom for sex-offense trial). Google has made no such request in this case and these authorities are therefore irrelevant.

To the contrary, as the Court is aware, the parties agreed to proceed with the class certification hearing in this case without any restriction on the use of confidential information. Throughout the course of the two-hour argument, Plaintiffs had 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. The Media Intervenors cannot claim that Google's sealing requests will somehow impede their ability to understand and report on the class certification issues in this case, when there has already been a fully public airing of the issues raised by Plaintiffs' motion for class certification.

III. CONCLUSION

For all these reasons, Google respectfully requests that the Court grant Google's pending sealing motions notwithstanding the Media Intervenors' objections.

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