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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION
15

16 ROCKY MOUNTAIN BANK, a Wyoming
17 Corporation,

18 Plaintiff,

19 v.

20 GOOGLE INC., a Delaware Corporation,

21 Defendant.

Case No. 5:09-CV-04385 JW

GOOGLE INC.'S RESPONSE TO NON-
PARTY MEDIAPOST'S MOTIONS TO
INTERVENE AND TO UNSEAL
DOCUMENT

22
23 Google Inc. ("Google") respectfully submits this response to non-party MediaPost
24 Communications's Motions to Intervene and to Unseal Document (the "Motions") to make public
25 the report Google lodged with the Court on September 25, 2009 (the "Report"). The Report
26 contains the personal information of a Gmail user and Google's statement of compliance with the
27 Court's Order of September 23, 2009. Any presumption in favor of disclosure should yield in
28

GOOGLE INC.'S RESPONSE TO MOTIONS
TO INTERVENE AND UNSEAL
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1 these circumstances to the privacy interests of the Gmail user – an innocent bystander who just
2 happened to receive an email from Rocky Mountain Bank that included financial information
3 about *other* innocent parties (that bank’s customers). Google respectfully requests that the Court
4 deny the Motions.¹

5 BACKGROUND

6 On August 12, 2009, Plaintiff Rocky Mountain Bank (“Rocky Mountain”) inadvertently
7 sent a file allegedly containing the personal information for 1,325 Rocky Mountain customers to
8 the wrong Gmail account (the “Inadvertent Email”). Rocky Mountain Complaint (“Compl.”) at
9 ¶¶ 8-11. On September 17, 2009 Rocky Mountain initiated an action against Google seeking
10 declaratory and injunctive relief to prevent use and disclosure of the Inadvertent Email. Rocky
11 Mountain also sought to file the Complaint under seal, and requested a temporary restraining
12 order requiring Google to deactivate the Gmail Account and to provide information as to whether
13 the Inadvertent Email had been accessed or otherwise disclosed. On September 18, 2009,
14 Magistrate Judge Whyte denied Rocky Mountain’s sealing motion and directed the bank to
15 publicly file the Complaint, but redact the Inadvertent Email address. *See* Docket Entry No. 11.

16 On September 23, 2009, the Court entered an order enjoining both Google and the Gmail
17 Account holder from “accessing, using or distributing” the Inadvertent Email and the attached
18 confidential customer information. *See* Docket Entry No. 23. The Order also required Google to:
19 (1) immediately deactivate the Gmail Account and (2) immediately disclose to Rocky Mountain
20 and the Court “whether the Gmail Account was dormant or active, whether the Inadvertent Email
21 was opened or otherwise manipulated, and in the event that the Gmail Account is not dormant,
22 the identity and contact information for the Gmail Account holder.” *See id.* The Court also set a
23 date for a preliminary injunction hearing.

24 In compliance with the Court’s Order, and after consulting with the Court’s clerk
25 regarding the manner in which the Court wished to receive the information, Google lodged its
26

27 ¹ Google respectfully submits that a hearing on the Motions is not necessary. MediaPost has
28 briefed its arguments, and will have the opportunity to reply to this Opposition. In the interest of judicial
economy and the burden on the parties, the Court should rule based on the pleadings submitted.

1 Report with the Court on September 25, 2009 and simultaneously delivered a copy to Rocky
 2 Mountain. The Report confirmed Google’s compliance with the Court’s Order and included the
 3 information requested. Upon providing this information to the Court and to Rocky Mountain, the
 4 parties stipulated to a dismissal of all claims with prejudice and the Court dismissed the action
 5 and closed the case on September 28, 2009.²

6 MediaPost now demands that the Court allow it to intervene then have the Court unseal
 7 and publicly file the Report on the grounds that it is a “judicial record,” which MediaPost
 8 hypothesizes contains more than the user’s personal information. See MediaPost’s Motion to
 9 Unseal at 5. MediaPost seeks disclosure of the Report to determine “how the Court reached its
 10 decision to vacate the TRO and to monitor how private parties are using — or abusing — courts’
 11 powers in this new species of case.” *Id.* at 5-6.

12 ARGUMENT

13 **The Public Interest In Disclosure of the Report Is Significantly Outweighed By** 14 **The Privacy Rights of an Innocent Gmail User**

15 There is no doubt that the public has a general right to access judicial records,³ but “the
 16 decision as to access is one best left to the sound discretion of the trial court, a discretion to be
 17 exercised in light of the relevant facts and circumstances of the particular case.” *Nixon v. Warner*
 18 *Communications, Inc.*, 435 U.S. 589, 599 (1978). This right is not absolute, and it can be
 19 overridden given sufficiently compelling reasons for doing so. *Foltz v. State Farm Mutual Auto.*
 20 *Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (citation omitted). In the Ninth Circuit, courts
 21 weigh both “the public interest in understanding the judicial process,” and whether allowing the
 22 material into the public domain “could result in improper use of the material for scandalous or
 23 libelous purposes or infringement upon trade secrets.” *Hagestad v. Tragesser*, 49 F.3d 1430,
 24 1434 (9th Cir. 1995) (internal citations omitted).

25
 26 ² Google does not dispute that the Court retains the inherent power to permit access to records in a
 27 case after it has been resolved or settled. See, e.g., *Philips v. General Motors Corp.*, 307 F.3d 1206 (9th
 28 Cir. 2002).

³ It is not necessary to address MediaPost’s argument that the Report is a judicial record because
 regardless of how the Report is characterized, its disclosure is not warranted.

1 Protecting the identity and privacy of the Gmail account user, and that user's activities
2 with the account, is a compelling reason not to disclose the Report. There is no reason to believe
3 that the user had any relation with Rocky Mountain, or solicited the bank's email containing
4 sensitive information about many of its customers. There is no reason to believe the Gmail
5 account user even understood the significance of the bank's email or the proceedings in this
6 Court, which the bank waited to initiate until several weeks after sending the Inadvertent Email.
7 Indeed, the Gmail account holder – through no fault of his or her own – lost use of the Gmail
8 Account for nearly a week. The Gmail Account user is truly an innocent bystander whose
9 identity, communications, and activities are of no public interest whatsoever. The remedy Rocky
10 Mount sought – designed to avoid further injury to its clients – has been obtained by Rocky
11 Mountain. The public's interest is limited to *the bank's* conduct – not in the identity,
12 communications, and activities of the innocent Gmail account holder.

13 Judge Whyte already reached this same conclusion in his order denying Rocky
14 Mountain's sealing motion. *See* Docket Entry No. 11. He found that Rocky Mountain's attempt
15 "to shield information about an unauthorized disclosure of confidential information" was not a
16 "compelling reason that overrides the public's common law right of access to court filings." *Id.*
17 at 3. However, Judge Whyte did find compelling reason to require Rocky Mountain to "redact
18 the specific Gmail account name from copies of its complaint and motion papers that it files in the
19 public record." *Id.* at 4.

20 Both Judge Whyte and this Court already employed the proper balancing: hiding the
21 plaintiff's own behavior was not a compelling reason to override the public's right of access, but
22 protecting the personal information of a Gmail user who is completely uninvolved in this matter
23 other than having the misfortune of being the recipient of a misdirected email. This was a
24 compelling reason for the Court to seal information about the user, *sua sponte*.

25 MediaPost incorrectly speculates that the Report contains information beyond the Gmail
26 Account user's identity and use of the Gmail Account. In any event, the public already has access
27 to Rocky Mountain's complaint (*see* Docket Entry No. 18), the Court's Order showing what
28 Google was required to do (*see* Docket Entry No. 23), and Google's compliance with the Order

