UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

KEITH DUNBAR, Individually, and as Representative on Behalf of all Similarly Situated Persons, **Plaintiff,** **versus** **GOOGLE, INC.** **Defendant.**	**Civil Action N^{o} 5:10CV00194-DF** **SECOND AMENDED CLASS ACTION COMPLAINT** **JURY DEMANDED**

INITIALLY FILED UNDER SEAL PURSUANT TO AGREED PROTECTIVE ORDER

EXHIBIT 4

PLAINTIFF, KEITH DUNBAR, Individually and on behalf of the Class described below ("the Class"), brings this nationwide Class Action suit against Defendant Google, Inc. ("Google"), and for his Second Amended Complaint, and upon information and belief, alleges the following:

PARTIES

1. Plaintiff is a citizen of the State of Texas, and he resides in Bowie County, Texas, which is within the Eastern District of Texas, Texarkana, Division.

2. Google is a Delaware corporation, whose principal place of business is at 1600 Amphitheatre Parkway, Mountain View, County of Santa Clara, State of California. Google has been served through its agent for service of process: Corporation Service Company d/b/a CSC – Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218.

JURISDICTION AND VENUE

3. Pursuant to 28 U.S.C. § 1331, this Court has original jurisdiction over the Plaintiff's and the Class' claims arising under the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. §§ 2510 *et seq.,* a law of the United States.

4. This Court has general and specific personal jurisdiction over the Defendant, in that Google has sufficient minimum contacts within the State of Texas and within the Eastern District of Texas, and further because certain material acts upon which this suit is based occurred within the Eastern District of Texas.

5. Venue is proper in the Eastern District of Texas pursuant to 28 U.S.C. § 1391(b) and (c) in that: (1) Google resides in the Eastern District of Texas because it is subject to personal jurisdiction within the Eastern District of Texas; (2) a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this judicial district; and (3) Google may be found in this district.

NATURE OF SUIT

6. Pursuant to Rule 23 of the *Federal Rules of Civil Procedure*, Plaintiff brings this nationwide class action lawsuit against Google for the unlawful (1) intentional interception of electronic communications and (2) intentional use of the contents of electronic communications in violation of the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. Sections 2510 *et seq*. Google operates a popular email service known as "Gmail." Gmail account holders are assigned a Gmail email address through which to send and receive electronic communications. Through its Google Apps Partner program, Google also operates it Gmail service on behalf of Internet Service Providers (ISP's), such as Cable One, who then re-sell to their customers, like Plaintiff, the Gmail service labeled as "Cable One, Powered by Google."

7. Google scans the content of all electronic communications received by Gmail account holders and customers of Google Apps Partners. Utilizing multiple devices, Google intercepts all electronic communications sent to Gmail account holders and certain Google Apps Partners who re-sell to their customers the Gmail service. Google uses the information and content obtained from the scanning of incoming electronic communications to sell and place in certain account holders' browser windows advertisements that are related to the content ***and meaning*** of intercepted electronic communications. In addition, Google uses the information and content obtained from the scanning of incoming electronic communications to Gmail account holders and certain Google Apps Partners customers for multiple uses other than the placement of advertisements to that particular recipient. One such believed use, based upon publicly available patents and patent applications, includes Google's continued amassing of data from email in order to "learn" and train its artificial intelligence device known as "**PHIL**."

8. The actions complained of herein involve the interception and use of content from Plaintiff's and Class Members'[1] electronic communications (email) when those emails are sent to a

[1] The Class definition can be found at ¶ 209.

Gmail user ("@gmail.com") or to an "@cableone.net" email address held by a Cable One Web Mail account holder, whether through the initialization of electronic communications to the Gmail user or Cable One Web Mail user, a response/reply to an electronic communication from the Gmail user or Cable One Web Mail user, or any subsequent new electronic communication transmitted by Plaintiff and Class Members to a Gmail user or Cable One Web Mail user. This case does not involve the scanning of previously sent text from Plaintiff's and Class Members' prior emails which may be in the body of responsive communication.

9. Google's interception of electronic communications (i.e. emails) sent from Plaintiff and other non-@gmail.com emailers violates 18 U.S.C. § 2511(1)(a). Google's use of content obtained from the intercepted emails sent by Plaintiff and other non@gmail.com emailers violates 18 U.S.C. § 2511(1)(d).

STATEMENT OF FACTS

10. Google owns the world's leading internet search engine, and, as part of its marketing strategy, offers a vast array of services to internet users. Google's "free" services lure internet users, allowing Google to generate the majority of its revenues by selling online advertising aimed at the users of these "free" services. The more users or usage through Google services that can be demonstrated by Google to advertisers, the more revenue Google makes.

11. As part of its advertising business model, Google actively seeks out, collects, and stores vast amounts of behavioral information regarding internet users. For Google, the acquisition, storage, and ready access to information directly correspond to advertising revenues. As such, Google's advertising business model requires it to continue to acquire additional information. Personalized, detailed, and behavioral information is the most valuable to Google.

12. However, unbeknownst to the World, Google also seeks to acquire, track, learn, profile, store, and understand the thoughts and behavioral habits of the users of Google's services. To do this,

Google needs data.

13. Google also owns Postini. Postini is an email and web security service that provides cloud computing services for filtering email spam and malware. Google sells the Postini product to third parties. The Postini product is only as good as the new data provided to it.

14. "Gmail" is an electronic communication service operated by Google.

15. Google requires users of Gmail to register for the use of Gmail separate and apart from using other Google services.

16. Google assigns Gmail account holders a Gmail email address (username@gmail.com) for the purposes of sending and receiving electronic communications through the electronic communication service operated by Google (i.e. Gmail). Gmail account holders can receive electronic communications from other Gmail account holders and from non-@gmail.com account holders.

17. In addition, Google offers a program called "Google Apps Partner Edition," which allows Internet Service Providers (ISP's) to purchase certain Google products in order resell those products to the ISP's customers under the ISP domain name and service.

18. Prior to November 16, 2010, Plaintiff was a paying Cable One account holder for his internet service at his home and business. Included within this paid service from Cable One was Plaintiff's email service, within which he and his family (for personal and work use) held email accounts *via* @cableone.net email addresses.

19. On November 16, 2010, Plaintiff learned that Cable One was requiring him and all other Cable One account holders to migrate their email accounts in order for those accounts to be "Powered by Google," but still remain paid Cable One and @cableone.net email accounts. As Cable One was his existing paid Internet Service Provider and his @cableone.net email account was included within the paid service, Plaintiff, as with all Cable One account holders who desired to continue to use their paid for @cableone.net email accounts, migrated his account to be "Powered by Google."

20. Upon information and belief, even if an @cableone.net user did not migrate their account, as with one of Plaintiff's accounts, that account was automatically migrated without the knowledge of the cableone.net user. Google intercepts and uses the content of emails to and from these accounts.

21. Since the migration, Plaintiff and all other Cable One account holders with @cableone.net email account addresses have been "Powered by Google." Although the Cable One Web Mail page appears when Plaintiff and Cable One account holders use their @cableone.net email accounts, the email service is Gmail.

22. Prior to and after the migration, Plaintiff has sent and continues to send electronic communications to @gmail.com account holders.

23. After the migration, Plaintiff has sent and continues to send electronic communications to @cableone.net account holders who have also migrated to be "Powered by Google."

24. Google intercepted(s) Plaintiff's electronic communications and used(s) the content of these emails for multiple purposes.

25. Neither Plaintiff nor the @gmail.com and migrated @cableone.net account holders consented(s) to the interception and use of Plaintiff's electronic communications and the contents thereof.

The Contract Between Gmail Users and Google;
The Cable One Account Holders Agreements

26. In order to obtain a Gmail account for an @gmail.com email address a person must agree to the Google Terms of Service, the Gmail Legal Notice, the Google Program Policies, and the Google Privacy Policy. Each of these documents is a written contract comprising specific written clauses.

27. The Terms of Service is attached as Exhibit D. The Gmail Legal Notice is attached as

Exhibit F. The Program Policies is attached as Exhibit G. The Privacy Policy is attached as Exhibit H.

28. To create a Gmail account, a person may view a webpage entitled, "A Google approach to Email." *See* Exhibit A.

29. The webpage entitled "A Google approach to Email" does not mention advertising, interception of email content, or use of email content. Instead, Google touts "Lots of Space," "Less Spam," and "Mobile Access." *See* Exhibit A.

30. This webpage contains links to "Create an account," to "Terms & Privacy," and to "About Gmail." *See* Exhibit A.

31. If a person clicks on the link "About Gmail," the person is taken to a webpage entitled "Google's Approach to Email." *See* Exhibit B. This webpage gives Google's "Top 10 reasons to use Gmail." Neither advertising nor receiving targeted ads is ever mentioned. Further, Google does not mention interception of email content or use of email content.

32. At the top right of Exhibit B, "Google's Approach to Email," a big, blue rectangular button invites the user to "Get Started." Clicking that link takes a user directly to the "Create an Account" webpage attached as Exhibit C.

33. When a person clicks on the link to "Create an Account" on Exhibit A or on the inviting blue "Get Started" button on Exhibit B, the Gmail account page appears. *See* Exhibit C. After entering some personal information for the creation of the account, the person is asked to affirmatively agree to only three documents, all of which Google drafted: Google's Terms of Service, Google's Program Policy, and Google's Privacy Policy. *See* Exhibit C.

34. Google's Terms of Service is contained in a single written document entitled, "Google Terms of Service." *See* Exhibit D. When a person interested in reading the Terms of Service prints a "Printable Version" of the "Terms of Service," as allowed by Google's sign-in screen and encouraged at ¶ 2.4, a single document numbering nine (9) pages and paragraphs numbered 1.1 through 20.7 is

printed. *See* Exhibit D.

35. In the "Google Terms of Service," Google expressly defines the collective word "Terms" to include only: (1) the "terms and conditions" set forth in the "Terms of Service" which Google defines as the "Universal Terms;" and (2) the "terms of any 'Legal Notices'" applicable to a specific Service, which Google defines as the "Additional Terms." *See* Exhibit D, ¶ 1.2 and 1.3. According to Google in ¶ 1.4 of the Terms of Service, only the "Universal Terms" and the "Additional Terms" form "a legally binding agreement between [the user] and Google in relation to [the user's] use of the Services." *See* Exhibit D, ¶ 1.4.

36. At paragraph 7.1, Google refers the user to certain "data protection practices" through a hyperlink, but Google only binds the Gmail user to Google's specific Privacy Policy mentioned at ¶ 7.2. *See* Exhibit D, ¶¶ 7.1 and 7.2.

37. Paragraph 20.2 provides that "The Terms constitute the whole legal agreement between you [Gmail user] and Google and govern your use of the Services." *See* Exhibit D, ¶ 20.2. Other than the privacy policy referenced at ¶ 7.2, no other hyperlinks, webpages, documents, practices, or other terms are incorporated by reference to be included in and made a part of the "Google Terms of Service" and to create a binding agreement between Google and Gmail user.

38. Paragraph 20.7 of the Terms of Service provides that "The Terms . . . shall be governed by the laws of the State of California." *See* Exhibit D, ¶ 20.7.

39. As to the incorporated "Legal Notices," Google's Terms of Service at ¶ 1.5 specifically states, "If there is any contradiction between what the Additional Terms say and what the Universal Terms say, then the *Additional Terms shall take precedence in relation to that Service*." *See* Exhibit D, ¶ 1.5 (emphasis added). Accordingly, the Additional Terms or "Legal Notices" specific to Gmail take precedence over any conflicting provision contained in Universal Terms of the Google Terms of Service.

40. In looking at the "A Google approach to email" screen (*See* Exhibit A), there exists a link for "Terms & Privacy." Once clicked, the "Terms & Privacy" screen lists the following: Legal Notices, Privacy Policy, Program Policies, and Terms of Service. *See* Exhibit E. When the user clicks on "Legal Notices" for Gmail (also called the "Additional Terms"), a one page, two paragraph document is provided. *See* Exhibit F.

41. In the "Gmail Legal Notices," Google states its does not claim any ownership in any of the content of any material transmitted in the Gmail account. *See* Exhibit F.

42. In the "Gmail Legal Notices," Google affirmatively states to the user, "We will not use any of your content for *any purpose* except to provide you with the Service." *See* Exhibit F (emphasis added). The "Service" stated in Exhibit F is Gmail.

43. From the "Create an Account" webpage (attached as Exhibit C), the Gmail applicant is required to accept the terms of Google's Program Policy. Upon clicking the link to the "Program Policy," the reader is shown a two-page document, entitled, "Gmail Program Policies." *See* Exhibit G. No other hyperlinks, web-pages, documents, practices, or other terms are incorporated by reference to be included in and made a part of the "Gmail Program Policies." Upon printing a version of the "Gmail Program Policies" only the two page document found at Exhibit G will print.

44. In addition to other terms, the Gmail Program Policy prohibits a user from using "Gmail to violate the legal rights (such as rights of privacy and publicity) of others." *See* Exhibit G, page 1.

45. From the "A Google approach to email" webpage (attached as Exhibit A), the Gmail applicant can access the "Terms & Privacy" page at Exhibit E. Once there, the user can open Google's Privacy Policy. Upon clicking the link to the "Privacy Policy," the reader is shown a four-page document, entitled, "Privacy Policy." *See* Exhibit H. No other hyperlinks, web-pages, documents, practices, or other terms are incorporated by reference to be included in and made a part of the "Privacy Policy." Upon printing a version of the "Privacy Policy" only the two-page document found at Exhibit

H will print.

46. "Google Terms of Service," "Gmail Legal Notices," "Gmail Program Policies," and Google's "Privacy Policy," (Exhibits D, F, G, H) are the only terms to which the applicant must affirmatively "accept" and agree.

47. For the operation of a Cable One account, Cable One states that a user agrees to be bound by its Terms and Conditions. *See* Exhibit Q. No other document or terms are incorporated into the Cable One Terms and Conditions.

48. While not part of any contract on the part of the Cable One user, Cable One's Privacy Policy specifically states, "Cable ONE does not routinely monitor the activity of user accounts except for measurements of system utilization, general statistical analyses and the preparation of billing records and logs which result in the gathering of minimal personally identifiable information, including names and e-mail addresses of visitors to this website." *See* Exhibit R.

49. As part of the forced migration of the @cableone.net email accounts to be serviced by Gmail, all paid Cable One Web Mail users were required to agree to the Google Apps Terms of Service in order to access and utilize their for-pay Cable One Web Mail in the @cableone.net accounts. *See* Exhibit S.

50. As part of the forced migration of the @cableone.net email accounts to be serviced by Gmail and as part of the Google Apps Terms of Service, all paid Cable One Web Mail users were required to agree to, and Google is bound by, the Google Program Polices and Legal Notices, as previously identified at Exhibits G and F, respectively.

51. However, unlike the Google Terms of Service which specifically incorporated the Google Privacy Policy into the Terms of Service, the Google Privacy Policy in the Google Apps Terms of Service is only referenced for informational purposes and is not a part of the Google Apps Terms of Service. In its Google Apps Terms of Service, Google in fact limits its access to "any Content" within

incoming or outgoing mail of @cableone.net accounts to only those instances if Google is "required to do so by law or in a good faith belief that such access" is "reasonably necessary" to (a) satisfy any applicable law, regulation, legal process or enforceable government request, (b) enforce the Terms of Service, including investigation of potential violations hereof, (c) detect, prevent, or otherwise address fraud, security or technical issues (including, without limitation, the filtering of spam), or (d) protect against imminent harm to the rights, property or safety of Google, its uses or the public as required or permitted by law. *See* Exhibit S, pages 1-2. As such, Google expressly states to the migrated Cable One Web Mail users it will not access "any Content" of @cableone.net emails or emails received by @cableone.net accounts for any purpose other than as stated above, and only then if it is required by law or is in good faith belief it is reasonably necessary.

52. Importantly, the migrated Cable One Web Mail users sending and receiving emails from their @cableone.net accounts *are not* displayed advertisements on their Cable One Web Mail user screens.

Google Intercepts and Uses the Contents of Plaintiff's and Class Members' Email

53. In various webpages and through links appearing on those webpages, *none of which are incorporated* into the Terms of Service or any binding terms upon a Gmail user, Google makes a number of admissions regarding its interception and use of email content. Google chose to include the following language in its Terms of Service, "The Terms constitute the whole legal agreement between you and Google and govern your use of the Services . . . and completely replace any prior agreements between you and Google." *See* Exhibit D, ¶ 20.2.

54. From a webpage entitled, "Privacy Center," Google mentions its Privacy Policy as a separate document, and then states, "The following statements explain specific privacy *practices* with respect to certain products and services." *See* Exhibit I, page 1 (emphasis added). Below the statement is a list of products and services. ***Gmail is not listed***.

55. There is no way for a user to intuit that Gmail, as a service, is related to any link referenced on the Google Privacy Center page. *See* Exhibit I.

56. In the left column of the "Privacy Center" webpage (attached as Exhibit I), there exists a link to "Advertising." When the "Advertising" link is clicked, a webpage entitled, "Advertising and Privacy" can be viewed. *See* Exhibit J.

57. Google does not incorporate by reference the information on the webpage entitled, "Advertising and Privacy," into the Google Terms of Service, the Gmail Legal Notice, the Program Policy, or the Privacy Policy.

58. In the next to the last paragraph of Exhibit J, Google states, "What information does Google use to *serve ads* on Gmail?" *See* Exhibit J, page 4 (emphasis added). Google then says:

> Google scans the text of Gmail messages in order to filter spam and detect viruses. The Gmail filtering system also scans for keywords in users' emails which are then used to match and serve ads. The whole process is automated and involves no humans matching ads to Gmail content.

See Exhibit J, page 4.

59. Google does not incorporate these words into the Terms of Service, the Gmail Legal Notice, the Program Policy, or the Privacy Policy.

60. The sentence, "The Gmail filtering system also scans for keywords in users' emails which are then used to match and serve ads," is a false statement.

61. The sentence, "The whole process is automated and involves no humans matching ads to Gmail content," is a false statement.

62. In addition, at Exhibit J, Google only tells users it scans for "keywords" in the "users' emails."

63. However, Google acquires the content of Plaintiff's and Class Members' emails before they are delivered to Gmail users.

64. These emails are electronic communications as defined by 18 U.S.C. § 2510(12).

65. The "keywords" and other information within the emails scanned by Google amount to content of Plaintiff's and Class Members' email.

66. Either in the scanning process, the matching process, or in some other as of yet unknown manner, the content is acquired from Plaintiff's and Class Members' email by a device or multiple devices. While the devices may be automated, at least one believed device is asserted to have the ability to learn the "meaning behind text" by learning the relationships between words and concepts from a large amount of acquired data. This device is called "PHIL," or the Probabilistic Hierarchical Inferential Learner. *See* Exhibit T.

67. The devices used by Google are not a telephone or telegraph instrument, they are not telephone or telegraph equipment, they are not a telephone or telegraph facility, and they are not any component thereof.

68. Following the acquisition of the "keywords" or content of Plaintiff's and Class Members' email, Google uses those "keywords" or content to serve advertisements to @gmail.com user displays and for other purposes. Following the acquisition of the "keywords" or content of Plaintiff's and Class Members' email, Google uses those "keywords" or content for multiple other purposes.

69. On a web-page entitled "More on Gmail and privacy" (which is not accessible by links from Google's "Terms of Service," "Program Policy," "Privacy Policy," "Privacy Center," "Google's approach to email," or any page to which Google refers users regarding Gmail and not incorporated by Google into the Terms of Service), Google states:

> Google scans the text of Gmail messages in order to filter spam and detect viruses, just as all major webmail services do. Google also uses this scanning technology to deliver targeted text ads and other related information. This is completely automated and involves no humans.

See Exhibit K, page 2, 3d ¶. The sentence, "Google also uses this scanning technology to deliver targeted text ads and other related information," is a false statement. The sentence, "This is completely

automated and involves no humans," is a false statement. Google further states:

> It is important to note that the ads generated by this matching process are *dynamically generated* each time a message is opened by the user—in other words, Google does not attach particular ads to individual messages or to users' accounts.

See Exhibit K, page 2, 4th ¶. The phrase, "Google does not attach particular ads to individual messages or to users' accounts," is a false statement.

70. Google does not incorporate any of the information of Exhibit K into the Terms of Service, the Gmail Legal Notice, the Program Policy, or the Privacy Policy.

71. In Exhibit K, Google only tells user's it scans "Gmail messages."

72. However, Google also scans Plaintiff's and Class Members emails before they are delivered to @gmail.com and @cablone.net users.

73. These emails are electronic communications pursuant to 18 U.S.C. § 2510(12).

74. The "text" of Plaintiff's and Class Members' email that is scanned and acquired by Google amounts to content of Plaintiff's and Class Members' email.

75. Either in the scanning process, the matching process, or in some other as of yet unknown manner, the content is acquired from Plaintiff's and Class Members' email by a device or multiple devices. While the devices may be automated, at least one believed device is asserted to have the ability to learn the "meaning behind text" by learning the relationships between words and concepts from a large amount of acquired data. This device is called "PHIL," or the Probabilistic Hierarchical Inferential Learner. *See* Exhibit T.

76. The devices are not a telephone or telegraph instrument, they are not telephone or telegraph equipment, they are not a telephone or telegraph facility, or any component thereof.

77. The acquisition of content from Plaintiff's and Class Members' email occurs in the transfer of that email to the @gmail.com or @cableone.net user.

78. Following the acquisition of the "text" or content of Plaintiff's and Class Members'

email, Google uses the "text" or content of Plaintiff's email to generate advertisements and for other purposes.

79. Upon information and belief, and without limitation, Google utilizes an embodiment of an extraction device or devices mentioned in United States Patent Application US 2004/0059712 A1, or one similar thereto, to intercept Plaintiff's and Class Members' email and to acquire content from that email and use (*i.e.* match) that content to target advertisements displayed on the Gmail user's screen. *See* Exhibit L. The patent application was filed under the Attorney Docket No.: Google-31/CON3 (GP-064—04-US). *See* Exhibit M. Although several claims of the proposed invention were rejected on or about February 1, 2011, the Application illustrates the device(s) used by Google to intercept electronic communications.

80. At ¶ 0087 of Exhibit L, Google's application discusses embodiments of an invention which may utilize various "devices" for the extraction or acquisition of content from in-coming email. *See* Exhibit L, ¶ 0087. In doing so, Google refers to Figure 5, block 520, entitled "Accept and/or Determine E-Mail Information," and Figure 6, block 612, entitled "Relevance Information Extraction/Generation Operations." *See* Exhibit L, ¶ 0087. In describing the "extraction operations," Google states, "an e-mail server may extract and/or generate e-mail information." *See* Exhibit L, ¶ 0087. In addition, Google states, "Indeed, e-mail information extraction and/or generation may be distributed over more than one device (e.g., e-mail application, browser, e-mail server, e-mail information server, e-mail relevant ad server, etc.)." *See* Exhibit L, ¶ 0087.

81. In addition, Google states, "Various ways of extracting and/or generating relevance information are described in U.S. Provisional Application Serial No. 60/413,536, entitled, 'METHODS AND APPARATUS FOR SERVING RELEVANT ADVERTISEMENTS', filed on Sep. 24, 2002, . . . and in U.S. patent application Ser. No. 10/314,427, entitled "METHODS AND APPARATUS FOR SERVING RELEVANT ADVERTISMENTS', filed on Dec. 6, 2002 . . . ." *See* Exhibit L, ¶ 0089.

82. The "e-mail information" of Plaintiff's and Class Members' email that is extracted by Google amounts to the content of Plaintiff's and Class Members' emails. *See* Exhibit L, ¶¶ 0046, 0051, and 0055-80.

83. The "e-mail information" or content of Plaintiff's and Class Members' email is "extracted" or acquired by Google by use of a "device" or "more than one device."

84. The device or devices are not a telephone or telegraph instrument, they are not telephone or telegraph equipment, they are not a telephone or telegraph facility, or any component thereof.

85. The interception of Plaintiff's and Class Members' email occurs during the transfer of that email to the @gmail.com and @cablone.net user.

86. Following the "extraction" of "e-mail information" or content from Plaintiff's and Class Members' email, Google uses the "e-mail information" or content "for purposes of targeted ads." *See* Exhibit L, ¶ 0087.

87. Apart from these interceptions, Google uses multiple devices throughout the data flow process to intercept the content of Plaintiff's and Class Members' emails to @gmail.com and @cableone.net recipients.

Google's Use of Intercepted Content From Plaintiff's and Class Member's Email

88. Google's interception and use of the content of Plaintiff's and Class Members' electronic communications is not limited to the placement of targeted advertising displayed on a Gmail user's screen.

89. Google intercepts, acquires, and uses the content of Plaintiff's and Class Members' electronic communications to build profiles on users.

90. Upon information and belief, Google utilizes an embodiment of United States Patent Application US 60/676,571, "PHIL," and subsequently issued United States Patents US 7,383,258 B2 and US 7,231,393 B1, in the delivery of email to @gmail.com users, and uses email content obtained

from Plaintiff and Class Members' email to @gmail.com and @cableone.net users for purposes associated with PHIL. *See* Exhibit T. These embodiments are also used by Google, in regard to the content of Plaintiff's and Class Members' email, for other purposes.

91. Regarding this artificial intelligence model, Google speaks of PHIL and the "Learning of PHIL" as follows:

a. "The system we are about to describe does so [capture much of the meaning behind text], by *learning the relationships between words and 'concepts' from a large amount of data.*" Exhibit T, page 1 (emphasis added).

b. "Our system, the Probabilistic Hierarchical Inferential Learner (PHIL) *learns concepts by learning any explanatory model of text.* In Phil's view, small pieces of text are generated in a fairly simple, but incredibly powerful way, through the execution of probabilistic network. Phil *learns the parameters of this network by examining many examples of small pieces of text.*" Exhibit T, page 1 (emphasis added).

c. "Phil considers the important information in a piece of text to be the words (and compounds) used in the text." Exhibit T, page 1.

d. "What this means is that Phil simplifies the analysis of text by not considering the order of the words in the text . . . . This simplification means that Phil treats segments of text as a set of terminals." Exhibit T, page 2 (emphasis added).

e. "Phil's concepts are supposed to *model the ideas in a person's mind* ***before they generate text.***" Exhibit T, page 2 (emphasis added).

f. "These links imply that when a user thinks of once concept, *they are likely to think of another concept or write another terminal afterwards.*" Exhibit T, page 2 (emphasis added).

g. Much like the synapses in the human brain allowing neurons to fire at cells, Google states the following, "We will often say that the node is 'active' or has 'fired' to imply this. For concepts, firing means that the idea of that concept is active, and is able to fire terminals. For terminals, the idea of firing is that the terminals exist in the text to be generated." Exhibit T, page 2.

h. "The system we have built learns the intermediate concepts, the links and the link weights—in order to explain the co-occurrence of words and compounds in small pieces of text." Exhibit T, page 3.

i. "At this point, we have gone over how an existing Phil model could be used to generate text. We have not detailed a couple of the most important aspects of this work: (1) how Phil is learned 2) How Phil is used to estimate the concepts present in

text 3) How Phil is used in practical situations." Exhibit T, page 5.

j. "For this reason, the first implementation of Phil, which we will be detailing here uses "query sessions" from the Google search engine as its small pieces of text." Exhibit T, pages 5-6.

k. "We have also implemented and run Phil on web pages *and other sources of text*, but for the purposes of making this explanation more concrete, we focus on the analysis of query sessions." Exhibit T, page 6 (emphasis added).

l. Google even tracks users' session with Phil, "To be more precise, we define a query session (also referred to as a user session or a session) as the set of words used by a single user on Google *for a single day*. Often users will search for related material, issuing several queries in a row about a particular topic." Exhibit T, page 6 (emphasis added).

m. PHIL is built upon each new piece of data, "Now, for each piece of text (user session) *we replicate the entire model, creating a local network.* Exhibit T, page 6 (emphasis added).

n. "User sessions are stored as one or more files in the filesystem. Their format is such that a lexicon lookup has already transformed each recognized word into a unique integer, which is its terminal_id." Exhibit T, page 21.

o. "We have been discussing Phil in the context of query sessions. However, as pointed out at the beginning of the document, Phil can be run on any source of text, such as web documents." Exhibit T, page 27.

p. "***One interesting technique we have developed is in training Phil on one source of data, while applying it on another source."*** Exhibit T, page 27.

92. On April 9, 2005, Google's Ruchira S. Datta described PHIL as follows:

> Understanding the Meaning of Text
> A text is a bag of words, such as a webpage.
> The person who created the text had certain concepts in mind.
> *To understand the meaning of the text*, we want to model the concepts.
> Model them by their effects:
> when one thinks of a concept, one
> - writes some words
> - thinks of other concepts

See Exhibit U (emphasis added). As to how Google teaches or "learns" the PHIL model, Google's Ruchira S. Datta described it as, "We learn the Phil model from a large number of training texts. For each text, we replicate the whole Phil model into a local network." *See* Exhibit U. As such, PHIL

becomes a newer version each time it is learned.

93. Upon information and belief, Google intercepts, acquires, and uses the content of Plaintiff's and Class Members' electronic communications to create one or more "stopword" lists in the functionality of one or more artificial intelligence or probabilistic semantic learning system(s), one implementation of which is as described in United States Patent Number US 7,409,383 B1. *See* Exhibit V. Such systems are used within Google beyond the Service of Gmail.

94. Google intercepts, acquires, and uses the content of Plaintiff's and Class Members' electronic communications to expand the existing spam filter components for use in POSTINI®, Google's proprietary software which it sells to third parties. Importantly, the POSTINI services sold to third parties is only as good as the massive amounts of data acquired in order to create and update the system. Plaintiff's and Class Member's email afford Google that data for it to then build its product and sell beyond the Service of Gmail.

95. Google intercepts, acquires, and uses the content of Plaintiff's and Class Members' electronic communications to improve the functionality of the Google search engine.

96. Google intercepts, acquires, and uses the content of Plaintiff's and Class Members' electronic communications to increase the minimum bid amounts for keywords in the Adwords system, by counting keyword content extracted from intercepted emails as an "occurrence" of a keyword.

97. Google intercepts, acquires, and uses the content of Plaintiff's and Class Members' electronic communications to increase the net revenue generated by the Adwords program by lowering Google's "traffic acquisition cost" as defined by Google on page 32 of its 10K filed with the Securities Exchange Commission for the year ended December 31, 2010. This is so because Google does not compensate its email customers the way it compensates its AdSense program participants.

98. Google intercepts, acquires, and uses the content of Plaintiff's and Class Members' electronic communications to rank advertisements based upon concepts and meaning in lieu of simply

relying upon purchased "keywords" bought through its AdWords program.

99. Google uses the intercepted content of Plaintiff's and Class Member's electronic communications for other purposes beyond targeted advertising to users and the Service of Gmail.

100. For its interception and use of the content of email, Google uses the same or similar device(s) to acquire the content of Plaintiff's and Class Members' email as it does for its targeted advertisement placement in Gmail. Google also uses these and other devices to acquire the content from Plaintiff's and Class Members' emails and for Google's use beyond targeted advertising and the Service of Gmail.

101. Google's interception and use of the content of Plaintiff's and Class Members' electronic communications is not an activity which is a necessary incident to the rendition of Gmail or to the protection of the rights or property of Google in providing Gmail.

102. Google's interception and use of content of electronic communications from Plaintiff and Class Members is not within the ordinary course of business of an electronic communication service.

103. No party to Plaintiff's and Class Members' email to Gmail users or to @cableone.net users has consented to Google's interception or use of the content of Plaintiff's and Class Members' electronic communications as made the basis of this suit.

Gmail Users Do Not Consent To Google Intercepting And Using Email Content; Cable One Web Mail Users Do Not Consent To Google Intercepting And Using Email Content

104. Google drafted the terms and is the author of its "Terms of Service," "Gmail Legal Notices," "Program Polices," "Privacy Policy," and "Google Apps Terms of Service."

105. In its Google Apps Terms of Service, Google expressly limits its access to "any Content" within the @cableone.net emails to only those instances if Google is "required to do so by law or in a good faith belief that such access" is "reasonably necessary" to (a) satisfy any applicable law, regulation, legal process or enforceable government request, (b) enforce the Terms of Service,

including investigation of potential violations hereof, (c) detect, prevent, or otherwise address fraud, security or technical issues (including, without limitation, the filtering of spam), or (d) protect against imminent harm to the rights, property or safety of Google, its uses or the public as required or permitted by law. *See* Exhibit S. No consent from @cablone.net users is sought elsewhere or provided.

106. The Google "Gmail Program Policies" (Exhibit G) do not mention the scanning, interception, or use of content of email for targeted advertising or for any purpose.

107. By agreeing to the terms of the "Gmail Program Policy," a user of Gmail does not consent to the interception and use of Plaintiff's and Class Members' electronic communications.

108. The Google "Privacy Policy" (Exhibit H) does not mention the scanning, interception, acquisition or use of content of email for targeted advertising or any purpose.

109. In the Google "Privacy Policy," Google expressly limits the information it collects from Gmail users to the following: (1) personal information (specifically defined) provided by the user when the user signs up for a Google Account, (2) information derived from the placement of cookies on the user's computer or device, (3) log information, (4) user communications *directed at* Google, (5) personal information (specifically defined) provided from affiliated Google Services or other sites, (6) information from third party applications, (7) location data from location-enabled services, and (8) unique application numbers from Google Toolbar. *See* Exhibit H, "Information we collect and how we use it." Google omits from any of these categories content, meaning, or other textual information collected from incoming email.

110. By agreeing to the terms of the "Privacy Policy," a user of Gmail does not consent to the interception and use of non-@gmail.com users' electronic communications for any purpose.

111. Paragraph 7.1 of the "Terms of Service" refers the Gmail user to "Google's privacy policy," which can be found at a link on the web-page http://www.google.com/privacy.html. *See*

Exhibit D, ¶ 7.1. As Google acknowledges in the controlling Terms of Service, this privacy policy is in regard to Google's treatment of only the user's "personal information."

112. Paragraph 7.1 of the "Terms of Service" does not refer the user to any document other than the "privacy policy."

113. While the location for the user's finding of the privacy policy is identified at http://www.google.com/privacy.html and is entitled the "Privacy Center," neither the "Privacy Center" nor the various hyperlinks identified on that particular page are incorporated into the "Privacy Policy" or the other terms to which the user must agree. *See* Exhibit D.

114. The information and the hyperlinks found on the "Privacy Center" webpage do not mention the word "Gmail," and from that page a user is not given any indication that any hyperlink might contain additional information related to Gmail.

115. Paragraph 7.2 of the "Terms of Service" states that the user agrees to the use of "*your data* in accordance with Google's privacy policies." *See* Exhibit D, ¶ 7.2. The only privacy "policies" a viewer is directed to are those in the aforementioned "Privacy Policy." No other links are offered to take potential users to an actual policy other than the "Privacy Policy."

116. Paragraph 7.2 of the "Terms of Service" does not ask and does not require the user to agree to Google's use of any other person's data prior to the receipt of that data by the Gmail user.

117. Paragraph 7.2 does not ask and does require the user to consent to Google's interception and use of any other person's data or communications.

118. At ¶ 8.1 of the "Terms of Service," Google places responsibility for content to which a user may have access on the originator of the content. *See* Exhibit D, ¶ 8.1.

119. At ¶ 8.2 of the "Terms of Service," Google notifies the user that the content presented as part of the services may be owned or protected by a third party, and the user may do nothing with that content "unless you have been *specifically told* that you may do so by Google or by the owners of that

Content, in a separate agreement." *See* Exhibit D, ¶ 8.2 (emphasis added).

120. At ¶ 8.3 of the "Terms of Service," Google states:

> Google reserves the right (but shall have no obligation) to pre-screen, review, flag, filter, modify, refuse or remove any or all Content from any Service. For some Services, Google may provide tools to filter out explicit sexual content. These tools include the SafeSearch preference settings (see http://www.google.com/help/cutomoze.html#safe). In addition, there are commercially available services and software to limit access to material that you may find objectionable.

See Exhibit D, ¶ 8.3.

121. At ¶ 8.4 of the "Terms of Service," Google warns users that they may be exposed to content that they find "offensive, indecent or objectionable and that, in this respect, you use the Services at your own risk." *See* Exhibit D, ¶ 8.4.

122. At ¶ 8.5 of the "Terms of Service," Google places sole responsibility on the user for any content created, transmitted, or displayed by user while using any of the services and for the consequences of the user's actions. *See* Exhibit D, ¶ 8.5.

123. The first sentence of ¶ 8.3 of the "Terms of Service," when viewed in the context of the entirety of Section 8 and the remaining sentences within ¶ 8.3, is limited to Google's reservation of rights to protect its services and users. This meaning is also evidenced by the Google Apps Terms of Service which places the language, "Google reserves the right, but shall have no obligation, to prescreen, flag, filter, refuse, modify or move any Content available via Google services," within the section "Appropriate Conduct," clearly meaning Google can protect its services—not acquire content from private conversation.

124. The words "use," "use of Content," "add," or "add to Content" or words of similar meaning are not stated in the ¶ 8.3.

125. No wording in ¶ 8.3 advises users or seeks the consent of users for Google's interception of Plaintiff's and Class Members' email.

126. No wording in ¶ 8.3 advises users or seeks the consent of users for Google's use of the

content of Plaintiff's and Class Members' email that have been intercepted.

127. When a user views the "Terms of Service" webpage, a link called "Terms of Service Highlights" appears in the left column. *See* Exhibit N. Google describes the "highlights" as providing users with the "basics" or a "summary" of the Terms of Service. *See* Exhibit N. In discussing the "highlights" of Google's "Terms of Service," and in particular the Section 8 highlights regarding dealing with Content, Google states:

> About your content . . . .
>
> - Content on our services usually isn't ours. *We may not monitor what we host or link to, although in some limited case we might.* Don't be surprised if you see something you don't like. You can always tell us about it or stop looking.

See Exhibit N, ¶ "About your Content" (emphasis added).

128. At Exhibit N, when Google states, "We may not monitor what we host or link to, although in some limited case we might," Google is summarizing the first sentence of ¶ 8.3 of the "Terms of Service."

129. The words "pre-screen," "review," "flag," "filter," "modify," "refuse," and "remove" are ambiguous in the context of ¶ 8.3 of the Terms of Service, Section 8 of the Terms of Service, the "Terms of Service," the "The Terms of Service Highlights," the "Gmail Legal Notices," the " Program Policies," and the "Privacy Policy" as to whether the definition of these words include the acquisition and use of content of electronic communication as made the basis of this suit.

130. Paragraph 17.1 of the "Terms of Service" advises users that "*Some* of the Services are supported by advertising revenue and may display advertisements and promotions." *See* Exhibit D, ¶ 17.1 (emphasis added). Google does not refer to Gmail as a service to which this provision is applicable.

131. Paragraph 17.1 of the "Terms of Service" further provides, "These advertisements may be targeted to the *content* information stored on the Services, queries made through the Service or other

information." *See* Exhibit D, ¶ 17.1 (emphasis added). Google does not refer to Gmail as a service to which this provision is applicable.

132. At ¶ 17.1 in the "Terms of Service," Google does not advise the user how the "content" is "targeted."

133. At ¶ 17.1 in the "Terms of Service," Google does not advise the user that "content" may be from a non-@gmail.com user.

134. At ¶ 17.1 in the "Terms of Service," Google does not use in ¶ 17.1 the capitalized word "Content" as defined in ¶ 8.1 and used throughout the "Terms of Service," thereby excluding the data or content of others.

135. Plaintiff's and the Class Members' electronic communications sent to @gmail.com users are not matters stored on Google's Gmail.

136. Plaintiff's and the Class Members' electronic communications sent to @gmail.com users are not queries through Gmail or other information.

137. In the context of Gmail, the language, "These advertisements may be targeted to the content information stored on the Services, queries made through the Service or other information," is a false statement.

138. The language of ¶ 17.1 in the "Terms of Service" is ambiguous in the context of the "Terms of Service," the "Gmail Legal Notices," "The Program Policies," and the "Privacy Policy" as to whether the definition of the words in ¶ 17.1 include the acquisition and use of content of electronic communication as made the basis of this suit.

139. Paragraph 17.3 of the "Terms of Service" provides, "In consideration for Google granting you access to and use of the Services, you agree that Google may *place such advertising on the Services.*" *See* Exhibit D, ¶ 17.3. Paragraph 17.3 only allows Google to place advertisements on the unidentified services; it does not address or solicit consent to the interception and use of non-

@gmail.com users' electronic communications as made the basis of this suit.

140. By agreeing to the terms of the "Terms of Service," a user of Gmail does not consent to the interception and use of non-@gmail.com users' electronic communications as made the basis of this suit.

141. Pursuant to ¶ 1.5 of the "Terms of Service," the Additional Terms or Legal Notices for a particular Service, like Gmail, take precedence over any term within the "Terms of Service." *See* Exhibit D, ¶ 1.5.

142. The "Gmail Legal Notices" specifically states, "We will not use any of your content for any purpose except to provide you with the Service." *See* Exhibit F.

143. The electronic communication service known as Gmail is the only applicable Google "Service" within the "Gmail Legal Notices."

144. The Gmail Legal Notices does not operate to obtain consent from Gmail users for the interception and use of electronic communications. The Gmail Legal Notices is Google's affirmative and contractual obligation to the Gmail user.

145. Advertising is not the applicable Google "Service" within the "Gmail Legal Notices."

146. Advertising is not a Google "Service" to Gmail users.

147. Advertising is not a service within Gmail.

148. Advertising in other Google services is not a Google "Service" to Gmail users.

149. When a user subscribes to Gmail, targeted advertising is not mentioned as a service in the Gmail Terms of Service, Program Policies, and Privacy Policies.

150. On the Google web-page, "What is Gmail?" advertising is not mentioned as a service within Gmail. *See* Exhibit O.

151. On the Google web-page, "Google's approach to email, Top 10 reasons to use Gmail," advertising is not mentioned as a "reason" to use Gmail. *See* Exhibit B.

152. Paragraph 17.1 of the "Terms of Service" distinguishes "Services" from advertising revenues which pay for the "Services." *See* Exhibit D.

153. Paragraph 17.3's specific request for the user to agree to the placement of advertisements on Services evidences that advertisements are not "Services."

154. Paragraph 17.3's specific request for the user to agree to the placement of advertisement on Services evidences that advertisements are not part of any "Service."

155. If advertisements, and in particular targeted advertisements based upon the content of Plaintiff's and Class Members' email, were a part of the Services offered by Google, the inclusion of ¶ 17.3 in the "Terms of Service" would be unnecessary.

156. Paragraphs 7.1, 7.2, 8.3, 17.1, and 17.3 are in contradiction with the "Additional Terms" entitled "Gmail Legal Notices" and are invalid to the extent they purport to allow for the interception and use of the content of Plaintiff's and Class Members' email.

157. Paragraphs 7.1, 7.2, 8.3, 17.1, and 17.3 of the "Terms of Service" and "Gmail Legal Notices" are silent with regard to the interception and use of the content of incoming Plaintiff's and Class Members' email.

158. Paragraphs 7.1, 7.2, 8.3, 17.1 and 17.3 of the "Terms of Service" and "Gmail Legal Notices" are ambiguous with regard to consent for the interception and use of the content of incoming Plaintiff's and Class Members' email.

159. Previously identified Exhibit J, entitled "Advertising and Privacy," is a web-page from a link in the "Privacy Center" and listed under "Product Information." Google did not incorporate this webpage into any agreement made by the user for a Gmail account.

160. In the next to last section, entitled, "What information does Google use to serve ads on Gmail?" Google states:

> Google scans the text of Gmail messages in order to filter spam and detect viruses. The Gmail filtering system also scans for keywords in users' emails

> which are then used to match and serve ads. The whole process is automated and involves no humans matching ads to Gmail content.

See Exhibit J, page 4.

161. The sentence, "The Gmail filtering system also scans for keywords in users' emails which are then used to match and serve ads," is a false statement.

162. The sentence, "The whole process is automated and involves no humans matching ads to Gmail content," is a false statement.

163. Further, Plaintiff's and Class Members' emails are not "users' emails."

164. The language in Exhibit J is in contradiction with the "Additional Terms" entitled "Gmail Legal Notices" and is invalid to the extent it purports to notify the user of any interception and use of the content of Plaintiff's and Class Members' email.

165. The language of Exhibit J is ambiguous with regard to consent or notice of the interception of content of incoming non-Gmail user's email.

166. On the "Create an Account" screen (Exhibit C), Google states, "With Gmail, you won't see blinking banners ads. Instead, we display ads you might find useful that are relevant to the content of your messages. Learn more." Exhibit C, "Create an Account," is not part of any agreement made by the user regarding a Gmail account.

167. The sentence, "Instead, we display ads you might find useful that are relevant to the content of your messages," is a false statement.

168. The phrase, "Learn more" is a hyperlink.

169. Looking at Exhibit C, Google does not identify how the "content" is obtained.

170. Looking at Exhibit C, Google only states the ads are relevant to the content of the user's messages.

171. Further, Plaintiff's and Class Members' emails are not the "users'" messages.

172. The language in Exhibit C is in contradiction with the "Additional Terms" entitled

"Gmail Legal Notices" and is invalid to the extent it purports to notify the user of any interception and use of the content of Plaintiff's and Class Members' email.

173. The language of Exhibit C is ambiguous with regard to consent or notice of the interception of content of incoming non-Gmail user's email.

174. By clicking on the hyperlink, "Learn more," on Exhibit C, the applicant is taken to a webpage entitled, "Ads in Gmail and your personal data." *See* Exhibit P. Google did not incorporate the webpage attached as Exhibit P and entitled, "Ads in Gmail and your personal data," into any agreement made by the user for a Gmail account.

175. At Exhibit P, "Ads in Gmail and your personal data," Google states, "In Gmail, ads are related to the content of your messages." This is a false statement. Google further states, "Ad targeting in Gmail is fully automated, and no humans read your email in order to target advertisements or related information." *See* Exhibit P. This is also a false statement.

176. Google does not identify how the content is obtained.

177. Further, at Exhibit P, Google only states the advertisements are relevant to the user's messages and the user's emails.

178. Plaintiff's and Class Members' emails are not the users' messages or the users' email.

179. The language in Exhibit P is in contradiction with the "Additional Terms" entitled "Gmail Legal Notices" and is invalid to the extent it purports to notify the user of any interception and use of the content of Plaintiff's and Class Members' email.

180. The language of Exhibit P is ambiguous with regard to consent or notice of the interception of incoming electronic communications.

181. Gmail users do not consent to the interception of incoming electronic communications for the acquisition of content.

182. Gmail users do not consent to the use of the content of incoming electronic

communications.

183. Neither Plaintiff nor the Class Members have consented to Google intercepting and using the content of their electronic communications.

Targeted Advertising Based Upon Intercepted Content Of Email And The Other Uses Google Makes of Plaintiff's And Class Members' Email Are Not (1) Necessary For The Rendition Of The Service Of Gmail Or (2) For The Protection Of Google's Rights And Property, And Are Not In The Ordinary Course Of Business Of An Electronic Communication Service

184. Pursuant to 28 U.S.C. § 2510(15), an "electronic communication service" means any service which provides to users thereof the ability to send and receive electronic communications.

185. "Gmail" is an "electronic communication service" (as defined by 28 U.S.C. § 2510(15)).

186. A Gmail account holder who sends and receives email through Gmail is a "user" pursuant to 28 U.S.C. § 2510(13).

187. A Gmail "user" (as defined by 28 U.S.C. § 2510(13)) receives Gmail through a Gmail account and through no other service of Google.

188. Emails sent and received by Gmail account holders through Gmail are "electronic communications" (as defined by 28 U.S.C. § 2510(12).

189. Google's acquisition and use of content from Plaintiff's and Class Members' email is not necessary incident to the ability to send or receive email or to operate the electronic communication service known as Gmail.

190. Google has the technical capacity to offer Gmail without intercepting and using the content of Plaintiff's and Class Members' email.

191. Google's acquisition and use of content from Plaintiff's and Class Members' electronic communications is not necessary incident to the protection of the rights or property of the provider of that service.

192. The industry standard for webmail electronic communication services does not include

the interception and use of the content of Plaintiff's and Class Members' email as Google performs on these electronic communications.

193. The ordinary course of business within the industry for webmail electronic communication services for the ability to send and receive electronic communications does not include the interception of content of an electronic communication and the use of its content as Google performs on Plaintiff's and Class Members' email.

194. Google's services that are not related to the ability to send and receive electronic communications are not electronic communication services.

195. Google's targeted advertising and other uses of Plaintiff's and Class Members' email content are not an electronic communication service as defined by 18 U.S.C. § 2510(15).

196. Google's interception and use of content of electronic communications from Plaintiff and the Class Members is not within the ordinary course of business of an electronic communication service.

Plaintiff Has Sent And Continues To Send Email To Gmail Users

197. Within the Class Period, Plaintiff has sent and continues to send e-mails to Gmail account holders and @cableone.net account holders from his non-@gmail.com account.

198. Plaintiff's emails are electronic communications.

199. At the time Plaintiff sent the emails to @gmail.com account holders and @cableone.net account holders, Plaintiff did so from his cableone.net account both prior to and after November 16, 2010.

200. Google intentionally intercepted and used the content of Plaintiff's e-mails to @gmail.com account holders and @cableone.net account holders for Google's commercial gain.

201. In one specific instance and based solely on the content of Plaintiff's email, when Plaintiff's email was received by the @gmail.com account holder, links to competing businesses were

provided for viewing by the @gmail.com account holder.

202. Plaintiff did not consent to Google's intentional interception and use of the content of Plaintiff's emails to @gmail.com account holders or @cableone.net account holders for any purpose.

203. Google's intentional interception and use of the content of Plaintiff's emails or the use of the information derived thereof provided a financial gain to Google.

204. Google did not compensate Plaintiff for the interception and use of the content of Plaintiff's email or the use of the content of Plaintiff's email.

205. Google profited from and continues to profit from the content of Plaintiff's and Class Members' email.

206. Google's storage of Gmail user's data, including received, sent, and unsent email, to include any and all backup or other uses by Google of that data, allows Google the ability to determine the number of non-@gmail.com users' email sent to Gmail users for the two years prior to this suit and continuing.

207. Through Google's storage of Gmail user's email, to include any all backup or other uses by Google of that email, Google can obtain the email addresses of non-@gmail.com user's email sent to Gmail users for the two years prior to this suit and continuing.

208. Plaintiff's and Class Members' emails sent to @gmail.com and @cablone.net users can be identified by the unique Message-ID required of every email pursuant to RFC 2822—Internet Message Format.

CLASS ALLEGATIONS

209. Plaintiff brings this nationwide class action, pursuant to Rule 23 of the *Federal Rules of Civil Procedure*, individually and on behalf of all members of the following Class. The Class consists of:

> All natural persons located within the United States who sent emails from a non-@gmail.com account email addresses to an @gmail.com account e-mail address

from within two years before the filing of this action up through and including the date of the judgment in this case;

AND

All natural persons located with the United States who sent emails from non@gmail.com account email addresses to an @cablone.net account e-mail address serviced by Google from within two years before the filing of this action through and including the date of the judgment in this case.

Excluded from the class are the following individuals and/or entities:

a. Any and all federal, state, or local governments, including but not limited to their department, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions;

b. Individuals, if any, who timely opt out of this proceeding using the correct protocol for opting out;

c. Current or former employees of Google;

d. Entities;

e. Individuals, if any, who seek actual damages and profits from Google;

f. Individuals, if any, who have previously settled or compromised claims(s) as identified herein for the class; and

g. Any currently sitting federal judge and/or person within the third degree of consanguinity to any federal judge.

A. Numerosity

210. The Class is so numerous that joinder of all members is impracticable.

211. The number of separate individuals who sent emails from a non@gmail.com account email addresses to an @gmail.com account email address from within two years before the filing of this action is excess of 100 persons.

212. The number of separate individuals who sent emails from non@gmail.com account email addresses to an @cableone.net account email address serviced by Google from within two years before the filing of this action is in excess of 100 persons.

213. Upon information and belief, the number of Gmail account holders is more than 100

million users. Correspondingly, Plaintiff alleges the numbers for the Class are in the millions.

B. Commonality

214. There are questions of law or fact common to the class. These questions include, but are not limited to, the following:

a. Whether Google intentionally intercepted, endeavored to intercept, or procured any other person to intercept or endeavor to intercept Plaintiff's and Class Members' electronic communications to @gmail.com account recipients and @cableone.net account recipients serviced by Google? Inclusive in this common question are the common questions regarding the elements of 18 U.S.C. § 2511(1)(a) and § 2520 based upon the statutory definitions:

- Whether Google acted intentionally?
- Whether Google acquired any content of Plaintiff's and Class members email?
- Whether that content amounted to any information concerning the substance, purport, or meaning of Plaintiff's and Class Members' emails?
- Whether Plaintiff's and Class Members' emails to the @gmail.com account recipients and @cableone.net recipients were electronic communications?
- Whether Google used an electronic, mechanical, or other device, with the definition of device being statutorily provided?
- Whether statutory damages against Google should be assessed? and
- Whether injunctive and declaratory relief against Google should be issued?

b. Whether Google intentionally used, or endeavored to use, the contents of Plaintiff's and Class Members' electronic communications to @gmail.com account recipients and @cablone.net account recipients serviced by Google knowing or having reason to know that the information was obtained through the interception of the electronic communication in violation of 28 U.S.C. § 2511(1)? Inclusive in this common question are the common questions regarding the elements of 18 U.S.C. § 2511(1)(d) and § 2520 and based upon the statutory definitions:

- Whether Google acted intentionally?
- Whether Google acquired any content of Plaintiff's and Class members email?

- Whether that content amounted to any information concerning the substance, purport, or meaning of Plaintiff's and Class Members' emails?

- Whether Plaintiff's and Class Members' emails to the @gmail.com account recipients and @cableone.net recipients were electronic communications?

- Whether Google used an electronic, mechanical, or other device, with the definition of device being statutorily provided?

- Whether Google used the content of Plaintiff's and Class Members' email?

- Whether statutory damages against Google should be assessed? and

- Whether injunctive and declaratory relief against Google should be issued?

C. Typicality

215. Plaintiff's claims are typical of the claims of the Class in that Plaintiff and the Class sent emails to @gmail.com and @cablone.net account holders, Google intercepted and acquired the emails' contents, Google used or endeavored to use the contents of the Plaintiff's the Class Members' emails, the users of Gmail did not consent to the interception and uses made the basis of this suit, neither Plaintiff nor the Class consented to Google's interception and uses of content made the basis of this suit, Plaintiff and the Class Members are entitled to declaratory relief, statutory damages, and injunctive relief due to Google's conduct.

D. Adequacy of Representation

216. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff's interests do not conflict with the interests of the Class members. Furthermore, Plaintiff has retained competent counsel experienced in class action litigation. Plaintiff's counsel will fairly and adequately protect and represent the interests of the Class.

217. Plaintiff asserts that pursuant to Fed. R. Civ. P. 23(b)(3), questions of law or fact common to the Class Members predominate over any questions affecting only individual members, and

that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

CAUSE OF ACTION
VIOLATIONS OF 18 U.S.C. §§ 2510 et seq

218. Google, as a corporation, is a "person" pursuant to 18 U.S.C. § 2510(6).

219. Throughout the entirety of the conduct upon which this suit is brought, Google's actions were/are intentional.

220. Throughout the entirety of the conduct upon which this suit is brought, Google's actions affect interstate commerce.

221. Pursuant to 18 U.S.C. § 2511(1)(a), Google intentionally intercepted, intercepts, or endeavored or endeavors to intercept the electronic communications of Plaintiff's email and Class members' emails based on the following:

- Google acquired(s) the content of Plaintiff's and Class Members' email;
- Plaintiff's and Class Members' emails are electronic communications;
- Google utilized(s) one or more devices composing of an electronic, mechanical or other device or apparatus to intercept Plaintiff's and Class Members' electronic communications;
- Google's intercepting devices are not a telephone or telegraph instrument, are not telephone or telegraph equipment, are not a telephone or telegraph facility, or are not any component thereof;
- Google does not furnish the devices to Gmail users and users do not use the devices for connection to the facilities;
- The devices are not used by Google, if operating as an electronic communication service, in the ordinary course of its business as a provider of an electronic communication service;
- Google's interception of Plaintiff's and Class Members' electronic communications for undisclosed purposes, for the purpose of delivering targeted advertisements, for purposes beyond the Service of Gmail, in violation of its user agreements, in violation

of its contracts with third parties, and in violation of its statements to users are not within the ordinary course of business of a provider of an electronic communication service

222. Pursuant to 18 U.S.C. § 2511(1)(d), Google intentionally used, uses, or endeavored or endeavors to use the contents of Plaintiff's and Class Members' electronic communications knowing or having reason to know that the information was obtained through the interception of the electronic communication in violation of 18 U.S.S. § 2511(1)(a).

223. Google's interception of and use of the contents of Plaintiff's and Class Members' electronic communications were not performed by an employee while engaged in any activity which is necessary incident to the rendition of Gmail or to the protection of the rights or property of the Google.

224. Google's advertising and other uses of Plaintiff's and Class Members' emails are not a service of an electronic communication service as defined by 18 U.S.C. § 2510(15).

225. Google's advertising and other uses of Plaintiff's and Class Members' emails are not a service of a provider of an electronic communication service as defined by 18 U.S.C. § 2510(15).

226. No party to the electronic communications sent by Plaintiff and the Class Members as made the basis of this suit consented to Google's interception or use of the contents of the electronic communications.

227. As a result of Google's violations of § 2511, pursuant to § 2520, Plaintiff and the Class are entitled to:

a. Preliminary and permanent injunctive relief to halt Google's violations;

b. Appropriate declaratory relief;

c. For Plaintiff and each Class members, the greater of $100 a day for each day of violation or $10,000 whichever is greater; and

d. Reasonable attorneys' fees and other litigation costs reasonably incurred.

JURY DEMANDED

Pursuant to Federal Rule of Civil Procedure 38, Plaintiff demands a jury on any issue triable of

right by a jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all Class members, requests judgment be entered against Defendant and that the Court grant the following:

1. An order certifying the Class and appointing Plaintiff and his counsel to represent the Class;

2. Judgment against the Defendant for Plaintiff's and the Class' asserted causes of action;

3. Appropriate declaratory relief against Defendant;

4. Preliminary and permanent injunctive relief against Defendant;

5. An award of statutory damages to the Plaintiff and the Class, for each, the greater of $100 a day for each day of violation or $10,000, whichever is greater;

6. An award of reasonable attorneys' fees and other litigation costs reasonably incurred; and

7. Any and all other relief to which the Plaintiff and the Class may be entitled.

Respectfully submitted,

/s/ Sean F. Rommel_____
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic case files system of the court. The electronic case system sent a "Notice of Electronic Filing" to individuals who have consented in writing to accept this Notice as service of this document by electronic means. All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by first class mail on this date.

/s/ Sean F. Rommel
Sean F. Rommel