RECORD NO. 10-2007

In The
United States Court of Appeals
For The Fourth Circuit

ROSETTA STONE, LTD.,

Plaintiff – Appellant,

v.

GOOGLE INC.,

Defendant – Appellee,

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA**

**GOOGLE INC.'S MOTION FOR ORAL ARGUMENT
ON PROPOSED INTERVENORS' MOTION TO UNSEAL**

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Defendant-Appellee Google Inc. (Google) respectfully requests that the Court grant oral argument on the Motion to Unseal (Dkt. No. 135) filed by Proposed Intervenors Public Citizen, Eric Goldman, and Martin Schwimmer ("Proposed Intervenors"). Pursuant to Local Rule 27(a), Counsel for Proposed Intervenors and Appellant Rosetta Stone were informed of the intended filing of this motion. Rosetta Stone takes no position on the motion; Proposed Intervenors oppose it.

INTRODUCTION

Google seeks oral argument on Proposed Intervenors' Motion to Unseal recognizing that "[a] motion will be decided without oral argument unless the court orders otherwise." Fed. R. App. P. 27(e). If this Court elects to deviate from its established precedent of remanding factual determinations concerning the appropriateness of sealing to the district court, oral argument is warranted on Proposed Intervenors' motion. First, if Proposed Intervenors were appealing the sealing orders below, Google would be entitled to oral argument unless the conditions of Rule 34(a)(2) were satisfied. Second, oral argument is appropriate to give the parties the opportunity to address any factual or legal concerns the Court may have concerning the unprecedented relief Proposed Intervenors seek.

I. GOOGLE WOULD BE ENTITLED TO ORAL ARGUMENT IF PROPOSED INTERVENORS HAD APPEALED THE DISTRICT COURT'S SEALING ORDERS

In almost all of the decisions cited by Proposed Intervenors, the question of whether documents should be sealed arises before this Court as a review of the district court's sealing or unsealing of documents. *E.g.*, *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 660-65 (8th Cir. 1983); *In re Washington Post Co.*, 807 F.2d 383, 388 (4th Cir. 1986); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677 (3d Cir. 1988); *Va. Dept. of State Police v. Washington Post*, 386 F.3d 567, 578 (4th Cir. 2004). In contrast, Proposed Intervenors do not seek to have their motion decided "as if it were an appeal from a decision of the district court to seal some of its own records." Reply Brief (Dkt. No. 159) ("Reply") at 2. Rather, they argue that Google should have submitted employee affidavits to this Court in opposition to the motion to unseal, and because it did not, this Court should unseal the entirety of the Joint Appendix (Reply at 8, 11)—without permitting further supplementation of the record as the Court allowed in *United States v. Moussaoui*, 65 F. App'x 881, 889 (4th Cir. 2003) ("Upon receipt of the Government's submission, this court will proceed to review the unclassified materials in both appendices and determine which of the documents therein should remain sealed).

If Proposed Intervenors had sought review of the district court's sealing orders, Google would presumably be entitled to oral argument under Rule 34(a) of

the Federal Rules of Appellate Procedure "unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons":

> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or
>
> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Fed. R. App. P. 34(a)(2). Google respectfully submits that the procedural posture Proposed Intervenors selected should not be used to deny Google the opportunity to present oral argument concerning the subject matter addressed by the district court's rulings. *See, e.g., Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (referencing statement made at oral argument concerning appropriateness of sealing documents accompanying successful motion for summary judgment).

II. ORAL ARGUMENT IS APPROPRIATE IF THE COURT IS CONSIDERING GRANTING THE UNPRECEDENTED RELIEF SOUGHT BY PROPOSED INTERVENORS

By filing a motion to unseal before this Court instead of appealing the district court's order sealing the documents at issue, Proposed Intervenors have asked this Court to act as a fact finder. Oral argument should be permitted before the Court agrees to undertake such a remarkable role in a civil case between

corporations.[1] The need for oral argument is even greater if this Court is inclined to grant the unprecedented relief Proposed Intervenors seek of ordering the Joint Appendix unsealed in its entirety. Oral argument would permit Google to address any factual concerns the Court may have, including whether submission of further evidence is necessary, as well as allow the Court to question the parties concerning the unprecedented nature of Proposed Intervenors' request.

Proposed Intervenors originally asked this Court to develop an evidentiary record by requiring Google to prepare a *Vaughn* index. Motion to Unseal (Dkt. No. 136) ("Mot.") at 14. Although abundant precedent teaches that the appropriate procedure for addressing concerns about the propriety of sealing is remand to the district court, and Proposed Intervenors cited no authority ordering non-government entities to prepare a *Vaughn*-index, Google nonetheless prepared an index that described the documents in question and identified the confidential information they contained. (Dkt No. 158.) Yet since Google provided much of the information Proposed Intervenors claimed to seek in their opening brief, they

[1] Such civil cases do not implicate the judiciary's role in providing constitutional checks on the executive and legislative branches, which requires particular vigilance in cases in which the government is party. *See, e.g., Moussaoui*, 65 F. App'x at 886-87 (noting district court cannot assume Congress struck the proper balance in the Classified Information Procedures Act); *In re Washington Post Co.*, 807 F.2d at 391 (expressing concern that the judiciary should not "abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present" because "[h]istory teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions").

now take the position that Google should have submitted affidavits by Google employees to this Court describing exactly how the disclosure would enable the harm identified. Reply at 8. Side-stepping the question of how Google could provide sufficient detail to satisfy them without disclosing the very information it seeks to keep confidential, Proposed Intervenors argue that the entire Joint Appendix should be unsealed. Reply at 10-11. Neither of Proposed Intervenors' novel positions should be accepted without oral argument. *See, e.g., Green v. Young*, 454 F.3d 405, 407 (4th Cir. 2006) (setting motion raising issue of first impression in this circuit on the oral argument calendar).

Except for *Moussaoui*, none of the cases cited in Proposed Intervenors' reply brief supports the proposition that an appellate court can or should develop a factual record upon which to base its decision to unseal documents rather than remanding to the district court to do so. Indeed, they instruct the opposite. For example, in *In re Washington Post Co.*, this Court explained: "Where a request for the sealing of documents has been made, the district court . . . must . . . provide interested persons with notice of the government's motion and an opportunity to voice their objections" and then balance the First Amendment right of access against the interest in closure. 807 F.2d at 391. Because the district court had failed to do so, intervenor's motion to unseal documents was remanded for the district court to reconsider it applying the constitutional standards set forth in the

opinion. *Id.* at 393. The Court did not undertake its own determination of whether sealing was factually proper, nor reference *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984) (cited in Reply at 3, 4) as authorizing such a determination.

In addition, Proposed Intervenors cite *Iowa Freedom*, 724 F.2d at 663, for the proposition that "courts should not simply take representations of interested counsel on faith." Reply at 6. However, in that opinion the Eighth Circuit actually affirmed the district court's sealing order without the existence of affidavits or a *Vaughn*-index, notwithstanding the observation that "[o]rdinarily . . . a representation [of counsel that trade secrets are involved] should not be accepted without question. *Iowa Freedom,* 724 F.2d at 663. As that court noted, the district court, having tried the underlying case and being familiar with the discovery proceedings, including the protective order, "was already intimately familiar with the trade-secrets issue and its implications." *Id.* Similarly, the other cases cited by Proposed Intervenors, with the exception of *Moussaoui*, involve appellate review of a district court's findings, not the appellate court making such findings in the first instance. *See, e.g., Littlejohn*, 851 F.2d at 685; *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991).

Not even *Moussaoui* supports Proposed Intervenors' extreme position of requiring affidavits or an index that identifies information such as author, recipient,

date, and a detailed description of the contents of documents sought to keep sealed. Rather, the Court directed the Government to identify "with as much specificity as possible, what material is classified," its views concerning whether the non-classified documents were subject to a common law or First Amendment right of access, and its arguments concerning continued sealing of non-classified documents. *Moussaoui,* 65 F. App'x at 887 n.5, 889 (rejecting intervenors' suggestion that the Court not defer to the Government's identification of documents as "classified" and identifying further information sought). This is essentially the same information Google has already provided as part of its response to the motion to unseal. Dkt. No. 158.

Moreover, *Moussaoui,* a criminal case involving terrorism and the sealing of government records, stands on far different ground from a civil trademark case involving corporate documents. As the Eighth Circuit explained in *Iowa Freedom:* "We stress that this case involves *private commercial conduct*. If the material still under seal had some substantial relation to an important governmental or political question, an entirely different question would be presented, and we might be required to embark on the weighing process urged on us by petitioners." 724 F.2d at 664 (noting that at oral argument petitioners suggested "no satisfactory criteria" for weighing the property rights in confidential information against First Amendment rights) (emphasis added).

Nor do *Bose*, 466 U.S. 485, or *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009) (cited in Reply at 3-4), support the idea that an appellate court can find facts not already in the record in deciding a motion to unseal.[2] Both address the standard of review and the level of deference afforded to district courts in the context of tort claims arising from speech. The First Amendment was not merely "implicated" in these decisions, but was at the substantive core of the merits—not bootstrapped onto the evaluation of the record through an unsealing motion. *See Bose*, 466 U.S. at 514; *Snyder*, 580 F.3d at 218.

Moreover, neither *Bose* nor *Snyder* suggests that in reviewing *the record*, appellate courts should take evidence to supplement the record developed by the district court. *See, e.g., DiBella v. Hopkins*, 403 F.3d 102, 116 (2d Cir. 2005) ("[Exercising independent judgment] does not mean that an appellate court may sit as an independent trier of fact, nor is the independent review function equivalent to a de novo review of the ultimate judgment itself."). Nor do any of the cases Proposed Intervenors cite suggest that an appellant should introduce affidavits or other evidence *for the first time* on appeal for the appellate court to consider. Yet this is exactly what Proposed Intervenors ask the Court to do here. At most, if the Court agrees with Proposed Intervenors that the record below does not support the

[2] Like *Iowa Freedom*, *Littlejohn*, and *Republic of Philippines*, Proposed Intervenors first cited *Bose* and *Snyder* and the arguments based on them, in their reply brief. Oral argument would also provide Google with the opportunity to address this new authority.

district court's sealing, the Court should remand to the district court to find the facts necessary to determine whether the documents have been properly sealed.

Finally, Proposed Intervenors have cited ***no*** authority in which a Court of Appeals has itself unsealed documents sealed by the district court merely upon request, whether by motion, appeal, or mandamus (except upon consent of the parties or recognition that the parties had already disclosed that information). *See Moussaoui*, 65 F. App'x at 889-90 (unsealing certificate of confidentiality and motion to seal oral argument and the motion to seal those two pleadings because the government's justification for sealing was to keep confidential the substance of the district court's order being appealed—which was disclosed by the public portion of the government's brief); *Rushford*, 846 F.2d at 252 (unsealing documents party conceded did not need to be sealed). As discussed above, not even the *Moussaoui* court took such drastic action of unsealing the entire record. This Court should not be the first to grant such sweeping relief without allowing oral argument.

CONCLUSION

For the foregoing reasons, this Court should grant Google's Motion for Oral Argument on Proposed Intervenors' Motion to Unseal.

February 15, 2011 Respectfully submitted,

By /s/ Margret M. Caruso

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CERTIFICATE OF SERVICE

I certify that on February 15, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Margret M. Caruso

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