UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-15522

ROCKY MOUNTAIN NATIONAL BANK,

Plaintiff-Appellee,

v.

GOOGLE, INC.,

Defendant-Appellee,

MEDIAPOST COMMUNICATIONS,

Intervenor-Appellant.

On Appeal from a Final Order of the
United States District Court for the
Northern District of California
No. 5:09-cv-04385-JW

BRIEF FOR APPELLANT MEDIAPOST COMMUNICATIONS

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August 16, 2010

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CORPORATE DISCLOSURE STATEMENT'

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, I hereby certify that appellant MediaPost Communications is the d/b/a/ of Fadner Media Enterprises, LLC. It has no parent corporation and no corporation owns 10% or more of it.

/s/ Paul Alan Levy
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MISCELLANEOUS

In this case, a bank that mistakenly sent records to a Google email address sued Google to identify the owner of the e-mail address and to freeze the address, without any allegation that the owner had violated the bank's rights in any way and without any proper basis either for suing Google or for federal court jurisdiction. Proceeding ex parte, without complying with Rule 65 or affording due process to either Google or the address owner, and despite the fact that the bank's basis for proceeding in federal court was highly tenuous under well-established precedent, the bank secured a temporary restraining order ("TRO") compelling Google to identify the address owner and to inform the Court how it complied with the TRO. Instead of defending its user's rights, Google gave its Compliance Report, explaining how it was complying with the Court's order, directly to chambers instead of filing it on the public docket.

The document submitted by Google is a judicial record that is subject to the presumption of public access. Members of the public, including appellant MediaPost, an Internet news publisher that intervened to invoke the right of public access, should be able to see Google's report so that they can understand how the Court's TRO was satisfied and why the Court dismissed the action. More broadly, disclosure of the document may help the public assess the district court's performance from the outset of this case, and consider whether better protections are needed against ex parte proceedings involving anonymous Internet speakers. The district court's denial of

MediaPost's motion to unseal the report should be reversed, and the case remanded with instructions to unseal Google's Compliance Report, subject to redactions needed to protect the personal privacy of the account holder.

JURISDICTIONAL STATEMENT

(A) Subject Matter Jurisdiction Below. Plaintiff Rocky Mountain Bank is a citizen of Wyoming and defendant Google is a citizen of California. Plaintiff invoked diversity jurisdiction under 28 U.S.C. § 1332. Regardless of the propriety of plaintiff's invocation of diversity jurisdiction over its purported claims, the district court had subject matter jurisdiction to address MediaPost's motion to unseal, which concerned the status of the district court's own records. *Cf. Willy v. Coastal Corp.*, 503 U.S. 131, 135-39 (1992) (holding that lack of subject matter jurisdiction does not deprive district court of power to resolve matters "collateral to the merits," and that "[t]he interest in having rules of procedure observed . . . does not disappear upon a subsequent determination that the court was without subject-matter jurisdiction").

(B) Appellate Jurisdiction. The Court has jurisdiction under 28 U.S.C. § 1291 over this appeal from a post-judgment final order. In *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003), and *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995), third parties were permitted to appeal the denial of motions to unseal that were, like the motion in this case, filed after the parties had

settled their case and the court file was therefore closed. In *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-1179 (9th Cir. 2006), *Phillips v. General Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002), and *Beckman Industries v. International Ins. Co.*, 966 F.2d 470, 472-473 (9th Cir. 1992), the Court allowed parties to appeal from orders on unsealing motions after the underlying case had been settled.

(C) Timeliness of Appeal. On December 4, 2009, the district court denied MediaPost's motion for leave to intervene and motion to unseal. ER 11-14. On December 9, 2009, MediaPost moved to reconsider that decision. ER 5, DN 47. On January 27, 2010, the district court granted appellant's motion for leave to intervene for the purpose of seeking unsealing, but denied the motion to unseal. ER 38-44. On February 26, 2010, appellant filed its notice of appeal. ER 45.

ISSUES PRESENTED FOR REVIEW

1. Is a Compliance Report, which was presented to the district judge so that he could assure himself that the defendant had complied with his injunction, and was required by that injunction to be presented to the court, a judicial record that is presumptively required to be open for public inspection?

2. Did the parties make a showing of the need for confidentiality of all parts of Google's Compliance Report, sufficient to overcome the presumption that judicial

records are open for public inspection?

STATEMENT

A. Facts

This action began when a customer of Rocky Mountain Bank asked the bank to send some of his records to a third party by email. Rocky Mountain, however, did not send its email to the correct address of the third party; instead, the email was sent to an address in the form XXX@gmail.com. This email account belonged to an unidentified individual who is referred to in this brief as Jane Doe (MediaPost does not know the gender of the Doe). Even worse, Rocky Mountain did not simply attach records belonging to the requesting customer to the mis-addressed email, but attached information relating to more than one thousand different customer accounts. After discovering the error and making an unsuccessful effort to recall the email, the president of Rocky Mountain sent a second email to the gmail address in question, "instructing" the recipient to delete the mistaken email without opening it, and "requesting" the recipient to contact the bank to discuss the matter. Hendrickson Affidavit, Docket Entry No. 20 ("DN 20 "), ¶ 12.

At this point, Rocky Mountain did not know whether Jane Doe had actually received the email and its attachments, or whether Jane Doe had retained the materials. It is quite common for owners of email addresses to receive large amounts

of spam that purport to be communications from banks, often warning the recipients that their accounts have been compromised, asking the recipients to contact the sender immediately, and soliciting information about the recipient. Such emails are often referred to as "phishing." *See* http://en.wikipedia.org/wiki/Phishing. The Federal Trade Commission has specifically warned consumers about opening email and attachments that purport to be from banks because that is a common form of phishing. *See* http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt089.shtm. In fact, many email providers have spam filters that are designed to eliminate purported communications from banks unknown to the recipient. One feature of gmail that makes it most attractive in the market for email services is gmail's reputation for having a very effective spam filter. *See* http://www.askdavetaylor.com/does_gmail_ do_ a_ good_job_of_filtering_spam.html.[1/]

B. Proceedings Below

1. The Flawed Underlying Lawsuit

Seeking to ensure that its customers' information remained private, Rocky Mountain decided to file suit to prevent Jane Doe from making any improper use of

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[1/] The court can take judicial notice of these widely reported facts. After the case ended, a local newspaper in Rocky Mountain's home town reported that the mistaken email had not been opened by the gmail customer. http://www.jhnewsandguide.com/article.php?art_id=5110. MediaPost does not know whether this is a fact that was mentioned in Google's report to the court.

the documents that the bank had sent. However, Rocky Mountain did not avail itself of the well-established procedure for suing an Internet user and seeking a subpoena to identify him or her, which can be enforced after the Doe receives notice and has an opportunity to oppose the discovery by showing that the plaintiff does not have a substantial claim of wrongdoing. [2/]

Instead, on September 17, 2009, Rocky Mountain filed this action against Google only, alleging two counts: one for a declaratory judgment that it was entitled to identify Doe, DN 18, at 6, and one for injunctive relief against both Google **and Doe** (even though she was not named as a party), seeking to enjoin them both from accessing, distributing or using the documents, and ordering Google to identify Doe. *Id.* at 7. The Bank filed the action under seal on the theory that it needed to prevent embarrassment, but with the result that nobody was before the court to point out the many flaws in the Bank's complaint.

Those flaws are relevant to this appeal because, without any notice, the judge entered a TRO that constituted a gross invasion of the rights of an anonymous Internet user. MediaPost suspects that the document whose disclosure is sought will show that the invasion of individual rights was completely unnecessary, and members

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[2/] *In re Anonymous Online Speakers*, 2010 WL 2721490 (9th Cir. July 12, 2010); *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Cal. App. 6 Dist. 2008); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005).

of the public may want to point to that needless invasion in arguing that there is a need for greater protection of individual rights in future such cases. The remainder of this subsection of the Statement of Proceedings Below dissects the complaint's flaws in some detail.

First, the Verified Complaint explains the basis for Rocky Mountain's concern, but never spells out a cognizable claim for relief against either Doe or Google. Even assuming that Jane Doe did something wrong and could have been sued, Google was immune from suit for any misuse by Doe of her email account, under section 230 of the Communications Decency Act, 47 U.S.C. § 230. *Fair Housing Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*). Even if the claim were predicated on some sort of state law intellectual property right, this Court has held that only federal intellectual property claims are exempt from section 230 immunity, *Perfect 10 v. CCBill*, 488 F.3d 1102 (9th Cir. 2007), and the bank asserted no federal claims of any kinds. Thus, none of the claims in the case was a proper basis for any relief against Google.

Moreover, although the complaint sought relief against Doe, it did not name Doe as a defendant. There was a reason for this omission. Although Rocky Mountain Bank referred in passing to federal and state banking regulations that required the bank to try to protect its customers' privacy, those regulations did not

give the bank any cause of action against either Google or Doe, and they did not create a basis for federal question jurisdiction. Indeed, although Rocky Mountain labeled each of its counts a "cause of action," neither count purported to state any legally cognizable claim for relief. The counts just relied on principles of equity which, it contended, gave it a right to relief.

Because these principles of equity presumably arose under state law, the bank asserted that the district court had diversity jurisdiction. But in order to obtain relief, given Google's section 230 immunity, Rocky Mountain would have had to sue Doe; and, in any event, Rocky Mountain was seeking an injunction against Doe, and therefore Doe should have been named as a defendant. A diversity action cannot be filed against a Doe defendant.[3/] After all, "the essential elements of diversity of citizenship jurisdiction must be alleged in any pleading asserting a claim for relief," 13E Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3602.1, at 77-79 (3d ed. 2008); *Brown v. Keene*, 33 U.S. (8 Pet.) 112 (1834); Federal Rules of Civil Procedure, Rule 8(a)(1). Because Rocky Mountain could not plead Doe's citizenship, it could not have sued Doe in federal

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[3/] *Menzies v. Doe*, 194 F.3d 174 (D.C. Cir 1999) (mem.); *Howell by Goerdt v. Tribune Entertainment Co.*, 106 F.3d 215, 218 (7th Cir. 1997); *McMann v. Doe*, 460 F.Supp.2d 259, 264 (D. Mass. 2006); *Meng v. Schwartz*, 305 F.Supp.2d 49 (D.D.C. 2004); *Stephens v. Halliburton Co.*, 2003 WL 22077752 (N.D. Tex. Sept. 5, 2003), at *5.

court. Nor could it solve this problem by suing Google alone, because Doe remains the real party in interest and a diversity suit is subject to dismissal unless the diversity of citizenship of all the defendants is alleged in the complaint. Yet the relief sought in the case was plainly prejudicial to the interests of Doe; the case should never have been allowed to proceed given her absence, given the fact that her presence would have destroyed diversity, and given the availability of state court as an alternate forum. *Aguilar v. Los Angeles County*, 751 F.2d 1089, 1094 (9th Cir. 1985).

2. TRO Sought and Granted Without Notice.

On September 18, 2009, Rocky Mountain sought a temporary restraining order ("TRO") and a preliminary injunction. In violation of Rule 65, Rocky Mountain neither gave notice to the adverse party nor furnished any explanation of why notice could not be given before the TRO was heard. Indeed, because the Bank had discovered the problem on August 17 but did not seek a TRO until September 18, it is hard to believe that the time required for effective notice would have caused undue injury to the legitimate interests at stake.[4/] Moreover, calling the relief sought a TRO

[4/] Rocky Mountain recited that it had sent to emails to Jane Doe but had received no response; but it did not attach the emails, from which the court might have been able to judge whether they were of the sort that would likely have been disregarded as spam from an unknown bank. For example, an effective notice might have been labeled as "Notice of Subpoena." Indeed, the most effective way to achieve notice to the Doe would have been to enlist the cooperation of Google itself, whose communications to the Doe would be less likely to be

was a misnomer, because the relief sought — an injunction against dissemination of the mis-emailed documents and disclosure of Doe's identity, which was the entire relief sought in the Complaint — could not reasonably be characterized as "interim relief" pendente lite. Like the Complaint, the TRO motion was filed under seal so that Rocky Mountain could avoid having to tell its customers what had occurred. DN 13, at 3 (information "could potentially alarm the Bank's customers").

District Judge Ronald Whyte denied the motion to file under seal, DN 11, and, on September 21, Rocky Mountain refiled the complaint and the motion papers in redacted form, removing the Doe's email address. The case was then reassigned to District Judge James Ware. DN 21. Then, on September 23, without shortening the time for Google or the Doe to file a response, without giving Google any opportunity to respond to the motion, and without taking steps to ensure that Doe had received notice of the motion to identify her, the district court granted the TRO in its entirety, including relief against Jane Doe. Document No. 23. The order provided:

> (1) Google and the Gmail Account holder are temporarily enjoined from accessing, using, or distributing the Confidential Customer Information;
>
> (2) Google shall immediately deactivate the Gmail Account;
>
> (3) Google shall immediately disclose to Plaintiff and the Court the status of the Gmail Account, specifically, whether the Gmail Account is

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discarded as spam and to be ignored.

> dormant or active, whether the Inadvertent Email was opened or otherwise manipulated, and in the event that the Gmail Account is not dormant, the identity and contact information for the Gmail Account holder.

The Court scheduled a preliminary injunction hearing for September 28 and directed Google to file any response to the preliminary injunction motion by September 25.

3. Google's Compliance Report and the End of the Suit.

Instead of seeking reconsideration (or filing an immediate appeal and seeking a stay pending appeal) to protect its customer's rights, Google complied with the order. Specifically, on September 25, 2009, it "lodged a Report with the Court in response to, and in compliance with, the Court's September 23, 2009 Order Granting Temporary Restraining Order." ER 28. The Report itself is not on the district court's docket, and its contents were not made public, even in redacted form. Google has asserted that the document includes information identifying Jane Doe, DN 44, at 4, but it has never stated that the document is limited to identifying information.

On September 25, Google and Rocky Mountain filed a joint motion to continue the preliminary injunction hearing and to vacate the TRO. The Court continued the hearing but declined to vacate the TRO, thus leaving the gmail account frozen. On September 28, the parties filed a stipulation to dismiss the action with prejudice. In light of that stipulation, the Court vacated the TRO.

4. MediaPost's Unsuccessful Effort to Unseal the Compliance Report.

MediaPost reporter Wendy Davis broke the story about the district court's order granting plaintiff's request for a TRO and ordering the gmail user's account deactivated, and published stories about developments in the case.[5/] Subsequently, there was extensive coverage and criticism of this course of events, both in the United States and elsewhere, as bloggers and reporters commented on Rocky Mountain's use of the courts to shut down an email address and identify its user to make up for its own errors.[6/] MediaPost sought to review the Compliance Report to help the public understand how the Court reached its decision to vacate the TRO and to monitor how private parties are using — or abusing — courts' powers in this new species of case.

Accordingly, MediaPost filed a motion for leave to intervene for the purpose of moving to unseal, as well as a motion to unseal the Compliance Report. On December 4, 2009, District Judge Ware initially denied the motion for leave to intervene, on the ground that the action had been settled and there was therefore no

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[5/] *See* http://www.mediapost.com/publications/?fa=Articles.showArticle&art _ aid=114264; http://www.mediapost.com/publications/?fa=Articles.show Article& art_aid=114347.

[6/] *E.g.,* http://www.techdirt.com/articles/20090924/1705386309.shtml; http://www.dailymail.co.uk/sciencetech/article-1216883/Bank-sends-confiden tial-details-wrong-e-mail-address--judge-orders-Google-suspend-account.html; http://www.telegraph.co.uk/technology/google/6239172/Bank-forces-Googl e-to-close-random-GMail-account-over-rogue-message.html.

current case or controversy in which MediaPost could intervene. The court denied the motion for leave to unseal as moot (because only after being granted leave to intervene may a party seek unsealing). DN 46. On December 9, 2009, MediaPost timely sought reconsideration of the denial of the motion to intervene, pointing out that this Court had frequently allowed intervention for the purpose of unsealing documents in cases dismissed pursuant to a settlement. DN 47.

Judge Ware granted leave for this reconsideration to be sought, DN 48, and ultimately granted the motion for leave to intervene. DN 53, ER 38-44. However, in the same order, Judge Ware denied the motion to unseal. He reasoned that he had only "ordered Google to 'lodge' with the Court" its Compliance Report. ER 40 (internal quotation marks in original, without citation to any document containing the quoted word). Even though the document was provided "for the sole purpose of ensuring compliance with a TRO," ER 42, Judge Ware felt that the semantic distinction between lodging and filing was enough to take the document outside the presumptive requirement of public access to judicial records. *Id.* Moreover, he noted that, after Google submitted its Compliance Report, the parties settled the case, and, although "the public has some general interest in monitoring the actions of the judiciary, . . . that interest [does not] outweigh the respective interests of the parties in this case to negotiate a mutually beneficial settlement." *Id.* Judge Ware did not

cite any evidence that concealment of the Compliance Report was a condition of the settlement, nor that providing public access to the Report would improperly reveal confidential settlement negotiations.

Judge Ware also noted that if Google had simply provided the Compliance Report to Rocky Mountain without giving it to the court as well, the report would not have been a judicial record; Judge Ware opined that the mere fact that the Report **was** given to the court "to ensure that Defendant had complied with the terms of the TRO" should not turn the document into a judicial record. ER 42. The judge tried to distinguish the Second Circuit's ruling in *IBM v. Edelstein*, 526 F.2d 37 (2d Cir. 1975), where the Second Circuit refused to allow a district judge to keep substantive papers out of the judicial record by requiring the parties to provide them to chambers instead of filing them because, in that case, it was a **party** that wanted the papers to be filed, while here, neither of the parties to the case had sought filing. ER 43.

SUMMARY OF ARGUMENT

MediaPost seeks to exercise its common law right of access to obtain a redacted copy of the Compliance Report because the document may shed light on an abuse of the judicial process by a financial institution, the too-easy acquiescence of one of America's biggest companies in that abuse, and the failure of the district judge below to follow proper procedures that might have protected the rights of Jane Doe,

the Internet user whose email account was frozen and whose identity was revealed to the Bank. It is possible that the Compliance Report will reveal that the judicial intrusion on her rights was completely unnecessary; or perhaps it will reveal the opposite. But MediaPost pursues this appeal because it will enable MediaPost and the general public to understand better what happened in this case, and to assess the need for better protection against a repetition.

Google's Compliance Report is a judicial record, subject to the presumption of public access, because the district judge required that it be submitted to him so that he could determine whether his TRO had been obeyed, and because Google submitted it to him for that purpose. Papers submitted to the court to influence the adjudicatory process, especially adjudications about the merits of a dispute, are precisely the sort of documents that the public has the greatest right to see. Post-hoc use of the label "lodge" instead of "file," and submission of papers directly to the judge in chambers instead of filing under seal on the docket, cannot be allowed to undercut the public's right of access. And the prospect that the parties to the case, or indeed the judge himself, may be embarrassed if disclosure of a redacted document shows that the intrusion on the rights of Jane Doe was unnecessary and could have been avoided if the case had been more carefully handled, cannot avoid the public's right to hold the judicial process accountable. The only legitimate privacy interest at stake — the

privacy of Jane Doe — can be addressed by redaction of any details in the document that could lead to her identification.

ARGUMENT

GOOGLE'S REPORT TO THE COURT IS A JUDICIAL RECORD THAT MUST BE DISCLOSED UNDER THE FIRST AMENDMENT AND THE COMMON-LAW REQUIREMENT OF PUBLIC ACCESS.

The Supreme Court and this Court have repeatedly upheld the public right of access to judicial records. *E.g.*, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 677-679 (9th Cir. 2010); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-1179 (9th Cir. 2006); *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *San Jose Mercury News v. United States District Court*, 187 F. 3d 1096, 1102 (9th Cir. 1999); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). As Judge Posner has explained,

> The general rule is that the record of a judicial proceeding is public . . .. Not only do such records often concern issues in which the public has an interest . . . but also the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret.
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> *Jessup v. Luther*, 277 F.3d 926, 927 (7th Cir. 2002).

And this Court has summarized the law this way:

> Unless a particular court record is one "traditionally kept secret," a "strong presumption in favor of access" is the starting point. . . . A party

> seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the "compelling reasons" standard. . . . That is, the party must "articulate[ ] compelling reasons supported by specific factual findings," . . . that outweigh the general history of access and the public policies favoring disclosure, such as the "'public interest in understanding the judicial process.'"

Kamakana v. Honolulu, 447 F.3d at 1178-1179.

Several circuits have also held that the First Amendment creates a right of access to judicial records in civil cases, *e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120-121 (2d Cir. 2006); *Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994), but this Court has not addressed that question. The Court should follow the Second and Seventh Circuits on this issue.

A district court's decision about whether to unseal a given judicial record is reviewed for abuse of discretion. However, the determination of whether a given document is a judicial record is a legal question and hence is reviewed de novo. *Phillips v. General Motors*, 307 F.3d 1206, 1213 (9th Cir. 2002) ("We review de novo whether the presumption of access applies to [a particular court document].").

A. Google's Report to the Court Is a Judicial Record.

Google's Compliance Report to the Court is a "judicial record" subject to a right of presumptive public access under this Court's precedents. The purpose of the Report was to explain Google's actions and to assure the court below that its order

had been obeyed, and thus to aid that court in ensuring compliance with its orders. The Seventh Circuit has applied the common law right of access to "those records of a proceeding that are filed in court or that, while not filed, are relied upon by a judicial officer in making a ruling or decision." *Smith v. United States District Court Officers*, 203 F.3d 440, 442 (7th Cir. 2000), *citing Grove Fresh*, 24 F.3d at 897. Likewise, the Third Circuit has held that "[w]hether or not a document or record is subject to the right of access turns on whether that item is considered to be a 'judicial record.' The status of a document as a 'judicial record,' in turn, depends on whether a document has been filed with the court **or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings**." *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) (emphasis added). Similarly, in *Amodeo v. Meyer*, 44 F.3d 141, 145 (2d Cir. 1995), the court held that whether the document had been "filed" was not determinative in assessing whether it was a judicial record. Rather, any document that is "relevant to the performance of the judicial function and useful in the judicial process" is a judicial document. *See also United States v. Gonzales*, 150 F.3d 1246, 1255 (10th Cir. 1998) (whether certain filed documents were judicial documents depended on whether "the . . . documents are . . . directly related to the process of adjudication"); *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997) ("[W]hat makes a document a judicial record and subjects it to the common law

right of access is the role it plays in the adjudicatory process.").

Google's Compliance Report to the court below easily satisfies this test. First, Judge Ware demanded the Report to satisfy himself that his TRO had been obeyed — that is, so that he could decide for himself that no enforcement steps were needed. We must assume that he found the contents satisfactory, because no compliance proceedings were instituted. Moreover, in their subsequent joint filing asking the court to vacate the TRO, DN 28, both parties expressly relied on the information contained in the report to show that the relief requested in the motion for a preliminary injunction had become moot, that there was no longer any need for a hearing on a preliminary injunction, and that the TRO itself should be vacated. *Id.* at 2, ¶¶ 2, 3. In his decision vacating the TRO, Judge Ware said that he had relied on the pleadings submitted to him. DN 39. And in his order denying the motion to unseal, Judge Ware said that the "purpose of lodging the Report was to satisfy the Court that Defendant had complied with the TRO's other provisions," DN 53 at 4; *see also id.* at 5 ("Defendant also provided the Court with a copy of the Report to ensure that Defendant had complied with the terms of the TRO . . . . The Court . . . accepted the document . . . for the sole purpose of ensuring compliance with a TRO."). The court below was obviously treating the report as a pleading submitted to inform the court in its deliberations in the case.

Although we have not identified a case where a party's report to the court about compliance with an injunction has been the subject of litigation under the public-access-to-court-records doctrine, in several cases where monitors have been appointed to assist in the implementation of consent decrees, the monitors' written reports to the court have been treated as judicial records, subject to the general rule of public access. In *B.H. v. Ryder*, 856 F. Supp. 1285 (N.D. Ill. 1994), *aff'd sub nom B.H. v. McDonald*, 49 F.3d 294 (7th Cir. 1995), the court described the terms of a consent decree entered into between a class of neglected children and the Illinois Department of Children and Family Services (DCFS). The periodic reports of the court-appointed monitor for which that decree provided were filed publicly, appeared on the docket, and were available to the public. *Id.* at 1291. In affirming a district court order excluding the public from in-chambers conferences held to negotiate resolution of certain disputes under the decree, the Seventh Circuit emphasized that the interest in public scrutiny of the judicial process had been satisfied because "the public had access to all of the monitor's reports, the DCFS's responses to the reports, and the plaintiff's written replies to both of these submissions." 49 F.3d at 301. *Accord*, *Chao v. Estate of Fitzsimmons*, 349 F. Supp.2d 1082 (N.D. Ill. 2004).

Similarly, the Second Circuit's two decisions in *Amodeo* involved a court officer appointed pursuant to a consent decree between the United States and union

local to investigate allegations of corruption. *See United States v. Amodeo*, 71 F.3d 1044, 1047 (2d Cir. 1995) (describing mechanics of court officer's role in implementing the consent decree). The court-appointed monitor was not required to file reports with the court, but did so anyway. These reports — both those she intended to be publicly available and those she believed should be kept confidential — are reflected in the docket. *See* S.D.N.Y Docket No. 1:92-cv-07744RPP ("*Amodeo* Docket"). The docket reflects her public reports as "letters" and also includes a listing of the materials that she preferred remain confidential. *Amodeo*, 71 F.3d at 1044. The confidential reports were delivered directly to the district court judge, *id.*, but nonetheless appear in the docket as "sealed" documents. *See Amodeo* Docket. In an initial decision, the Second Circuit held that the monitor's report, although delivered directly to chambers, was nevertheless a judicial record presumptively subject to public inspection. *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995). A second decision following the district court's decision on remand held that part of the report was to be released with redactions. 71 F.3d at 1052-1053.

Rule 5(d) of the Federal Rules of Civil Procedure underscores that the Report's status as a judicial record is not affected by the fact that it was sent to chambers instead of to the Clerk's office, because the rules require that the paper be

transmitted to the Clerk's office for filing. Under Rule 5(d), "[a]ll papers required to be served upon a party . . . must be filed with the court within a reasonable time after service." Although Rule 5(d)(2)(B) allows such papers to be sent directly to the judge, in that event the judge "must . . . promptly send it to the clerk." Thus, receipt by the court's staff, or by a district judge, is sufficient to constitute "filing," even if the document is not noted in the docket. *Houston v. Lack*, 487 U.S. 266, 274 (1988); *Forgy v. Norris*, 64 F.3d 399, 401 (8th Cir. 1995); *United States v. Solly*, 545 F.2d 874, 876 (3d Cir. 1976).

Judge Ware sought to avoid the force of this rule by stating that the TRO did not require the Report to be "served" on the other party to the case (Rocky Mountain), but only required that it be "provided." That is a distinction without a difference. The "provision" of a written document to a party to a case is service of that document. Moreover, under Rule 5(a) of the Federal Rules of Civil Procedure, any "paper" has to be served on every party, including any "written notice . . . or any similar paper." Rule 5(a)(1)(E). The Compliance Report was, effectively, a notice informing both the court and the parties of the manner in which Google had complied with the TRO. Because Rule 5(a) required it to be served, by operation of Rule 5(d) it was also required to be filed.

Indeed, Rule 5(a)(1) authorizes a Court to excuse the service on all parties of

two specific kinds of papers: "a pleading filed after the original complaint," whose service may be excused only because "there are numerous defendants," Rule 5(a)(1)(B), and "a discovery paper," whose service on all parties may be excused if "the court orders otherwise." Rule 5(a)(1)(C). The federal rules make no exception to the service requirement for any other paper. Thus, it was the Federal Rules that required the service of the Compliance Report on Rocky Mountain, and not just the TRO itself. Consequently, that the TRO used the word "disclose" in describing Google's obligation to provide the information to both the court and Rocky Mountain did not in any way vitiate Google's obligation to "serve" the document containing that information, given that Google's disclosure was contained in a paper that was provided to the court.

Judge Ware also sought to avoid the force of the filing requirement in the federal rules by saying that he had only ordered the document to be "lodged" and not filed in the original TRO. DN 53, at 3. But although Judge Ware put the word "lodged" in quotation marks, he was not quoting his original order, which required Google to "disclose" the specified information to the plaintiff and to the court. Moreover, the TRO did not compel Google to provide the information to Judge Ware as an individual – Google was required to provide its compliance report "to the Court," so that "the Court" could satisfy itself that its order had been obeyed. And,

in any event, the application of the common law right of access to judicial records should not and does not turn on the precise form of words that is used in the underlying order. The question is, what was the purpose for which Google provided the paper to the court – was it for use in the court's adjudicatory process? If so, the court cannot evade the public's right of access to the adjudicatory process by creating a shadow set of court documents outside the official record.

If Google's Compliance Report had disclosed that Google had violated the order, contempt sanctions or other strong action would surely have followed. By submitting its Compliance Report to the district court, Google secured for itself a determination that no further judicial action was required, at least pending further submissions from the parties. Because the Compliance Report was demanded to guide the adjudicatory process, the Report was a judicial record and hence was subject to MediaPost's presumptive right of access.

Judge Ware cited this Court's unreported decision in *Mitchell v. Orange County*, 65 Fed. Appx. 164 (9th Cir. 2003), as supporting his distinction between "lodged" and "filed" documents. Even apart from the fact that the decision cannot be cited for precedential purposes under Circuit Rule 36-3(c), the case is inapposite — that decision pertained to whether certain documents had become part of the appellate record and were subject to consideration by the court of appeals in

reviewing the district court's grant of summary judgment, not whether the documents were "judicial records" that were presumptively open to public scrutiny. Moreover, nothing in the court's unpublished opinion suggests that the district court in that case had been **correct** in permitting the materials in question to be "lodged"; indeed, the court remanded so that the district court could determine whether the materials had been "erroneously" excluded from the record, and the decision thus strongly suggests that materials going to the merits of an issue (there, summary judgment) should not be "lodged" rather than filed in the record. And in any event, as *Mitchell* itself illustrates, the distinction between "lodging" and "filing" materials that are submitted to a court for the purpose of influencing the adjudicative process does raise significant concerns, in that it allows a district judge to manipulate the record on which the judge's own actions may be judged, whether on appeal or by the general public exercising its right of public access.

Such concerns lay behind the Second Circuit's decision in *International Business Machines v. Edelstein*, 526 F.2d 37, 46 (2d Cir. 1975), holding that a district judge does not have discretion to withhold documents from filing by having them submitted in chambers instead of to the clerk's office. Otherwise, the Second Circuit recognized, a district judge could protect his management of the litigation from appellate scrutiny by keeping dispositive information and argument out of the judicial

record. Consequently, the district judge was required to "send [the papers] to the Clerk's office, as contemplated by [the] Rule." By the same token, even if Judge Ware had ordered Google just to inform him personally about compliance with its TRO and the possible need for further action, instead of providing the information to "the Court," that would have been an abuse of discretion.

To be sure, in this case, unlike *IBM,* both parties are happy to keep the document out of the public record, because they do not want the public to be able to draw any conclusions about possible abuse of the litigation process (and about Google's too-easy acquiescence in such abuse). But the reason for refusing to allow a distinction between "lodging" and "filing" to affect the document's status as a judicial record is to protect the **public**'s ability to hold the judicial process accountable, not to protect the jurisdiction of the Court of Appeals. Both the need for public scrutiny and the need to protect appellate review process are significant — both are means of holding trial judges accountable.

Finally, Judge Ware sought to invoke the prospect of invasion of Jane Doe's privacy as a reason to permit the "lodging" of the Compliance Report without subjecting it to public access. ER 40. But this part of Judge Ware's decision puts the cart before the horse. Protecting privacy is not a good reason for deciding whether or not the Compliance Report is a judicial record because, once it is determined to be

a judicial record, the court below would then have the opportunity to redact the document before disclosure to avoid intrusion on Jane Doe's privacy. Indeed, MediaPost argued below for such redaction, and argued further that Google should be required to notify Jane Doe of the pendency of MediaPost's motion, so that Doe could, if she wished to do so, make her views known about whether even a redacted document should be withheld.

Moreover, protection of privacy does not require withholding of the entire document. Once all identifying information about the Doe has been redacted, revealing whatever "use of the Gmail account" may be implicated will not invade the Doe's privacy. Indeed, in the Freedom of Information Act context, courts frequently hold that a defense under Exemption 6, which forbids clearly unwarranted invasions of personal privacy, can be overcome by the redaction of personally identifiable information and disclosing the rest of the document. *Department of State v. Ray*, 502 U.S. 164, 176 (1991) ("[D]isclosure of . . . personal information constitutes only a *de minimis* invasion of privacy when the identities . . . are unknown."); *Department of Air Force v. Rose*, 425 U.S. 352, 378 (1976). Privacy is sufficiently protected by the redaction of identifying information even if that data would otherwise be embarrassing; in *Rose*, for example, the Government was compelled to disclose summaries of disciplinary cases that would have been very embarrassing to the Air

Force cadets involved had their personal identifying information been included. With respect, it appeared below that the parties (and the district court) were hiding behind the Doe's privacy to avoid public scrutiny of their own conduct during the litigation.

In this case, for example, hypothesize that the redacted document revealed that the misdirected email was never opened before it was deleted. In that case, the public might well criticize Rocky Mountain Bank for forcing the identification of an Internet user and freezing her email address when there was really no reason to do so (because learning about the discarding of the email and attachment would have fully satisfied the Bank's claimed legitimate need). In that way, the disclosure here may well serve the public interest in scrutinizing the Bank's activities. By the same token, that information might lead Google's customers and potential customers to make judgments about Google's conduct in the case.

Fundamentally, providing public access to what Google submitted to comply with the TRO will reveal significant information about the use or abuse of court processes and help shape future courts' responses to this new species of case. For example, if Google's Compliance Report shows that the misdirected email was never opened before it was captured by a spam filter and/or deleted, then the public may well wonder whether there was any need for the district court to order Google to identify the Doe without even giving Google or the Doe a chance to respond to the

TRO motion. In that way, the disclosure will help the public understand and assess the judicial process, and help other courts issue appropriately narrow orders in future cases. The public might similarly criticize the district judge for rushing to judgment on the TRO motion without allowing any chance for a response.[7/]

B. There Is No Compelling Justification for Denying Access to Google's Report.

Once it is established that the document in question is a judicial record, a strong presumption of openness requires "compelling justification" to keep a particular record secret. *Kamakana,* 447 F.3d at 1178. As Judge Easterbrook has explained:

> People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. . . . Judges deliberate in private but issue public decisions after public arguments based on public records. . . . Any step that withdraws an element of the judicial process from public view makes the ensuing

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[7/] This is not the first case in which a banking institution has initiated baseless litigation in the Northern District of California and obtained an ex parte TRO, thus avoiding any consideration of serious jurisdictional and other flaws. In *Bank Julius Baer & Co. v. Wikileaks*, 535 F. Supp.2d 980 (N.D.Cal. 2008), a bank obtained a TRO against the company hosting a web site (the web site's owner was not before the court) on which some of its confidential documents had been displayed, despite the facts that its claim of diversity jurisdiction was obviously faulty on the face of the complaint, that the hosting company was immune from suit under section 230, and that the standards for a prior restraint were not satisfied. As soon as parties appeared before the court to point out these flaws, the TRO was lifted.

decision look more like fiat, which requires compelling justification.

Union Oil Co. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000).

The party seeking secrecy must "articulate compelling reasons supported by specific factual findings," *Kamakana*, 447 F.3d at 1178, and a decision to keep a particular judicial record under seal can only be based "on a compelling reason [that] articulate[s] the factual basis for [the] ruling, without relying on hypothesis or conjecture." *Id.* at 1179.

When MediaPost sought Google's concurrence in the motion to unseal, the only ground given by Google for keeping the document secret was that it contains information that could identify Jane Doe; Judge Ware also expressed concern about Doe's privacy. But as discussed above, that interest can adequately be protected by redacting the identifying information. *See* ER 14 n.5 (in denying motion to file complaint and motion papers under seal, Judge Whyte said that if future filings contain private customer information, the filing party should "move to seal the confidential portions of those filings pursuant to this court's Civil Local Rule 79-5"). On the other hand, Google's customers have a significant interest in knowing the quantity of identifying information about Jane Doe that Google released, as well as what efforts Google took to comply with the Court's TRO and whether Google took efforts to provide additional notice to Jane Doe of its actions. By publicly filing a

redacted copy of the report, Google will reveal that information to its other customers, while still protecting the privacy of the Doe. MediaPost does, however, suggest that on remand, Google be ordered to provide additional notice to the Doe, so that she will have the opportunity to suggest specific redactions needed to protect her privacy, if she so chooses.

Beyond its claimed interest in protecting Jane Doe's privacy, Google may be embarrassed at revealing publicly how easily it acquiesced in Rocky Mountain's violation of its customer's rights. However, "[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Kamakana*, 447 F.3d at 1179. Indeed, although Google and Rocky Mountain might well prefer to prevent disclosure of Google's report, only that disclosure can inform the public how the TRO was satisfied, and why the court below dismissed the action. Disclosure in this case will enable MediaPost to report further on this case about how the courts function; for future purposes, disclosure will allow the public to ensure that private parties do not misuse judicial procedures by seeking and obtaining emergency relief without notice and an opportunity for all adverse parties to respond.

CONCLUSION

The decision of the district court denying the motion to unseal should be

reversed. The case should be remanded with instructions to unseal the Compliance Report, subject to redactions needed to protect Jane Doe's personal privacy.

Respectfully submitted,

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August 16, 2010

RELATED CASES

There are no known related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Word Perfect X3, using fourteen point Times New Roman type, and that Word Perfect reports that the brief contains 7808 words, exclusive of cover, tables, certificates, and addendum.

/s/ Paul Alan Levy

August 16, 2010

ADDENDUM

Rule 5 of the Federal Rules of Civil Procedure provides, in pertinent part:

Rule 5. Service and Filing of Pleadings and Other Papers

* * *

(a) Service: When Required.

(1) In General.

Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(d) Filing

(1) Required Filings; Certificate of Service.

Any paper after the complaint that is required to be served — together with a certificate of service — must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(2) How Filing Is Made — In General.

A paper is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) Electronic Filing, Signing, or Verification.

A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.

(4) Acceptance by the Clerk.

The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

CERTIFICATE OF IDENTICALNESS

I hereby certify that, other than the addition of this certificate and the revised certificate of service that follows, the brief is identical to the version submitted electronically.

/s/ Paul Alan Levy
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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused two copies of the foregoing Brief to be served by first-class mail, postage prepaid, on counsel for appellees as follows:

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