

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROSETTA STONE,)	
)	
Plaintiff-Appellant,)	
)	
v.)	No. 10-2007
)	
GOOGLE, INC.,)	
)	
Defendant-Appellee,)	
)	
PUBLIC CITIZEN, ERIC GOLDMAN,)	
and MARTIN SCHWIMMER,)	
)	
Intervenors.)	

OPPOSITION TO MOTION FOR ORAL ARGUMENT

Although captioned as a motion for oral argument, Google’s ten-page brief is really a sur-reply in opposition to the motion to unseal, attempting to rebut arguments in intervenors’ reply brief. Intervenors are willing to let Google have the last word, rather than filing a sur-sur-reply on those issues.

As for oral argument, now that Google has had the last word in briefing, there is no need for oral argument. The main legal issue here is whether a party that seeks to justify sealing nearly 800 pages of appellate court records, presented by the parties as being needed to decide the issues on appeal, must present evidence and detailed justification in support of sealing. That straightforward legal issue will not be substantially elucidated by oral argument.

If Google loses on this point, it seeks another round of briefing, and presumably another oral argument. But Google has made a tactical choice not to submit admissible evidence supporting its claims of confidentiality; even its sur-reply is not accompanied by evidence. It should accept the consequences of that choice.

At this juncture, the appeal is ready for oral argument on the merits, and intervenors prefer to have the Court rule on the motion to unseal so that, by the time oral argument occurs, the public will have had a chance to review the entire Joint Appendix, or at least those parts that the Court has chosen to unseal. That way, the public can better appreciate the points that are being advanced at oral argument not to speak of understanding the basis for the Court's ultimate decision.

In the event the Court **does** decide to schedule oral argument on the motion to unseal, it should order appellant to file immediately a new Joint Appendix with all materials not claimed to be confidential left unredacted. By our count, although Google has made contested confidentiality claims about nearly 800 sealed pages of the Joint Appendix, there is no longer any contention that nearly six thousand pages of Joint Appendix ought to be unsealed. However, the parties take the view that under the Court's rules they cannot unseal even a single page of the Joint Appendix without the Court's express permission. There is no reason to delay that unsealing.¹

¹Because neither party has opposed the motion for leave to intervene, that motion should be granted.

Respectfully submitted,

/s/ Paul Alan Levy

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February 16, 2011

CERTIFICATE OF SERVICE

I certify that on this 16th day of February, 2011, I am filing this motion through the Court's ECF system, which will serve copies of the brief on counsel for both appellant and appellee.

 /s/ Paul Alan Levy
Paul Alan Levy