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.	)	

REPLY BRIEF IN SUPPORT OF MOTION TO UNSEAL JOINT APPENDIX

In response to intervenors' motion to unseal the thirteen volumes of the Joint Appendix that the parties filed under seal, Rosetta Stone has agreed that all documents in the Joint Appendix that were kept under seal because Rosetta Stone had unilaterally stamped them as "confidential" during the discovery process in the district court should now be unsealed. Google, for its part, has agreed that most of the pages in the Joint Appendix that were kept under seal because of **its** unilateral "confidential" stamps should also now be unsealed.

Google argues, however, that some documents are "competitively-sensitive" or "consumer-sensitive" and hence that continued sealing is required. But in opposing

intervenors' motion to unseal those documents, Google indulges three fundamentally unsound assumptions. Without those assumptions, there is nothing left to Google's attempted showing that its need for confidentiality outweighs the compelling First Amendment interest in disclosure of those documents that the parties have, by inclusion in the Joint Appendix, represented are "vital to the understanding of the basic issues on appeal." Local Rule 30(b). *See also* Rule 30(b)(1) and Local Rule 30(a) (cautioning against unnecessary designations of parts of the record for inclusion in the Joint Appendix).

A. This Court's Records Are At Issue, Not the District Court's.

Google's opposition simply assumes that this motion is to be decided as if it were an appeal from a decision of the district court to seal some of its own records, which, Google contends, should be resolved under a deferential standard. But intervenors have not asked that any district court records be unsealed; they have only moved **this Court** to unseal some of its own records. As noted in our opening brief, every court has authority over its own records, and other courts of appeals have recognized that this authority cannot be shunted off onto the district court. Rather, when the issue is raised properly by motion, the court of appeals must decide for itself whether a private interest outweighs the public's right to access court records. Indeed, this Court followed that approach in the unpublished but thoroughly reasoned

opinion in *United States v. Moussaoui*, 65 F. App'x 881 (4th Cir. 2003).

Google points out that, as an unpublished decision, *Moussaoui* is not binding, and further argues that its persuasive power is diminished because of the enormous public interest in that case. But the difference in the level of public interest in the case affects only the balance between disclosure and the need for confidentiality; it has no bearing on whether this Court's balancing owes any deference to the district court's assessment of the need for confidentiality of the district court's own files.

B. No Deference Is Given to the District Court's Sealing.

Even if Google were right to characterize the motion as an implicit appeal from the district court's sealing decisions, it would be wrong to defer to those decisions. To begin with, as Google concedes, the Joint Appendix has been compiled by the parties to put before this Court those documents that the Court will need to consider to decide this appeal. Consequently, the First Amendment right of access is at stake, not just the common law right of access. And when First Amendment rights are at stake, it is not only issues of law that are subject to de novo review; appellate judges must also exercise independent judgment in deciding the factual issues on which First Amendment rights turn. *Bose Corp. v. Consumers Union of United States,* 466 U.S. 485, 510-514 (1984); *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009).

Google cites several cases holding, on appeal from district court orders about

the sealing of their own records, that such sealing rulings are reviewed de novo "with respect to questions of law"; Google then notes that those cases rely on district courts "to make any required findings of fact." Google Opp. 10. But none of those cases defer to district court findings of fact on issues relating to the need for sealing. Nor could they have, consistent with *Bose*.

Moreover, Google is plainly wrong in speculating that the district court might have conducted its own, independent evaluation of the need for confidentiality and whether that need outweighed the public interest in disclosure; there was, in fact, no record on which the district court could have relied to make factual findings on this point. The parties presented joint motions to seal without any affidavits showing the basis for the claim of confidentiality. Typical was the first Joint Motion to Seal, DN 101, in which the entirety of the "showing" in support of sealing was a paragraph in the unsworn joint motion that recited the following formula (at 4, ¶ 7):

> The parties represent that the Protected Information at issue relates to business practices and internal communications that are confidential and proprietary, the public disclosure of which would be harmful to their business interests. Reasonable public notice of the sealing of these documents has been given through the filings in this case. No less restrictive method would adequately preserve the confidential and proprietary nature of the information at issue.

The district judge then signed the parties' proposed order. Given the absence of any affidavits, the district judge could not have been making "factual findings" — he was

just accepting the parties' uncontested joint representations. Moreover, by their conduct in this Court, the parties have implicitly admitted that the trial judge was **wrong** to have accepted their blanket claims of the need for confidentiality of the district court's records, because, having been challenged, they now concede that the great bulk of the documents for whose confidentiality they vouched below are not, in the end, sensitive.

C. Google Has Not Met Its Burden of Presenting Particularized Proof That Disclosure Would Cause It Clearly Defined and Serious Injury.

1. Conclusory Assertions in Lieu of Specific Evidence

Google wrongly assumes that the need for confidentiality can be established by a party's mere say-so in conclusory terms, without proof and without any particularized showing. The entirety of Google's showing consists of a chart that contains such generalizations as "Proprietary, competitively sensitive and consumer-sensitive information regarding display of ads, including information that could be used to 'game' Google's search results," or "Proprietary, competitively sensitive and consumer-sensitive information regarding future Adwords strategy and initiatives." The veracity of the statements in the chart is attested only by Google's outside counsel, who cannot possibly have either the personal knowledge or the expertise to testify to these facts. And, indeed, counsel does not purport to aver that these facts

are true; she simply avers that unidentified other lawyers working for Google have come to these conclusions, for unspecified reasons.

Implicitly, Google argues that the very fact that it is requesting withholding of a limited number of documents and portions of documents suggests that it has carefully weighed the need for confidentiality and limited its claims to those items that Google most wants to protect from disclosure. But there is no showing that, in isolating those items, Google's decision-makers considered only those potential harms that should properly be considered in deciding whether the public interest in access is decisively outweighed; nor is there proof that those decision makers applied those considerations properly. Instead, Google asks the Court to assume Google's good faith and hence defer to Google's own judgments.

This will not do. Before it can decide that a specific part of a document in the Joint Appendix merits confidentiality, the Court must make the relevant "factual findings," based on a particularized "showing." *See*, *e.g.*, *Rushford v. New Yorker Magazine*, 846 F.2d 249, 254 (4th Cir. 1988); *In re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir 1986). Courts "should not simply take representations of interested counsel on faith." *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 663 (8th Cir. 1983). Instead, to make a showing that the need for confidentiality is so great that it outweighs the public's right of access, the party seeking secrecy must present

affidavits that "show[] how disclosure would work a clearly defined and serious injury to its interests." *Littlejohn v. Bic Corp.*, 851 F.2d 673, 685 (3d Cir. 1988) (internal quotation marks omitted). The mere fact that some of the documents may be "competitively sensitive" or "consumer sensitive" (whatever that may mean) is not enough to outweigh the First Amendment right of access to judicial records. And when the party's affidavits do not show the need for confidentiality with sufficient particularity, the request for sealing must be denied. *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991). Here, not only are the claims of confidentiality mere representations of counsel, but they are started with such generality that neither the Court nor the intervenors can assess their propriety.

2. Two Examples

A reply brief is not the place for an exhaustive examination of each document at issue, but two examples encapsulate the problem. First, Google claims that certain disclosures would enable web site operators to "game" Google's search rankings. Intervenors agree that Google's search algorithm is a trade secret. But a whole industry, search engine optimization ("SEO"), is devoted to helping the operators of web sites position their web pages to rank higher in Google's search results. SEO specialists help webmasters identify the techniques by which they can increase their search rank, and also help webmasters implement those techniques effectively, while

not leading Google to conclude that the site operator has been one step too clever and hence "ban" the page from the search database. And Google itself has never been shy about selectively releasing information about how its search engine operates, and advising webmasters what they should and should not do to get higher search rankings. Indeed, Google maintains a blog, on which its staff posts regularly, to give such advice. http://googlewebmaster central.blogspot.com/. If the information being withheld is available elsewhere, no showing can be made that disclosure would cause competitive harm. *Frazee v. U.S. Forest Service*, 97 F.3d 367, 371 (9th Cir. 1996). Without a more detailed explanation, the Court cannot be confident that the information that Google wants to withhold both would enable improper gaming and is not available through one of Google's own official channels. For each piece of information withheld, Google needs to show, by a proper affidavit, **how** disclosure would facilitate improper gaming.

Similarly, Google characterizes several withholdings as revealing "Google's policies and procedures with respect to internal experimentation and competitive analysis." The latest of the documents so classified are two years old, and some date from five or seven or even eleven years ago; the mere age of these documents may render their current disclosure relatively innocuous. Google needs to show persuasively that the **current** disclosure of the document would cause a specific and

serious injury to its interests, and not merely embarrassment about the experimental findings. *See Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (harm to corporate reputation does not overcome even the common law right of access). In its appellate brief, at 6-8, 28, Google argued that its older experiments and analyses should be given little weight because it has developed better technology to solve the problems that the studies revealed. The public has a substantial interest in seeing the studies themselves so that it can judge for itself whether Google's claimed distinctions are valid, and thus better assess the Court's ruling on appeal. And even if true, the fact that the studies addressed a technologically outdated system militates against a finding that disclosure of the details of the studies would cause Google **current** competitive harm.

In an effort to side-step the age of the experiments, Google claims that the disclosure that would be harmful is not the facts or conclusions drawn from the experiments, but rather that disclosure would reveal Google's "policies and procedures with respect to internal experimentation and competitive analysis." Google does not explain, however, how disclosure of such "policies and procedures" would cause serious injury to Google.

3. Insufficient Basis for Google's Claims of Harm

There are two different ways for courts to assess the reliability of claims of the

need for confidentiality. One method is in-camera review. But in-camera review places a high burden on the courts, and indeed in this case in camera review might not provide an effective way for the Court to assess Google's claim of confidentiality because the Court may well lack the expertise needed to assess whether particular fragments of documents could enable gaming of Google's search results, or whether they would otherwise "work a clearly defined and serious injury to [Google's] interests." *Littlejohn v. Bic Corp.*, 851 F.2d 673, 685 (3d Cir. 1988). Moreover, in-camera review limits the opportunity of the proponent of disclosure to participate in the review process, while at the same time depriving the Court of the benefits of the adversary process in reaching its decisions. The time-honored alternative to in-camera inspection is a privilege log or *Vaughn* index, which is preferred because it avoids the imposition on judicial time that in-camera inspection implicates, and because it enables the adversary to participate in the process of adjudicating the claim of confidentiality. *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1250 (4th Cir. 1994).

Google contends that it is just too burdensome for it to prepare a *Vaughn* index, because, according to Google, it isn't fair to make Google shoulder the burden that the law imposes, of proving injuries sufficiently serious to warrant nondisclosure. But Google's choice to rely instead on a request that the Court trust its good faith is inconsistent with the First Amendment and indeed with the common law right of

access to judicial records. Because Google has chosen not to meet its heavy burden of proving the need for confidentiality, its arguments against unsealing should be rejected.

CONCLUSION

The motion to unseal the Joint Appendix in its entirety should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 7th 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