UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROSETTA STONE LTD.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No.10-2007
	)	
GOOGLE INC.,	)	
	)	
Defendant-Appellee.	)	

MOTION TO UNSEAL

Pursuant to the common law and First Amendment rights of public access to judicial records, Public Citizen, Eric Goldman and Martin Schwimmer move the Court to unseal in their entirety both the Joint Appendix and the Reply Brief of Rosetta Stone. Consent of the parties has been sought but refused.

BACKGROUND

On July 17, 2010, Rosetta Stone sued Google for trademark infringement and dilution, challenging Google's practice of allowing advertisers to bid for the right to display advertising when a company's trademark (or any other words that are the subject of a registered or common-law trademark) is used among the search terms in a search engine search. The parties entered an intense period of discovery, and as frequently occurs in commercial litigation, the parties stipulated with the Court's approval that either party could unilaterally designate any information produced in

discovery as "confidential information," "confidential attorneys eyes only," or "restricted confidential — source code." No proof was required for the implanting of such stamps and there was no provision for adversarial testing of the validity of any such claim of confidentiality unless and until one of the parties challenged another party's designations. Moreover, the stipulation provided that any discovery materials that had previously been stamped would be filed under seal.

Neither party challenged any of the "confidential" stamps, and when it came time for the parties to file their papers on their cross-motions for summary judgment, the motions for leave to file under seal were filed either jointly or, at least, without opposition. DN 100, 132, 170, 185. This, too, is frequently the case in commercial litigation — neither party has any incentive to challenge the other's confidentiality claims, and the parties get along with each other (and avoid significant extra work) by not doing so. Each motion duly recited in the most conclusory fashion, without any supporting affidavits or any detail concerning the contents of the documents, the formula that the various documents for sealing contained confidential business information and that disclosure would be harmful. No opposition to any of the sealing requests was submitted, and the trial judge approved each of the joint motions, signing the proposed orders that the parties had presented, which, in turn, again recited that the information was confidential and that disclosure would be

harmful. There was no indication that the trial judge had viewed the documents in question, no explanation of the contents of the documents, and no attempt to weigh the need for confidentiality against the public interest in disclosure.

The trial court granted summary judgment for Google and this appeal followed. Rosetta's opening brief contained extensive redactions, including roughly two thirds of its Statement of Facts and large sections of the factual aspects of its argument. Movant Public Citizen asked the parties for consent to a motion for leave to intervene for the purpose of seeking to unseal Rosetta's brief. The parties promptly agreed that none of the redactions needed to remain under seal, and jointly moved the Court to unseal Rosetta's entire brief. The court ordered Rosetta to file its brief in unredacted form within ten days. Google then filed its brief, with a small section of factual discussion redacted. Once again, movant Public Citizen asked the parties for consent to a motion for leave to intervene for the purpose of seeking to unseal Google's brief. The parties promptly agreed that none of the redactions needed to remain under seal, and jointly moved the Court to unseal Google's entire brief.

However, the parties have filed thirteen volumes of the fifteen-volume Joint Appendix under seal. The first two volumes of the Joint Appendix were filed openly, consisting primarily of the complaint, court documents, transcripts of hearings, and an affidavit attaching relevant authority; there are a handful of other affidavits as

well. But the remaining thirteen volumes of the Joint Appendix contain the bulk of the evidence relevant to this appeal, and even those parts of the Joint Appendix that are cited as the evidentiary basis for the now-unsealed factual assertions in the parties' briefs remain under seal. Nor have the parties provided any explanation of the continued need to keep the thirteen volumes of Joint Appendix under seal. And movants have no assurance that Rosetta's reply brief will not contain redactions.

ARGUMENT

The Court Should Unseal the Records Sealed by the District Court as Required by the Common Law and First Amendment Rights of Access to Court Records.

A. The Court of Appeals Should Decide Whether to Unseal Its Own Records Even Though the Records At Issue Were Originally Filed Under Seal Below.

This Court should unseal the Joint Appendix, even though it contains documents sealed by the district court at the parties' request, pursuant to the public's presumptive common-law right to inspect and copy judicial records and documents. *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575-76 (4th Cir. 2004), citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)). No reasons have yet been advanced to explain why secrecy was necessary for these documents, and in the absence of any such justification the documents must be open to the public. *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848-849 (5th Cir. 1993)

(overturning district court's decision to seal documents without balancing the competing interests involved); *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987) ("The district court's discretion to seal the record of judicial proceedings is to be exercised charily."). This presumption of openness "serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." *Van Waeyenberghe*, 990 F.2d at 849.

Although a trial court has discretion to seal or unseal files during the trial stage of litigation, an appellate court possesses the inherent supervisory authority to unseal files once they have been transferred. *Id.* at 848 (quoting *Nixon*, *supra*, 435 U.S. at 597) ("Every court has supervisory power over its own records and files . . . ."); *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (Seventh Circuit proceedings could only be sealed by order of the Seventh Circuit, even though the district judge had previously placed records under seal). And the presumption of access applies as forcefully to appellate proceedings as it does to district court proceedings. In *Baxter Int'l v. Abbott Labs.*, the Seventh Circuit explained:

> Information transmitted to the court of appeals is presumptively public because the appellate record normally is vital to the case's outcome. Agreements that were appropriate at the discovery stage are no longer appropriate for the few documents that determine the resolution of an appeal, so any claim of secrecy must be reviewed independently in this

court.

297 F.3d 544, 545 (7th Cir. 2002).

Similarly, in *United States v. Moussaoui*, 65 F. App'x 881 (4th Cir. 2003), this Court responded to a motion to unseal a joint appendix of documents transferred from the district court by stressing the Court's independent duty to conduct its own examination of the documents to determine whether they should be maintained under seal:

> As noted above, while the classified appendix contains a number of classified documents, not all of the documents therein are classified, and it appears that at least some of the documents that contain classified information could be made public (assuming a common law or First Amendment right of access attaches) after classified material is redacted. The unclassified appendix contains a wide variety of materials, such as pleadings, hearing and deposition transcripts, and some discovery materials. Some of these documents fall within the common law presumption of access, while others are subject to the greater right of access provided by the First Amendment. Still others may not qualify as "judicial records" at all. *See Amodeo,* 44 F.3d at 145-46 (discussing when a document filed with the court is a "judicial record"). We therefore must examine the unclassified appendix document by document to determine, for each document, the source of the right of access (if any such right exists). *See Stone,* 855 F.2d at 181. As to those documents subject to a right of access, we must then conduct the appropriate balancing to determine whether the remainder of the document should remain sealed, in whole or in part.
>
> *Id.* at 888-89.

That the Court retains authority to unseal records is made clear by the Court's

own rules: Fourth Circuit Rule 25(c)(1)(A) provides that "material held under seal by another court or agency remains subject to that seal on appeal **unless modified or amended by the Court of Appeals**." (emphasis added) Other circuits regularly exercise similar authority. *See* Third Circuit Misc. R. 1066.1(c)(2) (mandating that documents "will remain under seal in [the Third Circuit] for thirty (30) days after the filing of the notice of appeal to give counsel an opportunity to file a motion to continue the impoundment"); Seventh Circuit Internal Operating Procedure 10 ("[E]very document filed in or by [the Seventh Circuit] (whether or not the document was sealed in the district court) is in the public record unless a judge of [the Seventh Circuit] orders it to be sealed."). Even those circuits that, like this circuit, do not provide for automatically unsealing records generally provide a mechanism for parties to unseal records once they reach the appellate level. *See*, *e.g.*, Sixth Circuit Internal Operating Procedure 11(c) (retaining sealed status of document but permitting records to be unsealed on order of either the Sixth Circuit or the district court); Ninth Circuit Rule 27-13(c) ("During the pendency of an appeal, any party may file a motion with this court requesting that matters filed under seal either in the district court or this court be unsealed.").

B. The Common Law Right of Access Requires Unsealing.

Documents should be made available for public review when they "properly

come before the court in the course of an adjudicatory proceeding and . . . are relevant to the adjudication." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 412-13 (1st Cir. 1987); *see also Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994) (recognizing that documents become part of the public record when either "the court has relied on them" or when "the litigants have offered them as evidentiary support"); *Smith v. United States Dist. Court for Southern Dist. of Ill.*, 956 F.2d 647, 650 (7th Cir. 1992) (holding that materials on which a court relies in determining litigants' substantive rights are subject to the right of public access); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny."). Without access to records that influenced a judge's decision, "[h]ow else are observers to know what the suit is about or assess the judges' disposition of it?" *Baxter Int'l,* 297 F.3d at 547.

"Th[e common law] presumption of access . . . can be rebutted if countervailing interests heavily outweigh the public interests in access," but "[t]he party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption." *Virginia Dept. of State Police*, 386 F.3d at 575-76.

C. The First Amendment Protects the Right of Access to the Joint Appendix and Briefs.

In *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980), the Supreme Court recognized a First Amendment right to attend criminal proceedings. This Court and others have indicated that *Richmond Newspapers* extends to civil as well as criminal proceedings. *See, e.g.*, *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004); *Doe v. Stegall*, 653 F.2d 180, 185 (5th. Cir. 1981) (in considering whether a litigant had the right to proceed anonymously in a civil case, the Court noted that "First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings"); *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983). Public access to judicial proceedings is essential because "[t]he public has no less a right under the first amendment to receive information about the operation of the nation's courts than it has to know how other governmental agencies work and to receive other ideas and information." *In re Express-News Corp.*, 695 F.2d 807, 809 (5th Cir. 1982).

The Court has specifically held that the First Amendment right of access

extends to documents filed in connection with a summary judgment motion. *Rushford v. New Yorker*, 846 F.2d 249, 253 (4th Cir. 1988). It is a fortiori that the First Amendment guarantees access to documents filed in connection with this appeal from a summary judgment ruling.

As this Court said in *Virginia Dept. of State Police*,

> When the First Amendment provides a right of access, a district court may restrict access "only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest.". . . The burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position. *See Press-Enterprise Co. v. Superior Court,* 478 U.S.1, 15 (1986) ("The First Amendment right of access cannot be overcome by [a] conclusory assertion").

386 F.3d at 575 (some citations omitted).

D. The Joint Appendix and Briefs Should Be Unsealed.

Here, the parties have never advanced any detailed, document-by-document justification for maintaining the secrecy of the sealed matter. Indeed, the documents in question were all unilaterally designated as "confidential" by each party when it produced the documents in discovery, without any adversary testing of the need for confidentiality. The parties filed joint motions to keep each others' documents confidential, a situation that encouraged each side simply to defer to each other's designations. The motions rested on **unsworn** and highly conclusory contentions

about the need for confidentiality, *e.g.*, DN 101, 185 ("The parties represent that the Protected Information at issue relates to business practices and internal communications that are confidential and proprietary."). In granting the motions, the district court recited a similar formula about the need for confidentiality, repeating the parties' conclusory statements word for word: "The filings identified above reference documents, testimony, and information that relate to business practices and internal communications that are confidential and proprietary, the public disclosure of which would be harmful to Rosetta Stone's and/or Google's business interests." DN 177, 216. However, there is no indication that the trial judge engaged in the required document-by-document review. *See Moussaui*, 65 Fed. App'x at 888-89. The court below did not explain the nature of each document or why confidentiality was required.

Moreover, it is highly unlikely that everything in the thirteen volumes of joint appendix that the parties have selected from the record below as providing the basis for either affirming or reversing the judgment of the district court is so sensitive that the need for confidentiality outweighs the public's right of access to the judicial records. For example, the formerly redacted statement of facts in Rosetta's opening brief reveals that the Joint Appendix contains evidence supporting Rosetta's contentions about the strength of its marks, Rosetta Br. 5, Google's internal

communications going back before 2004, including the results of in-house experiments about the impact of Google search results on user confusion, *id.* 7-8, and presentations by Google to its customers from 2005. *Id.* 10. It is hard to believe that disclosure of these materials would create any significant danger of current competitive harm. The Joint Appendix also contains hundred of pages of communications to Google from Rosetta Stone about counterfeit Rosetta products, communications from customers supposedly showing confusion, and depositions of non-party witnesses (and in-house Google lawyers) who testified about their experiences with Google search results and the products that they subsequently purchased. *Id.* 12, 31, 36. It is unlikely that these deposition questions and answers present a need for confidentiality sufficient to outweigh the public's right to see judicial records showing why the case was decided the way it was decided below and will be decided by this Court. The Joint Appendix also evidently contains an expert witness report, purporting to find actual confusion, *id.* 13, and because there was a motion to exclude that report, there may well have been a deposition of the expert witness or counter-affidavits submitted in support of that motion. Again, we question whether the secrecy of any of this material can be justified.

In contrast to the lack of any demonstrated need for confidentiality, the public has a strong interest in gaining access to the evidentiary basis for the Court's

disposition of this appeal. This case is of great public interest. Professor Goldman estimates that well over a hundred trademark cases have been filed by trademark owners involving keyword advertising, whether against Google and other search engines, or against the keywords advertisers themselves, resulting in dozens of reported decisions. Goldman Affidavit ¶ 4. Although the Second Circuit has already addressed as a purely legal issue whether keyword advertising is a "use in commerce," *Rescuecom Corp. v. Google*, 562 F.3d 123 (2d Cir. 2009), this case represents the first of this wave of litigation to reach the appellate level on the merits. Litigants in all the other cases will have a vital interest in understanding exactly what this Court's decision signifies, and they cannot understand that if the record is under seal.

Moreover, the extent of the broader public interest in the case is reflected by the ten amicus curiae briefs that have been filed on both sides of the case, not to speak of hundreds of articles in mainstream news outlets, plus many more in law reviews and legal treatises. Professor Goldman's affidavit explains how academic and other writers will be able to use the disclosures to better analyze the Court's ruling and address the proper development of the law in this area. Goldman Affidavit ¶ 5. Congress may well wish to step into the fray with legislation directed to the issue; disclosure of the evidentiary basis for the Court's ruling will inform the debate over

such proposals. *Id.* The Court's ruling will be subject to intense scrutiny and the public is entitled to know the factual basis underlying the ruling.

In addition, although it is now too late to permit the amici curiae to take the record evidence into account in arguing to the Court how it should resolve this appeal, further review may be sought and the current amici, or others, may seek to express their views to the en banc Court or to the Supreme Court. Unsealing should be ordered for that reason as well.

E. The Parties Should Be Required to Provide Detailed Justification for Sealing.

Because the party demanding continued confidentiality of each judicial record has the burden of showing both the need for confidentiality and that this need outweighs the strong presumption of public access, the Court should require the parties to prepare a list of each document in the Joint Appendix that they believe should be kept under seal, and each reasonably segregable part of each document, comparable to a *Vaughn* index, *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1250 (4th Cir. 1994). If any redactions are made in Rosetta's reply brief, a similar index should be required to support those redactions as well. The index should list the author, title, date, and subject of the document, explain the basis for the claim of confidentiality and describe the contents with sufficient detail to show the need for confidentiality

while conveying enough information for movants to participate in the adversary process by arguing against continued confidentiality.

In practice under the Freedom of Information Act as well as in discovery disputes, the discipline of having to prepare an index or privilege log, and the information provided by a well-prepared index, is usually sufficient to eliminate most disputes and thereby to minimize the Court's need to examine documents to make its own determinations about confidentiality.

CONCLUSION

The motion to unseal the Joint Appendix and Rosetta Stone's reply brief should be granted.

Respectfully submitted,

/s/ Paul Alan Levy

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CERTIFICATE OF SERVICE

I certify that on this 13th day of December, 2010, 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