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18 ARIZONA SUPERIOR COURT

19 MARICOPA COUNTY

20 The State of Arizona *ex rel.*
21 Mark Brnovich, Attorney General,

22 Plaintiffs,

23 v.

24 Google LLC, a Delaware Limited Liability
25 Company,

26 Defendant.

No. CV2020-006219

MOTION FOR A CONTINUANCE

(Assigned to the Hon. Timothy Thomason)

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1 For the reasons described below, Google respectfully requests that the Court continue the
2 deadline to file its Motion to Seal under Rule 5.4 until after adjudication of Google’s Motion
3 to Dismiss. In the alternative, Google requests that the Court take up the issue of motion
4 sequencing at the August 4, 2020 status conference and, in the meantime, continue Google’s
5 deadline to file the Motion to Seal to August 21, 2020.

6 **I. INTRODUCTION**

7 Attorney General Mark Brnovich (“AG”) brought this action against Google on May
8 27, 2020, under the Arizona Consumer Fraud Act (“ACFA”). The AG filed a 45-page
9 Complaint with nearly 100 exhibits chock-full of Google’s confidential information,
10 purportedly alleging consumer fraud under the ACFA. This information was provided to the
11 AG during his investigation under a protective order and constitutes discovery materials that
12 should remain confidential. On July 17th, the AG filed a Notice of Lodging under seal of this
13 confidential information pursuant to Rule 5.4, announcing his position that *all* of it should be
14 publicly filed. The filed Notice spans 117 pages, including exhibits. The AG’s position seeks
15 to turn the confidentiality standard on its head. He includes in his Complaint confidential
16 information and documents that are not necessary to his pleading, forcing Google to file—and
17 the Court to adjudicate—burdensome and potentially seriatim Motions to Seal even though
18 the law is clear that discovery materials should not be attached to non-dispositive motions.
19 That burden is exacerbated because the confidential information the AG filed has nothing to
20 do with an ACFA claim. While the ACFA is meant to protect Arizona consumers from being
21 deceived into purchasing merchandise, neither the Complaint nor the attached documents
22 suggest that Google did anything that would constitute a violation of the ACFA.

23 There is a better way. On July 15, 2020, Google filed a Motion to Dismiss that, once
24 adjudicated, should eliminate or at least substantially narrow the case. It is only after that
25 Motion is settled that the Court should take up Motions to Seal, to the extent they become
26 necessary at all. Sequencing the motions in this way provides two primary benefits. *First*,
27 sequencing will provide procedural efficiencies. Dismissing the Complaint would moot a
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1 Motion to Seal and eliminate the need for the Court to adjudicate the confidentiality of the
2 underlying documents. Even if the Complaint is not dismissed, sequencing will prevent
3 multiple and potentially overlapping Motions to Seal. For example, a Motion to Seal an
4 Amended Complaint could be filed before adjudication of a Motion to Seal the original
5 Complaint. If any Motion to Seal needs to be filed and ruled upon, it should happen once and
6 after Google has been ordered to Answer. *Second*, sequencing will provide benefits on the
7 merits of the Motion to Seal. The Motion to Dismiss underscores the lack of relevance of
8 many of the AG’s allegations and exhibits to the AG’s Complaint; these questions will be
9 important to adjudication of the Motion to Seal.

10 Thus, Google respectfully requests a continuance of the deadline to file any Motion to
11 Seal until after the pending Motion to Dismiss is adjudicated. In the alternative, Google
12 requests that the Court take up the issue of motion sequencing at the August 4, 2020 status
13 conference and extend Google’s deadline to file the Motion to Seal by three weeks--until
14 August 21--so the Court can consider sequencing at the status conference prior to Google
15 preparing the Motion to Seal and so that Google may have more time to prepare it.

16 **II. BACKGROUND**

17 The AG brought this action against Google after a lengthy investigation.¹ Google
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21 ¹ Google learned through information it received pursuant to the Arizona Public Records Law
22 (“APRL”) that the investigation was encouraged by Google’s long time litigation adversary,
23 Oracle. Moreover, while the AG asserts that revealing Google’s confidential information is
24 appropriate because of so-called public interest in the case (Notice of Lodging at 6), he fails to
25 acknowledge that the investigation was improperly publicized both locally and nationally,
26 though it was supposed to be confidential by statute. *Compare* A.R.S. § 44-1525 (ACFA
27 confidentiality requirement) *with* Tony Romm, *Google’s Location Privacy Practices Are Under
28 Investigation in Arizona*, Washington Post (Sept. 11, 2018) *available at*
<https://www.washingtonpost.com/technology/2018/09/11/googles-location-privacy-practices-are-under-investigation-arizona/>. For example, the AG’s APRL response revealed
that the AG’s office approached Tucker Carlson about potentially covering the investigation
of Google. It also revealed that contingency fee lawyers behind the investigation stood to make
up to \$50 million under their agreement with the AG if they could recover or extract a
settlement from Google, and nothing at all if they did not.

1 cooperated with the investigation and produced documents to the AG subject to a
2 confidentiality agreement. Many of the documents include Google’s confidential and
3 proprietary information about Google’s geolocation technology, product development and
4 internal analyses. Ultimately, the AG filed a 167-paragraph complaint against Google loaded
5 with redacted references to the confidential documents and information he obtained in their
6 investigation. Although the Complaint must allege that Google deceived consumers in the
7 purchase of merchandise in Arizona to successfully state a claim under the ACFA, the AG fails
8 to identify any deception associated with sale of any merchandise at all. In short, the allegations
9 have nothing to do with consumer fraud.

10 A significant portion of the 45-page Complaint and nearly 100 exhibits attached thereto
11 contain Google’s confidential information. The parties met and conferred in an attempt to
12 resolve which of these materials could be filed publicly, but they did not reach agreement. The
13 AG has now filed a Notice of Lodging under seal of nearly all the confidential materials.
14 Rather than file a Notice--as the Rule requires--the AG filed a 17-page brief that further
15 demonstrates the density of the materials and information at issue and that additional time to
16 respond is warranted.² Pursuant to Rule 5.4(g)(4), absent an extension, Google’s Motion to
17 Seal those materials is due on July 31, in the middle of the parties’ Motion to Dismiss practice.
18 The AG’s opposition to Google’s 16-page Motion to Dismiss was initially due August 3. At
19 the AG’s request, Google stipulated to a three-week extension to file his opposition, which is
20 now due August 24.

21 Google asked the AG if he would agree to sequenced motion practice, so that the
22 Court first adjudicates the Motion to Dismiss, and the parties have guidance on what (if any)
23 allegations remain at issue in this case before the Motion to Seal is decided. The AG did not
24 agree and took the position that the Court must adjudicate the confidentiality of the hundreds

25 _____
26 ² The prolix “Notice” is at odds with the practice contemplated by the Rule itself, which
27 provides that the “notice must summarize the dispute and set forth the submitting party’s
28 position.” Ariz. R. Civ. P. 5.4(g)(3). The Rule permits substantive briefing by the noticing
party only in response to any forthcoming Motion to Seal and even then only if “the court
authorizes it.” *Id* at (g)(4)(B).

1 of redactions in, and dozens of exhibits to, the Complaint regardless of the outcome of any
2 Motion to Dismiss. Because the Motion to Seal deadline is only two-weeks after the Rule 5.4
3 Notice, Google also asked the AG if he would stipulate to a three-week extension (until August
4 21) to file its Motion to Seal so the parties can discuss sequencing with the Court at the August
5 4 status conference, before Google expends resources briefing a Motion to Seal that may
6 become moot by the Motion to Dismiss. Google made this request on both July 16 and 17,
7 but counsel for the AG would not agree.

8 The AG's proposed approach to motion practice would place a tremendous and
9 unnecessary burden on both the Court and the parties, whereas the motion sequencing Google
10 seeks would streamline early motion practice so it proceeds without the unnecessary burden of
11 sorting through irrelevant, confidential material the AG seeks to include.

12 **III. LEGAL STANDARD**

13 The Court has "inherent power to manage its docket in an efficient and expeditious
14 manner and to use its discretion to avoid technicalities which might cause a miscarriage of
15 justice." *McCutchen v. Hill*, 147 Ariz. 401, 406 (1985). This includes the authority to set
16 deadlines in the interest of promoting judicial efficiency, and to manage case schedules to
17 promote the speedy and orderly administration of justice. *State ex rel. Thomas v. Newell*, 221 Ariz.
18 112, 115 (App. 2009).

19 There is no presumption of public access to discovery materials attached to the
20 Complaint. Canvassing the relevant constitutional and common law standards, the California
21 Court of Appeal recently held that the "mere act of attaching . . . discovery materials as exhibits
22 to the Complaint did not result in them being submitted as a basis for adjudication" such that
23 there was a presumption of public access to the materials. *Mercury Interactive Corp. v. Klein*, 70
24 Cal. Rptr. 3d 88, 121 (2007). Discovery, "which is ordinarily conducted in private, stands on a
25 wholly different footing than does a motion filed by a party seeking action by the court."
26 *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 252 (4th Cir. 1988).

27 Because no right of public access attaches to sealed discovery materials attached to a
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1 Complaint, a showing of “good cause” under “Rule 26(c) will suffice to warrant preserving the
2 secrecy of sealed discovery material.” *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1180
3 (9th Cir. 2006) (internal citation omitted). Applying that standard, the Court will evaluate,
4 among other things, whether: (1) the confidential discovery materials attached to the Complaint
5 are unrelated to the claim and therefore should remain under seal, *id.*; (2) whether needless
6 exposure of witness identity could cause “annoyance, embarrassment, oppression or undue
7 burden,” Ariz. R. Civ. P. 26(c)(1); and (3) whether Google’s interest in keeping the information
8 confidential outweigh any public interest, which depends in part on the relevance of the
9 materials to the claim. *See Kamakana*, 447 F.3d at 1179; *see also Foltz v. State Farm Mut. Auto. Ins.*
10 *Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003) (“[M]uch of the information that surfaces during
11 pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of
12 action.”) (quoting *Seattle Times Co. v Rhinehart*, 467 U.S. 20, 33 (1984)). Each of these issues
13 requires an assessment of the relevance of the allegations and exhibits to the AG’s ACFA claim.

14 **IV. ARGUMENT**

15 **A. Sequencing the Motion to Dismiss first will moot the Motion to Seal or** 16 **avoid multiple and duplicative Motions to Seal**

17 If Google’s Motion to Dismiss disposes of the case, it will entirely moot the Motion to
18 Seal. *See, e.g., Jimenez v. Progressive Cas. Ins. Co.*, No. CV-15-01187-PHX-ROS, 2016 WL
19 11602906, at *6–7 (D. Ariz. Jan. 12, 2016) (denying motion to seal as moot after granting
20 motion to dismiss); *IceMOS Tech. Corp. v. Omron Corp.*, No. CV-17-02575-PHX-JAT, 2020 WL
21 1083817, at *7 (D. Ariz. Mar. 6, 2020) (dismissing motion to seal where consideration of the
22 underlying documents was unnecessary to considering the pending motion in limine).

23 To the extent that any Motion to Seal is required after resolution of Google’s Motion
24 to Dismiss, it is far more efficient to resolve that Motion only once, after the parties and Court
25 have clarity on the operative pleading. It is certainly less burdensome for Google to file a single
26 Motion to Seal rather than filing one now relating to the initial Complaint, and then potentially
27 multiple times more if the Complaint is dismissed with leave to amend. It could even decrease
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1 the burden on the AG, to the extent that the Court requests briefing from Plaintiff on Google's
2 various Motions to Seal. Proceeding seriatim, as the AG would like, would require the Court
3 to invest substantial time adjudicating a Motion to Seal a Complaint that may no longer be the
4 operative pleading in the case.

5 It is within the Court's sound discretion to manage its docket, and significant efficiencies
6 will be gained by sequencing the briefing and hearing on the Motion to Dismiss to occur prior
7 to briefing and hearing of the Motion to Seal.

8 **B. Sequencing will aid in preparing and adjudicating any Motion to Seal**

9 Sequencing will also provide benefits on the merits. One of the primary issues in the
10 Motion to Seal will be assessing the public's interest, if any, in access to confidential information
11 that is irrelevant to the ACFA claim at issue. Although the AG had the luxury of conducting
12 discovery prior to filing his Complaint, that does not entitle him to simply attach broad swaths
13 of discovery to his Complaint. There is no public right of access to "discovery materials that
14 are neither used at trial nor submitted as a basis for adjudication." *NBC Subsidiary (KNBC-TV),*
15 *Inc. v. Superior Court*, 980 P.2d 337, 358 n.25 (Cal. 1999); *see also Seattle Times*, 467 U.S. at 33
16 ("[R]estrictions placed on discovered, but not yet admitted, information are not a restriction on
17 a traditionally public source of information."). This is because the "public has less of a need
18 for access" to discovery materials because "those documents are often unrelated, or only
19 tangentially related, to the underlying cause of action." *Kamakana*, 447 F.3d at 1179 (internal
20 quotations and citation omitted). That is precisely the case here, where the AG's Complaint is
21 replete with materials that do not relate to his allegations under the ACFA.

22 Adjudicating the Motion to Dismiss first will greatly aid in assessing the public's interest
23 in access to the lodged materials. While the AG asserts only a single cause of action under the
24 ACFA, he asserts nineteen disjointed theories of purported "deceptive" or "unfair" conduct.
25 Compl. ¶ 161. Yet the AG's allegations have nothing to do with consumer fraud. Rather, the
26 gravamen of the AG's claim is about geolocation data that Google collected pursuant to clear
27 and robust disclosures and settings. It is unconnected to harm to consumers or sale of any
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1 products, as required by the ACFA. *See* A.R.S. § 44-1522(A). The ACFA cannot be stretched
2 so far as to include the clearly disclosed collection and use of geolocation data in services
3 provided to consumers for free. Accordingly, the Court’s ruling on the Motion to Dismiss will
4 clarify which documents and allegations are actually at issue here. There is no reason for the
5 Court to sift through the AG’s request to un-redact hundreds of unique pieces of confidential
6 information when the underlying claims may not survive and when so few of the allegations in
7 the Complaint are in connection with the “sale or advertising of merchandise” as the ACFA
8 requires. Allowing Google to respond to the AG’s Rule 5.4 Notice after the Court’s ruling on
9 the Motion to Dismiss will promote orderly and efficient resolution of the early issues
10 presented in this case.

11 **V. CONCLUSION**

12 For the foregoing reasons, Google respectfully requests that the Court continue its
13 deadline for filing a Motion to Seal until after its Motion to Dismiss has been adjudicated, or
14 in the alternative, that the Court take up the issue of motion sequencing at the August 4, 2020
15 status conference and continue Google’s deadline to file the Motion to Seal to August 21, 2020.

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17 Dated: July 18, 2020

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