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THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General, Plaintiff, v. GOOGLE LLC, a Delaware limited liability company, Defendant.	Case No: CV2020-006219 **STATE'S RESPONSE IN OPPOSITION TO GOOGLE'S MOTION FOR A CONTINUANCE** Assigned to the Hon. Timothy Thomason (**COMPLEX CALENDAR**) ****Status Conference set for 8/4/2020 at 10:00 a.m.****

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INTRODUCTION

Google's Motion for Continuance ("Motion") should be denied. Setting aside the merits of Google's Motion to Dismiss ("MTD"), there are no efficiencies gained from delaying the sealing motion and doing so would actually create ***more work*** for the Court and Parties. Under Arizona law, the Court applies a single standard to the sealing of civil court filings, and a ruling on the MTD would not change that standard or Google's obligation to comply with it. Indeed, while Google relies on rules and cases from other jurisdictions, it ignores Arizona's Rule 5.4 and Arizona case law, which makes clear that the standard in 5.4(c)(2)(A)-(D) applies to all sealing decisions related to the Complaint and Exhibits here. *See Ctr. for Auto Safety v. Goodyear Tire & Rubber Co.*, 247 Ariz. 567 (App. 2019). And, absent a ruling on Google's confidentiality designations, the State (and the Court) would have to contend with even more sealing issues prior to any ruling from this Court. Google's entire "efficiency" premise fails.

Second, and more importantly, Google's requested delay would unconstitutionally impair the right of public access that is guaranteed by both the First Amendment and the Arizona Constitution. The letters received by the Court and the press coverage to date demonstrate the concrete interest in viewing these materials that Google is trying to hide. (Exhs. A-D).

Third, the information in the Complaint was provided to the Attorney General ("AG") through his statutory investigatory powers, not under any protective order entered by the Court. The AG is statutorily permitted to make these materials public, and nothing precludes the State from doing so. Google has already delayed this process for over two months, and the State has not agreed to keep this information private unless Google files a motion to seal by August 10.

FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 2020, the State filed a Complaint against Google for violations of the Consumer Fraud Act. The Complaint details extensive unfair and deceptive acts and practices by Google, with citations to documents and testimony obtained during the AG's investigation. The Complaint also describes Google's efforts to delay and impede the investigation. The State spent considerable time drafting the Complaint in a manner to exclude materials it believed would meet the requirements of Rule 5.4(c)(2) for filing under seal. The exhibits to the

complaint are a small fraction of the documents Google produced.

During the AG's investigation, Google designated as "confidential" nearly every document produced, every page of every examination and every word in every written discovery response. The State tentatively honored those designations when the filing and redacting the original Complaint on May 27, without waiving its right to oppose sealing.

On the same day the Complaint was filed (May 27), the State provided notice to Google as follows: "[I]t is the judgment of the Attorney General that, consistent with Arizona Rule of Civil Procedure 5.4, the ends of justice and the public interest will be served by making these materials public, *see* A.R.S. § 44-1525." (Exh. E ¶ 2). The State further provided 10 days' notice to Google, pursuant to the pre-litigation Confidentiality Agreement between the parties, that the State intended to file the entire unredacted Complaint (including exhibits) in the public record. (*Id.* ¶ 3). In light of the strong public interest in this case and the constitutional right-of-access issues (*see* July 17, 2020 Rule 5.4(g)(3) Notice and Argument, *infra*), the State sought to engage Google as soon as possible in order to begin the process required by Rule 5.4.

Over the next *seven weeks*, the State engaged in numerous written communications and six phone calls with Google's counsel that collectively lasted for hours. On call after call, the State explained to Google, line-by-line, why it believes the information in the Complaint should be fully public. The State also highlighted each exhibit to show the portions that the State believes should be included in the public record. (*Id.* ¶¶ 3–13).

In contrast, during those seven weeks, Google did not try to substantiate ***any*** confidentiality interest for ***any*** information or document in the Complaint. For example, the State offered to consider any confidentiality concerns if Google were to explain why specific materials or information are particularly sensitive. Google never took up this offer and never pointed to anything that is particularly sensitive, much less with any substantiation. (*Id.*) Google did insist that the names of Google designated witnesses should be redacted because of concerns that they would be harassed, but even as to that point, Google failed to explain which employees were concerned or why they were concerned—particularly given that most of the

employees named in the Complaint also typically offer public comments on behalf of Google. (*Id.* ¶ 13).

On July 15, 2020, Google confirmed that it seeks to seal "all information that is redacted in the version of the Complaint filed publicly on May 27, 2020," including almost all exhibits. (*Id.* ¶ 12). The only exceptions were seven exhibits—subject to heavy redactions—which the State filed publicly with its Rule 5.4(g)(3) Notice. (*Id.*).

In the meantime, there has been substantial public interest in this litigation. Major news outlets reported on the Complaint mere hours after it was filed. (*See* Notice at 6). Additionally, there has been a specific, demonstrated interest from academics, Congress, and the press in accessing the documents that Google is trying to hide. (Exhs. A-D).

Google filed its Notice on Friday, July 17, 2020. Rather than responding with a Motion to Seal, Google quickly filed (over the weekend) the instant motion seeking to delay any resolution of its proposed sealing. On the top of that, Google requested a further three week extension for its Motion to Seal in the event that the Court denies Google's proposed sequencing—a habit of delay that it carried over from the investigation. These serial delays serve no purpose other than to harm the constitutional interests of the public just so Google can avoid embarrassment. At this juncture, the State believes Google must file any motion to seal by August 10. In total, that affords Google more than two and a half months since the Complaint was filed on May 27—while the public has waited.

ARGUMENT

I. Sequencing Would Not Create Efficiencies—It Would Create *More* Work For The Court And Parties.

A. As a matter of law, a ruling on Google's MTD would not moot the issue of whether to seal the original Complaint and Exhibits.

The premise of Google's lead argument (at 6-7) is simply incorrect: This Court's ruling on the MTD will ***not*** moot the separate question of what portions of the judicial record may be sealed from public view. The public right of access has already attached to the Complaint (including exhibits). Win, lose, or draw on the MTD, Google must still comply with the

requirements of Rule 5.4(g), and the Court must still evaluate what portions (if any) of the existing Complaint (including its Exhibits) warrant sealing. Google's efficiency premise fails.

The Ninth Circuit this year confirmed that "[a] complaint is a judicial document or record . . . [and a]bsent a showing that there is a substantial interest in retaining the private nature of a judicial record, once documents have been filed in judicial proceedings, a presumption arises that the public has the right to know the information they contain." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 592 (9th Cir. 2020) (*Planet III*); *see also* Notice at 4 (discussing *Planet III*). The Ninth Circuit confirmed that "public access to civil complaints ***before judicial action upon them*** 'plays a particularly significant role' in the public's ability to ably scrutinize 'the judicial process and the government as a whole.'" *Id.* at 592 (citation omitted; emphasis added). "Public access to civil complaints before judicial action also buttresses the institutional integrity of the judiciary." *Id.* "Some civil complaints may *never* come up for judicial evaluation because they may prompt the parties to settle. The public still has a right to know that the filing of the complaint in our courts influenced the settlement of the dispute." *Id.* at 592-93.

The Ninth Circuit in *Planet III* relied on the Second Circuit, which "easily conclude[d]" that "a complaint is a judicial document subject to a presumption of access." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016); *see also* Notice at 4-5 (discussing *Bernstein*). In *Bernstein*, the parties settled the lawsuit before an answer was filed. *Id.* at 137. Because the Complaint reflected confidential client communications, the parties "jointly moved for an order directing the clerk of court 'to close the file without ordering the file unsealed.'" *Id.* at 139. The district court denied the request. *Id.* Affirming, the Second Circuit explained, "Such documents are presumptively public so that the federal courts 'have a measure of accountability' and so that the public may 'have confidence in the administration of justice.'" *Id.* (citation omitted).

As the Notice explains (at 5), the same analysis applies to the Complaint's exhibits. The Notice cites *FTC v. AbbVie Products, LLC*, which squarely holds, "If a complaint is a judicial record, then it follows that attached exhibits must also be treated as judicial records." Notice at 5 (citing 713 F.3d 54, 63 (11th Cir. 2013)). This is because under federal and Arizona law,

the exhibits are part of the Complaint, and Google has relied on the exhibits in seeking to dismiss Arizona's action here. Notice at 5 (citing Arizona case as well as specific portions of Google's MTD that address Complaint's Exhibits).

Ignoring *Planet III*, *Bernstein* and other authorities cited in the Notice, Google relies (at 6) on snippets from two district court decisions. But even those cases do not involve sealing of a complaint (or anything of the sort) and do not support Google's position. For example, in *Jimenez v. Progressive Casualty Insurance Co.*, No. CV-15-1187, 2016 WL 11602906, at *6 (D. Ariz. Jan. 12, 2016), one defendant asked the court to take judicial notice of a document that the defendant also sought to file under seal. The court "decline[d] to take judicial notice" of the document, which did not become part of the record, and therefore "the motion to seal [wa]s denied as moot." *Id.* Similarly, in *IceMOS Technology Corp. v. Omron Corp.*, the parties filed "various motions to seal . . . in connection with motions in limine." No. CV-17-2575, 2020 WL 1083817, at *6 (D. Ariz. Mar. 6, 2020). Ultimately, the court ruled based on the public (redacted) versions of the documents, and "the requests to file unredacted versions of these materials into the record [were] denied as unnecessary." *Id.* Again, the redacted versions of the motions *in limine* were not considered or even included in the record.

Nothing in these cases—or any other—suggest that a court can ignore sealed portions of the Complaint in ruling on the MTD. Indeed, these materials are already front-and-center for the Court: as explained in the Notice, Google's own MTD purports to characterize what is and is not contained in the sealed portions of the Complaint. Obviously, the State must be able to reference these materials in its Response, and (presumably) Google will again do so in its Reply. The Court cannot grant or deny Google's MTD "without reference to or consideration of" the State's Complaint and Exhibits, which form the "architecture of the lawsuit," *FTC*, 713 F.3d at 62, and the Court ***will*** necessarily have to consider them. *See Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶¶7-9 (2012).

B. Sequencing would create *more* work for the Court and parties because there will be more filings prior to resolution of the MTD.

On top of the lack of legal support for Google's proposal, delaying the Court's guidance as to what materials Google may seal will only result in *more* work for everyone. Most notably, there will soon be pending before the Court ***another*** dispute over sealing: The State will file its response to Google's MTD by August 24, and the response may obviously quote extensively from the Complaint and Exhibits. As explained above, Google seeks to seal so much of the Complaint and exhibits that it would be impossible for the State to respond to the MTD without sealing the entire Response and then letting Google go through the pleading line by line to identify what it seeks to seal. By way of comparison, Google took ***seven weeks*** to provide its position as to what it seeks to seal in the Complaint itself (when Google refused to de-designate even one word in the Complaint and very little in seven Exhibits).

Presumably, the Court itself might also consider quoting from the Complaint and its Exhibits when ruling on the MTD. But under Google's proposal, the Court would not even have the benefit of Google's Motion to Seal before deciding which portions of the complaint the Court will or will not quote in its decision.

Further, without any guidance as to what Google may properly seal, the parties will have no framework for filing other materials in this case. For example, the State expects to file a partial motion for summary judgment ("MSJ") on some of the threshold legal issues that Google raises in its MTD, as well as on some discrete liability theories (all in an effort to potentially streamline the case and discovery, consistent with the goals of the Complex Court). As explained in the Notice (at 8), Google takes the position that nearly every word from every document that Google provided to the AG during his investigation—as well as every word of testimony and even the names of witnesses and their titles—must be filed under seal. Accordingly, the Court would have to contend with yet another highly redacted and sealed pleading in connection with the upcoming MSJ.

As discussed below, there are serious First Amendment issues at play in allowing Google to seal the Complaint indefinitely. Those concerns are greatly exacerbated if *only* Google's

MTD is publicly available, while the State's response and potentially the Court's ruling—not to mention the Complaint and Exhibits and any summary judgment papers—must remain under seal indefinitely. This is all more concerning given that, to date, Google has not even *attempted* to substantiate a basis for sealing *anything*.

In any event, from a pure efficiency standpoint, the Court should order Google to follow the procedure set forth in Rule 5.4(g)(4) and file its motion to seal, so the Court can rule on the issue to assist the Parties as they proceed through these forthcoming MTD and MSJ filings, rather than allowing additional motions to seal to stack up without any guidance from the Court.

II. Sequencing Would Impair The Right Of Public Access To Court Proceedings Guaranteed by the First Amendment and Arizona Constitution.

In addition to causing more work for the Court and Parties, granting Google's request to delay making public *any* presently non-public portion of the Complaint and Exhibits would impair the public right of access guaranteed by the First Amendment and Article 2, Sections 6 and 11 of the Arizona Constitution. Moreover, the record contains evidence that 1) twenty-seven recognized "scholars, practitioners, and advocates with notable careers in the privacy field," 2) another governmental official (Member of Congress) speaking on behalf of his Arizona constituents, and 3) a media outlet that reports to Arizonans have all expressed interest in the contents of the Complaint and Exhibits. See Exhibits A-C to this Response. The media outlet has made a formal public records request to this Court's Clerk under Supreme Court Rule 123. Exh. C-D. Therefore, the First Amendment harm from delay is not hypothetical but concrete.[1] Google never acknowledges the constitutional issue at stake here. Instead, it seems to argue (at 7-8) that this harm is acceptable because some of the Complaint and Exhibits might be mere "discovery materials." Google's argument is wrong from top to bottom and strikes at fundamental rights of *public* access.

[1] Plaintiff may assert the state constitutional speech rights of these third parties. *See, e.g.*, *Mountain States*, 160 Ariz. at 356; *see also Zenith Elecs. Corp. v. Ballinger*, 220 Ariz. 257, 264 ¶23 (App. 2009) (recognizing "newspaper's right of access to court proceedings was 'directly and substantially related to the litigation,'" and "parties' interest in nondisclosure and the newspaper's interest in challenging that nondisclosure presented a common question of law").

A. The First Amendment guarantees a right of public access to court proceedings, including judicial records in civil matters.

The First Amendment guarantees "timely access to newly filed civil complaints." *Planet III*, 947 F.3d at 591; *see also Bernstein*, 814 F.3d at 141 ("Complaints have historically been publicly accessible by default, even when they contain arguably sensitive information."). A plurality of the U.S. Supreme Court first recognized a First Amendment right of access in the context of access to criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). A majority of the Court affirmed this presumptive right of access in *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 603-04 (1982).

To determine if the First Amendment right of public access applies to a type of judicial proceeding/record, courts apply the "experience and logic" test, which "consider[s] (1) whether that proceeding or record 'ha[s] historically been open to the press and general public' and (2) 'whether public access plays a significant positive role in the functioning of the particular [governmental] process in question.' . . . A presumptive First Amendment right of access arises if a proceeding or record satisfies both requirements . . . ." *Planet III*, 947 F.3d at 590.

Applying this test, in *Bernstein*, the Second Circuit affirmed that the right of public access attaches to confidential complaints. 814 F.3d at 141. In *Planet III*, the Ninth Circuit relied on *Bernstein* and held that under the test, the right applied to "newly filed nonconfidential civil complaints." *Id.* at 592; *see also Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 556 (E.D. Va. 2020) (recognizing "federal courts' unanimity" on the issue). Because the right of public access is derived from the need for citizens to monitor their government's functioning, *see*, *e.g.*, *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988), it attaches to complaints.

Parties cannot prevent a complaint (or other judicial records) from becoming public simply by calling it "confidential." *Bernstein*, 814 F.3d at 139. This is all the more salient here—where Google has declared so much to be confidential, while providing zero substantiation. In any event, Google's purported "confidentiality" rights must be evaluated as part of Rule 5.4(c)'s balancing test. *See infra* Part II(D).

B. Article 2, Sections 6 and 11 of the Arizona Constitution, reflected in Arizona Court Rules, guarantee as much, if not more, public access.

The Arizona Constitution's protections have consistently been interpreted as broader than the First Amendment in the area of public access. And these guarantees are reflected in both Arizona Rule of Supreme Court 123 and Arizona Rule of Civil Procedure 5.4.

It is well-established that Article 2, Sections 6 and 11 of the Arizona Constitution guarantee a right of public access to judicial proceedings and records in this State. Section 6 provides, "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Section 11 provides, "[j]ustice in all cases shall be administered openly, and without unnecessary delay."

The Arizona Supreme Court has explained that, based on these constitutional provisions, Arizona courts have found state rights of public access before such rights were established as a matter of federal law. *See Mountain States Tel. & Tel. Co. v. ACC*, 160 Ariz. 350, 354-55 (1989) (discussing public right of access under Arizona Constitution to habeas corpus proceeding and to preliminary hearing in criminal case). Just this year, the court described Article 2, section 11 as a "guarantee of public access to all court proceedings." *State v. Trujillo*, 248 Ariz. 473, 480 ¶38 (2020); *see also KPNX-TV Channel 12, v. Stephens*, 236 Ariz. 367, 370 ¶8 (App. 2014) ("It is undisputed that the public has a constitutional and common law right of access to observe court proceedings.").

The Arizona Supreme Court has likewise recognized the strength of Section 6's speech protections. *See Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 282 ¶46 (2019) (Article 2, section 6 "does, by its terms, provide greater speech protection than the First Amendment" and "a violation of First Amendment principles 'necessarily implies' a violation of the broader protections of article 2, section 6" (citation omitted)). The Court also noted that Arizona's provisions are based on the Washington Constitution. *Mountain States*, 160 Ariz. at 355. And while not dispositive, the Washington Supreme Court recognizes that its constitution guarantees "a right of access to judicial proceedings and court documents in both civil and criminal cases." *Dreiling v. Jain*, 93 P.3d 861, 866 (Wash. 2004).

These constitutional principles are embodied in the Arizona Supreme Court's rules that are applicable to this Court and its Clerk. *See* Ariz. R. Supreme Ct. 123(c)(1) ("Historically, this state has always favored open government and an informed citizenry. In the tradition, the records in all courts and administrative officers of the Judicial Department . . . are ***presumed*** to be open to any member of the public for inspection . . . ." (emphasis added)); *id.* 123(d) ("All case records are open to public except as may be closed by law, or as provided in this rule. Upon closing any record, ***the court shall state the reason for the action***, including a reference to any statute, case, rule, or administrative order relied upon." (emphasis added)); *id.* 123(f)(2) ("Upon receiving a request to inspect or obtain copies of records, the custodian ***shall promptly respond orally or in writing concerning the availability of the records***, and provide the records in a reasonable time . . . ."(emphasis added)).

Rule of Civil Procedure 5.4's "substantive standards [codified in 5.4(c)(2)(A)-(D)] are drawn from federal and Arizona case law, and reflect the constitutional presumption favoring the public's right of access to court proceedings." Notice at 4 (citing 1 McAuliffe & McAuliffe, *Ariz. Legal Forms, Civil Proc. Rule 5.4 Comment 3*). And Rule 5.4(b)(1) defines "document" to include "any filing, exhibit, record, or other documentary material to be filed or lodged with the court." This obviously includes within its terms a complaint and its exhibits.

In addition to its substantive standards and scope, Rule 5.4 imposes a specific time limit on a party that claims a confidentiality interest following the lodging of a document under Rule 5.4(g)(3). That time period is 14 days to move to seal. Ariz. R. Civ. P. 5.4(g)(4). And there is an important procedural safeguard under Rule 5.4(g)(4): the party seeking to seal is required to file and sign under Rule 11 that what it is seeking to seal meets the requirements of Rule 5.4(c)(2)(A)-(D); it is also required to get support for that argument, including declarations if necessary to substantiate its claim.

There are other clear indications from Rule 5.4's structure that it establishes a procedure for promptly resolving sealing requests, so that the right of public access is not infringed. *See Roberto F. v. Dep't of Child Safety*, 237 Ariz. 440, 442 ¶9 (2015) (interpreting rule based in part on rule's structure). For example, it has a 7-day requirement for filing the document after the

court rules on sealing. Rule 5.4(f)(1). It also envisions that the ruling on the sealing of a complaint is made at the *outset* of the case. *See* Rule 5.4 (i)(2)(C) (noting party may seek to abandon case based on sealing ruling).

Google's motion conflicts with both the text and structure of the rule and the right of public access the rule reflects. Google asks the Court to excuse Google from having to move to seal within 14 days (and beyond) and, instead, provide an indefinite extension. Google also asks the Court to proceed with adjudicating the MTD without even ruling on what parts of the Complaint and Exhibits are public. Google already delayed the State's filing of its Rule 5.4(g) Notice by refusing to provide Google's position for seven weeks and—even then—refusing to de-designate much of anything. Google wants to continue maintaining these materials under seal for months without even *trying* to substantiate a basis for seal, much less having the Court evaluate its submission. The Court should deny Google's motion.

C. Google makes no attempt to argue—nor could it establish—that the impairment on public access through "sequencing" is constitutional.

Google has not attempted to meet its burden of showing that the impairment on the constitutional right of public access it requests through "sequencing" is constitutional. This argument is therefore waived. *See, e.g.*, *Westin Tucson Hotel Co. v. State Dep't of Revenue*, 188 Ariz. 360, 364 (App. 1997) ("[A] claim raised for the first time in a reply is waived.").

Nor could Google meet its burden. As a general matter, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And "Courts, too, are bound by the First Amendment." *Citizens United v. F.E.C.*, 558 U.S. 310, 326 (2010).

Under Ninth Circuit precedent, courts apply the standard from *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), to a claim of infringement of the First Amendment right of public access. *Planet III*, 947 F.3d at 596. That standard states that access may be restricted only if "closure is essential to preserve higher values and is narrowly tailored to serve those interests." *Press-Enterprise II*, 478 U.S. at 13-14; *see also Globe Newspaper Co.*, 457 U.S. at 606-07. "[T]he *Press-Enterprise II* 'balancing test' is 'rigorous,' but not strict,

scrutiny." *Planet III*, 947 F.3d at 596. The Ninth Circuit has framed the test as requiring the proponent of closure to show "there is a 'substantial probability' that its interest in the fair and orderly administration of justice would be impaired by immediate access, and second, that no reasonable alternatives exist to 'adequately protect' that government interest." *Id.* at 596. The Ninth Circuit in *Planet III* held unconstitutional the delay (even by a few days) in making non-confidential civil complaints publicly accessible until after processing by the clerk's office. *Id.*

The constitutional issue here is closely related to *Planet III* and *Bernstein*. Does the excessive delay (perhaps for months) in ruling on whether *any* presently non-public part of the Complaint and Exhibits may be made public, even while proceeding to adjudicate the MTD, meet *Press-Enterprise II* scrutiny? The answer is no.

First, Google has not shown "a 'substantial probability' that more contemporaneous access to" the Complaint and Exhibits "would impair its interest in orderly administration." *See Planet III*, 947 F.3d at 596-97. Under the plain language of Rule 5.4(g)(4), a party is afforded 14 days to respond after the notice of lodging under 5.4(g)(3) is served. Similarly, under the Confidentiality Agreement, the parties agreed to afford Google 10 days to seek to seal if the State determined it was going to make documents Google marked "confidential" public under § 44-1525. Google now seeks to delay for months, which bears no resemblance to the 14 and 10 days provided in the rule and parties' agreement.

The only argument Google raises is potential "efficiencies." First, as shown above (Part I, *supra*), these efficiencies are illusory and Google would cause more work with its plan. Second, "efficiency" gains, are not the type of interest contemplated by preservation of "orderly administration of justice"; only something like true prejudice would be sufficiently weighty to override the public right of access under this prong. For example, in *Planet III*, it may have been more "efficient" for the clerk to completely process complaints before making them public, but this was unconstitutional nonetheless. The Motion thus fails the test at step one.

Even if the Court were to reach step two, "reasonable alternatives exist" to preserve Google's desired efficiency. *See Planet III*, 947 F.3d at 596. The most obvious is that *Google could immediately file its Motion, so that the Court can consider it.* As noted above, even

without the Court's ruling, there are important procedural safeguards in making a party move to seal as a prerequisite to keeping court records from the public.

For the above reasons, the Arizona Constitutions would also be violated by Google's proposed continuance. *See Brush & Nib*, 247 Ariz. at 282 ¶46 ("[A] violation of First Amendment principles 'necessarily implies' a violation of the broader protections of article 2, section 6" (citation omitted)).

* * *

In sum, Google's requested "sequencing" is completely incompatible with the public right of access guaranteed by the Arizona and Federal Constitutions. It asks the Court to delay determining whether the Complaint and Exhibits are public or sealed until *after* adjudicating Google's MTD. It further asks the Court to impose this delay without Google even having to move to seal the portions it wants to keep secret. In the meantime, the public is denied access even as the Court issues no ruling on whether any records meet the sealing requirements.

D. Arizona law and the posture of this case foreclose Google's California-law-premised argument that a lower standard applies to sealing "discovery materials" not submitted as "a basis for adjudication."

As explained above, the Complaint and its Exhibits are judicial records and therefore, under both the Arizona and federal constitutions, there is a strong presumption of public access. But the Court does not even need to reach these constitutional issues because Arizona's *rules* establish that *all* filings must be public unless they party seeking to seal them can meet the requirements under Rule 5.4.

Absent another applicable statute, rule or prior court order, "a court may order that a ***document*** may be filed under seal *only* if its finds in a written order that" that a four-part test is satisfied. Rule 5.4(c)(2) (emphasis added). Rule 5.4(b)(1) defines "document" as "any filing [or] exhibit." The language of Arizona Rule 5.4 and case law do not distinguish between different types of civil court filings when describing the right of public access. *See* Notice at 4-5. For example, even though discovery "is not ordinarily public information," it becomes public once "introduced into evidence or ***filed with the court***." *Lewis R. Pyle Mem'l Hosp. v. Super.*

Ct., 149 Ariz. 193, 197 (1986) (emphasis added). There is no authority in the rules for sealing a document—any document—without meeting the four-part test of Rule 5.4(c)(2).

The Arizona Court of Appeals recently held as much, confirming that the standard for sealing discovery materials filed with the Court is the standard in Rule 5.4(c)(2)(A)-(D). *See Ctr. for Auto Safety*, 247 Ariz. at 568 ¶1. There, in Superior Court, "[b]oth the Haegers and Goodyear filed motions that described some of the documents designated 'confidential' by Goodyear" pursuant to a protective order, and "the Center for Auto Safety ("CAS") [later] intervened, moving to unseal ***all*** court records and vacate the blanket protective order." *Id.* at 570 ¶7, ¶9 (emphasis added). The Court of Appeals recognized that while Rule 26 governs confidentiality of discovery material, "[t]he superior court may order documents to be ***filed under seal only if*** it finds in a written order that" the substantive requirements of 5.4(c)(2)(A)-(D) are met. *Id.* at 572 ¶21 (emphasis added)); *see also State v. Ludwig*, No. 1 CA-CR 16-0735, 2017 WL 3484502, at *4 ¶19 (Ariz. Ct. App. Aug. 15, 2017) (discussing former Local Rule 2.19; concluding good cause does not equal compelling reasons and that trial court did not err by finding Ludwig failed to show a compelling interest to seal *charges* filed against him).[2]

The Court's ruling on Google's MTD will not change the analysis under Rule 5.4(c)(2). The factors in Rule 5.4(c)(2)(A)-(D) are not based on the "relevance" of the information to the case, but rather protecting the right of public access. Google accuses (at 2) the AG of including "in his Complaint confidential information and documents that are not necessary to his pleadings," but Google identifies no such extraneous materials. Tellingly, Google did not timely move to strike any portion of the Complaint and Exhibits. *See* Ariz. R. Civ. P. 12(f)(2) (motion must be made before responding to the pleading). Nor would Google have any basis for seeking to strike anything: the State carefully drafted its complaint, and nothing in the Complaint comes close to the standard for striking. *See Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 395, 381 P.2d 107, 114 (1963) ("such motion is not favored and [material] should

[2] "[T]he grounds for sealing under the two rules [Rule 5.4 and former Local Rule 2.19] are substantially the same." *Ctr. for Auto Safety*, 247 Ariz. at 572 ¶22.

'not be stricken from a pleading unless it is clear that it can have no possible relation to the subject matter of the litigation' and the movant can show he is prejudiced by the allegations" (citations omitted)).[3] The materials that are presently non-public are undoubtedly part of the Complaint and Exhibits and will remain so regardless of the outcome of Google's MTD.

Ignoring Arizona rules and case law, Google turns to *California* rules and case law to attempt to persuade this Court to deviate from the plain language of Arizona's Rule 5.4. *Motion* at 5, 7 (citing *Mercury Interactive Corp. v. Klein*, 70 Cal. Rptr. 3d 88, 103 (App. 2007); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 n.25 (Cal. 1999)). Google points out that, under California's rules, some courts hold that "discovery materials" attached to a complaint are not subject to the presumption of public access unless they are submitted as a basis for adjudication. These California cases interpret California State Trial Court Rule 2.550(a)(3), which expressly distinguishes between, on the one hand, "discovery motions and records filed or lodged in connection with discovery motions or proceedings" and, on the other hand, "discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings." But California rules do not apply in Arizona courts, and Arizona law does not make this distinction.[4]

For all of these reasons, the Rule 5.4(c)(2)(A)-(D) substantive standard applies to any request by Google to seal any portion of the Complaint and Exhibits. No decision on any pending MTD will change the applicable standard or Google's obligation to meet it.

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[3] *Stonev* was overruled in part on other grounds by *Grimm v. Arizona Bd. Of Pardons & Paroles,* 115 Ariz. 260 (1977).

[4] Google also cites to a dispositive/non-dispositive distinction for attaching discovery materials to filings. Motion at 6 (citing *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179-80 (9th Cir. 2006); *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003)). But the Ninth Circuit has confirmed unequivocally that the constitutional right of public access is strongly presumed for a case-initiating complaint. *Planet III*, 947 F.3d at 591–94. Even as to non-dispositve motions, these Federal cases also cannot, and do not purport to, override Arizona's rules and binding Arizona precedent discussed above. Finally, Google's reliance on *Seattle Times Co. v. Rhinehardt*, 467 U.S. 20, 33 (1984) is entirely misplaced—that case (also discussed below) involves documents that were not filed with the court at all.

III. Consistent With The Separation Of Powers, The Court Should Not Rewrite The Parties' Contract To Preclude The Attorney General From Exercising His Statutory Discretion To Make Pre-suit Materials Public.

Google incorrectly frames the issue at hand as the Court overseeing the public disclosure of "discovery materials" obtained pursuant to a "protective order." *See* Motion at 2. Contrary to Google's unsupported assertions, the information contained in the Complaint and its Exhibits were obtained by the AG pursuant to statutory investigative powers, not discovery. *See* A.R.S. §§ 44-1524, 44-1526. The difference is critical.

In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), a news organization challenged the court's protective order as a prior restraint with regard to information obtained by the news organization through litigation discovery. Rejecting this argument, the Court explained that such a restraint does not require exacting First Amendment scrutiny because it "prevents a party from disseminating only that information obtained through use of the discovery process." *Id.* at 34. Importantly, the Court added, "the party may disseminate the identical information covered by the protective order as long as the information is ***gained through means independent of the court's processes***." *Id.* (emphasis added); *see also Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1081 (9th Cir. 1988) (court's "power to control discovery does not extend to material discovered in a separate action"); *see also In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988) (reversing decision "plac[ing] under a protective order materials not obtained through discovery); *Joseph v. Joseph*, No. 1:16-CV-465, 2019 WL 6310193, at *8 n.2 (S.D. Ohio Nov. 25, 2019) (protective order does not apply to documents produced outside of discovery context).

The AG is a constitutional, executive official. *See* Ariz. Const. Art. V § 1(A); *see also DeVries v. State*, 219 Ariz. 314, 321 ¶19 (App. 2008) (describing AG "as the chief law enforcement officer of the state"). The exercise of those investigative powers is an executive function vested in the officers who are charged by law with enforcing their provisions. *Cf. Sensing v. Harris*, 217 Ariz. 261, 263 ¶7 (App. 2007) ("Law enforcement activities by police and prosecutors are generally considered to be discretionary . . . . "). And importantly, the statutory scheme also vests discretion in the AG whether to make any of those materials public. A.R.S. § 44-1525 (information obtained from investigation "shall not be made public ***unless in***

the judgment of the attorney general the ends of justice and the public interest will be served by the publication thereof, provided that the names of the interested parties shall not be made public" (emphasis added)).

"Nowhere in the United States is this system of structured liberty [of separation of powers] more explicitly and firmly expressed than in Arizona." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997) (quoting *Mecham v. Gordon,* 156 Ariz. 297, 300 (1988)); *see also* Ariz. Const. art. III. The AG has statutory authority to make these materials public, and the Parties' Confidentiality Agreement only requires the State to provide Google 10 days' advance notice of filing the materials publicly.[5] Although Google dragged out the meet-and-confer process for seven weeks, and Rule 5.4 only affords Google another 14 days from the Notice, the State has patiently afforded Google until August 10, 2020, to bring a motion to seal. The information at hand was gained pursuant to the AG's investigation, and the AG has not agreed to maintain these materials as confidential unless Google files its motion by that date.

Given the separation of powers concerns implicated here, this Court should not grant Google's request to further delay unsealing.

CONCLUSION

The Court should deny Google's Motion for a Continuance.

Dated: July 24, 2020

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[5] *State Farm Mut. Auto. Ins. v. Johnson*, 151 Ariz. 591, 594 (App. 1986) ("[I]t is not the prerogative of the court to *rewrite* the contract.").

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