

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-006219

08/05/2020

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

STATE OF ARIZONA, et al.

BRUNN W ROYSDEN III

v.

GOOGLE L L C

JEAN JACQUES CABOU

ORAMEL HORACE SKINNER
MICHAEL S CATLETT
GUY RUTTENBERG
MICHAEL ESHAGHIAN
DAVID H THOMPSON
PETER A PATTERSON
BENEDICT Y HUR
SIMONA AGNOLUCCI
NELSON A F MIXON
JUDGE THOMASON

MINUTE ENTRY

Google LLC (“Google”) has moved for a continuance of the time to file a Motion to Seal under Rule 5.4 until after adjudication of Google’s Motion to Dismiss. The Court has considered the Motion, Response and Reply. The Court has also considered the arguments of counsel.

The Attorney General (“AG”) of the State of Arizona (“Arizona” or “State”) has brought a Consumer Fraud Act Complaint against Google. Google contends that the Complaint and Exhibits are “chock-full” of Google’s confidential information. The AG obtained some of these materials during his pre-suit investigation under a protective order. On July 17, 2020, the AG filed

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a Notice of Lodging under seal and announced the State's position that all of the materials included with the Complaint should be made public.

Google has filed a Motion to Dismiss the Complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted ("MTD). Google asks the Court to continue the deadline for filing its Motion to Seal under Rule 5.4 and postpone adjudication of the Motion to Seal until after the Court rules on the MTD.

Google makes two main points. First, it contends that the Motion to Seal is moot if the MTD is granted, citing *Jimenez v. Progressive Casualty Ins. Co.*, No. CV-15-091187-PHX-ROS, 2016 WL 11602906, at *6-7 (D. Ariz. Jan. 12, 2016). In that case, however, a 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." The *Jimenez* decision does not stand for the broad proposition that granting a Motion to Dismiss moots a determination of what documents and information submitted with a Complaint should be sealed.

Second, Google argues that sequencing will be more efficient, even if the MTD is denied. According to Google, the Court's ruling on the MTD may help clarify what is actually at issue, thus making it easier to determine what information, if any, should be made public. As such, according to Google, the Court should not address a Motion to Seal before the MTD is resolved and the issues are clarified. It appears to the Court, however, that a ruling denying the MTD will not have any appreciable impact on determining what documents and information should be made public.

The State opposes deferring a determination on sealing of documents. The State has three primary reasons for its opposition.

First, the State argues that a ruling on the MTD would not moot the issue of whether the Complaint and Exhibits should be sealed. According to the State, Rule 5.4 has one standard for determining when documents should be sealed.

As such, according to the State, irrespective of how the MTD decided, Google is still required to comply with Rule 5.4(g). The Ninth Circuit has stated that "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*). The Ninth Circuit in *Planet III* relied on the Second Circuit, which "easily concluded[d]" that "a complaint is a judicial document subject to a presumption of access." *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 139 (2d Cir. 2016).

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The State notes that Google's own MTD purports to characterize what is and is not contained in certain sealed portions of the Complaint. The State also notes that it might need to reference the sealed materials in its Response. As such, the Court may need to consider some of the sealed materials in resolving the MTD.

Second, the State argues that sequencing would impair the right of public access to Court proceedings guaranteed by the First Amendment and the Arizona Constitution.¹ The Court believes that the Arizona Constitution's protections are broader than the First Amendment to the United States Constitution. Therefore, the Court will focus on the Arizona Constitution.

Article 2, Section 6 provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Article 2, Section 11 provides, "[j]ustice in all cases shall be administered openly, and without unnecessary delay."

Just this year, the Arizona Supreme 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). Rule 123(c)(1) of the Rules of the Arizona Supreme Court provides that "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..."

Rule 5.4 of the Arizona Rules of Civil Procedure includes substantive standards that reflect the general Constitutional presumption of public access. In addition, Rule 5.4(g)(4) imposes a specific time limit on a party to assert a claim of confidentiality following the lodging of a document under Rule 5.4(g)(3). If the party does not timely file a motion to seal the document, the Court is authorized under Rule 5.4(g)(5) to enter an order making the material part of the public record. Accordingly, the State contends that the process in determining what documents and information can be kept under seal should proceed forthwith.

Third, the State argues that the Court should not preclude the AG from exercising his statutory discretion to make pre-suit materials public. The AG obtained the information contained in the Complaint and Exhibits pursuant to a statutory investigation. A.R.S. §§ 44-1524, 44-1526. The materials do not constitute discovery. The AG is an executive official created by Article V of

¹ The State advises the Court that twenty-seven recognized scholars, practitioners and advocates have expressed interest in the contents of the Complaint and Exhibits. The fact that various scholars and practitioners might be "interested" in some of the documents is completely irrelevant. The State also mentions a letter sent to this Court by a member of Congress. This letter was an improper *ex parte* communication, which the Court disregarded after giving a copy to the parties. It was inappropriate for the State to mention this letter or attach it to its Response. Finally, as the State observes, media interest in the Complaint and Exhibits may be a relevant consideration in assessing Constitutional issues regarding access to Court proceedings.

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the Arizona Constitution.² The AG has investigative powers. Information obtained from an 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.” A.R.S. § 44-1525.

As such, the AG contends that the Court should not interfere with his discretion to make materials public. The parties’ Confidentiality Agreement only requires the State to provide Google 10 days advance notice of publicly filing the materials.

The State has the better argument. The Court believes firmly that Court proceedings have a strong presumption of being open to the public. As such, the Complaint and Exhibits might be information that should be made available to the public, even if the MTD is granted.

The Court is mindful of possible mischief. It is certainly possible that a frivolous complaint could be filed simply to make documents available to the public that otherwise would not be. Certainly, if that were to happen, the Court has the ability to enter appropriate sanctions. The Court, however, has no reason to think that is the case here. The State is represented by well-respected and excellent counsel who are well aware of their professional obligations. The Complaint was the result of an extensive investigation by accomplished lawyers, including the AG of the State of Arizona. Of course, that does not necessarily mean the MTD will be denied. Indeed, the Court will certainly not prejudge the MTD.

The Court finds and concludes that the determination of what documents and information should be sealed should proceed forthwith. The Motion for Continuance is denied.

² Google contends that there is no presumption of public access to discovery materials attached to a complaint, citing a California decision, *Mercury Interactive Corp. v. Klein*, 70 Cal. Rptr. 3d 88, 121 (App. 2007). Accordingly, Google argues that a showing of “good cause” under Rule 26 is sufficient to warrant preserving the secrecy of sealed documents. The materials at issue here, however, are not traditional discovery materials. Rather, they were obtained pursuant to a statutory investigation by the AG that occurred prior to suit being filed.