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16	NORTHERN DISTRICT OF CALIFORNIA	
17	SAN JOSE	DIVISION
18	SAN JOSE IN RE GOOGLE INC. GMAIL LITIGATION	DIVISION Master Docket No.: 13-MD-02430-LHK
18 19	IN RE GOOGLE INC. GMAIL LITIGATION THIS DOCUMENT RELATES TO:	Master Docket No.: 13-MD-02430-LHK DECLARATION OF MATTHEW D.
18 19 20	IN RE GOOGLE INC. GMAIL LITIGATION	Master Docket No.: 13-MD-02430-LHK DECLARATION OF MATTHEW D. GREEN, PH.D., IN REPLY AND IN SUPPORT OF THE CONSOLIDATED
18 19 20 21	IN RE GOOGLE INC. GMAIL LITIGATION THIS DOCUMENT RELATES TO:	Master Docket No.: 13-MD-02430-LHK DECLARATION OF MATTHEW D. GREEN, PH.D., IN REPLY AND IN SUPPORT OF THE CONSOLIDATED MOTION FOR CLASS CERTIFICATION
18 19 20 21 22	IN RE GOOGLE INC. GMAIL LITIGATION THIS DOCUMENT RELATES TO:	Master Docket No.: 13-MD-02430-LHK DECLARATION OF MATTHEW D. GREEN, PH.D., IN REPLY AND IN SUPPORT OF THE CONSOLIDATED MOTION FOR CLASS CERTIFICATION Date: January 16, 2014 Time: 1:30 p.m.
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18 19 20 21 22 23 24 25 26 27	IN RE GOOGLE INC. GMAIL LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS /// /// [PUBLIC REDACTED VERSION OF	Master Docket No.: 13-MD-02430-LHK DECLARATION OF MATTHEW D. GREEN, PH.D., IN REPLY AND IN SUPPORT OF THE CONSOLIDATED MOTION FOR CLASS CERTIFICATION Date: January 16, 2014 Time: 1:30 p.m. Judge: Hon. Lucy H. Koh Place: Courtroom 8—4 th Floor Trial Date: October 20, 2014 DOCUMENT FILED UNDER SEAL]

I, Matthew D. Green, Ph.D., under penalty of perjury pursuant to 28 U.S.C. § 1746, hereby make the following Declaration in support of the Plaintiffs' Consolidated Motion for Class Certification, and state as follows:

- 1. Various Google employees have given unequivocal declarations that Gmail processes data in non-uniform ways and that information does not exist to process Class Member claims. Plaintiffs' counsel has asked me to give my opinion as to whether those unequivocal declarations are consistent with the evidence Google has produced in this case, and whether a trier of fact can resolve any disputes using common proof. On January 28, 2013, I submitted a declaration in support of Mr. Keith Dunbar's Motion for Class Certification in the matter *Keith Dunbar*, *et al. v. Google, Inc.*, 5:12-cv-03305-LHK, In the United States District Court for the Northern District of California. I incorporate my statements and opinions expressed in that declaration into this Declaration as if re-written herein and attach that declaration as Exhibit A.
- 2. On March 28, 2013, I submitted a supplemental declaration in support of Mr. Keith Dunbar's Motion for Class Certification in the matter *Keith Dunbar*, *et al. v. Google*, *Inc.*,, 5:12-cv-03305-LHK, In the United States District Court for the Northern District of California. I incorporate my statements and opinions expressed in that declaration into this Declaration as if re-written herein and attach that declaration as Exhibit B.
- 3. I base my analysis on a review of the documents identified in Exhibits A and B, as well as the following:
 - The Consolidated Motion for Class Certification;
 - Declaration of Sean Rommel in Support of the Consolidated Motion for Class Certification and Exhibits;
 - The Opposition to the Consolidated Motion for Class Certification;
 - Google's Declarations and Exhibits in Opposition to the Consolidated Motion for Class Certification; and
 - Declaration of Sean Rommel in Reply and Exhibits.

(Kapadia Dec., p.1:8-9.) I read the remainder

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f the Kapadia Declaration as an attempt to support this assertion. I have addressed many of the		
ssues raised by the Kapadia Declaration in my Exhibits A and B and offer those in rebuttal. In		
ddition, I will address more specifically additional issues or supplement prior statements based		
pon new information made available since my last declaration. However, the unequivocal		
ssertions made by Stacey Kapadia throughout the Kapadia Declaration that Google's systems		
re not uniform for various reasons versus the evidence upon which I rely would appear to		
llow for a common question(s) upon which a single trier of fact could answer. Each step in the		
Smail process can be posed to a single trier of fact as to its uniform application given a very		
ew finite events as I have previously identified and reiterate below.		

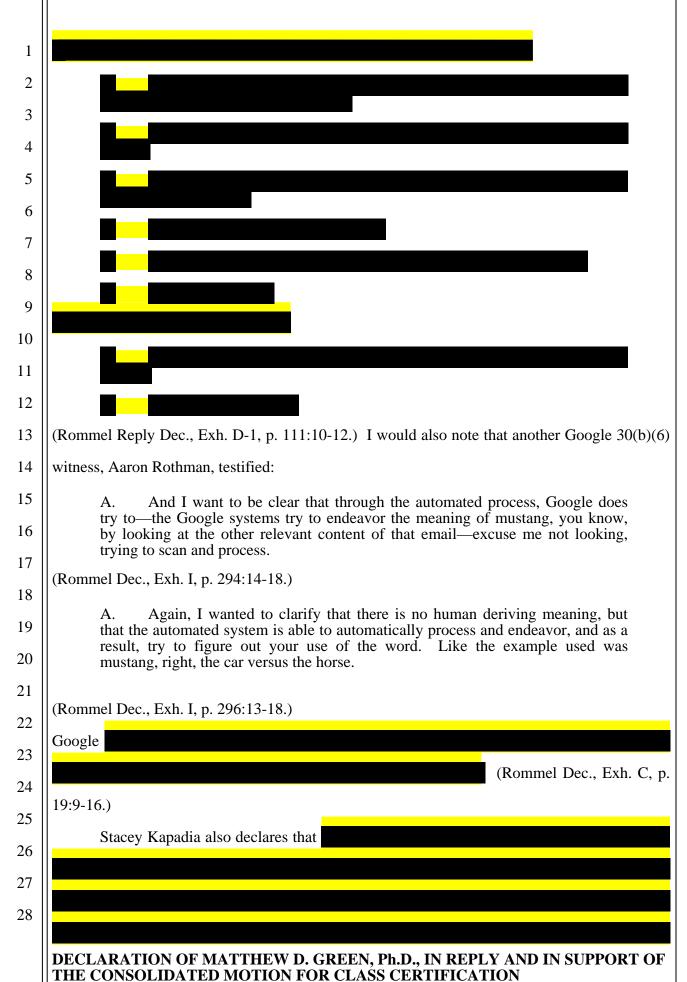
(Kapadia Dec., p. 1:9-11.) I have addressed separately the uniformity of Google's actions in the preceding and subsequent paragraphs. ¶¶ 8-9, 18, 20,

21, 26-27, and offer these paragraphs in rebuttal to the Kapadia assertion stating otherwise. I note that the quoted passage, "model the actual ideas in a person's mind," is a direct quote from the PHIL patent application which reads in relevant parts:

- "Processing text in a way that captures its underlying meaning—its semantics—is an often performed but poorly understood task." (Rommel Dec., Exh. F)
- "In general, search systems and other such semantic processing systems have failed to capture much of the meaning behind text. The system we are about to describe does so, by learning the relationships between words and 'concepts' from a large amount of data." (Id.)
- "Our system, the Probabilistic Hierarchical Inferential Learner (PHIL) learns concepts by learning the explanatory model of text." (*Id.*)
- "Phil considers the important information in a piece of text to be words (and compounds) used in the text." (*Id.*)
- "It is because when people are generating text with these words, they have ideas in mind. Phil's concepts are supposed to model the ideas in a person' mind before they generate text." (*Id.*)

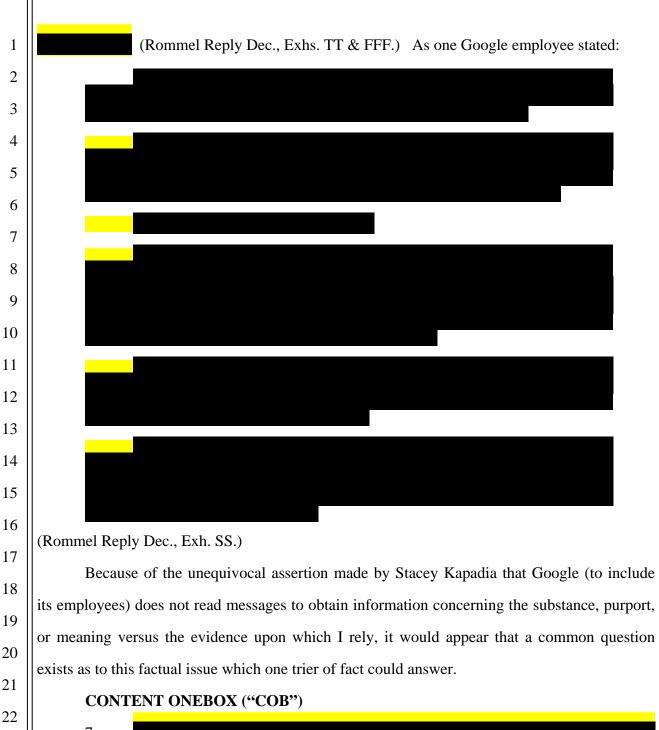
I would further note that Google's own 30(b)(6) witness, Thompson Gawley, had no perceived problem in understanding and agreeing with the statement(s)

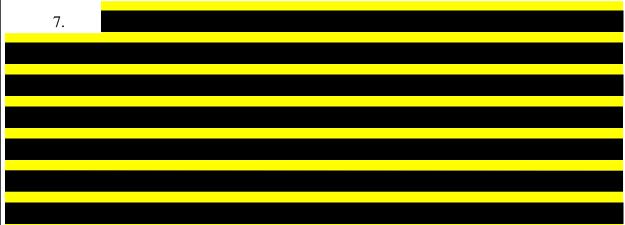
DECLARATION OF MATTHEW D. GREEN, Ph.D., IN REPLY AND IN SUPPORT OF THE CONSOLIDATED MOTION FOR CLASS CERTIFICATION

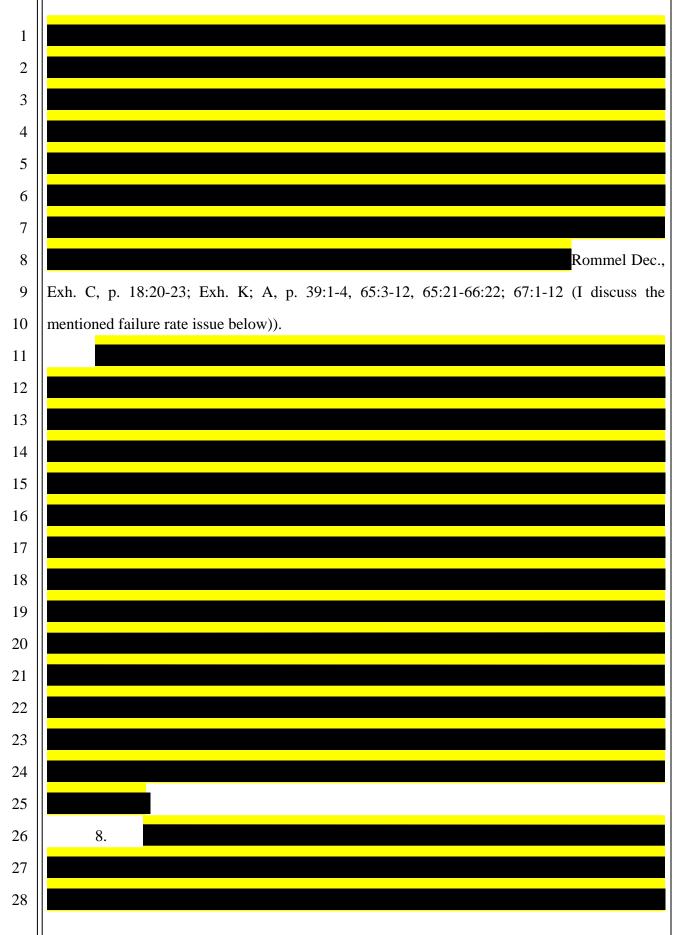


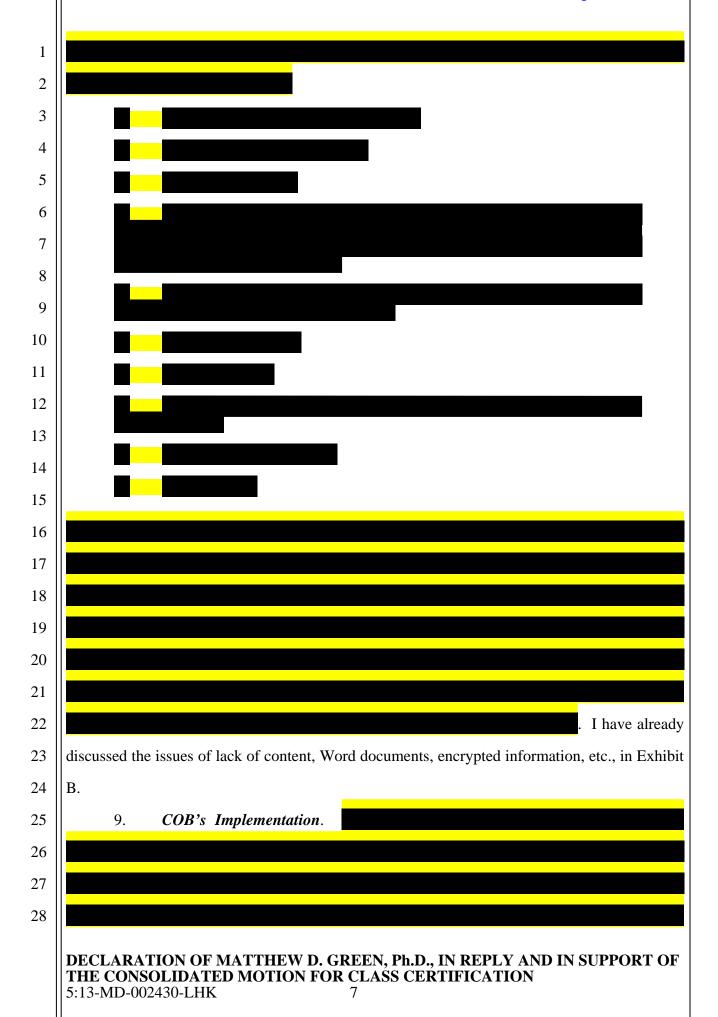
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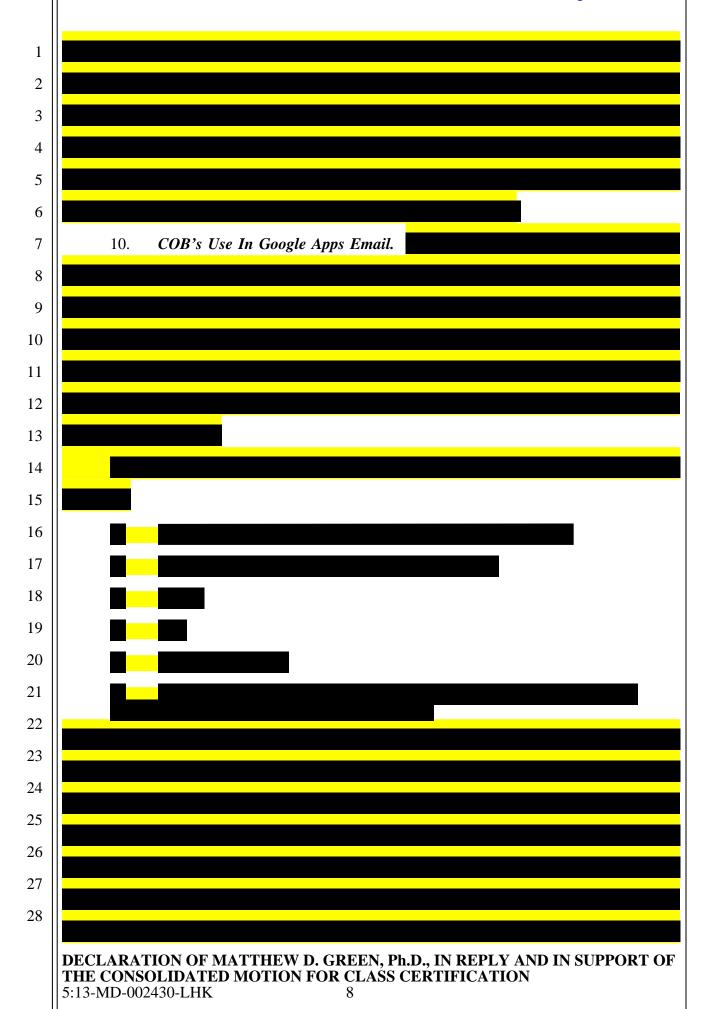
(Kapadia Dec., ¶¶ 14-15.) However, these same statements
are supportive of evidence that could be applied to to determine whether
Google acquires any "information concerning" the substance, purport, or meaning of the email.
(18 U.S.C. § 2510(8) (emphasis added).) Stacey Kapadia's statements of COB's processes
evidences COB's ability to
(Kapdia Dec., ¶ 16.) I will not speculate as to the basis for the
Kapadia distinction between humans or automated processes making these types of
associations. But an admitted "automated processes" that must examine the entirety of an
email's content for the presence or lack of and that has the capability of
in my opinion, would be evidence I would apply to the statutory definitions of
"intercept" (which requires a non-human component of "electronic, mechanical, or other
device) (18 U.S.C. § 2510(4)); "electronic, mechanical, or other device," (which requires a non-
human component of "device or apparatus") (18 U.S.C. § 2510(5)); and "contents" (which
involves "any information" concerning the substance, purport, or meaning) (18 U.S.C. §
2510(8)). In my opinion, the Kapadia declaration provides evidence for a determination that
in fact acquire "any information" about an email's substance, purport, or meaning.
The substance may have great relevance or weight to the benefit of Google, or it may have little
to no value to Google. But Google's ability to make that determination, in my opinion, would
be evidence applied to processes to show that Google does acquire "any information"
about the email's content in order to make that decision.
6. In addition, the evidence to-date does



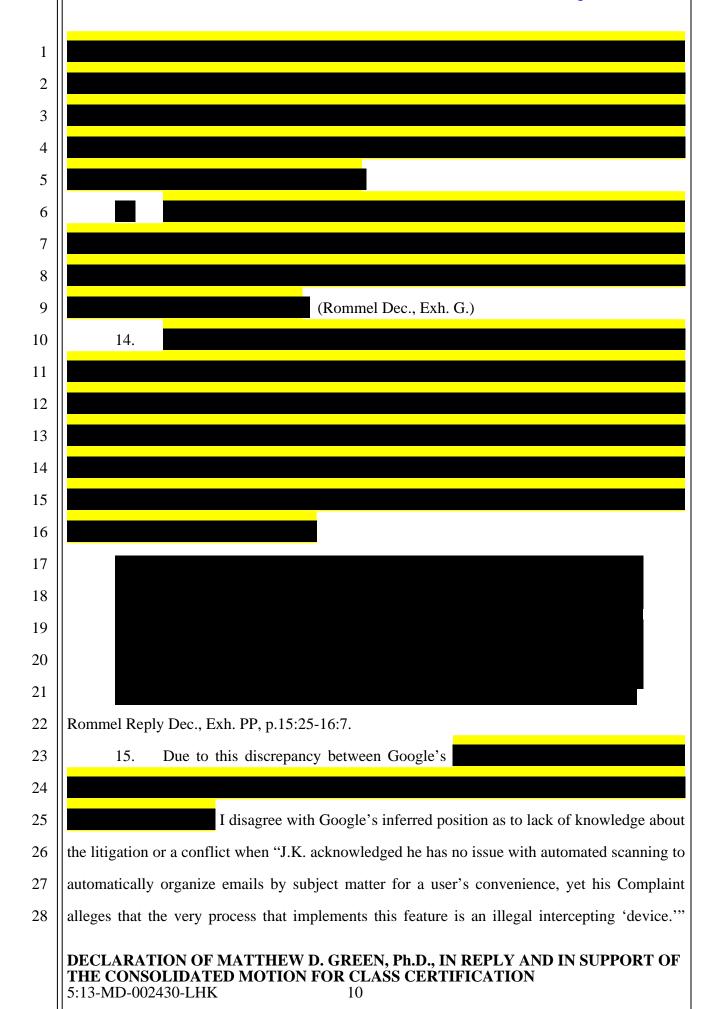








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4	is "ad-related scanning or processing." I am aware that Google tells	
5	Google Apps users, "Note that there is no-ad related scanning or processing in Google Apps for	
6	Education or Business with ads disabled." (Rommel Dec., Exh. R.)	
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11	I note that Rommel Dec., Exh. R, was printed from the web-	
12	page as of August 22, 2013. It also appears that Google's 30(b)(6) witness on consent, Aaron	
13	Rothman, was questioned about Google's statement, "Note that there is no-ad related scanning	
14	or processing in Google Apps for Education or Business with ads disabled," on August 29,	
15	2013. (Rommel Dec., Exh. I, p. 188:22-189:1; 193:11-201:1.) In addition, Google states in	
16	Exhibit R, "In other words, we scan or index user content in Google Apps in order to provide	
17	features that will directly benefit users, or help us maintain the safety and security of our	
18	system." Mr. Rothman was questioned about this statement as well. (Rommel Dec., Exh. I, p.	
19	193:11-201:1.) To the Cable One Google Apps user or the Google Apps EDU user, all of	
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21	For any Cable One Google Apps user	
22	or Google Apps EDU user, I find no direct benefit to the user or need for "safety and security of	
23	[Google's] system" for any of the	
24	applied to their emails. Finally, I note that following the Aaron Rothman deposition, it appears	
25	Google removed from its web-page the language, "Note that there is no-ad related scanning o	
26	processing in Google Apps for Education or Business with ads disabled." (Rommel Dec., Exh	
27	CC.)	
28	12. MEDLEY SERVER.	



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(Opp. p. 29:14-17.) First, I was required to sign an Attachment A to the Agreed Protective
Order before I could view most of the documents upon which I rely in making these
Declarations. My understanding is that most of Google's production in this case has been made
under a designation of "Highly Confidential—Attorneys' Eyes Only," and the majority if not all
of the documents upon which I have relied and that have been produced by Google have been
so-marked. I also note that all of the sworn discovery responses and testimony provided to me
and which discuss Google's processes have been marked "Highly Confidential—Attorneys"
Eyes Only." Secondly, as I note in this Declaration, there now appear to be numerous
contradictions inserted by Google in its current Opposition and supporting Declarations versus
the prior Google documentation, the Google sworn discovery responses, and Google's
testimony all on the material topics of Google's processes.
J.K. may have been well within his
understanding of the case for having no concerns of what occurs in storage—a function not
involved in this matter. In any event, the sheer volume of information marked confidential in
this case would pose a serious impediment to any Plaintiff or lay person attempting to match
and identify any particular process to a resulting feature.
16.
(Kapadia Dec., p. 9:17-21.) While I have addressed this issue
supra, See
Rommel Reply Dec., Exh. PP, p. 15:5-8.

(Rommel Reply Dec., Exh. PP, p. 9:9-16.)

- 17. **EVENTS TO ESTABLISH DEVICE APPLICATION AND CLASS MEMBER IDENTIFICATION.** I will respond to the assertions made in Google's Opposition and the Opposition declarations against the ability to verify Class Members and acts necessary to make a claim. In this Declaration, I have described certain processes leading to events a Plaintiff or Class Member would need to show to establish the application of a Google device upon a particular email.
- 18. I understand Google to assert that the proposed classes are unascertainable, in part, because individualized proof would be founded upon potential "class member affidavits." (Opp. 9:2-11). However, the verification of class membership and the events associated with the Gmail processes would be based upon objectively verifiable information from either the emails at issue, the public header data in those emails, or Google's own business logs not involving Gmail user email content. I will discuss these specifics *below*.
- (Kapadia Declaraion, ¶ 20 & 26.) In my opinion, such logs specifying the particular device(s) are unnecessary to identify the relevant events and the class members.
- 20. Further, I understand Google to claim that the classes of individuals at issue would contain "Individuals who sent spam, computer viruses, or other abusive (or illegal) emails to Gmail users, who cannot use the wiretapping statutes to benefit from their own wrongful conduct." (Opp., p. 10:6-7.)

 (see also Exhibit A, ¶ 20; Exhibit B, ¶ 8-11.)

This single event is objectively

verifiable by a number of methods, as well as Google's own records as discussed below.

- 21. Although I have previously addressed terms and phrases such as "Message IDs" or "message identifiers" (Exh. A, ¶¶ 14 and 41; Exh. B, ¶ 10), and "message headers" (Exh. A, ¶¶ 41), I will further describe these phrases and others in response to Stacey Kapadia's and Brandon Long's Declarations about the absence of logs and Google's assertion that the proof to be submitted by Plaintiffs and Class Members is either unavailable or not objectively determinable. All email messages contain certain data created when email is essentially transmitted, and I will briefly describe those to be discussed herein:
 - The "Message-ID" field "contains a single unique message identifier," which refers to a "particular version of a particular message." (Rommel Dec., Exh. B, § 3.6.4.) It pertains to "exactly one instantiation of a particular message; subsequent revisions to the message each receive new message identifiers." (*Id.*)
 - The "In-Reply-To" and "References" fields "are used when creating a reply to a message." (*Id.*) They hold the message identifier "of the original message," and the "In-Reply-To" contains the contents of the "'Message-ID:' field of the message to which this one is a reply ('the parent message')." (*Id.*) In the context of this case, such information would validate that a particular Plaintiff or Class Member had in fact sent an email message to an @gmail.com user and the message was in fact received by the @gmail.com user—as identified by the "In-Reply-To" field containing the "parent message" message identifier.
 - Other fields include: (1) the "From" field, which identifies the author of the message and the mailbox (*Id.*, § 3.6.2); (2) the "To" field, which identifies the recipients of the message and contains the address(es) of the recipients (*Id.*, § 3.6.3); and (3) the "Origination date field" or "Date" field (*Id.*, §§ 3.6, 3.6.1).
 - Google itself provides an explanation in its web-page, "Reading full email headers," as to how these fields and others can be interpreted and read. (Rommel Reply Dec., Exh. YY.) Google also provides a very simple description of how such message headers, which "contain tracking information for an individual email," can be obtained from any number of Webmail providers. (Rommel Reply Dec., Exh. ZZ.) Such information could easily be conveyed to any Class Member for claim submission either contained fully in a notice or referenced by hyperlink.
 - In this Declaration, I have referenced certain events, such as: non-spam, delivery, receipt, etc. I have also noted in Exhibit A, ¶ 41, the evidence of Google's logs which contain the necessary information to establish the events discussed herein. I note that Google claims in its Opposition that is does not maintain the necessary data for the events and other actions discussed herein. (Opp., p. 8 n.4) Further, Google asserts issues of overwhelming individual evidence leading to disputes necessary to set aside the "myriad issues needed to resolve their claim." (Opp., p. 8:14-23.) However, Google itself publishes web-sites explaining its own capabilities with its own business records through actual "Gmail delivery logs" to provide virtually all of the necessary information to support any

Plaintiffs' or Class Members' claims. (Rommel Reply Dec., Exh. AAA.) These types of logs allow Google to answer basic questions such as:

- ✓ "What happened to an inbound or outbound message?"
- ✓ "Was a message sent to my domain and marked as spam?"
- ✓ "Which users sent or received a specific message?" (*Id.*) These Google business records contain "information that is available in the log search feature includ[ing]:"
 - ✓ Sender.
 - ✓ Recipient,
 - ✓ Date,
 - ✓ Message-ID,
 - ✓ The presence of Attachments,
 - ✓ Delivery status,
 - ✓ Marked Spam,
 - ✓ Rejected, and
 - ✓ Delivered to Gmail inbox.

(*Id.*; see also Rommel Reply Dec., Exh. DDD) Google even publicizes that it can provide the search for this information through "BigQuery because it can analyze multi-terabyte data with billions of header to deliver precise results in just a few seconds." (*Id.*) These capabilities also allow for the identification of the IP address "a message has been sent." (Rommel Reply Dec., Exh. BBB.) This could certainly help verify geographic location, if necessary. While the web-site appears to be offered publicly to Google Apps administrators, Google's 30(b)(6) witness, Thompson Gawley, testified about the existence of "Gmail delivery logs" associated with "incoming mail" addressed to Gmail accounts. (Rommel Reply Dec., Exh. D-1, p. 189:13-190:31.) It is my opinion that Google has the capabilities within its own business records to provide the same information for matters associated with this case as it publicly makes available to Google Apps administrators.

- I note that Google claims availability of the type of identifying information and event information mentioned above is barred by the Storage Communication Act. I make no opinion as to the application of the Storage Communication Act. But Google's internal documents do reveal how Google treats the information discussed herein. Google does not consider "user-entered label names," "general headers" (except for "subject lines"), and "Gmail preferences" as User Data. (Rommel Reply Dec., Exh. CCC.)
- In its Opposition, Google does make note of the inability to determine geographic locations of class members. (Opp., p. 23, n. 27.) However, Google itself publishes its ability to determine "general physical location based on someone's computer or mobile device location" with the use of Internet Protocol (IP) addresses, which Google defines as, "a unique number assigned by Internet Service Providers to each computer connected to the Internet." (Rommel Reply

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Dec., Exh. BBB & EEE; Rommel Reply Dec., Exh. D, p. 122:5-10.)

- 22. Class Member verification.
- Cable One Google Apps, Google Apps EDU users, and minor Gmail users. a.

For any Cable One Google Apps user, Google Apps EDU user, and minor Gmail user, Google maintains as to each person based upon their email address which would establish the (1) their name, (2) their email address, (3) their status as a Gmail user, (4) date in which they activated their Gmail account, and (5) every IP address from which they logged-in or used their Gmail account. (Rommel Dec., Exh. W; Green Exhibits A & B) With verification of the date of activation of the Gmail account, Brandon Long's declaration about the differences in time in which an Apps user may have joined Gmail can be readily determined by the user's own information and with ease. (c.f. Long Dec., \P 4 & 6.)

As such, for any Cable One Google Apps user, Google Apps EDU user, and/or minor Gmail user, that person could submit any email within their inbox alleged to have been intercepted and the header information of that email to show who they are, the date of the email, and the sender of that email. In addition to verification of the class member being accomplished in this manner, the event for *delivery* would also be established. Further, metadata and the additional within their own email would clearly establish (1) spam or non-spam and (2) and its processes on that particular email as demonstrated by Rommel Reply Dec., Exh. XX.

For any Cable One Google Apps user, Google Apps EDU user, and/or minor Gmail user that person could submit any email within their sent box alleged to have been intercepted to show who they are, the date of the email, and the @gmail.com recipient of the email.

b. Non-Gmail users. A non-gmail user can be readily identified as being a person who sent an email from a non-gmail account via the email address utilized in the emails and claimed by that person to have been intercepted. In the same way Google can verify that a Gmail user or Apps user maintains a Gmail account and used a particular email address, Google can also verify that the email address used by a particular Class Member was not associated with a Gmail account. (Rommel Dec., Exh. W.)

As such, for every non-gmail user, that person could submit any email within their sent DECLARATION OF MATTHEW D. GREEN, Ph.D., IN REPLY AND IN SUPPORT OF THE CONSOLIDATED MOTION FOR CLASS CERTIFICATION 5:13-MD-002430-LHK

box alleged to have been intercepted to show who they are, the date of the email, and the purported @gmail.com recipient of the email. The Plaintiff or Class Member would still need to show the applicable events as indicated below.

23.

a.

to be established by the Plaintiff or Class Member to verify (1) Google's processing by any accused device to an email sent to an @gmail.com user or (2) Google's processing by any

Class Member: After verification of the Class Member status, the following events would need

Emails sent to @gmail.com person or received by a Gmail or Google Apps

accused device of an email received by a Google Apps or Gmail user:

i.

Event Verification.

- b. *Gmail and Google Apps Class Members*. For every Gmail or Google Apps Class Member who submits in their claim a received email from their own Gmail or Google Apps account as having been intercepted pursuant to that account, all of the necessary events can be verified and obtained in the Gmail delivery logs, or if necessary the metadata within their email as exhibited by Rommel Dec., Exh. W and Rommel Reply Dec., Exh. XX. As shown by Exh. XX, can be readily identifiable. The submission of a Message ID as contained in the header information would be the only information necessary to generate a verifying report.
- c. Emails sent to @gmail.com users. For any Plaintiff or Class Member who submits a claim for an email as having been intercepted when sent to an @gmail.com recipient, the events of ______ can be verified by the Gmail Delivery Logs or logs associated with the Message Id for that email based upon the sender, time, and date. An alternative form of proof of claim could easily be for the Plaintiff or Class Member to submit in the claims process the email received by the @gmail.com user along with the header information from that email. A reply email with the header information showing the "parent message" would also establish initial delivery to the Gmail user.
 - 24. I understand that Brandon Long has declared that

DECLARATION OF MATTHEW D. GREEN, Ph.D., IN REPLY AND IN SUPPORT OF THE CONSOLIDATED MOTION FOR CLASS CERTIFICATION