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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

IN RE GOOGLE INC. GMAIL LITIGATION

Master Docket No.: 13-MD-02430-LHK

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**PLAINTIFFS' OBJECTIONS TO THE  
DECLARATIONS OF AARON  
ROTHMAN AND KYLE WONG AND  
EXHIBITS THERETO SUBMITTED IN  
SUPPORT OF GOOGLE'S MOTION TO  
DISMISS**

Date: September 5, 2013  
Time: 1:30 p.m.  
Judge: Hon. Lucy H. Koh  
Place: Courtroom 8—4<sup>th</sup> Floor

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**PLAINTIFFS' OBJECTIONS TO THE DECLARATIONS OF AARON ROTHMAN  
AND KYLE WONG AND EXHIBITS THERETO SUBMITTED IN SUPPORT OF  
GOOGLE'S MOTION TO DISMISS**  
5:13-MD-002430-LHK

**I. INTRODUCTION.**

COME NOW the Plaintiffs, by and through counsel, who object to Declarations and evidence set forth in the Declarations of Aaron Rothman and Kyle Wong In Support Of Defendant Google Inc.'s Motion to Dismiss Plaintiffs' Consolidated Individual And Class Action Complaint<sup>1</sup> And Its Request For Judicial Notice (the "Rothman Declaration" and the "Wong Declaration") and exhibits identified below to the respective Declarations. *See* [D.E. 45- 46]. Ignoring the fact that in deciding a motion to dismiss the Court must "accept all factual allegations in the complaint as true," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2509 (2007), Google, through the Rothman and Wong Declarations and exhibits, improperly interjects facts and documents (a) specifically refuted by the Complaint, (b) which exceeds the scope of FED. R. CIV. P. 12(b)(6), and (c) which serves, in violation of this Court's page limitation Order, as a vehicle for additional argument by Google well in excess of its thirty (30) page briefing limitation.

Pursuant to Civil L.R. 7-5; FED. R. CIV. P. 12(b)(6); and the Court's Case Management Order of May 8, 2013, [Doc. 37] setting for the page limitations for the parties' briefing,<sup>2</sup> Plaintiffs object to the Court's consideration of the Rothman and Wong Declarations and certain Exhibits thereto and/or move to strike the below-identified paragraphs of the Declarations and certain Exhibits thereto. Furthermore, Plaintiffs object to any arguments in Google's Motion to Dismiss that rely on Rothman and Wong Declarations and certain exhibits thereto.

**II. LEGAL STANDARD**

As a general rule, a court may not consider "any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *United States v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). A court "may, however, consider materials that are submitted with and attached to the Complaint . . . [and] may also consider unattached evidence on which the complaint 'necessarily relies' if: (1) the

<sup>1</sup> Hereinafter referred to as the "Complaint" and "CC" for citation purposes.

<sup>2</sup> The Court set a thirty (30) page limit for Defendant's opening brief and a twenty (20) page limit for the reply brief. Should the Court allow the Declaration to be considered, Plaintiffs request in the alternative that the ten (10) pages used by Google in the Rothman Declaration be counted against Defendants' total page limits of fifty (50) pages.

complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document.” *Id.* at 998-99 (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9<sup>th</sup> Cir.2006)); *Lee*, 250 F.3d at 688. However, the court must still accept all factual allegations pled in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9<sup>th</sup> Cir.1996).

Pursuant to Federal Rule of Evidence 201, a court may also take judicial notice of “matters of public record,” *but not of facts that may be* “subject to reasonable dispute.” *Id.* 250 F.3d at 689. More specifically, a court may not, on the basis of evidence outside of the Complaint, take judicial notice of facts favorable to Defendants that could reasonably be disputed. *See id.* at 689–90.<sup>3</sup>

While certain documents may be referenced in the Plaintiffs’ Complaint and others certainly are not, the Rothman’s Declaration exceeds mere identification and authentication of documents discussed by Google in its Motion. Instead, the Rothman Declaration provides a self-serving running commentary on the how the purported exhibits support the various arguments Google makes in its motion and attempt to offer rebuttals to the Plaintiffs allegations. While Plaintiffs do not necessarily contest the authenticity of any of the purported exhibits as documents, their contents and Google’s improper effort at extrapolation therefrom through a Google witness is a different story. The submitted exhibits and the testimony of Google witnesses about such documents are “subject to reasonable dispute” based upon the Complaint. Accordingly, they are improperly submitted to the Court. Further, Rothman’s declaration serves as an extension of Google’s arguments in violation of the Court’s page limitations.

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<sup>3</sup> A judicially noticed fact must be:

one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b) (emphasis added). In other words, for a fact to be judicially noticed, “indisputability is a prerequisite.” *Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344, 1354 (7<sup>th</sup> Cir. 1995).

1           **III.     ARGUMENT**

2           **A.     Plaintiffs Objections to the Rothman Declaration and Exhibits**

3           Plaintiffs object to and move to strike the following specific matters from the Rothman  
4 Declaration:

5           **Paragraph 2.** Rothman testimony as a Google witness states no facts and attaches no  
6 exhibits which are indisputably true nor otherwise alleged to be properly the subject of judicial  
7 notice. It constitutes his improper testimony regarding certain things about Gmail he claims to  
8 know. Plaintiffs have not admitted and contest Gmail is “offered to consumer users for free[,]”  
9 in the Consolidated Complaint. *See e.g.*, CC ¶¶ 2-6, 47-50, 74-79, 96.

10          **Paragraph 5.** The entirety of this paragraph contains facts which are not the proper  
11 subject of judicial notice. Paragraph 5 involves testimony by a Google witness which includes  
12 information which is “subject to reasonable dispute” as to what Google discloses and what it  
13 does not disclose at various points in time, and through what alleged modes of communication.  
14 Plaintiffs contests these factual assertions, including the inference or assertion that Google  
15 obtains valid consent to the practices alleged in the Complaint. *See e.g.*, CC, ¶¶ 102-159, 185-  
16 197, 187-191, 22-91, 214.

17          **Paragraph 6.** Plaintiffs object to Exhibit A to the extent offered for anything more than  
18 a document which was alleged to exist on January 19, 2011. The Exhibit and Rothman’s  
19 testimony, as a Google witness, regarding how Plaintiff J.K. would have encountered this  
20 Exhibit, and its alleged contents or meaning on a particular date and time are not indisputably  
21 true, and not admitted by virtue of the allegations of the Complaint. Plaintiffs, including J.K.  
22 contest these allegations including the inference or assertion that Google obtains consent to the  
23 practices alleged in the Consolidated Complaint through Exhibit “A” or otherwise. *See e.g.*,  
24 CC, ¶¶ 22-91, 102-213, 214.

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**Paragraph 7.** Plaintiffs object to Exhibit B as offered for anything more than proof of a document which existed on some unknown date. The Exhibit and Rothman's testimony, as a Google witness, regarding Cable One, the contents or alleged meaning of its terms of service at any particular time, or what Plaintiff Dunbar or others would have encountered, or been obligated to or bound by are not indisputably true or otherwise subject to judicial notice, and not admitted by virtue of the allegations of the Complaint. Plaintiffs, including Dunbar, dispute the contentions argued herein and vigorously dispute the purported assertion or implication that Google's terms of service disclose or allow the practices complained about in the Consolidated Complaint -- through Exhibit "B" or otherwise. *See e.g.*, Consolidated Complaint, ¶¶ 144-45, 137-160.

**Paragraphs 8-9.** Plaintiffs object to Exhibits C and D as offered for anything more than proof of a document which existed on some date, and, as to Exhibit D, that it is an authentic or genuine contract with the terms or conditions included and discussed by Google witness Rothman. The Exhibits and Rothman's testimony, as a Google witness, regarding Google Apps.' terms of service including their alleged contents or meaning at any particular time, or what Plaintiffs Fread or Carrillo, would have encountered, or Fread, Carrillo or Google may been obligated to or bound by are not indisputably true or otherwise subject to judicial notice, and not admitted by virtue of the allegations of the Complaint. Plaintiffs, including Carrillo and Fread, dispute the contentions argued in these Paragraphs and vigorously dispute the purported assertion that Google APPS Edu's terms or its contracts with university institutions like Hawaii or UOP disclose or allow, or procure valid consent to the practices complained about in the Consolidated Complaint -- through Exhibits C or D, or otherwise. *See e.g.*, CC ¶¶ 22-91, 116, 121-127, 152, 161-184.

**Paragraph 10.** Mr. Rothman's testimony as a Google witness regarding Google's TOS, Privacy Policy, user agreements, and their terms, conditions or agreements, including what Plaintiffs, or any of them, have agreed or been obligated to at various points in time is not indisputably true or otherwise the proper subject of judicial notice, nor admitted by the allegations of the complaint. Plaintiffs dispute the contentions argued in this Paragraph and

1 vigorously dispute the purported assertion or implication that Google discloses or is allowed by,  
 2 or procures valid consent to engage in the practices complained about in the Consolidated  
 3 Complaint. *See e.g.*, CC, ¶¶ 102-197.

4 **Paragraph 11.** Plaintiffs object to Exhibit E as offered for anything more than proof as  
 5 to the existence of a document which existed on some date. The Exhibit and Rothman's  
 6 testimony, as a Google witness, regarding what Rothman refers to as the April 16, 2007 version  
 7 of a TOS, or what that TOS may contain or mean or infer, are not indisputably true or otherwise  
 8 subject to judicial notice, and not admitted by virtue of the allegations of the Complaint.  
 9 Plaintiffs dispute the contentions argued in this Paragraph and vigorously dispute the purported  
 10 assertion or implication that Google discloses or allowed to, or procures valid consent, to  
 11 engage in the practices complained about in the Consolidated Complaint. *See e.g.*, CC ¶¶ 22-91,  
 12 100, 107-130, 153.

13 **Paragraph 12.** Plaintiffs incorporate by reference in their entirety the objections lodged  
 14 as to Paragraph 11 as it relates Exhibit F or to a TOS that is claimed to have gone into effect on  
 15 a particular date or to be current. Plaintiffs dispute the contentions argued in this Paragraph and  
 16 vigorously dispute the purported assertion or implication that Google discloses or allowed to, or  
 17 procures valid consent, to engage in the practices complained about in the Consolidated  
 18 Complaint. *See* CC, ¶¶ 22-91, 187-191, 214.

19 **Paragraph 13-16.** Plaintiffs object to Exhibit G, H, I and J as offered for anything more  
 20 than proof of a document which existed on some date. The Exhibit and Rothman's testimony, as  
 21 a Google witness, regarding what Rothman refers to as Google's Privacy Policy, including what  
 22 it contained or contains, what it may have been revised to or added to include, meant or means,  
 23 what it allegedly bound or obligated persons to, or allowed Google to use or do, are not  
 24 indisputably true or otherwise subject to judicial notice, and not admitted by virtue of the  
 25 allegations of the Complaint. Plaintiffs, dispute the contentions argued herein and vigorously  
 26 dispute the purported assertion that Google discloses or is allowed, or procures valid consent, to  
 27 engage in the practices complained about in the Consolidated Complaint through its privacy  
 28 policy or otherwise. *See e.g.*, CC, ¶¶ 22-91, 187-191.



1       **Paragraph 17.** Mr. Rothman’s testimony and opinions offered as a Google witness are  
2 not indisputably true nor otherwise subject to judicial notice.

3       **Paragraph 18.** Plaintiffs object to Rothman’s testimony, as a Google witness, regarding  
4 what Rothman refers to as “Help Pages.” The matters are not part of any user agreements, and  
5 any discussion of such alleged additional disclosures is specifically addressed and disputed,  
6 *inter alia*, at CC, ¶¶ 198-213. *See also*, CC, ¶¶ 22-91, 100, 153, and 214.

7       **Paragraph 19.** Plaintiffs object to Exhibit K and the Rothman opinions in Paragraph 19.  
8 Exhibit K is not referenced in the Complaint. Exhibit K and Mr. Rothman’s opinions regarding  
9 this improperly included and referenced document are not the proper subject of judicial notice.  
10 The testimony Rothman seeks to adduce through this document is not admitted in the Complaint  
11 and is contested. *See* CC, ¶¶ 40, 46-91, 96, 207, 261-263.

12       **Paragraph 20.** Plaintiffs object to Paragraph 20 and Exhibit L. Exhibit L is not  
13 referenced in the Complaint. Exhibit L and Mr. Rothman’s opinions as a Google witness  
14 regarding this improperly included and referenced document are not the proper subject of  
15 judicial notice. Mr. Rothman’s opinions and Exhibit L perpetuate Google’s fraud upon its users  
16 and are reasonably disputed. *See e.g.*, CC, ¶¶ 40, 46-91.

17       **Paragraph 21.** Plaintiffs object to Paragraph 21 and Exhibit M. Exhibit M is not  
18 referenced in the Complaint. Exhibit M and Mr. Rothman’s opinions as a Google witness  
19 regarding this improperly included and referenced document are not the proper subject of  
20 judicial notice. The testimony of Google witness Rothman is not indisputable and is otherwise  
21 not the proper subject of judicial notice. Plaintiffs dispute Rothman’s facts. *See, e.g.*, CC, ¶¶  
22 22-91, 207 and 214.

23       **Paragraph 22.** Plaintiffs object to Paragraph 22 and Exhibit N. Exhibit N is not  
24 referenced in the Complaint. Plaintiffs incorporate their objections as to Paragraphs 18-21 in  
25 regard to Paragraph 22 and Exhibit N. This exhibit and testimony relating thereto is neither  
26 indisputable nor otherwise the proper subject of judicial notice, and are disputed by Plaintiffs.

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1       **Paragraph 23.** Plaintiffs object to Paragraph 23 and the “Why this ad?” link. The  
 2 “Why this ad?” link is not referenced in the Complaint. Plaintiffs incorporate their objections as  
 3 to Paragraphs 18-21. Plaintiffs dispute the matters contained herein. *See e.g.*, CC ¶¶ 22-91,  
 4 214.

5       **Paragraphs 24-26.** Plaintiffs object to Paragraphs 24-26 and Exhibits O-P and the  
 6 recent iteration of “Why this Add?” link. Exhibits O-P and the recent iteration of “Why this  
 7 Add?” link are not referenced in the Complaint. Plaintiffs incorporate their objections as to  
 8 Paragraphs 18-21 in regard to Paragraphs 24-26 and Exhibits O-P and the recent iteration of  
 9 “Why this Add?” link. *See e.g.*, CC ¶¶ 22-91, 214.

#### 10       **B. Plaintiffs Objections to the Wong Declaration and Exhibits**

11       **Paragraph 2 and 17.** Plaintiffs object to Paragraphs 2 and 17 and Exhibits AA and PP.  
 12 Exhibits AA and PP are not referenced in the Complaint. They are documents but their  
 13 meaning and content, and Google’s claims re same, are neither indisputable nor otherwise the  
 14 proper subject of judicial notice. They are disputed. *See e.g.*, CC, ¶¶ 257, 262-63, 331-32, 352-  
 15 53, and 374-75.

16       Google and Mr. Wong omitted that Google was a *co-defendant* with Yahoo! in the  
 17 matter of *Julie Sheppard v. Google, Inc., and Yahoo!, Inc.*, 4:12-cv-4022, In the United States  
 18 District Court for the Western District of Arkansas, Texarkana Division. Google and Mr. Wong  
 19 also failed to disclose to the Court that along with the unopposed dismissal of Yahoo!, Yahoo!  
 20 agreed to the filing a *sworn declaration* wherein Yahoo! specifically stated:

21       I am familiar with the Complaint filed in this action, and aware that the plaintiffs  
 22 contend that, prior to delivery, Yahoo! intercepts and reads person emails sent  
 23 from non-Yahoo! Mail users to Yahoo! Mail users. However, with the exception  
 for scanning for viruses, malware and spam, Yahoo! ***does not engage in that***  
***practice.***

24       *See* Declaration of Sean F. Rommel, Exhibit A, (Declaration of Amir Doron)(emphasis added)).  
 25 Accordingly, what other web-mail services providers either do or don’t do is an area of  
 26 “reasonable dispute” as alleged in the Complaint and as revealed by the court documents of  
 27 which Google is aware.

28       ///



*Paragraphs 11 and 12.* Plaintiffs object to Paragraphs 11 and 12 and Exhibits JJ and KK. Exhibits JJ and KK are not referenced in the Complaint. The objectionable portions of the Wong Declaration involve identification by a Google attorney of Federal Trade Commission (“FTC”) reports that exist as website content and printouts. Exhibits JJ and KK are website content alleged as FTC reports. Google has not moved for judicial notice of these documents. However, a “reasonable dispute” exists as to the application of the documents to the allegations in the Complaint. COPPA’s limits the type of data at issue to only include the “personal information” (as defined by § 6501(8)) of a minor under thirteen. The Complaint involves the acquisition of the “substance, purport, and meaning” of an electronic communication for those minors using Gmail—which are all thirteen or older because Google only offers Gmail to that age group. As such, COPPA does not address the type of information being unlawfully gathered by Google, nor does it affect the contractual rights and liabilities for minors thirteen or older. Further, the Complaint details the absolute lack of any attempt by Google to obtain consent for anything of which it is accused—rebutting Google’s assertions that it doesn’t need to do as much disclosure for kids (or any person) over the age of twelve to obtain ECPA consent regarding personal property.

#### **V. CONCLUSION**

Accordingly, Plaintiffs object to the Rothman and Wong Declarations and their Exhibits as set forth above. Plaintiffs respectfully request the matters objected to not be considered or afforded any weight in the Court’s analysis, and that they be stricken from the record. Plaintiffs further request that Google’s page limitations be reduced by the number of pages used within the Declarations given such Declarations were used to inject additional and improper argument.

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Respectfully submitted,

Dated: July 11, 2013

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