

1 ERICA L. CRAVEN-GREEN (Bar No. 199918)
Email: ecravengreen@gmail.com
2 Law Offices of Erica L. Craven-Green
P.O. Box 460367
3 San Francisco, California 94146-0367
Telephone: (415) 572-9028

4 PAUL ALAN LEVY, *pro hac vice* to be sought
5 Email: plevy@citizen.org
DEEPAK GUPTA
6 Email: dgupta@citizen.org
Public Citizen Litigation Group
7 1600 20th Street, NW
Washington, DC 20009
8 Telephone: (202) 588-1000
Facsimile: (202) 588-7795

9
10 Attorneys for MediaPost Communications

11 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13	ROCKY MOUNTAIN BANK,)	Case No. 5:09-CV-04385 JW
	a Wyoming Corporation,)	
14)	MOTION TO UNSEAL AND MEMORAN-
	Plaintiff,)	<u>DUM SUPPORTING MOTION TO UNSEAL</u>
15	v.)	F. R. Civ. P. 5; common law; First Amendment
)	
16	GOOGLE INC., a Delaware corporation,)	Date: December 7, 2009
)	Time: 9 AM
17	Defendant.)	Courtroom: Courtroom 8, 4th Floor
)	Judge Ware

18
19 **NOTICE OF MOTION AND MOTION TO UNSEAL**

20 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

21 Please take notice that, on Monday, December 7, at 9 AM, or as soon thereafter as the matter
22 may be heard by this Court, located at 280 South 1st Street, San Jose, California, MediaPost
23 Communications will move and hereby does move the Court, pursuant to Rule 5 of the Federal Rules
24 of Civil Procedure, the First Amendment, and the common law, to unseal the report that Google
25 lodged with the Court in chambers explaining its compliance with the Temporary Restraining Order
26 issued in this case on September 23, 2009. The report is a judicial record and thus subject to the
27 strong presumption of public access, and movant wants to see the document for the purpose of

28

1 continuing to report on this case.

2 This motion seeks the following relief: an order unsealing Google's report to the Court.

3 Respectfully submitted.

4

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/s/ Erica L. Craven-Green
Erica L. Craven-Green (Bar No. 199918)

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Email: ecravengreen@gmail.com
Law Offices of Erica L. Craven-Green
P.O. Box 460367
San Francisco, California 94146-0367
Telephone: (415) 572-9028

7

8

9

10

/s/ Paul Alan Levy
Paul Alan Levy (DC Bar No. 946400)
Deepak Gupta (DC Bar No. 495451)

11

12

Public Citizen Litigation Group
Email: plevy@citizen.org
1600 - 20th Street, N.W.
Washington, D.C. 20009
Telephone: (202) 588-1000
Facsimile: (202) 588-7795

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October 20, 2009

Attorneys for MediaPost Communications

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MEMORANDUM OF POINTS AND AUTHORITIES

In this case, a bank that mistakenly sent records to a Google email address sued to identify the account holder for that email address and to freeze the account, without any proof that the account holder had violated the bank’s rights in any way and without any proper basis either for suing Google or for federal court jurisdiction. Proceeding *ex parte*, without complying with Rule 65 or affording due process to either Google or the account holder, the bank secured an temporary restraining order (“TRO”) compelling Google to identify its account holder and to file a document with the Court showing how it complied with that order. Instead of defending its user’s rights, Google filed a document with the Court explaining how it was complying with the Court’s order. Google sent the document to chambers instead of filing it on the public docket.

The document submitted by Google is a judicial record that is subject to the presumption of openness. The public should be able to see Google’s report so that it can understand how the Court’s TRO was satisfied, and why the Court dismissed the action. Therefore, the report should be unsealed.

I. FACTS AND PROCEEDINGS TO DATE

According to the plaintiff, this action began when a customer of Rocky Mountain Bank asked the bank to send some of his records to a third party by email. Rocky Mountain, however, did not send its email to the correct address of the third party; instead, the email was sent to an address in the form XXX@gmail.com. This email account belonged to an unidentified individual who is referred to in these papers as Jane Doe (movant does not know the gender of the Doe). Compounding its error, Rocky Mountain did not simply attach records belonging to the requesting customer to the mis-addressed email, but attached information relating to more than one thousand different customer accounts. After discovering the error and making an unsuccessful effort to recall the email, the president of Rocky Mountain sent a second email to the gmail account in question, “instructing” the recipient to delete the mistaken email without opening it, and “requesting” the recipient to contact the bank to discuss the matter. Hendrickson Affidavit, Docket Entry No. 20 (“DN 20 ”), ¶ 12.

At this point, Rocky Mountain did not know whether Jane Doe had actually received the email and its attachments, or whether Jane Doe had retained the materials. Indeed, it is quite common for

1 owners of email addresses to receive large amounts of spam that purport to be communications from
2 banks, often purporting to warn the recipients that their accounts have been compromised and asking
3 the recipients to contact the sender immediately, and often soliciting information about the sender.
4 Such emails are often referred to as “phishing.” See <http://en.wikipedia.org/wiki/Phishing>. The
5 Federal Trade Commission has specifically warned consumers about opening email and attachments
6 that purport to be from banks because that is a common form of phishing. See
7 <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt089.shtm>. In fact, many email providers have
8 spam filters that are designed to eliminate purported communications from banks unknown to the
9 recipient; one feature of gmail that makes it most attractive in the market for email services is gmail’s
10 reputation for having a very effective spam filter. See [http://www.askdaveytaylor.com/does_gmail_do_a_](http://www.askdaveytaylor.com/does_gmail_do_a_good_job_of_filtering_spam.html)
11 [good_job_of_filtering_spam.html](http://www.askdaveytaylor.com/does_gmail_do_a_good_job_of_filtering_spam.html).^{1/}

12 Seeking to ensure that its customers’ information remained private, Rocky Mountain decided
13 to file suit to prevent Jane Doe from making any improper use of the documents that the bank had
14 sent. Even if Rocky Mountain had a claim against Doe, there is a well-established procedure for suing
15 an Internet user and seeking a subpoena to identify him or her, which can be enforced after the Doe
16 receives notice and has an opportunity to oppose the discovery by showing that the plaintiff does not
17 have a substantial claim of wrongdoing. *Krinsky v. Doe* 6, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231
18 (Cal.App. 6 Dist. 2008); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005).

19 Rocky Mountain did not file such a suit. Instead, on September 17, 2009, Rocky Mountain
20 filed this action against Google, alleging two counts: one for a declaratory judgment that it was
21 entitled to identify Doe, DN 18, at 6, and one for injunctive relief against both Google and Doe,
22 seeking to enjoin them both from accessing, distributing or using the documents, and ordering Google
23 to identify Doe. *Id.* at 7. The Bank filed the action under seal on the theory that it needed to prevent
24 embarrassment, but with the result that nobody was before the Court to point out the many flaws in

25 ^{1/} The court can take judicial notice of these widely reported facts. After the case ended, a local
26 newspaper in Rocky Mountain’s home town reported that the mistaken email had not been
27 opened by the gmail customer. See http://www.jhnewsandguide.com/article.php?art_id=5110.
It is not known whether this is a fact that was mentioned in Google’s report to the Court.

1 the Bank's complaint.

2 First, even assuming that Jane Doe did something wrong and could have been sued, Google
3 was immune from suit for Doe's misuse of her email account, under section 230 of the
4 Communications Decency Act, 47 U.S.C. § 230. *Fair Housing Council v. Roommates.com*, 521 F.3d
5 1157 (9th Cir. 2008) (*en banc*). Even if the state law claim is said to be predicated on some sort of
6 state law intellectual property right, the Ninth Circuit has held that only federal intellectual property
7 claims are exempt from section 230 immunity. *Perfect 10 v. CCBill*, 488 F.3d 1102 (9th Cir. 2007).
8 Thus, none of the claims in the case were a proper basis for any relief in this case.

9 Moreover, although the complaint sought relief against Jane Doe, it did not name Doe as a
10 defendant. There was a reason for this. Although Rocky Mountain Bank referred in passing to
11 federal and state banking regulations that required the Bank to try to protect its customers' privacy,
12 those regulations did not give the Bank any cause of action against either Google or Doe, and they
13 did not create a basis for federal question jurisdiction. Indeed, although Rocky Mountain labeled each
14 of its counts a "cause of action," neither count purported to state any cause of action. The counts just
15 relied on principles of equity which, it contended, gave it a right to relief.

16 Because these principles of equity presumably arose under state law, the Bank asserted that
17 the Court had diversity jurisdiction. But in order to obtain relief, given Google's section 230
18 immunity, Rocky Mountain would have had to sue Jane Doe; and, in any event, Rocky Mountain was
19 seeking an injunction against Jane Doe, and therefore Doe should have been named as a defendant.
20 But it is settled law that a diversity action cannot be filed against a Doe defendant.^{2/} Indeed, "the
21 essential elements of diversity jurisdiction must be alleged in the pleadings," 13B Wright, Miller &
22 Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3602, at 372 (2d ed.
23 1984); *Brown v. Keene*, 33 U.S. (8. Pet.) 112 (1834), and because Rocky Mountain was unable to
24 plead Doe's citizenship, it could not have sued Jane Doe in federal court. Nor could it solve this

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26 ^{2/} *Menzies v. Doe*, 194 F.3d 174 (D.C. Cir 1999) (mem.); *Howell by Goerdts v. Tribune*
27 *Entertainment Co.*, 106 F.3d 215, 218 (7th Cir. 1997); *McMann v. Doe*, 460 F.Supp.2d 259,
264 (D. Mass. 2006); *Meng v. Schwartz*, 305 F.Supp.2d 49 (D.D.C. 2004); *Stephens v.*
28 *Halliburton Co.*, 2003 WL 22077752, *5 (N.D. Tex. Sept. 5, 2003).

1 problem by suing Google alone, because Doe remains the real party in interest and a diversity suit is
2 subject to dismissal unless the diversity of citizenship of all the defendants is alleged in the complaint.

3 Despite these flaws in its complaint, on September 18, Rocky Mountain filed a motion for a
4 temporary restraining order (“TRO”) and a preliminary injunction. In violation of Rule 65, Rocky
5 Mountain neither gave notice to the adverse party nor furnished any explanation of why notice could
6 not be given before the TRO was heard. Indeed, because the Bank had discovered the problem on
7 August 17 but did not seek a TRO until September 18, it is hard to believe that the time required for
8 effective notice would have caused undue injury to the legitimate interests at stake.^{3/} Moreover,
9 calling the relief sought a TRO was a misnomer, because the relief sought — an injunction against
10 dissemination of the mis-emailed documents and disclosure of Doe’s identity, which was the entire
11 relief sought in the Complaint — could not possibly be characterized as “interim relief” pendente lite.
12 Like the Complaint, the TRO motion was filed under seal to avoid having to tell its customers what
13 had occurred. DN 13, at 3 (information “could potentially alarm the Bank’s customers”).

14 The Court denied the motion to file under seal, DN 11, and, on September 21, Rocky
15 Mountain refiled the complaint and the motion papers in redacted form, removing Jane Doe’s email
16 address. We understand that Google was planning to oppose this application. However, on
17 September 23, without shortening the time for Google or Jane Doe to file a response, giving Google
18 any opportunity to respond to the motion, or taking steps to ensure that Doe had received notice of
19 the motion to identify her, this Court granted the TRO in its entirety. Document No. 23. The order
20 provided:

- 21 (1) Google and the Gmail Account holder are temporarily enjoined from accessing,
22 using, or distributing the Confidential Customer Information;
- 23 (2) Google shall immediately deactivate the Gmail Account;

24 ^{3/} Rocky Mountain recited the fact that it had sent to emails to Jane Doe but had received no
25 response; but it did not attach the emails, from which the Court might have been able to judge
26 whether they were of the sort that would likely have been disregarded as spam from an
27 unknown bank. For example, an effective notice might have been labeled as “Notice of
28 Subpoena.” Indeed, the most effective way to achieve notice to Jane Doe would have been
to enlist the cooperation of Google itself, whose communications to Jane Doe would be less
likely to be discarded as spam and to be ignored.

1 (3) Google shall immediately disclose to Plaintiff and the Court the status of the Gmail
2 Account, specifically, whether the Gmail Account is dormant or active, whether the
3 Inadvertent Email was opened or otherwise manipulated, and in the event that the
4 Gmail Account is not dormant, the identity and contact information for the Gmail
5 Account holder.

6 The Court scheduled a preliminary injunction hearing for September 28 and directed Google to file
7 any response by September 25.

8 Rather than seeking reconsideration (or filing an immediate appeal and seeking a stay pending
9 appeal) to protect its customer's rights under the First and Fifth Amendments, Google complied with
10 the order. Specifically, it "lodged a Report with the Court in response to, and in compliance with, the
11 Court's September 23, 2009 Order Granting Temporary Restraining Order." DN 28, at 2. Movant
12 is advised that the document includes information identifying Jane Doe, but is not limited to such
13 information. The report has not been placed on the docket, and its contents have not been made
14 public, even in redacted form.

15 On September 25, Google and Rocky Mountain filed a joint motion to continue the
16 preliminary injunction hearing and to vacate the TRO. The Court continued the hearing but declined
17 to vacate the TRO, thus leaving the Gmail account frozen. On September 28, the parties filed a
18 stipulation to dismiss the action with prejudice. In light of that stipulation, the Court vacated the
19 TRO.

20 MediaPost reporter Wendy Davis broke the story about the Court's order granting plaintiff's
21 request for a TRO and ordering the Gmail user's account deactivated, and published several stories
22 about developments in the case.^{4/} Subsequently, there was extensive coverage and criticism of this
23 course of events, both in the United States and elsewhere, as bloggers and reporters commented on
24 Rocky Mountain's use of the courts to shut down an email address and identify its user to make up
25 for its own errors.^{5/} MediaPost seeks to review the compliance report to help the public understand

25 ^{4/} See http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=114264;
26 http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=114347.

27 ^{5/} E. g., <http://www.techdirt.com/articles/20090924/1705386309.shtml>;
28 <http://www.dailymail.co.uk/sciencetech/article-1216883/Bank-sends-confidential-details->

1 how the Court reached its decision to vacate the TRO and to monitor how private parties are using
2 — or abusing — courts’ powers in this new species of case.

3 **III. ARGUMENT**

4 **GOOGLE’S REPORT TO THE COURT IS A JUDICIAL RECORD THAT MUST BE**
5 **DISCLOSED UNDER THE FIRST AMENDMENT AND THE COMMON-LAW**
6 **REQUIREMENT OF PUBLIC ACCESS.**

7 The Supreme Court and the Court of Appeals for the Ninth Circuit have repeatedly upheld the
8 public right of access to judicial records. *E.g.*, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501
9 (1984); *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *Kamakana v. City and County*
10 *of Honolulu*, 447 F.3d 1172, 1178-1179 (9th Cir. 2006); *Foltz v. State Farm Mut. Auto Ins. Co.*, 331
11 F.3d 1122, 1135 (9th Cir. 2003); *San Jose Mercury News v. United States District Court*, 187 F. 3d
12 1096, 1102 (9th Cir. 1999); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

13 The general rule is that the record of a judicial proceeding is public Not only do
14 such records often concern issues in which the public has an interest . . . but also the
15 public cannot monitor judicial performance adequately if the records of judicial
16 proceedings are secret.

17 *Jessup v. Luther*, 277 F.3d 926, 927 (7th Cir. 2002).

18 Unless a particular court record is one “traditionally kept secret,” a “strong
19 presumption in favor of access” is the starting point. . . . A party seeking to seal a
20 judicial record then bears the burden of overcoming this strong presumption by
21 meeting the “compelling reasons” standard. . . . That is, the party must “articulate[]
22 compelling reasons supported by specific factual findings,” . . . , that outweigh the
23 general history of access and the public policies favoring disclosure, such as the
24 “‘public interest in understanding the judicial process.’ ”

25 *Kamakana v. Honolulu*, 447 F.3d at 1178-1179.

26 Several circuits have also held that the First Amendment creates a right of access to judicial
27 records in civil cases, *e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120-121 (2d Cir.
28 2006); *Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994), but the Ninth
Circuit has not addressed that question.

A. Google’s Report to the Court Is a Judicial Record.

26 [wrong-e-mail-address--judge-orders-Google-suspend-account.html](http://www.telegraph.co.uk/technology/google/6239172/Bank-forces-Google-to-close-rand-om-GMail-account-over-rogue-message.html);
27 <http://www.telegraph.co.uk/technology/google/6239172/Bank-forces-Google-to-close-rand-om-GMail-account-over-rogue-message.html>.

1 Google's compliance report to the Court is a "judicial record" subject to scrutiny under this
2 Court's precedents. The purpose of the Report was to explain Google's actions and to assure the
3 Court that its order had been obeyed, and thus to aid the Court in ensuring compliance with its orders.
4 The Seventh Circuit has applied the common law right of access to "those records of a proceeding that
5 are filed in court or that, while not filed, are relied upon by a judicial officer in making a ruling or
6 decision." *Smith v. United States District Court Officers*, 203 F.3d 440, 442 (7th Cir. 2000), *citing*
7 *Grove Fresh*, 24 F.3d at 897. Likewise, the Third Circuit has held that "[w]hether or not a document
8 or record is subject to the right of access turns on whether that item is considered to be a 'judicial
9 record.' The status of a document as a 'judicial record,' in turn, depends on whether a document has
10 been filed with the court or otherwise somehow incorporated or integrated into a district court's
11 adjudicatory proceedings." *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001).

12 Google's report to the Court easily satisfies this test. Indeed, in their subsequent joint filing
13 asking the Court to vacate the TRO, DN 28, both parties expressly relied on the information contained
14 in the report to show that the relief requested in the motion for a preliminary injunction had become
15 moot, that there was no longer any need for a hearing on a preliminary injunction, and that the TRO
16 itself should be vacated. *Id.* at 2, ¶¶ 2, 3. And in its decision vacating the TRO, the Court said that
17 it had relied on the pleadings submitted to it. In this regard, the Court was obviously treating the
18 report as a pleading.

19 Nor does the fact that the report was sent to chambers instead of the Clerk's office affect its
20 status as a judicial record, because Rules 5(d) and (e) of the Federal Rules of Civil Procedure required
21 that the paper be transmitted to the Clerk's office. Under Rule 5(d), "[a]ll papers required to be
22 served upon a party . . . must be filed with the court within a reasonable time after service." Although
23 Rule 5(e) allows such papers to be filed with the judge, "in [that] event the judge shall . . . forthwith
24 transmit them to the office of the Clerk." Thus, receipt by the Court's staff, or by a district judge,
25 is sufficient to constitute "filing," even if the document is not noted in the docket. *Houston v. Lack*,
26 487 U.S. 266, 274 (1988); *Forgy v. Norris*, 64 F.3d 399, 401 (8th Cir. 1995); *United States v. Solly*,
27 545 F.2d 874, 876 (3d Cir. 1976).

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1 A second decision following the district court’s decision on remand held that part of the report was
2 to be released with redactions. 71 F.3d at 1052-1053.

3 Even apart from the common law right of access, Google’s submission of its report to
4 chambers without making a public filing violated Local Rule 79-5, which requires a party that seeks
5 to submit a document that will not become public to obtain a court order by submitting a “request that
6 establishes that the document, or portions thereof, is privileged or protectable as a trade secret or
7 otherwise entitled to protection under the law The request must be narrowly tailored to seek
8 sealing only of sealable material” Local Rule 79-5(a). The Local Rule requires the party seeking
9 sealing of an entire document to file an Administrative Motion to File Under Seal. Local Rule
10 7(b)(1). Google filed no such motion and did not obtain permission to give its report to the Court in
11 the informal manner that it employed.

12 Like the reports of the court-appointed monitors in *B.H.* and *Amodeo*, Google’s report to the
13 Court showing its compliance with the TRO is a judicial record subject to the common law and
14 constitutional mandates of presumptive public access.

15 **B. The Law Presumes That Google’s Report Should Be Public, Absent Proof**
16 **to the Contrary.**

17 Once it is established that the documents in question are judicial records, a strong presumption
18 of openness requires “compelling justification” to keep a particular record secret. *Kamakana v.*
19 *Honolulu*, 447 F.3d at 1178. As Judge Easterbrook has explained:

20 People who want secrecy should opt for arbitration. When they call on the courts, they
21 must accept the openness that goes with subsidized dispute resolution by public (and
22 publicly accountable) officials. . . . Judges deliberate in private but issue public
23 decisions after public arguments based on public records. . . . Any step that withdraws
24 an element of the judicial process from public view makes the ensuing decision look
25 more like fiat, which requires compelling justification.

26 *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

27 A part seeking secrecy must “articulate compelling reasons supported by specific factual findings,”
28 *Kamakana*, 447 F.3d at 1178, and a decision to keep a particular judicial record under seal can only
be based “on a compelling reason [that] articulate[s] the factual basis for [the] ruling, without relying
on hypothesis or conjecture.” *Id.* at 1179.

1 When undersigned counsel sought Google’s concurrence in this motion, the only ground given
2 by Google for keeping the document secret was that it contains information that could identify Jane
3 Doe. But that interest can adequately be protected by redacting the identifying information. *See*
4 *Rocky Mountain Bank v. Google, Inc.* 2009 WL 3053716, *2 n.5 (N.D. Cal. 2009) (in denying motion
5 to file complaint and motion papers under seal, Judge Whyte said that if future filings contain private
6 customer information, the filing party should “move to seal the confidential portions of those filings
7 pursuant to this court’s Civil Local Rule 79-5”). On the other hand, Google’s customers have a
8 significant interest in knowing the quantity of identifying information about Jane Doe that Google
9 released, as well as what efforts Google took to comply with the Court’s TRO and whether Google
10 took efforts to provide additional notice to Jane Doe of its actions. By publicly filing a redacted copy
11 of the report, Google will reveal that information to its other customers, while still protecting the
12 privacy of the Doe. Movant does, however, suggest that Google provide additional notice to the Doe
13 of this Motion, so that she will have the opportunity to respond to this motion if she so chooses.

14 Beyond the interest of its customer, Google may be embarrassed at revealing publicly how
15 easily it acquiesced in Rocky Mountain’s violation of its customer’s rights. However, “[t]he mere fact
16 that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to
17 further litigation will not, without more, compel the court to seal its records.” *Kamakana v. Honolulu*,
18 447 F.3d at 1179. Indeed, although Google and Rocky Mountain might well prefer to prevent
19 disclosure of Google’s report, only that disclosure can inform the public how the Court’s TRO was
20 satisfied, and why the Court dismissed the action. Disclosure in this case will enable MediaPost to
21 report further on this case about how the courts function; for future purposes, disclosure will allow
22 the public to ensure that private parties do not misuse the Court’s procedure by seeking and obtaining
23 emergency relief without notice and an opportunity for all adverse parties to respond.

24 **CONCLUSION**

25 The motion to unseal should be granted.

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27 /s/ Erica L. Craven-Green
28 Erica L. Craven-Green (Bar No. 199918)

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Email: ecravengreen@gmail.com
Law Offices of Erica L. Craven-Green
P.O. Box 460367
San Francisco, California 94146-0367
Telephone: (415) 572-9028

/s/ Paul Alan Levy
Paul Alan Levy (DC Bar No. 946400)
Deepak Gupta (DC Bar No. 495451)

Public Citizen Litigation Group
Email: plevy@citizen.org
1600 - 20th Street, N.W.
Washington, D.C. 20009
Telephone: (202) 588-1000
Facsimile: (202) 588-7795

October 20, 2009

Attorneys for MediaPost Communications