

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

)	Case No.: 5:13-MD-2430-LHK
IN RE: GOOGLE INC. GMAIL LITIGATION)	
_____)	ORDER DENYING DEFENDANT’S
THIS DOCUMENT RELATES TO:)	MOTION FOR § 1292(b)
ALL ACTIONS)	CERTIFICATION FOR
_____)	INTERLOCUTORY REVIEW

On September 26, 2013, this Court granted in part and denied in part Defendant Google’s Motion to Dismiss Plaintiffs’ Consolidated Complaint in this multi-district litigation. *See* ECF No. 69 (“September 26, 2013 Order”). Google filed a Motion for § 1292(b) Certification for Interlocutory Review of this Court’s September 26, 2013 Order. *See* ECF No. 80 (“Section 1292(b) Certification Motion”). Plaintiffs filed an Opposition. *See* ECF No. 83. This Court held a hearing on the Section 1292(b) Certification Motion on October 29, 2013. *See* ECF No. 94. Having considered the parties’ filings, arguments at the hearing, and the relevant law, the Court, in its discretion, DENIES Google’s Section 1292(b) Certification Motion.

1 **I. LEGAL STANDARD**

2 A district court may, in its discretion, certify an interlocutory order in a civil action for
 3 appellate review when the court is of “the opinion that such order involves a controlling question of
 4 law as to which there is substantial ground for difference of opinion and that an immediate appeal
 5 from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C.
 6 § 1292(b). “[T]he legislative history of 1292(b) indicates that this section was to be used only in
 7 exceptional situations in which allowing an interlocutory appeal would avoid protracted and
 8 expensive litigation.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). “Section
 9 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore
 10 must be construed narrowly.” *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1068 n.6 (9th Cir.
 11 2002).

12 **II. DISCUSSION**

13 The Court here finds that the immediate appeal of the September 26, 2013 Order will not
 14 “materially advance the termination of the litigation.” 28 U.S.C. § 1292(b). The Court notes that
 15 this litigation is unlike other cases in which little to no discovery has occurred prior to the motion
 16 to dismiss. In fact, the oldest case in the instant multi-district litigation has been pending for more
 17 than three years. Furthermore, in that case, Google had an opportunity to seek appellate review of a
 18 May 23, 2011 order rejecting Google’s motion to dismiss based on Google’s consent and ordinary
 19 course of business exception arguments, the same arguments that are the subject of this Court’s
 20 September 26, 2013 Order, but Google chose not to do so. The long and tortuous procedural
 21 history of this litigation, as set forth below, demonstrates why further delaying this three-year-old
 22 litigation for immediate appellate review is unwarranted.

23 The first case that makes up this multi-district litigation, *Dunbar v. Google*, was filed on
 24 November 17, 2010, in the Eastern District of Texas. *See Dunbar v. Google, Inc.* (“*Dunbar I*”), No.
 25 10-CV-194, ECF No. 61 (E.D. Tex. May 23, 2011). Google moved to dismiss the complaint on

1 February 4, 2011, *see Dunbar I*, ECF No. 13 (E.D. Tex. Feb. 4, 2011), but Plaintiffs amended their
2 complaint, *see Dunbar I*, ECF No. 17 (E.D. Tex. Feb. 21, 2011), thereby mooted the initial motion
3 to dismiss. Google subsequently moved to dismiss the amended complaint on March 10, 2011, *see*
4 *Dunbar I*, ECF No. 23 (E.D. Tex. March 10, 2011). Google’s motion to dismiss was based on the
5 “ordinary course of business” and consent exceptions to the Wiretap Act, the same exceptions at
6 issue in this Court’s September 26, 2013 Order. *See id.* at 7-11 (“Scanning in the Ordinary Course
7 of Business is Excluded From Liability Under the Wiretap Act” and “The Alleged Interception Is
8 Lawful Because the Gmail Account Holder Consents”). While the motion was being briefed,
9 discovery commenced. *See Dunbar I*, ECF Nos. 42 & 43 (E.D. Tex. April 20, 2011).

10 After full briefing, on May 23, 2011, Judge Folsom denied in full Google’s motion to
11 dismiss. *See Dunbar I*, ECF No. 61 (E.D. Tex. May 23, 2011). Judge Folsom rejected Google’s
12 contention that Gmail users had consented to the interceptions. Judge Folsom ruled that at the
13 pleading stage, he could not conclude that Gmail users had consented to the specific alleged
14 interceptions at issue in the case. *Id.* at 6-7. Moreover, Judge Folsom rejected Google’s “ordinary
15 course of business” argument, holding that “[t]he applicability of the ‘ordinary course of business’
16 exception . . . cannot be resolved at the pleading stage.” *Id.* Google did not, however, move for
17 section 1292(b) certification of Judge Folsom’s May 23, 2011 order despite the fact that the case at
18 the time was only six months old, and the parties had not accrued substantial litigation expenses.

19 After the unappealed May 23, 2011 motion to dismiss order, discovery accelerated in
20 *Dunbar*. The parties exchanged discovery and filed various discovery motions. In an August 17,
21 2011 scheduling order, Judge Folsom indicated that Google had produced 28,000 pages of
22 documents and then subsequently produced 706,000 pages of discovery. *See Dunbar I*, ECF No. 87
23 (E.D. Tex. Aug. 17, 2011). Judge Folsom further set a deadline of October 25, 2011 for class
24 discovery with a hearing on class certification set for December 8, 2011. *See id.*

1 The parties proceeded on this schedule, taking substantial discovery in the lead up to the
2 class certification hearing. After the hearing, on March 16, 2012, Judge Folsom entered an order
3 denying Plaintiffs' class certification motion without prejudice. *See Dunbar I*, ECF No. 156 (E.D.
4 Tex. March 16, 2012). On April 20, 2012, Google filed another motion to dismiss. *See Dunbar I*,
5 ECF No. 160 (E.D. Tex. April 20, 2012). In the alternative Google requested that the case be
6 transferred to the Northern District of California. *See id.* The motion to transfer was granted, and
7 the case was transferred to this Court and assigned to the undersigned judge on June 27, 2012. *See*
8 *Dunbar v. Google, Inc.* ("Dunbar II"), No. 12-3305, ECF No. 180 (N.D. Cal. July 23, 2012).

9 This Court held an initial Case Management Conference after transfer on August 29, 2012.
10 At that conference, though the Court declined to set a full case schedule, the Court explicitly noted
11 that "[d]iscovery may proceed as to Plaintiff's individual claims as set forth in the Second
12 Amended Class Action Complaint." *See Dunbar II*, ECF No. 207 (N.D. Cal. Aug. 30, 2012). The
13 day after the conference, Plaintiff moved for leave to amend the complaint and indicated his intent
14 to file a renewed class certification motion. *See Dunbar II*, ECF No. 205 (N.D. Cal. Aug. 28,
15 2012). After full briefing, this Court granted the motion for leave to amend. *See Dunbar II*, ECF
16 No. 226 (N.D. Cal. Dec. 12, 2012).¹ The Court found that Plaintiff had been diligent since Judge
17 Folsom's denial of the initial class certification motion and that Google would not be unduly
18 prejudiced by amendment because the Court would not reopen class discovery. *Id.* at 17-25.
19 Thereafter, Plaintiff filed a Third Amended Complaint, which Google did not move to dismiss. *See*
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22 ¹ The Court's order also contained a detailed discussion of the discovery that had already been
23 undertaken. The Court noted that Plaintiff had sought information regarding Plaintiff's email
24 account in May 2011, which Google had not produced. *See Dunbar II*, ECF No. 226 at 3-5 (N.D.
25 Cal. Dec. 12, 2012). Yet, at a subsequent meet and confer, Google's counsel indicated that
26 Plaintiff's emails were scanned, which suggested that Google had this information. *See id.*
27 Nonetheless, in December 2012, Google had not produced the information, and Plaintiff filed a
28 motion to compel, which Judge Grewal granted on January 8, 2013. *See id.* at 18-19; *Dunbar II*,
ECF No. 244 (N.D. Cal. Jan. 8, 2013) (order granting in part motion to compel). Judge Grewal
ordered that all materials that were the subject of his order be produced by January 25, 2013. *See*
Dunbar II, ECF No. 244 (N.D. Cal. Jan. 8, 2013).

1 *Dunbar II*, ECF No. 228 (N.D. Cal. Dec. 14, 2013). Rather, Google answered the Third Amended
2 complaint. *See Dunbar II*, ECF No. 246 (N.D. Cal. Jan. 14, 2013).

3 On January 8, 2013, this Court held a further case management conference and set a
4 briefing schedule on Plaintiff's class certification motion. *See Dunbar II*, ECF No. 242 (N.D. Cal.
5 Jan. 8, 2013). Under that scheduling order, Plaintiff's deadline to file a class certification motion
6 was January 28, 2013, Defendant's opposition was due on March 7, 2013, and Plaintiff's reply was
7 due on March 28, 2013. *See id.* The class certification motion was fully briefed pursuant to this
8 scheduling order. *See Dunbar II*, ECF No. 249 (N.D. Cal. Jan. 28, 2013) (motion); *Dunbar II*, ECF
9 No. 261 (N.D. Cal. March 7, 2013) (opposition); *Dunbar II*, ECF No. 269 (N.D. Cal. March 28,
10 2013) (reply).

11 While *Dunbar* was pending, five other actions involving substantially similar allegations
12 against Google were filed in this District and throughout the country. *See Scott, et al. v. Google,*
13 *Inc.*, No. 12-3413 (N.D. Cal.); *Scott v. Google, Inc.*, No. 12-614 (N.D. Fla.); *A.K. v. Google, Inc.*,
14 No. 12-1179 (S.D. Ill.); *Knowles v. Google, Inc.*, No. 12-2022 (D. Md.); *Brinkman v. Google, Inc.*,
15 No. 12-6699 (E.D. Pa.). On April 1, 2013, the Judicial Panel on Multidistrict Litigation issued a
16 Transfer Order, centralizing *Dunbar* along with the five other actions in the Northern District of
17 California before the undersigned judge. *See* ECF No. 1. At an initial case management conference
18 on April 19, 2013, the Court ordered Plaintiffs to file a consolidated complaint on May 16, 2013,
19 and set the briefing schedule for any motion to dismiss and scheduled a hearing for September 5,
20 2013. *See* ECF No. 9. The Court also set a briefing schedule on Plaintiffs' Motion for Class
21 Certification and scheduled a hearing for January 16, 2014. *See id.* On May 6, 2013, this Court
22 related a seventh action, *Fread v. Google, Inc.*, No. 13-1961 (N.D. Cal.), as part of this multi-
23 district litigation. *See* ECF No. 29.

24 In line with the Court's scheduling order, Plaintiffs filed a Consolidated Complaint on May
25 16, 2013. *See* ECF No. 38. Google filed a Motion to Dismiss the Consolidated Complaint on June

1 13, 2013. *See* ECF No. 44. Plaintiffs filed their opposition to Google’s Motion to Dismiss on July
 2 11, 2013. *See* ECF No. 53. Google filed a reply on July 29, 2013. *See* ECF No. 56. This Court held
 3 a hearing on the Motion to Dismiss on September 5, 2013. *See* ECF No. 64. The Court issued an
 4 Order Granting in Part and Denying in Part the Motion to Dismiss on September 26, 2013. *See*
 5 ECF No. 69.²

6 On October 2, 2013, the Court issued a further scheduling order, which maintained the
 7 dates for class certification briefing and added deadlines for fact and expert discovery, along with
 8 deadlines for dispositive motions and scheduled a pretrial conference for September 25, 2014, and
 9 trial for October 20, 2014. *See* ECF No. 76. Subsequently, Plaintiff filed a Motion for Class
 10 Certification, which has been fully briefed in accordance with the Court’s schedule. ECF Nos. 87,
 11 101, 112. The Court intends to rule on Plaintiffs’ Motion for Class Certification shortly.

12 In light of this procedural history, the Court notes that this is not a case in which the parties
 13 have yet to accrue substantial litigation expenses that can be avoided by immediate appeal. Rather,
 14 multiple motions to dismiss have been fully briefed, argued, and ruled upon; multiple motions for
 15 class certification have been fully briefed; class discovery had closed in one of the cases more than
 16 two years ago; and fact discovery on the merits is set to close in less than three months. Due to the

17 ² One of the critical issues decided in this Court’s September 26, 2013 Order was the scope of the
 18 “ordinary course of business” exception to the Wiretap Act, under which the use of any “telephone
 19 or telegraph instrument, equipment or facility, or any component thereof . . . being used by a
 20 provider of wire or electronic communication service in the ordinary course of its business” is not
 21 prohibited. 18 U.S.C. § 2510(5)(a)(ii). This Court narrowly construed the exception, because *inter*
 22 *alia* it found that the word “ordinary” limited the exception because the modifier signaled that “not
 23 everything that a company may want to do falls within the ‘ordinary course of business’
 24 exception,” and because Google’s interceptions violated Google’s own internal policies. September
 25 26, 2013 Order at 14, 20-21. Multiple definitions of the “ordinary course of business” have been
 26 proposed. For example, Plaintiffs propose the definition of “necessary” to providing the electronic
 27 communication service. Google proposes “within customary and routine business practices.” This
 28 Court’s September 26, 2013 Order held that an interception must be “instrumental” to the provision
 of the electronic communication services to fall within the “ordinary course of business” exception.
 Regardless of which definition is adopted, the Court finds that factual development would be
 necessary in determining whether Google’s interceptions fall within the “ordinary course of
 business” exception. For example, the Court cannot determine based on the pleadings alone what is
 “necessary,” “customary or routine,” or “instrumental” to Google’s business.

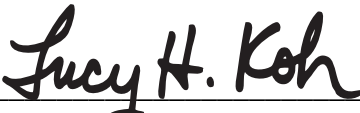
1 considerable expenses that have already accrued and the fact that the current case schedule
2 contemplates trial in October 2014, the Court finds that termination of the litigation is more likely
3 to be materially advanced by proceeding to final judgment.³

4 **III. CONCLUSION**

5 For the foregoing reasons, the Court, in its discretion, DENIES Google’s Section 1292(b)
6 Certification Motion.

8 **IT IS SO ORDERED.**

9 Dated: January 27, 2014

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12 LUCY H. KOH
13 United States District Judge

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17 ³ Google contends that certification is warranted by the fact that appellate review will provide
18 clarity not only in this litigation, but in other cases pending before the Court. However, the
19 questions Google moves to certify do not address the thorny issues presented in other litigation
20 pending before this Court. For example, Google does not move to certify the question whether the
21 consent exception to the state anti-wiretapping laws compels dismissal of the complaint in the
22 instant litigation. Determining whether the consent exception applies requires consideration of
23 whether non-Gmail users who sent emails to Gmail users consented to Google’s interceptions
24 despite the fact that non-Gmail users had not agreed to any of Google’s Terms of Service or
25 Privacy Policies. *See* Fla. Stat. § 934.03(2)(d); Md. Code, Cts. & Jud. Proc. § 10-402(c)(3); 18 Pa.
26 Cons. Stat. § 5704(4) (requiring that both parties to an interception consent for the consent
27 exception to apply). The Court finds that certifying the September 26, 2013 Order for interlocutory
28 review when Google does not seek appellate review of non-Gmail users’ consent would not
advance Google’s stated goal in its Section 1292(b) Certification Motion of providing an
authoritative decision that would have “important precedential value for other cases.” Section
1292(b) Certification Motion at 10. This is so because other pending litigation, including the
litigation related to the case Google cites, implicates the rights of non-users of electronic
communication service providers. *See Holland v. Yahoo!, Inc.*, No. 13-4980, ECF No. 1 ¶ 21 (N.D.
Cal. Oct. 25, 2013).