

1 COOLEY LLP  
 MICHAEL G. RHODES (116127)  
 2 (rhodesmg@cooley.com)  
 WHITTY SOMVICHIAN (194463)  
 3 (wsomvichian@cooley.com)  
 KYLE C. WONG (224021)  
 4 (kwong@cooley.com)  
 101 California Street, 5th Floor  
 5 San Francisco, CA 94111-5800  
 Telephone: (415) 693-2000  
 6 Facsimile: (415) 693-2222

7 QUINN EMANUEL URQUHART & SULLIVAN, LLP  
 KATHLEEN M. SULLIVAN (242261)  
 8 (kathleensullivan@quinnemanuel.com)  
 51 Madison Avenue, 22nd Floor  
 9 New York, NY 10010  
 Telephone: (212) 849-7000  
 10 Facsimile: (212) 849-7100

11 Attorneys for Defendant  
 GOOGLE INC.

13 UNITED STATES DISTRICT COURT  
 14 NORTHERN DISTRICT OF CALIFORNIA  
 15 SAN JOSE DIVISION

16 IN RE GOOGLE INC. GMAIL  
 LITIGATION

Case No. 5:13-md-02430-LHK (PSG)

17  
 18 THIS DOCUMENT RELATES TO:  
 ALL ACTIONS

**DEFENDANT GOOGLE INC.'S  
 ADMINISTRATIVE MOTION FOR LEAVE  
 TO SUBMIT SUPPLEMENTAL MATERIAL**

Judge: Hon. Lucy H. Koh

Trial Date: Not yet set

21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

1 Pursuant to Civil Local Rule 7-11, defendant Google Inc. (“Google”) brings this  
2 Administrative Motion to seek leave from the Court to submit supplemental material in support of  
3 its Motion for § 1292(b) Certification for Interlocutory Review (ECF No. 80).<sup>1</sup>

4 On December 30, 2013, plaintiffs Matthew Campbell and Michael Hurley filed a Class  
5 Action Complaint that is relevant to Google’s pending Motion for Certification before this Court.  
6 *See Campbell v. Facebook, Inc.*, No. 5:13-cv-05996-PJH, ECF No. 1 (N.D. Cal. Dec. 30, 2013)  
7 (“*Campbell*”). A true and correct copy of the *Campbell* Class Action Complaint is filed herewith  
8 as Appendix A.

9 The *Campbell* Complaint demonstrates that plaintiffs in other matters are pursuing claims  
10 that appear to be predicated in part on this Court’s interpretation of the “ordinary course of  
11 business” defense under 18 U.S.C. § 2510(5)(a)(ii) as set forth in its September 25, 2013 Order on  
12 Google’s Motion To Dismiss. In *Campbell*, the plaintiffs allege that Facebook “systematically  
13 intercept[s]” users’ Facebook messages and “scans the content of the Facebook message” “without  
14 users’ consent,” in violation of the Wiretap Act as modified by the Electronic Communications  
15 Privacy Act (“ECPA”). *See id.* at 2-3, 25. The Complaint further alleges that Facebook’s actions  
16 are not “necessary for or incidental to the ability to send or receive private messages” because  
17 “Facebook has the technical capacity to offer its private message service without intercepting,  
18 scanning, and using the content” of users’ messages. *See id.* at 19. The Complaint alleges that, as  
19 a result, such activities are “outside the ordinary course of business of electronic communications  
20 providers,” referring to the “ordinary course of business” defense under 18 U.S.C. § 2510(5)(a)(ii).  
21 *See id.* at 19.

22 This Court should grant the motion to submit the *Campbell* Class Action Complaint as  
23 supplemental material in support of Google’s Motion for Certification. *First*, this request is  
24 timely, as the *Campbell* Complaint was recently filed on December 30, 2013. *Second*, the filing of

---

25  
26 <sup>1</sup> Because the hearing on Google’s Motion for Certification has already occurred, Google is  
27 seeking prior court approval before submitting supplemental material. An administrative motion  
28 under Civil Local Rule 7-11 is the proper procedural mechanism for seeking this approval. *See Michael Taylor Designs v. Travelers Property Casualty Company of Am.*, 761 F. Supp. 2d 904,  
908-10 (N.D. Cal. 2011).

1 this Complaint is directly relevant to Google’s motion for certification because it demonstrates  
2 that plaintiffs in other matters are filing claims based on the unsettled interpretation of the  
3 “ordinary course of its business” exception within the Ninth Circuit. *Third*, there is no prejudice  
4 to Plaintiffs from the Court’s consideration of this Complaint, which is a matter of public record.

5 **CONCLUSION**

6 The Court should grant Google’s motion for leave to submit the *Campbell* Complaint for  
7 inclusion as part of the record on Google’s Motion for Certification.<sup>2</sup>

8 DATED: January 8, 2014

COOLEY LLP  
MICHAEL G. RHODES (116126)  
WHITTY SOMVICHIAN (194463)  
KYLE C. WONG (224021)

QUINN EMANUEL URQUHART &  
SULLIVAN, LLP  
KATHLEEN M. SULLIVAN (242261)

13 /s/ Whitty Somvichian  
14 Whitty Somvichian  
15 Attorneys for Defendant GOOGLE INC.

16  
17  
18  
19  
20  
21  
22  
23 \_\_\_\_\_  
24 <sup>2</sup> Pursuant to Civil Local Rule 7-11, counsel for Google asked lead counsel for Plaintiffs whether  
25 they would stipulate to this request; Plaintiffs declined to stipulate, and asked Google to include  
26 the following statement in its motion: “Plaintiffs were asked but declined to stipulate to this  
27 request. Plaintiffs stated their opposition to Google’s request on the grounds that the subject  
28 Complaint is not a ‘relevant judicial opinion’ within the meaning of [Civil Local Rule] 7-3(d)(1),  
and is not, therefore, the proper subject of a Statement of Recent Decision. Plaintiffs also oppose  
on the grounds that it is not a proper request for administrative relief as contemplated by [Civil  
Local Rule] 7-11.”