IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America, *et al.*, Plaintiffs, v. Google LLC, Defendant.	Case No. 1:20-cv-03010-APM HON. AMIT P. MEHTA
State of Colorado, *et al.*, Plaintiffs, v. Google LLC, Defendant.	Case No. 1:20-cv-03715-APM HON. AMIT P. MEHTA

JOINT SUBMISSION REGARDING PUBLIC POSTING OF TRIAL EXHIBITS

Pursuant to the Court's instructions that the parties meet-and-confer regarding public access to trial exhibits and provide a proposal to the Court, Plaintiffs in the above-referenced actions and Google each provide a proposed order, along with position statements below.

I. Joint Submission

Plaintiffs' proposed order is enclosed as **Exhibit A**. Google's proposed order is enclosed as **Exhibit B**. The parties' only material dispute relates to the timing of public disclosure. Plaintiffs propose that admitted materials used during a public session may be made available to the public at the end of the trial day. Google proposes a 24-hour notice period to the producing party prior to publicly disseminating an admitted exhibit.

II. Position Statements

A. Plaintiffs' Joint Position Statement

Plaintiffs seek to enable public access to admitted exhibits used in open court that have already been viewed by the public. Google seeks to inject unnecessary, duplicative process to delay and further frustrate the public's access to admitted exhibits. Accordingly, Google's proposal should be rejected as there exists no basis for preventing the public from accessing admitted exhibits the public has already seen and contain material the parties have already reviewed for confidentiality and already agreed can be shown to the public in open court.

As an initial matter, it is uncontested that documents used in open session constitute "public documents" under *United States v. Hubbard*, and therefore the public presumptively has a right to access these documents. 650 F.2d 293, 317 (D.C. Cir. 1980). Reflecting this understanding, both the United States and Google have published on their respective websites

documents used in this case.[1] The question before the Court is *when* the public may access documents it has already viewed. Plaintiffs respectfully propose that the Court enter an order allowing for the public dissemination of exhibits at the end of a trial day.

The Court's decision about "when" public documents "should be released" "is guided by the considerations in the six-part *Hubbard* test." *United States v. Munchel*, 567 F. Supp. 3d, 9, 15 (D.D.C. 2021). Under *Hubbard* and its progeny, the fact that this lawsuit is brought by the United States and 14 co-plaintiff states, along with the 38 states and territories bringing suit in the consolidated action, represented by public agencies, accentuates "[t]he appropriateness of making court files accessible." *E.E.O.C. v. National Children's Center, Inc.*, 98 F.3d 1406, 1409 (D.C. Circ. 1996) (quoting *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)). Importantly, the concept of accessibility is not limited to simply being able to view a public document during open court, but instead, the "common law right of access has long encompassed the right to 'copy public records.'" *Munchel*, 567 F. Supp. 3d at 15-16. In considering a request to delay the release of copies of public documents, the court in *Munchel* held that, "American courts have not only rejected artificial limitations on the common law right of access but also 'tended to view *any* limitation [on the public right of access] as repugnant to the spirit of our democratic institutions." *Munchel*, 567 F. Supp. 3d at 16 (D.D.C. 2021) (quoting *United States v. Mitchell*, 551 F.2d 1252, 1257 (D.C. Circ. 1976)).

Here, Google provides no argument that would justify imposing such restrictions on the right to public access. First, the exhibits will have already been published in open session, so the public will have already viewed them. Second, Google and third parties will have already had the

[1] *See* U.S. Department of Justice, Antitrust Division, U.S. and Plaintiff States v. Google LLC [2020], https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc; Google, Competition: Search Trial media center, blog.google\competition\media-center-us-v-google.

opportunity to review and seek redactions to any exhibit being used in open court, and therefore, these exhibits will contain no information that Google or third parties believe is non-public. An additional round of conferral and review improperly burdens the public's right to timely access. Third, Google's argument that any prior inadvertent mistakes in redactions (which have occurred on both sides) merits limiting the public's right to access does not rise to the "compelling circumstances" needed to "prevent contemporaneous public access to [public documents]." *Munchel*, 567 F. Supp. 3d at 16 (citing *In re Application of Nat'l Broad. Co., Inc.*, 635 F.2d 945, 952 (2d Cir. 1980)). Moreover, Plaintiffs propose publishing exhibits "at the end of the trial day," thus providing time for Google to identify any errors in redaction that it believes have occurred on the versions publicly displayed in Court.[2] Finally, Plaintiffs' proposal is consistent with this Court's prior practices on the publication of admitted exhibits used in open court, including *United States v. Rhodes*, which required the admitting party to "make available to the media at the end of each trial day a copy of any admitted exhibits that has been published to the jury and not restricted by the Court for dissemination." ECF No. 327, Case No. 1:22-cv-00015-APM (D.D.C. Sept. 20, 2022) (V. "Access to Admitted Exhibits"). In this civil case, Plaintiffs merely seek the ability to publish certain exhibits already used in open court in a similar fashion.

For these reasons, Plaintiffs respectfully request that the Court enter its proposed order, **Exhibit A**, regarding the public dissemination of public documents.

[2] To the extent Google or a third party identifies a potential redaction error when the admitted document is displayed during a public session in Court, Plaintiffs will refrain from publicly disseminating any such exhibits until a correction has been made, to the extent necessary.

B. Google's Position Statement

The only difference between the parties' proposed orders is whether Google and third-parties[3] will be given a short, 24-hour period of advance notice to ensure confidentiality redactions are properly applied. Given the sensitivity of the commercial information that is often contained in these trial exhibits and the fact that DOJ Plaintiffs have already committed errors in redacting several documents during trial, including those posted online, such advance notice is reasonable and necessary.

A 24-hour notice period will help prevent errors by the posting party from becoming irreversible breaches of information that the parties have agreed should remain confidential. This is not hypothetical—several times during this trial, DOJ Plaintiffs have failed to redact information that they agreed would remain confidential in Google's documents (in addition to several instances where DOJ Plaintiffs have read such information in open court). Indeed, on the first day of trial, DOJ Plaintiffs failed to redact information in their opening presentation, which they immediately posted online without notifying Google or the Court. Google informed DOJ Plaintiffs of this error as soon as it came to light, but by that point members of the public had already captured screenshots of the presentation from DOJ's website and shared them on Twitter. Tellingly, even though DOJ Plaintiffs have now removed all the trial exhibits they previously posted, the documents remain publicly available on numerous news websites. In this age of

[3] Google is not the only party that has requested such a review period. At least one third party has also requested "notice of either parties' intention to post any specific exhibits and . . . an opportunity to ensure that the redactions applied by the parties are sufficient to maintain the confidentiality of the redacted information," and Google believes that other parties share this view but are not aware of the Plaintiffs' proposed process for posting their documents without an opportunity for review. Because third parties also have an interest in this process, Google suggests affording them the opportunity to address this issue as well if the Court does not agree with Google's proposed 24-hour notice period.

immediate news coverage, any breach of confidentiality on the Internet—even if inadvertent—becomes permanent. A 24-hour notice period is reasonable and necessary to mitigate such irreparable harm.[4]

Moreover, a 24-hour notice period does not impinge on any right to public access. As the Court stated previously, "[i]n terms of the public's right of access, it has a right of access**,** but the case law doesn't make clear when it has a right of access." Aug. 11, 2023 Hr'g Tr. at 19. Courts often permit far longer than 24-hours to ensure exhibits are properly redacted before being released to the public. *See United States v. Avenatti*, 550 F.Supp.3d 36, 55 (S.D.N.Y. 2021) (providing Defendant 14 days to propose limited redactions to protect his interests).

Finally, Plaintiffs suggest that their proposed process is modelled after an order the Court entered in a recent January 6 case. As the Court has already observed, however, this case is "different" than the January 6 cases due to the types of exhibits at issue. Aug. 11, 2023 Hrg. Tr. at 19-20. As the Court recognized, "videos that are shown in a criminal trial that don't have the issues that this case does are much easier to immediately make available to the public than the kind of records that we're going to be dealing with here." *Id.*

[4] Google is fully justified in attempting to ensure that no further errors occur in light of the sheer magnitude of confidential material in Plaintiffs' possession and the approach Plaintiffs have taken to displaying documents in open court. Just two weeks into trial, Plaintiffs have already required Google to review for confidentiality more than 500 Google-produced documents that they purportedly intend to display in open court. That is well over the estimate of 300 exhibits Plaintiffs provided the Court for the entire trial, *see* Aug. 11, 2023 Hr'g Tr. at 47, and Plaintiffs continue to identify additional documents for confidentiality review on a near-daily basis. Google employees have expended considerable effort to meet Plaintiffs' demands for word-by-word review of these documents to avoid burdening the Court with confidentiality disputes. And while Google has provided redacted exhibits for Plaintiffs to use at trial, Plaintiffs have at times refused to use those versions and instead insisted on manually transferring the redactions to their own copies of the exhibits (changing the redaction language from "CONFIDENTIAL" to "REDACTED"). Moreover, Plaintiffs' demonstratives have often re-typed quotes from documents, rather than simply displaying the redacted documents. Both of these practices have resulted in DOJ Plaintiffs committing the redaction errors referenced above.

For these reasons, Google respectfully requests the Court enter its proposed order requiring a posting party to provide the proposed redacted version to parties with a potential confidentiality interest at least 24 hours before posting.

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