UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXARKANA
TEXARKANA DIVISION

KEITH DUNBAR, Individually, and as Representative on Behalf of all Similarly Situated Persons, **Plaintiff,** **versus** **GOOGLE, INC.** **Defendant.**	**Civil Action N^{o} 5:10CV00194** **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT**

COMES NOW KEITH DUNBAR, and for his Response to Defendant's Motion to Dismiss Plaintiff's First Amended Class Action Complaint (hereinafter "Complaint") would respectfully show the Court as follows:

Plaintiff brings this suit pursuant to 18 U.S.C. §§ 2510 *et seq*., more specifically 18 U.S.C. § 2511, the Title I amendment of the Electronic Communications Privacy Act of 1986 (hereinafter "ECPA"), which extended coverage of the Act to "electronic communications." *Steve Jackson Games, Inc. v. United States Secret Service, et al.*, 36 F.3d 457, 460 (5th Cir. 1994). In relevant part to the causes of action asserted by Plaintiff, Section 2511(1)(a) and 2511(1)(d) state:

> Interception and disclosure of wire, oral, or electronic communications prohibited:
>
> (1) Except as otherwise specifically provided in this chapter [18 U.S.C.S. §§ 2510 et seq.] any person who—
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; . . . .
>
> (d) intentionally uses, endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . .

> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Section 2520 of the ECPA "authorizes, *inter alia*, persons whose electronic communications are intercepted in violation of § 2511 to bring a civil action against the interceptor for actual damages, or for statutory damages of $10,000 per violation or $100 per day of the violation, which is greater." *Steve Jackson Games, Inc.*, 36 F.3d at 460. Further, § 2520(b)(1) and (3) specifically allow persons to seek "preliminary and other equitable" relief and for reasonable attorney's fees and costs incurred. Plaintiff seeks both monetary and injunctive relief.

On February 21, 2011, Plaintiff filed his First Amended Class Action Complaint. Defendant seeks dismissal based upon three proffered defenses which can be framed as the following issues:

1) Do Plaintiff's allegations defeat the application of the ordinary course of business exception of 18 U.S.C. § 2510(a)(ii), applicable only[1] to providers of electronic communication services, when Google's device and activities are wholly unrelated to the ability to send or receive electronic communications;

2) Has Plaintiff sufficiently alleged that Gmail users do not consent to Google's interception of Plaintiff's and Class Members' electronic communications; and

3) Do Plaintiff's allegations defeat the application of the "necessary incident to the rendition" of service exception found at 18 U.S.C. § 2511(2)(a)(i) when Google's activities are wholly unrelated to the service of electronic communications?

To each of these questions, Plaintiff's First Amended Class Action Complaint more than adequately pleads the necessary factual and legal assertions to support his case and defeat the present motion.

I. THE 12(b)(6) STANDARDS

A plaintiff must plead "sufficient factual matter[s], *accepted as true*, to 'state a claim to

[1] Plaintiff recognizes that providers of wire communication services are also potential recipients of the exception, but for this case the analysis is the same.

relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2008)(emphasis added)). These factual allegations need only "'raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doudtful in fact.)'" *Del-Ray Battery Co. v. Douglas Battery Co.*, ___ F.3d ___, 2011 U.S. App. LEXIS 5003, *6 (5th Cir. March 14, 2011) (quoting, *Twombly*, 550 U.S. at 570). A court should accept "'all well-plead facts as true and construe the complaint in the light most favorable to the plaintiff.'" *C.H. v. Rankin County Sch. Dist.*, ___ F.3d ___, 2011 U.S. App. LEXIS 4494, *7 (5th Cir. March 4, 2011) (quoting *In re Great Lakes Dredge & Dock Co.*, 464 F.3d 201, 210 (5th Cir. 2010). A court "ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, 'documents incorporated into the complaint by reference, and matters which a court may take judicial notice.'" *Wolcott v. Sebelius*, ___ F.3d ___, 2011 U.S. App. LEXIS 5019, *11-12 (5th Cir. March 15, 2011) (quoting, *Dorsey v. Portfolio Equities, Inc.* 540 F.3d 333, 338 (5th Cir. 2008)). Based upon these standards, Plaintiff's Complaint more than states a claim for relief, and Google's motion should be denied.

II. PLAINTIFF'S COMPLAINT MORE THAN STATES A CLAIM FOR RELIEF

A. Based On Plaintiff's Factual Allegations, § 2510(5)(a)'s Exception Does Not Apply

Validating Plaintiff's allegations, Google admits, "The email is scanned for keywords which may later be used in connection with certain ad servers to match and serve relevant advertisements for display to Gmail users who open Gmail messages from their inboxes." Google's Answer, Affirmative Defenses and Counterclaim, Page 64 ¶ 8; Complaint 49, 51, 59, 62, 66, and 70-75. However, Google asserts that it does not utilize a "device" when it acquires the content of private electronic communications between Plaintiff (and Class Members) and

Gmail users for the sole purpose of advertising. Google claims 18 U.S.C. § 2510(5)(a) provides it with an "ordinary course of business" exception. Yet, to benefit from § 2510(5)(a)'s exception, Google must overcome Plaintiff's allegations establishing that (1) the automated device or apparatus used by Google to acquire the content of private email for advertising is NOT "any telephone or telegraph instrument, equipment or facility, or any component thereof," AND (2) the automated device or apparatus used by Google to acquire the content of private email for advertising is NOT being used by a provider of an "electronic communication service in the ordinary course of its business." *See Sanders v. Robert Bosch Corp.*, 38 F.3d 736, 740 (4th Cir. 1994) (stating defendant must first establish the "voice logger" was a "telephone or telegraph instrument, equipment or facility, or a[] component thereof," and second that the use of the "voice logger" was within the ordinary course of business). Google fails to satisfy either scenario.

Desperate to fall within the first prong of § 2510(5)(a)'s exception, Google remarkably claims that Gmail utilizes "telegraph" equipment in the transmission of email.[2] Despite this attempt, the subject "device" is not the email itself or how the email message is transmitted. The "device" at issue consists of the "electronic, mechanical, or other device" used to "*intercept*" the electronic communication. Google's admitted device(s) is the "automated" "filtering system" that scans for keywords in "user's emails which are then used to match and serve ads." Complaint ¶¶ 43, 49, 50. 66, and 75. Indeed Google affirmatively admits the device has no relation to telegraphy: "The email is *scanned for keywords* which may later *be used* in connection with certain ad servers to match and serve relevant advertisements for display to Gmail users who open Gmail messages from their inboxes." Google's Counterclaim, ¶ 8 (emphasis added). Google's device amounts to the "electronic, mechanical, or other device" that

[2] There is no assertion by Google that "telephone" instruments, equipment, or facilities are used.

either during the scanning process or as a result of the scanning process acquires the content of the email. In whatever form that may be, Plaintiff has alleged that such scanning technology, key word search algorithms, keyword extraction technology, advertising servers, or other such devices used by Google to "acquire" the content of private email to match to advertisements are not "telegraph" equipment. Complaint ¶¶ 59-60, 66, 69, 71-73, and 75-76.

Moreover, Google's expansion of § 2510(5)(a) to exempt the use of "any equipment or facility" also fails. Google's theory relies entirely a solitary opinion from the Second Circuit in *Hall v. Earthlink Network, Inc.*, 396 F.3d 500 (2d Cir. 2005). The Second Circuit in *Hall* found that the words "telephone" and "telegraph" were ambiguous with regard to whether they modified the words "equipment" and "facility." Finding that the statutory structure offered no guidance, the *Hall* court removed the "telephone or telegraph" requirements entirely and found that any Internet Service Provider (ISP) using *any* equipment or *any* facility in the ordinary course of business was not using a "device." While Google is not an ISP,[3] *Hall's* analysis renders meaningless both the exceptions found at § 2510(5)(a)(i) and (ii), is contrary to other statutory provisions, and is contrary to countless cases interpreting the exceptions.

The exceptions listed at § 2510(5)(a)(i) and (ii) should be read as they are commonly and grammatically understood: to be excluded, the device or apparatus must be a *telephone* or *telegraph* instrument, a *telephone* or *telegraph* equipment, a *telephone* or *telegraph* facility, or any component thereof. As demonstrated above, Plaintiff has adequately pled that Google's scanning technology is not *telephone* or *telegraph* related. As the Sixth Circuit stated when looking at a different construction issue of the same language—telephone and telegraph apply to

[3] Contrary to Google's assertions, Plaintiff does not assert that the provider of an electronic communication service must be an ISP. However, if Google is going to claim an exception based upon being a provider of an electronic communication servicer, Plaintiff contends any and all business activities unrelated to providing that service are not applicable. *See* Complaint, ¶¶

each of instrument, equipment, and facility:

> This means, therefore, that "other than" must modify the nouns "device or apparatus." The language immediately following "other than" is "***any telephone or telegraph, or any component thereof***," all of which are also nouns.

Adams v. City of Battle Creek, 250 F.3d 980, 984 (6th Cir. 2001) (emphasis added due to court's use of telephone and telegraph modifying all subsequent words); *see also First v. Stark County Bd. Of Comm'rs*, 2000 U.S. App. LEXIS 2549, *9 (6th Cir. 2000) (unpublished opinion) (using as its list cite when describing a "component," a telephone system to be "within the exception as a 'component' of a telephone instrument, equipment or facility.").

Indeed, the § 2510(5)(a)(i) and (ii) exceptions have literally been called the "*extension telephone"* exception or exemption, clearly evidencing that any piece of equipment or facility is not sufficient.[4] If "telephone" or "telegraph" did not modify all three: instrument, equipment, and facility, there would be absolutely no need for the exceptions or numerous cases analyzing whether an accused device was related to a telephone sufficient to meet the § 2510(5)(a)(i) and (ii) exemptions because any piece of *non-telephone* equipment would be excluded.[5] *Hall's* interpretation actually decriminalizes the use of multiple pieces of equipment or facilities, and components thereof, because they no longer would be limited to telephone applications.

Even if *Hall's* grammatical interpretation was correct, *Hall* clearly analyzed the accused device with the intent of it having *a relation to the ability* to "***transmit*** e-mail." *Hall*, 396 F.3d at

[4] *See Briggs v. American Air Filter Co.*, 630 F.2d 414, 415 (5th Cir. 1980); *see also Williams v. Poulos*, 11 F.3d 271, 279 (1st Cir. 1993); and *United States v. Murdock*, 63 F.3d 1391, 1393-94 (6th Cir. 1995).

[5] *See Sanders v. Robert Bosch Corp.*, 38F.3d 736 (5th Cir. 1994) (finding exemption did not apply because "voice logger" was not telephone or telegraph instrument, equipment or facility); *Williams v. Poulos*, 11 F.3d 271, 280 (1st Cir. 1993) (stating, "In so stating, we note that the CR system is factually remote from the telephonic and telegraphic equipment [not just instrument] courts have recognized as falling within the exception . . . ."); *United States v Murdock*, 63 F.3d 1391 (6th Cir. 1995) (finding non-telephone recording device attached to phone line did not qualify for "telephone extension (or business extension) exemption)); *Deal v. Spears*, 980 F.2d 1153, 1158 (8th Cir. 1992) (denying use of the § 2510(5)(a)(i) exemption because "There is no evidence that the recorder could have operated independently of the telephone."); and *Royal Heath Care Services, Inc. v. Jefferson-Pilot Life Ins. Co.*, 924 F.2d 215, 217 (11th Cir. 1991)(stating, "We believe the telephone extension intercepted the call, while the tape recorder recorded it.").

505 (emphasis added) ("Congress' use of the term 'telephone' was thus understood to include the instruments, equipment and facilities that ISPs use to transmit e-mail."). The exception is only given to those devices that are related to the transmission of the communication sufficient to give the provider of the service the ability to do so. *See Sanders*, 38 F.3d at 740 (denying the application of the exception and stating, "The voice logger [the accused device] ***in no way furthers the plant's communication system***." (emphasis added)). Devices that allow the provider to sell advertisements do not fall within the exception.

Congress' insertion of the words "telephone" and "telegraph" establishes intent to limit the exception in a manner consistent with the service of the electronic communication. *Hall* expressed it would be absurd if ISP's could not offer "basic services." *Hall*, 396 F.3d at 505. Other courts have closely-examined the actual alleged device to see if it relates to the communication system. *See Williams v. Poulos*, 11 F.3d 271, 280 (1st Cir. 1993) (stating, "Simply put, we are at a loss to see how the monitoring system used here, consisting as it did of 'alligator clips attached to a microphone cable at one end' and an 'interface connecting [a microphone cable to a VCR and video camera' on the other, can be considered to be a 'telephone or telegraph instrument, equipment or facility, or a[] component thereof."). Accordingly, the use of "any equipment or facility" unrelated to the ability to send and receive the electronic communication has never been upheld and cannot meet the first requirement for the exception of a "device" enumerated at § 2510(5)(a). Plaintiff's Complaint alleges that Google's device has no relation to telephone, telegraph, or any equipment necessary for the transmission of Gmail. Complaint ¶¶ 43, 49, 50, 52, 59-60, 66, 69, 71-73, 76, 161-62, 165, and 167-168. Google's motion as to the § 2510(5)(a) exception should be denied.

In addition, Google also fails in relation to the second prong of the test: scanning for

email to serve advertisements is not within the ordinary course of business of the provider of an electronic communication service. Section 2510(5)(a)(ii)'s application is exclusive to "a provider of wire or electronic communication service" or "an investigative or law enforcement officer." Google is not an investigative or law enforcement officer. An "electronic communication service" means any "*service* which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15)(emphasis added). Accordingly, the exception is limited to only those providers of a "service" which provides to users the ability to send or receive wire or electronic communications. The "service" is email.

Although Google wants this Court and the world to believe that the device(s) that scan for key words extraction to send to ad servers are the same as the instruments or programs that scan for spam, viruses, spellchecking, forwarding, etc, Plaintiff has alleged they amount to a separate process. Indeed, Plaintiff asserts that Google's acquisition of key words for submission to ad servers is wholly separate from its touted scanning for matters related to the transmission and routing of email. Google admits as much in Paragraphs 7 and 8 of its Counterclaim [29] when it itself distinguishes the acts of scanning email for servicing the email as described in ¶ 7 versus scanning email for the extraction of key words purely to sell advertisements as described in ¶ 8.

"The phrase 'in the ordinary course of business" cannot be expanded to mean anything that interests a company. Such a reading 'flouts the words of the statute and establishes an exemption that is without basis in the legislative history' of Title III." *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 582 (11th Cir. 1983).[6] This is especially so when all the electronic

[6] Indeed, the *Watkins* court held that as to the § 2510(5)(a)(i) exception, "a personal call may be intercepted in the ordinary course of business to determine its nature *but never its contents*." 704 F.2d at 583. While Google asserts an exception under § 2510(5)(a)(ii), the ordinary course of business exception has consistently been analyzed with limitations.

communications at issue are "private" or "personal" between the Gmail recipient and the Class Member.[7] The contents of the emails at issue do not relate to Google's business.

Advertising is not a "service" which provides to the users of Gmail the ability to send or receive wire or electronic communications. The scanning for key words and their extraction to send to an ad server is not a "service" which provides to uses of Gmail the ability to send or receive Gmail. Finally, Google admits the industry standard for email service does not include the acquisition of content of private email for advertising revenue. Complaint ¶¶ 156-157.

Google suggests that its conduct could not possibly violate the statute because it has acquired the content of private email for over six years. Essentially, Google is saying, "No one has sued us on this before." While Google's conduct may have gone undiscovered, it certainly does not mean its actions are in conformity with the statute or that the statutory language should be rewritten to avoid a violation. *See Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1275 (W.D. Wash. 2001) (stating, "The answer, of course, is that until this case, no court had been asked to evaluate the common practice of excluding contraceptives from a generally comprehensive health plan under Title VII. While there are a number of possible explanations for the lack of litigation over this issue, none of them changes the fact that, having now been properly raised as a matter of statutory construction, this Court is constitutionally required to rule on the issue before it.").

B. **Gmail Users Do Not Consent To The Complaint Of Interceptions And Use**

Contrary to Google's assertion in Footnote 5, Plaintiff's Complaint devotes seventy (70) paragraphs and seven pages of detailed analysis of all the terms applicable to the issue of consent by Gmail users. Misconstruing its own Terms of Service, Google offers to the Court various

[7] Again, while the § 2510(5)(a)(ii) exception is raised, the numerous opinions reflecting the analysis of § 2510(a)(i)'s focus on private versus business related communications is important. Private communications are afforded the greatest of protection and the strongest of scrutiny when examining the ordinary course of business exception.

quotes from webpages and hyperlinks that are not a part of any agreement between Google and Gmail users. Pursuant to California law, which Google specifically binds itself and users to with regard to the Terms of Service ¶ 20.7, such matters make up no part of any agreement between the user and Google. Not only must the incorporation of another document into a written agreement be "clear and unequivocal," but the reference must "clearly and equivocally draw [the Gmail user's] attention to" it. *See Scott's Valley Fruit Exch. v. Growers Refrigeration Co.,* 184 P.2d 183 (Cal. Ct. App. 1947); and *Chan v. Drexel Burnham Lambert,* 178 Cal. App. 3d 632, 644 (Cal. App. 2d Dist. 1986).

In the "Google Terms of Service," Google expressly defines the collective word "Terms" to include only: (1) the "terms and conditions" set forth in the "Terms of Service" which Google defines as the "Universal Terms;" and (2) the "terms of any 'Legal Notices'" applicable to a specific Service, which Google defines as the "Additional Terms." Complaint ¶ 26, and Exhibit D of Complaint ¶ 1.2 and 1.3. According to Google in ¶ 1.4 of the Terms of Service, only the "Universal Terms" and the "Additional Terms" form "*a legally binding agreement* between [the user] and Google in relation to [the user's] use of the Services." Complaint ¶ 26, Exhibit D, ¶ 1.4 (emphasis added). As to the incorporated "Legal Notices," Google's Terms of Service at ¶ 1.5 specifically states, "If there is any contradiction between what the Additional Terms say and what the Universal Terms say, then the *Additional Terms shall take precedence in relation to that Service*." Complaint ¶ 30, Exhibit D, ¶ 1.5 (emphasis added). Accordingly, the Additional Terms or "Legal Notices" specific to Gmail take precedence over any conflicting provision contained in Universal Terms of the Google Terms of Service. Complaint ¶ 30.

In the "Gmail Legal Notices," Google states its does not claim any ownership in any of the content of any material transmitted in Gmail account. Complaint ¶ 32, Exhibit F. In the

"Gmail Legal Notices," Google affirmatively states to the user, "We will not use any of your content for *any purpose* except to provide you with the Service." Complaint ¶ 33, Exhibit F (emphasis added). The "Service" stated in Exhibit F is Gmail. Complaint ¶ 33. Accordingly, Google binds itself to the user that it can do nothing with the content of email except to provide the "Service" of email.

Section 2511(2)(d)'s consent defense only applies if "one of the parties to the communication has given prior consent to *such* an interception." (Emphasis added). The burden of establishing consent rests with Google, and does not prevent Plaintiff from establishing his *prima facie* case. *See In re Pharmatrak, Inc. Privacy Litigation*, 329 F.3d at 19; *see also United States v. Jones,* 839 F.2d 1041, 1050 (5th Cir. 1988) (burden of proof for consent placed on the government when attempting to use the § 2511(2)(c) exception). Consent may be "actual or implied." *United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987). While "implied" consent can be effective, "implied" consent is not "constructive consent." *Williams*, 11 F.3d at 281. Further, consent pursuant to § 2511(2)(d) is not to be "cavalierly implied." *Watkins*, 704 F.2d at 581. This is so because:

> Title III expresses a strong purpose to protect individual privacy by strictly limiting the occasions on which interception may lawfully take place. Stiff penalties are provided for its violation. It would thwart this policy if consent could routinely be implied from circumstances. Thus, *knowledge of the capability* of monitoring alone cannot be considered implied consent.

Watkins, 704 F.2d at 581 (internal citations omitted); *see also Williams*, 11 F.3d at 281 (stating, "In light of the prophylactic purposes of Title III, implied consent should not be casually inferred."). For implied consent to be found, it must be inferred from "'surrounding circumstances indicating that the party *knowingly* agreed to the surveillance.'" *Williams*, 11 F.3d at 281 (quoting *Amen*, 831 F.2d at 378)).

Consent can be also limited, and it is the task of the "trier of fact to determine the scope of the consent and to decide whether and to what extent the interception *exceeded that consent*." *Watkins*, 704 F.2d at 582 (emphasis added); *see also Williams*, 11 F.3d at 282 (finding a supportable basis for no implied consent because "Dyer was not told of the *manner in which the monitoring was conducted* and that *he himself would be monitored."* (emphasis added)). Plaintiff asserts the limiting words "*such* interception" found in § 2511(2)(d) signifies Congress' intent that consent must be given for the particular interception (or "such" interception) at issue. Therefore, at least three factors exist for implied consent: (1) the surrounding circumstances must indicate the party *knowingly* agreed to the surveillance, (2) knowledge of the *capability* of monitoring is not sufficient, and (3) consent can be limited and interception can exceed the scope of consent.

With this framework in mind, Google asserts Gmail users grant explicit consent, as a matter of law, based upon the following passages from various web pages. Plaintiff will address each one as presented by Defendant.

1. "With Gmail, you won't see blinking banner ads. Instead, we display ads you might find useful that are relevant to the content of your messages. Learn more." Response, Pages 9-10; full quotation found at Complaint, ¶ 133 and Exhibit C to the Complaint.

This quote is located on the "Create an Account" screen. *See* Exhibit C, First Amended Complaint. The "Create an Account" screen and the quoted language are not part of and are not incorporated into any agreement made by the user regarding a Gmail account. Complaint, ¶ 133. As such they cannot amount to explicit consent. Google does not identify how the "content" is obtained. Complaint, ¶ 135; *see also Williams*, 11 F.3d at 282 (manner must be disclosed). Google only advises that the ads are relevant to "user's" messages. Complaint, ¶ 136. Google does not advise that the ads are relevant to messages from others who are not "users."

Complaint, ¶¶ 136-137. In addition, the language is in direct conflict with the language of the "Gmail Legal Notices" ("We will not use any of your content for *any purpose* except to provide you with the Service") to the extent it purports to notify the user of any interception and use of the content for anything other than to provide the "user" with the Service of Gmail. Complaint, ¶ 138. Finally, the language is ambiguous. Complaint ¶ 139. Accordingly, no implied consent is given.

2. "In Gmail, ads are related to the content of your messages . . . . Ad targeting in Gmail is fully automated, and no humans read your email in order to target advertisements or related information." Response, Page 10; full quotation found at Complaint, ¶ 141 and Exhibit P to the Complaint.

The quote can be found on the "Ads in Gmail and your personal data" screen and from the hyperlink "Learn More." *See* Exhibit P, First Amended Complaint. The "Ads in Gmail and your personal data" screen and the quoted language are not part of and are not incorporated into any agreement made by the user regarding a Gmail account. Complaint, ¶ 140. As such they cannot amount to explicit consent. Google does not identify how the "content" is obtained. Complaint, ¶ 142; *see also Williams*, 11 F.3d at 282 (manner must be disclosed). Google only advises that the ads are related to user's messages and emails. Complaint, ¶ 143. Google does not advise that the ads are relevant to messages or emails from others who are not "users." Complaint, ¶¶ 143-44. In addition, the language is in direct conflict with the language of the "Gmail Legal Notices" ("We will not use any of your content for *any purpose* except to provide you with the Service.") to the extent it purports to notify the user of any interception and use of the content for anything other than to provide the "user" with the Service of Gmail. Complaint, ¶ 138. Finally, the language is ambiguous because Google limits the disclosure to the reading of the email versus and acquisition of parts of the email. Complaint, ¶ 146.

3. Google reserves the right (but shall have no obligation) to pre-screen, review, flag,

> filter, modify, refuse or remove any or all Content from any Service. For some Services, Google may provide tools to filter out explicit sexual content. These tools include the SafeSearch preference settings (see http://www.google.com/help/customize.html#safe). In addition, there are commercially available services and software to limit access to material that you may find objectionable. Response, Page 10; full quotation found at Complaint, ¶ 93 and Exhibit D to the Complaint.

This quote is located at ¶ 8.3 of the Terms of Service, Exhibit D. Paragraph 8.3 is a part of Section 8 of the Terms of Service. At ¶ 8.1 of the "Terms of Service," Google places responsibility for content to which a user may have access on the originator of the content. Complaint ¶ 91. At ¶ 8.2 of the "Terms of Service," Google notifies the user that the content presented as part of the services may be owned or protected by a third party, and the user may do nothing with that content "unless you have been *specifically told* that you may do so by Google or by the owners of that Content, in a separate agreement." Complaint ¶ 92. Accordingly, Google requires a user to have ***specific*** permission to do something with "content." At ¶ 8.4 of the "Terms of Service," Google warns users that they may be exposed to content that they find "offensive, indecent or objectionable and that, in this respect, you use the Services at your own risk." Complaint ¶ 94. At ¶ 8.5 of the "Terms of Service," Google places sole responsibility on the user for any content created, transmitted, or displayed by user while using any of the services and for the consequences of the user's actions. Complaint ¶ 95.

When ¶ 8.3 is viewed in the context of the entirety of Section 8 and the remaining sentences within ¶ 8.3 itself, Google is simply *reserving* its rights to protect its services and users. Complaint, ¶ 96; *see Watkins*, 704 F.2d at 581 (knowledge of *capability* insufficient for consent). Google does not tell the user that it actively and continuously intercepts private emails for any reason. No wording in ¶ 8.3 advises users or seeks consent of users for Google's interception of non-Gmail users' email to deliver targeted advertising. Complaint ¶ 98. In fact,

the very words used: pre-screen, review, flag, filter, modify, refuse, and remove, when examined in the context of ¶ 8.3 and Section 8, connote Google's *reservation* or ability to protect its services, not profit from private email. Complaint ¶ 101;

The definition of "screen" means "to guard from injury or danger." Merriam-Webster's Online Dictionary (10th Ed.), http://www.meriam-webster.com/. "Review" means to "to view or see again," not extraction. *Id.* "Flag" means "to signal with or as if with a flag; to mark or identify with or as if with a flag." *Id.* Google certainly doesn't "flag" to its users that it is taking content for ads. "Filter" means "to subject to the action of a filter; to remove by means of a filter." *Id.* To the user, the extraction/acquisition process is not "filtering" anything for them. "Modify" means "to make less extreme; to limit or restrict the meaning of especially in a grammatical construction; to make minor changes in; to make basic or fundamental changes in often to give a new orientation to or to serve a new end." *Id.* To the user, Google is not modifying their messages. "Refuse" means "to express oneself as unwilling to accept; to show or express unwillingness to do or comply with." *Id.* Far from refusing content and alerting the user, Google is surreptitiously taking content. Finally, "remove" means "to change the location, position, station, or residence of." *Id.* To the user, Google is not removing content, it is acquiring it for a pure profit. None of these words utilized in ¶ 8.3 could give any impression that Google was literally extracting the ideas associated with the content of private email for the sole purpose of generating revenue for Google and advertisers. Accordingly, no explicit consent is asked for or given by the user for continuous interception of private email for a purpose other than the protection of the Services. Complaint ¶¶ 96-101

Importantly, Google itself describes Section 8, and specifically Paragraph 8.3, in its own "Terms of Service Highlights" as cautionary in nature due to the content that isn't Google's and

for which a user may see:

> Content on our services usually isn't ours. *We may not monitor what we host or link to, although in some limited case we might.* Don't be surprised if you see something you don't like. You can always tell us about it or stop looking.

Complaint, ¶¶ 99-100 and Exhibit N. Surprisingly enough, Google describes this reservation of rights in the first sentence of ¶ 8.3 as only allowing Google the *ability* in "some limited case" to monitor the content from services. *See Deal v. Spears*, 980 F.2d 1153, 1157 (8th Cir. 1992) (stating, "'Knowledge of the *capability* of monitoring alone cannot be considered implied consent.'" quoting *Watkins*, 704 f.2d at 581.)) Accordingly, no explicit consent is asked for or given, and no implied consent can be found because the surrounding circumstances clearly show that the user did not *knowingly* agree to the type of surveillance at issue in the present case.

Finally, the language of ¶ 8.3 conflicts with the language of the "Gmail Legal Notices" ("We will not use any of your content for *any purpose* except to provide you with the Service.") to the extent it purports to allow any activity other than the expressed reservation by Google to protect its communication system.

4. "Some of the Services are supported by advertising revenue and may display advertisements and promotions. These advertisements may be targeted to the content of information stored on the Services, queries made through the Services or other information." Response, Page 10; full quotation found at Complaint, ¶¶ 93-94 and Exhibit D to the Complaint.

The quote can be found at ¶ 17.1 of the Terms of Service, Exhibit D. Although this might be the perfect location and context in which Google could obtain Gmail users' consent to Google's extraction of the contents of their (and their correspondents') personal, private emails for the sole purpose of making money off users' (and their correspondents') thoughts and ideas as expressed in those e-mails, Google instead wholly fails to identify which "Services" are supported by advertising that "*may* be targeted to the content" (emphasis added). Google

neglects to inform the user that ad targeting within Gmail will always occur. Knowledge of the capability or possibility of monitoring is not sufficient. *See Deal v. Spears*, 980 F.2d 1153, 1157 (8th Cir. 1992).

Gmail is never mentioned. Complaint, ¶¶ 102-03. Google does not advise users how the content is targeted. Complaint, ¶ 104. Further, Google limits the acquisition of content (1) from "information stored" on the Services and (2) from "queries" made through the Service or other information. None of these situations are applicable in this case because non-Gmail users do not store content on Gmail and do not make queries through Gmail or other information.[8] In fact, when Google refers to "content" in 17.1 it fails to use the capitalized version of the word "Content" as defined in ¶ 8.1 and used throughout the Terms of Service, thereby further limiting ¶ 17.1's application to undefined content that does not include incoming email. Complaint, ¶ 106. As such, incoming email from non-Gmail users is specifically excluded from ¶ 17.1.

5. "In consideration for Google granting you access to and use of the Services, you agree that Google may place such advertising on the Services."

The quote can be found at ¶ 17.3 of the Terms of Service, Exhibit D to the Complaint. The language says nothing of the extraction of content for the submission to ad servers to generate revenue. The language merely tells the user that for the use of the Service, the user agrees that ads may be placed on those services, but in only reference to "Some of the Services" and only regarding targeted content from "information stored" on "Some Services" or "queries" made through "Some Services" or "other information." Complaint ¶¶ 102-110. None of the situations described in ¶¶ 17.1 or 17.3 apply to Gmail, the scanning of content for the extraction of valuable ideas for submission to ad servers, or the use of those ideas to generate revenue

[8] The last phrase "other information" has to relate solely to the clause "queries made through the Service or other information," and cannot form a third component of a string citation because the sentence cannot then be read properly.

because non-Gmail users (1) have not stored information on Google Services and (2) have not made queries through Gmail or other information. Complaint ¶¶ 107-08.

Moving to its Privacy Policy, Google again contradicts its own Terms of Service and user agreements by offering the argument that its lower-case "privacy policies" control the issue of consent. Yet, Google has only a solitary "Privacy Policy" that it incorporates into the Terms of Service and binds itself and its users. Complaint ¶¶ 18, 28, 36-37, 128 and Exhibit H. What Google omits for the Court's consideration is the language of ¶ 7.1 of the Terms of Service which states:

> 7.1 For information about Google's data protection practices, please read Google's privacy *policy* at http://www.google.com/privacy .html. This *policy* explains how Google treats your personal information, and protects your privacy, when you use the Services.

First, ¶ 7.1 references only a solitary "privacy policy." Google wholly fails to refer to any other document or hyperlink, to include the "Privacy Center" or "Advertising." Complaint ¶ 85. Second, Google is only advising potential Gmail users how it treats their "personal information." Complaint ¶ 84. Google defines "personal information" only as "Information that you provide to us which personally identifies you, such as your name, email address or billing information, or other data which can be reasonably linked to such information by Google." *See* http://www.google.com/intl/en/privacy/faq.html#toc-terms-personal-info. By Google's own definition, such information does not include the content of private emails from Plaintiff and Class Members. Nowhere does Google advise a user that personal content of incoming email will be extracted. Indeed, even ¶ 7.2 of the Terms of Service, because it is dependent upon ¶ 7.1, is limited to only treatment of "your personal information"—that being the user's limited identifying information. Complaint ¶¶ 87-90. No indication is given as to the interception of the content of incoming email.

While the web-page identified at http://www.google.com/privacy.html is entitled the "Privacy Center," neither the "Privacy Center" nor the various hyperlinks identified on that particular page are incorporated into the "Privacy Policy" or the other terms to which the user must agree. Complaint ¶ 86 and Exhibit D. From ¶ 7.1 of the Terms of Service, the user is only directed to the solitary "privacy policy." When looking at the "Privacy Center" webpage, the "Privacy Policy" is prominently displayed in the upper-left corner of the page. *See* Exhibit J to Complaint. This is where the user can click the hyperlink entitled "Privacy Policy" to begin reviewing the binding terms in accordance with ¶ 7.2 of the Terms of Service and the initial user screen wherein the user expressly consents to the solitary document of the "Privacy Policy." Complaint ¶¶ 27, 36-37. Paragraph 7.1 clearly limits the user's invitation to a solitary "privacy policy," and Paragraph 7.2's incorporation is wholly dependent upon 7.1's reference. If an additional meaning is given, the language then becomes ambiguous—providing no consent.

Yet even as to the "Privacy Center" webpage, Google wholly misstates its language to the Court. First, the information and the hyperlinks found on the "Privacy Center" webpage do not mention the word "Gmail," and from that page a user is not given any indication that any hyperlink might contain additional information related to Gmail. Complaint ¶ 87, Exhibit I of Complaint. Second, as to Google's asserted "privacy policies" that "include an *advertising link*" which explain advertising in Gmail, Google doesn't even consider these to be "privacy policies."

When the actual webpage and language is examined (Exhibit I of Complaint), the Court (and presumably the prospective user) can readily see that Google clearly *differentiates* its "Privacy Policy" from what it labels as "privacy *practices*" as to "certain products and services." While Google touts Gmail as one of the "most feature-rich and popular email services in the world, notably among the thirty-six (36) claimed products and services listed on the "Privacy

Center," Gmail is not one of them. Instead, Google would have the Court, and prospective users, believe that in lieu of going to the hyperlink entitled "Privacy Policy," to which the prospective user was alerted, the user should intuit that additional language specific to Google's scanning practice could be found in the "Advertising" link listed under products. Only in that Advertising hyperlink, and only after scrolling down to the next-to-the last paragraph, does Google, in three sentences, attempt to explain away its conduct—in a very limited manner.

The advertising hyperlink can be found at Exhibit J to the Complaint. While it is a webpage from the Privacy Center, Google did not incorporate this webpage into any agreement made by the user for a Gmail account. Complaint ¶ 128. As such, it cannot form express consent. In the next-to-the last paragraph, Google states:

> **What information does Google use to serve ads on Gmail?**
> Google scan the text of Gmail messages in order to filter spam and detect viruses. The Gmail filtering system also scans for keywords in users' email which are then used to match and serve ads. The whole process is automated and involves no humans matching ads to Gmail content.

Complaint ¶ 129, Exhibit J. First, the disclosure is limited to the scanning of "users' email." Complaint ¶ 130. Plaintiff's and Class Members' emails are not "users' email." Complaint ¶ 130. Second, the language is in contradiction to the language of the Gmail Legal Notice to the extent it purports to notify the user of any interception and use of the content of Plaintiff's and Class Members' email for anything other than to provide the user with the "Service" of Gmail. Finally, Plaintiff asserts Google misstates its "filtering" system to the user in that device that actually acquires the information from the incoming email may in fact be wholly separate from process for spam and virus protection. Complaint ¶¶ 71-76 Only discovery will reveal whether Google and Ms. Wong, the Deputy General Counsel for Google who testified before Congress, have been truthful with their description of how Google's content extraction device really works.

Finally, Plaintiff has pled that Google's acquisition of content from personal email to sell advertising cannot be countenanced in the face of its expressed self-imposed declaration, "We will not use any of your content for any purpose except to provide you with the Service." The Terms of Service clearly state that there will be a corresponding Legal Notice specific to that "Service." Complaint ¶ 26. The Gmail Legal Notices can be found at Exhibit F to the Complaint. Complaint ¶ 33. The "Service" mentioned in the Gmail Legal Notices is Gmail. Complaint ¶¶ 33, 114. Advertising is not the applicable Google "Service" within the "Gmail Legal Notices." Complaint ¶ 115. Advertising is not even a "Service" within Gmail or to Gmail users. Complaint ¶¶ 116-17. Indeed, Google clearly differentiates its "Services" from the advertising used to generate revenue.

When a user subscribes to Gmail, targeted advertising is not mentioned as a service in the Gmail Terms of Service, Program Policies, and Privacy Policies. Complaint ¶ 118. On the Google web-page, "What is Gmail?" advertising is not mentioned as a service within Gmail. Complaint ¶ 119 and Exhibit O. On the Google web-page, "Google's approach to email, Top 10 reasons to use Gmail," advertising is not mentioned as a "reason" to use Gmail. Complaint ¶ 120 and Exhibit B. Paragraph 17.1 of the "Terms of Service" clearly distinguishes "Services" from advertising revenues which pay for the "Services." Complaint ¶ 121 and Exhibit D. Paragraph 17.3's specific request for the user to agree to the *placement of advertisements* on Services evidences that advertisements are not "Services" and advertisements are not a part of any "Service." Complaint ¶ 122-23. Paragraph 17.3's specific request for the user to agree to the placement of advertisement on Services evidences that advertisements are not part of any "Service." Complaint ¶ 123. If advertisements, and in particular targeted advertisements based upon the content of Plaintiff's and Class Members' email, were a part of the "Services" offered

by Google, the inclusion of ¶ 17.3 in the "Terms of Service" would be unnecessary because that Service would already be included. Complaint ¶ 124. Accordingly, the use of content from private email for the generation of revenue through advertising not only violates Google's legal obligation to its users *via* contract, but it violates §§ 2511(1)(a) and (1)(d) as well. In addition, Plaintiff has specifically pled that Google uses the information acquired from incoming email for purposes beyond the Service of Gmail. Complaint ¶¶ 172-77. Any such use would be in direct contradiction to Google's self-imposed limitation found in the Gmail Legal Notices.

Finally, Google's intent or "purpose" for scanning the content of email is to "use" the content of the email for its own financial good in violation of § 2511(1)(d). While consent can be a defense pursuant to § 2511(2)(d), the qualification negating consent applies in this case because consent cannot be effective if the communication "is intercepted for the purpose of committing any criminal or tortuous act in violation of the Constitution of laws of the United States or of any State." Because Gmail users never consent to Google's use of the content of the emails for advertising, the "use" of those "intercepted" emails is in violation of federal law and the consent provision is not applicable to Google. As stated by the court in *L.C. Cent. Pa. Youth Ballet*, 2010 U.S. Dist. LEXIS 66060, *13 (M.D. Penn 2010):

> Plaintiffs have clearly averred that the interception of the communications . . . was executed with the express purpose of disclosing the contents of the communication . . . . Since such disclosure is proscribed by § 2511(1)(c), the interception of the aforementioned communications was done for the purpose of committing an act in violation of federal law. Accordingly, the language contained in § 2511(2)(d) does not remove Ballet Defendants' conduct from the realm of illegality, meaning that Plaintiffs may properly maintain a civil cause of action against them pursuant to § 2520.

In the present case, no consent exists for the purpose of "use" of content for advertising. Unlike the affirmative agreement by users checking "Yes" to a *specifically identified* use in *In re Vista Print Corp. Mktg. & Sales Practices Litig.*, 2009 U.S. Dist. LEXIS 77509, 28-29 (S.D. Tex.

2009), Google makes no attempt to have its Gmail users agree to the use of the content of their email. In fact, it is believed Google long ago removed any such language about content mining for ads from the current version of its Terms of Service. As such, no consent has been given, and Plaintiff respectfully requests Defendant's motion be denied as to the defense of consent.

C. Plaintiff's allegations defeat the application of the "necessary incident to Rendition of service exception of 18 U.S.C. § 2511(2)(a)(i)

The § 2511(2)(a)(1) exception does not apply to automated devices. Section 2511(2)(a)(i) protects "an operator of a switchboard, or an officer, employee, or agent of a provider" of a wire or electronic communication service" – i.e., a human being – not the automated component of the "provider of that service." Google's touted "scanning" process is automated and involves no people. As such, the exception is not available to Google.

In addition, Google, with a single sentence, admits the necessary facts to defeat the application of § 2511(2)(a)(1):

> The email is scanned for keywords which may later be used in connection with certain ad servers to match and serve relevant advertisements for display to Gmail users who open Gmail messages from their inboxes"

Google's Counterclaim [Doc. 29], Page 64 ¶ 8. The sole purpose for which Google scans for keywords in Plaintiff's and Class Members' email is to acquire the content to send to ad servers to *generate* advertisements. There is absolutely nothing "necessary incident to the rendition" of email that involves the acquisition of content of private email for the sale of advertisements, and on this point alone Google and Plaintiff have alleged sufficient facts to defeat the exception. Complaint ¶¶ 150-70.

Plaintiff asserts that Google utilizes an embodiment of an extraction device or devices mentioned in United States Patent Application US 2004/0059712 A1, or one similar thereto, in order to acquire the content from the private email and submit content or "use" such content for

advertising servers. Complaint ¶ 71. It is the device that "acquires" the content which is important to the case. While discovery has yet to be had, Plaintiff asserts the device or devices used by Google may very well be an e-mail application, browser, email server, e-mail information server, e-mail relevant ad server, etc…. Complaint ¶ 72. Google has confirmed this process in its Counterclaim [29] Page 64, ¶ 8. Further, Google admits than an extraction or acquisition of content does occur as described in United States Patent Application US 2004/0059712 A1. Counterclaim ¶ 8, Complaint 72-74. Plaintiff asserts this acquisition process is wholly unrelated to the rendition of service, and is certainly not necessary. Complaint ¶¶ 158-59, 162-65.

The § 2511(2)(a)(i) exception applies to employees of providers of an electronic communication service. As with the issue of the § 2510(5)(a)(i) exception, the fact that Congress limited the exception to electronic communication services gives great guidance as to the purpose of the exception. Congress recognized that electronic transmissions may need to be monitored, and the Senate's report on § 2511(2)(a)(i)'s allowance for some monitoring explains the purposes Congress had in mind. "The provider of electronic communications services may have to ***monitor*** a stream of transmissions *in order to properly* ***route, terminate, and otherwise manage*** *the individual messages they contain*." S. Rep. No. 99-541, at 19 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3574 (emphasis added). Accordingly, the monitoring must relate to the ability to route, terminate, and otherwise manage the individual messages.

Pursuant to 28 U.S.C. § 2510(15), an "electronic communication service" means any service which provides to users thereof the ability to send and receive electronic communications. Complaint ¶ 150. "Gmail" is an "electronic communication service" (as defined by 28 U.S.C. § 2510(15)). Complaint ¶ 151. Emails sent and received by Gmail account

holders through Gmail are "electronic communications" (as defined by 28 U.S.C. § 2510(12). Complaint ¶ 155. Acquiring content to generate ads for revenue has nothing to do with the ability to send and receive electronic communications. Complaint ¶ 159. Google admits that the industry standard for email service is "free" email service without the acquisition of content from private email for the purpose of selling advertisements. Complaint ¶¶ 156-57. Moreover, Google has the technical ability, just like all email service providers, to offer Gmail without targeted advertising from acquired content. Complaint ¶ 161. This alone establishes that the acquisition of content from private email is not necessary incident to the rendition of the service of email. Complaint ¶ 156-58.

What Google wants, however, is a statutory interpretation that says once a company engages in any activity that may very well be "necessary incident to the rendition of service" then any other activity would also fall within the exception. Such an interpretation is unsupported in law. The Fifth Circuit has implicitly rejected this broad sweeping interpretation in *United States v. Clegg*, 509 F.2d 605, 613 (5th Cir. 1975) (emphasis added):

> It is unnecessary for us at this juncture to decide whether 18 U.S.C. § 2511(2)(a) continues to allow a telephone company to divulge the entire content of illegally placed telephone calls. However, we feel that it is quite clear and we do hold that § 2511(2)(a), *at a minimum*, authorizes a telephone company which has reasonable grounds to suspect that its billing procedures are being bypassed to monitor any phone from which it believes that illegal calls are being placed. If, by the use of a device similar to a TTS 176, it discovers the existence of illegal calls, § 2511(2)(a), again *at a minimum*, authorizes it to record, audibly, the salutations. Additionally, § 2511(2)(a) allows a telephone company to divulge, *at least*, the existence of the illegal calls and the fact that they were completed (the salutations) to law enforcement authorities and ultimately to the courts, since such disclosures are a necessary incident to the protection of the company's property rights. As authorized disclosures, such evidence is admissible in court. 18 U.S.C. § 2517(3).

See also United States v. Harvey, 540 F.2d 1345 (8th Cir. 1976). The *Clegg* case highlights the

importance of the limitations of the exception.[9] In examining the exception, the Fifth Circuit uses the phrase "at a minimum" to show what a provider can and possibly could not do. If the exception were as broadly defined as Google seeks, there would be absolutely no need to conduct an "at a minimum" analysis of anything.

The Circuit for the District of Columbia explained the limitation as follows:

> Berry responds that the exception does not apply, because, again, it cannot possibly be ***deemed in the normal course of a Watch Officer's employment*** to engage in any monitoring contrary to the guidelines. As we have indicated in the discussion above, we agree with this proposition, but do not think the exception applies here ***regardless of the Watch Officers' normal practices***. A switchboard operator is authorized to overhear (and disclose and use) only that part of a conversation "which is a necessary incident to the rendition of his service." We think it rather obvious from the statutory language that Congress recognized switchboard operators, when connecting calls, inevitably would overhear a small part of a call, ***but the exception permitting them to use that content is limited only to that moment or so during which the operator must listen to be sure the call is placed***. (It has been held that the operator also may stay on the line on those rare occasions when he hears something troubling during that moment, such as the planning of a murder.) See, e.g., *Adams v. Sumner,* 39 F.3d 933 (9th Cir. 1994); *United States v. Axselle,* 604 F.2d 1330 (10th Cir. 1979); *United States v. Savage,* 564 F.2d 728 (5th Cir. 1977). In short, the switchboard operator, performing only the switchboard function, ***is never authorized simply to monitor calls.***

Berry v. Funk, 146 F.3d 1003, 1010 (D.C. Cir. 1998) (emphasis added). *Berry* clearly shows the exception is limited to some function necessary for the service to be provided and for a limited use. Importantly, *Berry* rejects any notion that "normal practices" factor into the "necessary incident to the rendition of service" analysis. The Eighth Circuit's rationale behind the applicability of the exception stemmed from its finding that, "Gregory's random monitoring of the telephone conversation occurred because he was attempting to check the service quality of the Laffoon's line . . . . he was engaged in an activity necessary to the rendition of the service." *United States v. Ross,* 713 F.2d 389, 392 (8th Cir. 1983). Contrary to Google's interpretation, the

[9] While *Clegg* does involve an analysis of the exception offered for the "protection of the rights or property of the provider," the Fifth Circuit's awareness of the limitations within the § 2511(2)(a)(i) exception are clear.

Ninth Circuit expressed, "But the authority to intercept and disclose wire communications ***is not unlimited***, we noted. The telephone company may only intercept a communication which is a 'necessary incident to the rendition of . . . service.'" United States v. Cornfeld, 563 F.2d 967, 970 (9th Cir. 1977) (quoting, 18 U.S.C. § 2511(2)(a)(i)). Finally, in *United States v. Freeman*, 524 F.2d 337, 341 (7th Cir.1975), the Seventh Circuit made it clear that, "The statute's use of the word necessary, its proviso restricting random monitoring and Congress' intent to maximize the protection of privacy . . . suggests that this authorization should be limited in scope."

The Plaintiff's Complaint alleges Google's continuous acquisition of content from private email for the sole purpose of generating advertisement is not necessary incident to the rendition of service. Google's admission that it does in fact acquire content from email to be sent to ad servers and that email can be offered without targeted advertising more than defeats the application of the exception. Accordingly, Plaintiff respectfully requests Defendant's motion be denied as to this issue.

III. CONCLUSION

Taking Plaintiff's allegations as true:

1) Plaintiff's allegations defeat the application of the ordinary course of business exception of 18 U.S.C. § 2510(a)(ii);

2) Plaintiff's allegations defeat the application of the Google's consent defense;

3) Plaintiff's allegations defeat the application of the "necessary incident to the rendition" of service exception found at 18 U.S.C. § 2511(2)(a)(i).

WHEREFORE, Plaintiff prays this Court DENY Defendant's Motion to Dismiss Plaintiff's First Amended Class Action Complaint and grant Plaintiff all other relief to which Plaintiff may prove himself entitled.

Respectfully submitted,

/s/ Sean F. Rommel
Sean F. Rommel
Tex. Bar No. 24011612
srommel@wylyrommel.com
James C. Wyly
Tex. Bar No. 22100050
jwyly@wylyrommel.com

WYLY~ROMMEL, PLLC
2311 Moores Lane
Texarkana, Texas 75503
(903) 334-8646 (Telephone)
(903) 334-8645 (Fax)

Chris Travis
Admission by *Pro Hac Vice*
Travis@gill-law.com
Drake Mann
Admitted in ED Texas
Arkansas Bar No. 87108
mann@gill-law.com

GILL ELROD RAGON OWEN & SHERMAN, P.A.
425 West Capitol Avenue, Suite 3801
Little Rock, Arkansas 72201
(501) 376-3800 (Telephone)
(501) 372-3359 (Fax)

M. Chad Trammell
Tex. Bar No. 20183750
chad@thetrammellfirm.com

THE TRAMMELL LAW FIRM, PLLC
418 North State Line Avenue
Texarkana, AR 71854
(870) 779-1860 (Telephone)
(870) 779-1861 (Fax)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2011, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic case files system of the court. The electronic case files system sent a "Notice of Electronic Filing" to individuals who have consented in writing to accept this Notice as service of this document by electronic means. All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by first class mail today.

/s/ Sean F. Rommel
Sean F. Rommel