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19 Wyoming corporation

20 **UNITED STATES DISTRICT COURT**  
21 **NORTHERN DISTRICT OF CALIFORNIA**

22 ROCKY MOUNTAIN BANK, a  
23 Wyoming corporation,

24 Plaintiff,

25 v.

26 GOOGLE INC., a Delaware  
27 corporation,

28 Defendant.

Case No. 5:09-CV-04385 PVT

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**  
*(FILED UNDER SEAL) [REDACTED]*

Hearing Date: \_\_\_\_\_  
Time: a.m.  
Room:

Trial Date: Not Scheduled  
Date Action Filed: \_\_\_\_\_  
Judge: Hon. \_\_\_\_\_

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1 Plaintiff Rocky Mountain Bank, by and through its attorneys Kutak Rock  
2 LLP, hereby submits the following Memorandum of Points and Authorities in  
3 Support of its Motion for Temporary Restraining Order and Preliminary Injunction  
4 against Defendant Google Inc. (“Google”):

#### 5 INTRODUCTION AND SUMMARY OF ARGUMENT

6 The Bank is a full service banking institution which, among other things,  
7 offers various loans to individual consumers and corporate entities.

8 The Bank is instituting this action against Google and is seeking the  
9 injunctive relief requested herein to protect confidential and private information of  
10 approximately 1,325 customer accounts, which was inadvertently sent to a Google  
11 email account, namely [Redacted]@gmail.com. The information disclosed  
12 includes customer names, addresses, tax identification numbers, and account  
13 numbers.

14 After learning of the inadvertent disclosure the Bank took various steps to  
15 ensure that the confidential customer information was not disclosed further or used  
16 for any improper purpose, including contacting Google to request information and  
17 assistance in preventing use and disclosure of the customer information. Google,  
18 however, took the position that it was not able to assist the Bank unless and until it  
19 was served with legal process. Therefore, the Bank has been forced to initiate this  
20 action in order to protect the confidential and private information of its customers.

21 The Bank is entitled to the relief requested herein under the standards of this  
22 Court for issuing temporary restraining orders and preliminary injunctions. In  
23 particular, the balance of harm weighs heavily in favor of the Bank and its  
24 customers and there is, at least, a serious question going to the merits of the Bank’s  
25 claims. In regard to the merits, Google and its email account holder have no rights  
26 in or to the inadvertently disclosed information, while the Bank and its customers  
27 have every right to prevent further disclosure and use of such information. The  
28 Bank, therefore, is likely to prevail on its requests to prevent disclosure and use of

1 the customer information.

2 In regard to the balance of harms, the Bank and its customers will suffer  
3 extreme harm, including possible theft of customer identities and loss of customers  
4 and reputation by the Bank. Google, on the other hand, will suffer little or no harm  
5 if it is ordered to disclose information about the email account and taking steps to  
6 deactivate the account and deleting the inadvertently disclosed information.

7 Finally, there is a substantial public interest in preventing further disclosure  
8 and use of customer information.

9 The Bank, therefore, is entitled to a temporary restraining order and  
10 preliminary injunction as requested herein.

### 11 STATEMENT OF FACTS

12 The Bank is a full service banking institution which, among other things,  
13 offers various loans to individual consumers and corporate entities. (Verified  
14 Complaint (“Complaint”), ¶ 6.) On August 12, 2009, the Bank received a  
15 telephone call from a customer (the “Customer”), wherein the Customer requested  
16 that the Bank send certain annual loan statements (the “Requested Information”) to  
17 a third-party representative of the Customer (the “Request”). (Complaint, ¶ 7.)

18 In connection with the Request, on August 12, 2009, at approximately 4:13  
19 p.m., an employee of the Bank attempted to send the Customer’s representative the  
20 Requested Information via e-mail. (Complaint, ¶ 8.) At approximately 7:22 p.m.,  
21 the Customer’s representative informed the Customer, via email, that he had not  
22 received the Requested Information. The Customer forwarded the email to an  
23 employee of the Bank at approximately 7:50 p.m. (Complaint, ¶ 9.)

24 On August 13, 2009, an employee of the Bank discovered that the Requested  
25 Information was inadvertently sent to the wrong email address (the “Inadvertent  
26 Email”). The e-mail was sent to the following address: “[Redacted]@gmail.com”  
27 (the “Gmail Account”), which is an account that was set up and maintained through  
28 www.google.com. Additionally, the Bank discovered that the information that was

1 attached to the Inadvertent Email contained confidential customer information  
2 relating to 1,325 individual and business customer accounts (the “Customer  
3 Accounts”), *i.e.*, for customers other than just the Customer who requested  
4 information. (Complaint, ¶ 10.)

5 The customer information that was attached to the Inadvertent E-Mail  
6 included names, addresses, tax identification numbers and loan information for  
7 each of the 1,325 customer accounts. The attached information is confidential  
8 information of the Bank’s customers and to which the Bank’s customers have a  
9 right to privacy (hereinafter the “Confidential Customer Information”).  
10 (Complaint, ¶ 11.)

11 Because of the inadvertent disclosure of the Confidential Customer  
12 Information, state and federal regulations require the Bank to make a prompt and  
13 good faith investigation to determine the likelihood that the Confidential Customer  
14 Information has been or will be misused. The reason for this investigation is to  
15 ascertain if the privacy rights of the Customers are protected. (Complaint, ¶ 12.)

16 After learning of the inadvertent disclosure of Confidential Customer  
17 Information, the Bank immediately attempted to recall the Inadvertent Email, which  
18 was sent using Microsoft Outlook. However, the Bank’s efforts to recall the email  
19 were not successful. The Bank is advised that the recipient of the email must also  
20 be using Microsoft Outlook to recall an email. Further, the Bank is advised that, if  
21 the Inadvertent Email had already been opened, a recall attempt would be futile.  
22 (Complaint, ¶ 13.)

23 On August 13, 2009, at approximately 1:57 p.m., Mark Hendrickson, the  
24 President of the Bank, sent an email to the Gmail Account, whereby Mr.  
25 Hendrickson instructed the recipient to immediately delete the Inadvertent Email  
26 and the file attached thereto in its entirety without opening or reviewing it. Mr.  
27 Hendrickson also requested that the recipient immediately contact the Bank to  
28 discuss his/her actions. As of the date of this Memorandum, the Bank has not

1 received a response from the Gmail Account holder. (Complaint, ¶ 14.)

2 In an effort to determine whether the Gmail Account is a valid, active email  
3 address, on or about August 13, 2009, an employee of the Bank attempted to  
4 register the email address through Google.com. The Bank employee was unable to  
5 register the address. Therefore, the Bank concluded that Gmail Account was a  
6 valid Google email address. (Complaint, ¶ 15.)

7 The Bank believes and understands that Google has information regarding  
8 the Gmail Account Holder, and regarding the status and activity level of the Gmail  
9 Account. The Bank also believes that Google has the ability to freeze the Gmail  
10 Account and to take other steps to prevent access to and dissemination of the  
11 inadvertently disclosed Confidential Customer Information. Accordingly, in further  
12 efforts to protect the Confidential Customer Information, both the Bank and the  
13 Bank's undersigned counsel contacted Google's legal support via email and  
14 informed Google that Confidential Customer Information was sent to one of its  
15 "gmail" accounts and inquired as to whether the account was active or dormant and  
16 what steps could be taken to ensure that the Confidential Customer Information was  
17 not used or disclosed. However, Google advised the Bank and undersigned counsel  
18 that it would not provide any information regarding the Gmail Account and would  
19 not otherwise assist in preventing disclosure of the Confidential Customer  
20 Information except and unless it was requested through "a valid third-party  
21 subpoena or other appropriate legal process." (Complaint, ¶ 16.)

22 In connection with the Bank's internal investigation and evaluation of the  
23 likelihood that the Confidential Customer Information has been or will be misused,  
24 the Bank has determined that it is necessary to: (a) prevent Google or the Google  
25 account holder from using the Confidential Customer Information; (b) have the  
26 Gmail Account immediately frozen or deactivated to prevent any access to the  
27 Confidential Customer Information; (c) delete the Inadvertent Email from Google's  
28 system; (d) determine the status of the Gmail Account, specifically, whether the

1 Gmail Account is active or dormant and whether the Inadvertent Email was opened  
2 or otherwise manipulated by the account holder; and (e) in the event that the Gmail  
3 Account is not dormant, ascertain the identity of the Gmail Account holder, so that  
4 the Bank can take appropriate steps with the account holder to ensure that the  
5 Confidential Customer Information is not distributed or otherwise misused.  
6 (Complaint, ¶ 17.)

7 In connection with the Bank's internal investigation, on September 1, 2009  
8 the Bank notified the Wyoming Division of Banking and the Tenth Federal Reserve  
9 District (collectively, the "Regulators") of the Inadvertent Email and the steps the  
10 Bank had taken and planned to take to protect its customer information. The  
11 Regulators confirmed that the Bank was taking proper steps in connection with the  
12 Inadvertent Email and agreed that the Bank must take action to have the Gmail  
13 Account frozen and/or determine the status of the Gmail Account. (Complaint, ¶  
14 18.)

## 15 ARGUMENT

### 16 I. TRO AND PRELIMINARY INJUNCTION STANDARD.

17 Federal Rule of Civil Procedure 65 sets forth the procedure for issuance of a  
18 temporary restraining order ("TRO") and preliminary injunction. The Ninth Circuit  
19 has held that, a plaintiff is entitled to a TRO and preliminary injunction if there  
20 exists a combination of probable success on the merits and the probability of  
21 irreparable injury if an injunction is not granted, or, even if there are serious  
22 questions going to the merits of the claim, where the balance of hardships tips  
23 heavy in favor of the moving party. *See First Brands Corp. v. Fred Myers, Inc.*,  
24 809 F.2d 1378, 1381 (9th Cir. 1987); *see also Diamontiney v. Borg*, 918 F.2d 793,  
25 795 (9th Cir. 1990). These are not two distinct and independent tests: they are "the  
26 opposite ends of a single continuum in which the required showing of harm varies  
27 inversely with the required showing of meritoriousness." *See Rodeo Collection,*  
28 *Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987); *see also Diamontiney,*

1 918 F.2d at 795. The court should also consider the impact of the injunction on the  
2 public interest. *Intel Corp. v. ULSI System Technology, Inc.*, 995 F.2d 1566, 1568  
3 (9th Cir. 1993).

4 **II. THE BANK IS LIKELY TO PREVAIL ON THE MERITS, OR AT A**  
5 **MINIMUM, THERE IS A SERIOUS QUESTION GOING TO THE**  
6 **MERITS OF THE CLAIM.**

7 The Bank has asserted two causes of action in its Verified Complaint, namely  
8 declaratory relief and injunctive relief against Google.

9 In the Bank's first cause of action for declaratory judgment, the Bank seeks a  
10 declaration that it is entitled to the information regarding the status of the Gmail  
11 Account, including whether the Inadvertent Email was delivered, opened, or  
12 otherwise manipulated so that it can determine what further steps are necessary to  
13 protect the Confidential Customer Information. In the event that the Gmail  
14 Account is not dormant, then Google requests a declaration that it is entitled to  
15 information sufficient to identify of the Gmail Account holder. In addition, the  
16 Bank requests a declaration that Google is required to take all reasonable steps to  
17 ensure that the Confidential Customer Information is not accessed, used or  
18 distributed, including, but not limited to, deactivating the Gmail Account and  
19 deleting the Inadvertent Email from its system.

20 The Bank's second cause of action for injunctive relief seeks an order to: (a)  
21 restrain and permanently enjoin Google and its account holder from accessing,  
22 distributing, or using the Confidential Customer Information; (b) require Google to  
23 immediately deactivate the Gmail Account or any other steps within its power to  
24 prevent access to the Gmail Account; (c) require Google to delete the Inadvertent  
25 Email and the Confidential Customer Information from its system; (d) require  
26 Google to immediately disclose the status of the Gmail Account; specifically,  
27 whether the Gmail Account is active or dormant and whether the Inadvertent Email  
28 was opened or otherwise manipulated by the account holder; and (e) in the event

1 that the Gmail Account is not dormant, require Google to disclose all information  
2 that it has regarding the Gmail Account holder to allow the Bank to prevent the  
3 account holder from using or distributing the Confidential Customer Information.

4 The Bank is entitled to the relief requested because it has an obligation, legal  
5 and otherwise, to protect the privacy of its customers. In addition, in light of  
6 Google's refusal to provide information on the Gmail Account or otherwise assist  
7 the Bank in preventing further disclosure or use of the Confidential Customer  
8 Information, the Bank has no other avenue or remedy at law to ensure that its  
9 customer's privacy rights are protected. Furthermore, neither Google nor the  
10 recipient of the Inadvertent Email has any legal right to the Confidential Customer  
11 Information or any right to retain or use such information for any purpose.

12 Therefore, the Bank is likely to prevail on the merits of its request for  
13 declaratory and injunctive relief, or the facts presented herein create a serious  
14 question as to the merits of the Bank's claim that support entry of a TRO and  
15 preliminary injunction.

16 **III. THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN FAVOR OF**  
17 **ISSUING A TRO AND PRELIMINARY INJUNCTION.**

18 If the TRO and preliminary injunction are not issued as requested herein, the  
19 Bank and its customers will suffer substantial and irreparable harm.

20 The Bank has an affirmative obligation to take reasonable steps to protect the  
21 Confidential Customer Information and to make a prompt and good faith  
22 investigation to determine the likelihood that the Confidential Customer  
23 Information has been or will be misused. The only way for the Bank to determine  
24 if the Confidential Customer Information has been or could be misused is for this  
25 Court to enter the TRO and preliminary injunction requested herein. If the Bank's  
26 requested relief is not granted, the Bank will be forced to notify every account  
27 holder of the inadvertent disclosure. Such notice will result in the Bank losing  
28 customers and will significantly and negatively impact the Bank's reputation. This

1 harm would be irreparable and unnecessary if the Bank is able to determine that the  
2 Confidential Customer Information was not accessed, disclosed further, or used by  
3 Google or the Google Gmail Account holder, and if the Bank can ensure that such  
4 information cannot be used in the future. In addition, the Bank customers may be  
5 needlessly alarmed if in fact the Gmail Account is dormant, the Inadvertent Email  
6 was deleted or destroyed without disclosure of the Confidential Customer  
7 Information. Further, there is a significant cost involved in notifying Bank  
8 customers of the inadvertent disclosure, which could be avoided if the requested  
9 relief is granted.

10 In addition to the harm to the Bank, the Bank's customers also would be  
11 irreparably harmed if this Motion is not granted and the Confidential Customer  
12 Information is allowed to be used and/or disclosed. In particular, the use and  
13 disclosure of the Confidential Customer Information could result in the identify  
14 theft of more than 1,300 customers.

15 Google is in the unique position of having information that is essential to  
16 determining whether and how the Confidential Customer Information was used and  
17 in the position of being able to prevent access to and use of such information.  
18 Accordingly, the Bank cannot take necessary steps to protect its customers and the  
19 Confidential Customer Information until it is able to determine the status of the  
20 Gmail Account and what if any action was taken by the recipient in connection with  
21 the Inadvertent Email.

22 Google stands to suffer little more than a minor inconvenience if it is  
23 required to disclose the information requested with respect to the Gmail Account  
24 and to deactivate the account to ensure the Confidential Customer Information is  
25 not disclosed, accessed or used. Moreover, it is the Bank's understanding that to  
26 determine whether an account is fact active and whether the Inadvertent Email was  
27 opened is a very simple task which may be performed with little effort. To the  
28 extent that the Gmail Account is active and Google discloses information regarding

1 the account holder, the Bank will agree that such disclosure will be subject to a  
2 reasonable protective order.

3 **IV. THE PUBLIC INTEREST DICTATES THAT PLAINTIFF'S**  
4 **REQUEST FOR EXTRAORDINARY RELIEF BE GRANTED.**

5 The public interest in the issuance of a TRO and preliminary injunction is a  
6 factor that can be considered in appropriate cases. In this case the public interest in  
7 ensuring that the Confidential Customer Information relating to both individual  
8 consumers and business entities is not misused weighs strongly in favor of issuing  
9 the preliminary injunction and requiring Google to disclose the information  
10 regarding the status of the Gmail Account.

11 The public clearly has an interest in protecting confidential information and  
12 maintaining confidence in banking institutions. The Bank is acting on behalf of the  
13 holders of the Customer Accounts which clearly need some avenue of redress to  
14 ensure that their information has not been and cannot be misused and to potentially  
15 mitigate any damages which may have already occurred.

16 **CONCLUSION**

17 For the foregoing reasons, Plaintiff Rocky Mountain Bank respectfully  
18 requests that the Court issue a TRO and preliminary injunction (a) restraining and  
19 permanently enjoining Google and its account holder from accessing, distributing,  
20 or using the Confidential Customer Information; (b) requiring Google to  
21 immediately deactivate the Gmail Account or any other steps within its power to  
22 prevent access to the Gmail Account; (c) requiring Google to delete the Inadvertent  
23 Email and the Confidential Customer Information from its system; (d) requiring  
24 Google to immediately disclose the status of the Gmail Account; specifically,  
25 whether the Gmail Account is active or dormant and whether the Inadvertent Email  
26 was opened or otherwise manipulated by the account holder; and (e) in the event  
27 that the Gmail Account is not dormant, requiring Google to disclose all information  
28 that it has regarding the Gmail Account holder to allow the Bank to prevent the

1 account holder from using or distributing the Confidential Customer Information.

2 Respectfully submitted this 17<sup>th</sup> day of September, 2009.

3  
4 **KUTAK ROCK LLP**

5  
6 By: /s/ Grace Y. Horoupian

7 Grace Y. Horoupian

8 ATTORNEYS FOR PLAINTIFF

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