

No. 11-17483

In the
United States Court Of Appeals
For the
Ninth Circuit

BENJAMIN JOFFE, *et al.*,

Plaintiffs-Appellees,

v.

GOOGLE INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
Case No 3:10-MD-2184-CRB
The Honorable James Ware, U.S. District Court Judge

**Plaintiffs-Appellees' Opposition to Google's Motion for Leave
to File Reply Brief in Support of Its Petition for Rehearing and
Rehearing En Banc**

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Plaintiffs-Appellees Benjamin Joffe, *et al.* (“Plaintiffs”) oppose Google’s Motion for Leave to File Reply Brief in Support of Its Petition for Rehearing and Rehearing En Banc (“Motion”), and state as follows:

1. First, Google’s entire proposed reply does no more than rehash and restate arguments it already made in both its Appellate briefs and its Petition for Rehearing and Rehearing En Banc. Google’s proposed reply presents no new facts, theories or arguments, let alone points of law or facts that it believes the Panel overlooked or misunderstood. If a desire to re-state one’s arguments were enough to justify a reply, then reply briefs would be the norm—not the rare exception—on petitions for rehearing. The fact is, Google disagrees with Plaintiffs’ arguments and the Panel’s unanimous decision, and that is simply an insufficient basis to permit a reply.

2. Second, the Federal Rules and Ninth Circuit Rules clearly do not contemplate replies regularly on petitions for rehearing. These rules do not even permit a *response* to a petition for rehearing and rehearing en banc absent a request from the Panel, and they make absolutely no mention of a reply to such a court-ordered response. *See* Fed. R. App. P. 35(e), 40(a)(3); 9th Cir. R. 35-2, 40(a)(3), 40-1(a). Google’s motion offers no extenuating circumstances that make this the exceptional case warranting yet another brief on this appeal.

3. Third, Google's assertions regarding Plaintiffs' response are simply wrong. Contrary to Google's claim that "Plaintiffs ma[d]e no real effort to defend the panel's holding," Motion, point 6, Plaintiffs explained in their opposition that Google ignored "the vast majority of the Panel's analysis" in support of its rejection of Google's interpretation of the Wiretap Act. Opp. at 7-8. Plaintiffs then rebutted Google's challenges to the few portions of the panel's reasoning that it addressed. *See* Opp. at 8-12.

4. Google is likewise incorrect that Plaintiffs "concede" it was improper for the Panel to find that unencrypted Wi-Fi communications are not readily accessible to the general public. *See* Motion, point 7. To the contrary, Plaintiffs explained that Google had mischaracterized "the Panel's affirmance of the sufficiency of Plaintiffs pleadings as a factual finding," as it "is clear that the Panel was reviewing a ruling on a Rule 12(b)(6) motion to dismiss." *See* Opp. 16-17 n.4.

WHEREFORE, Plaintiffs-Appellees Benjamin Joffe, et al. respectfully request that this Court enter an Order denying Google's Motion for Leave to File Reply Brief in Support of its Petition for Rehearing and Rehearing En Banc.

DATED: November 14, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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