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 [redacted]

GOOGLE LLC'S OPPOSITION TO DOJ PLAINTIFFS' MOTION TO SANCTION GOOGLE AND COMPEL DISCLOSURE OF DOCUMENTS UNJUSTIFIABLY CLAIMED BY GOOGLE AS ATTORNEY-CLIENT PRIVILEGED

Accusing an adversary of engaging in a systematic, bad-faith scheme to falsify and hide documents is a serious matter. A charge of that magnitude should be accompanied by unassailable proof. The DOJ Plaintiffs ("Plaintiffs") have provided none.[1] Their allegations of sanctionable misconduct are baseless. They misread three slides from internal presentations out of the more than 4.5 million documents produced by Google to argue that Google engaged in a nefarious scheme to falsify and hide documents. When read in context, the slides provide legitimate guidance to Google employees about how to communicate with in-house counsel to request legal advice on subjects with obvious legal implications.

To be sure, Google employees copy in-house counsel on emails and label those emails "privileged and confidential." That is understandable: many aspects of Google's operations have significant legal implications (such as contractual and privacy-related issues) and are subject to

[1] The present motion was filed by Plaintiffs in *United States v. Google LLC*, but not the Plaintiffs in *Colorado v. Google LLC*. Accordingly, references to "Plaintiffs" herein refer only to Plaintiffs in *United States v. Google LLC*.

government oversight and regulation; Google in-house counsel work hand-in-hand with lay employees every day to navigate complex legal and commercial issues; and distinguishing between privileged legal advice and nonprivileged business advice is "especially difficult." *Am. Nat'l Bank & Tr. Co. v. Equitable Life Ass. Soc'y*, 406 F.3d 867, 879 (7th Cir. 2005).

Copying in-house counsel on emails or marking emails "privileged" did not spoliate emails or otherwise exempt them from scrutiny during discovery. Google collected responsive documents, reviewed them for privilege, served privilege logs, and has been working in good faith to re-review documents challenged by Plaintiffs—including documents that are the subject of this motion and that Plaintiffs first challenged just weeks ago. In fact, Google already produced the vast majority of emails that seemingly meet Plaintiffs' "silent-attorney" rubric—more than 100,000 in total—including those that Plaintiffs attach as exhibits to their motion. Plaintiffs come nowhere close to proving the bad-faith misconduct that is required to strip a party of its privilege protections as a sanction under the Court's inherent authority. The Court should deny the motion for sanctions.

Plaintiffs' alternative motion to compel seeks the same relief as their sanctions motion: blanket removal of privilege protection over large swathes of unidentified emails. They ask the Court categorically to compel production of what they call "silent-attorney" emails on the theory that if an attorney did not respond to an email in the same email chain, the email cannot be privileged or work product. Of course, this is wrong and there are many reasons why an attorney might not respond to a privileged or work-product email, which is why privilege must be assessed on a case-by-case basis. Plaintiffs cite no case adopting their "silent-attorney" rule, and the case law does not require an attorney response to render a client's request for legal advice privileged. Adopting Plaintiffs' rule would unjustly require production of large quantities of privileged and

work-product documents, and would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981). The Court should deny Plaintiffs' motion to compel.

BACKGROUND

A. Plaintiffs' "Communicate-with-Care" Allegations Are Baseless.

Plaintiffs' motion rests on their allegation that Google "systematically trained its employees" to hide documents from discovery by "camoflag[ing] ordinary-course business documents to look like privileged discussions." Mot. 3. Plaintiffs call this supposed instruction "Communicate with Care." Mot. 4. Plaintiffs' allegation lacks any basis in fact and cannot support an award of sanctions.

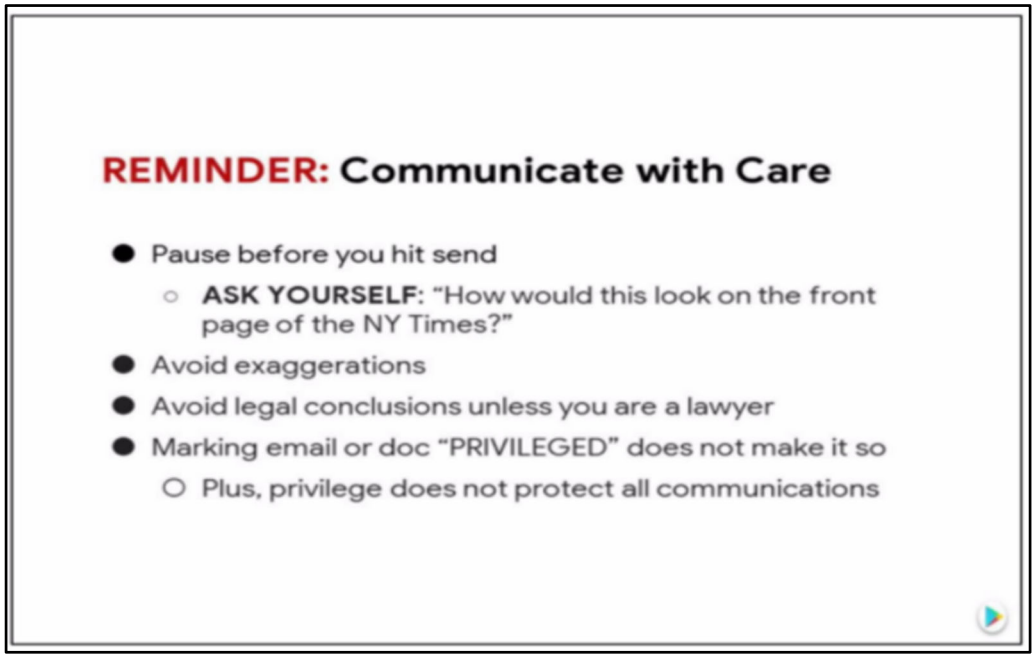
1. What "communicate with care" actually means.

Google has, in trainings from time to time, reminded employees to "communicate with care," but for entirely legitimate reasons. "[C]ommunicate with care" conveys a set of recommendations that encourage employees to think carefully about what they reduce to writing in order to protect commercially sensitive and/or legitimately privileged communications. Plaintiffs' attempt to transform "communicate with care" into a scheme to thwart government investigations or discovery finds no support in the evidence. To the contrary, as discussed below, the ideas advanced in Google's "communicate with care" guidance have been endorsed by legal commentators.

Google's documents show that "communicate with care" means to follow best practices for handling confidential, proprietary, and/or privileged information in email correspondence and other internal communications. For example, as part of a quarterly presentation to one business group, Google instructed employees on how to share sensitive, non-public information within their working groups. One slide in the presentation recommended, in relevant part, that employees

pause before pressing 'send' and consider whether they would be comfortable if *The New York Times* published the contents of their emails.[2] Importantly, the presentation educated employees about the limitations of attorney-client privilege; it specifically told employees that marking documents as privileged "does not make it so." And it reminded employees of the importance of sensible email etiquette (e.g., avoiding exaggerations and legal conclusions) regardless of whether emails and other communications reflect or seek legal guidance.

Figure 1[3]

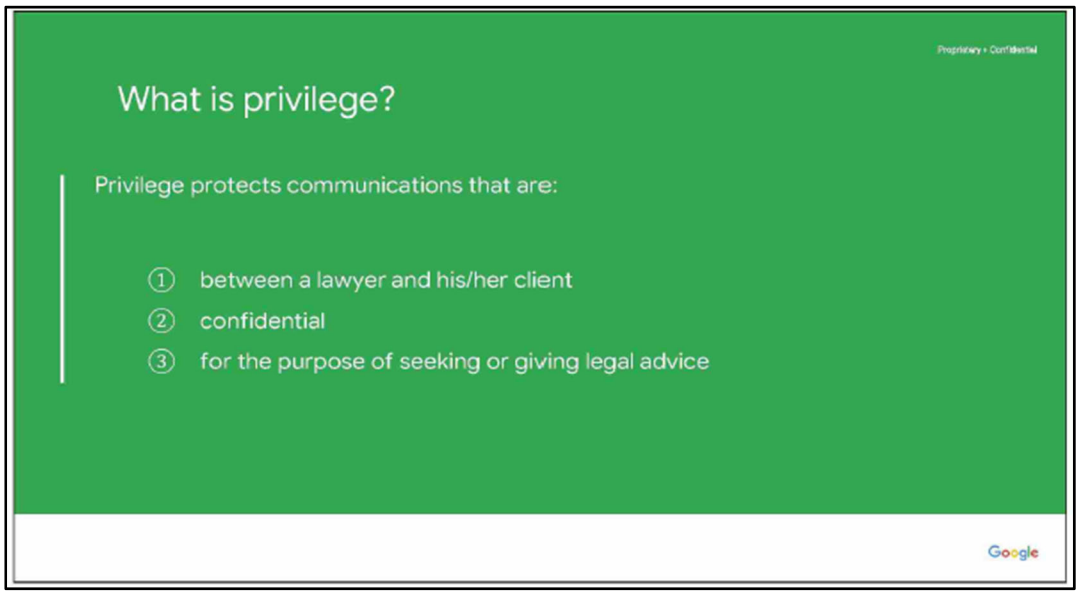


Contrary to Plaintiffs' assertions, such instructions to "communicate with care" do not teach employees to shield their emails from discovery by abusing attorney-client privilege. As set forth in the examples below, Google employees receive industry-standard guidance regarding the scope of attorney-client privilege. Employees are trained, for example, that communications are

[2] Google Ex. 4 (GOOG-DOJ-16974608), at -616; *see also, e.g.*, Google Ex. 5 (GOOG-DOJ-07746117), at -230 ("A good rule of thumb is don't type anything . . . that you wouldn't want to see quoted on the front page of The Verge.").
[3] Google Ex. 4 at -616.

privileged only to the extent they reflect confidential information between a lawyer and a client for the purpose of receiving or providing legal advice:

Figure 2[4]



Google also provides its employees with tips for protecting *legitimately* privileged communications from disclosure, while cautioning that "just adding a lawyer to an email/document doesn't guarantee that it will be protected by the privilege":

[4] Google Ex. 6 (GOOG-DOJ-21004668), at -672.

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