FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

2011 MAR -7 P 12:07

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN RE 2703(d) ORDER AND 2703(f) PRESERVATION REQUEST RELATING TO GMAIL ACCOUNT [redacted]	Misc. No. 10GJ3793 11-DM-2 FILED UNDER SEAL

GOOGLE INC.'S REPLY IN SUPPORT OF ITS OBJECTIONS TO MAGISTRATE'S ORDER OF FEBRUARY 9, 2011 AND NOTICE OF APPEAL PURSUANT TO FED. R. CRIM. P. 59

Google Inc. ("Google") hereby submits this Reply in Support of its Objections to Magistrate's Order of February 9, 2011 and Notice of Appeal Pursuant to Fed. R. Crim. P. 59.

The government has admitted that the demand at issue here (the "Order")[1] and the unsealed Twitter Order[2] relate to the same investigation. The government has also acknowledged that the subjects of the Twitter Order (including Twitter user [redacted] and anyone who has heard about the highly publicized Twitter Order) already are operating under the assumption that the government has sought information related to their Google accounts. These facts alone demonstrate that there is no cause for the Order to have been sealed in the first place or to remain sealed now. The government has "buyer's remorse" for having unsealed the Twitter Order, and wants Google's subscriber and Google to pay for the government's perceived mistake by compelled silence.

Rather than demonstrating how unsealing the Order to Google will harm its well-publicized investigation, the government lists a "parade of horribles" that allegedly have already

[1] *See* Declaration of John K. Roche, Ex. 1 ("Roche Decl.") (filed Feb. 17, 2011).

[2] *Id.* Ex. 2.

occurred since it unsealed the Twitter Order. The government fails to establish how any of these past developments could be further exacerbated by unsealing this Order. The subject of the Order likely already knows or has surmised that the government has sought the account information. All that compelled silence would accomplish here is to prevent the user from raising more informed objections and obtaining judicial review as the Twitter user [redacted] has sought to do in regard to the Twitter Order.

Accordingly, for these reasons and those stated below and in Google's Objections, Google respectfully requests that the Court modify the Order pursuant to the terms of Google's proposed order.

I. ARGUMENT

A. The Court's Standard of Review is *De Novo*

Judicial orders based on sealed certifications from the government must be reviewed *de novo* because review of such orders is done "*ex parte* and thus unaided by the adversarial process." *U.S. v. Rosen*, 447 F. Supp. 2d 538, 545 (E.D. Va. 2006) (rejecting the government's contention that a reviewing district court must accord the Foreign Intelligence Surveillance Court's probable cause determination "substantial deference"). Neither the government nor Judge [redacted] revealed anything to Google about what was included in the government's *ex parte* application for the Order, thus precluding any adversarial proceeding over the substance of that application. As such, respectfully, the Court owes no deference to Judge [redacted] conclusion that notification of the Order will "seriously jeopardiz[e] an investigation" under 18 U.S.C. § 2705. *Id.* (conducting *de novo* review "with no deference accorded to the [Foreign Intelligence Surveillance Court's] probable cause determinations").

Furthermore, as Google noted in its Objections, the Supreme Court and the Fourth Circuit have found that discovery orders directed at third parties are dispositive for appellate purposes. *U.S. v. Myers*, 593 F.3d 338, 345 (4th Cir. 2010) (discovery order directed at a third party is "an immediately appealable final order.") (quoting *Church of Scientology of California v. U.S.*, 506 U.S. 9, 18 n.11 (1992)). Accordingly, such orders are necessarily governed by the *de novo* standard of review for dispositive orders under Fed. R. Crim. P. 59(b)(3). The government claims these cases are inapposite because they address appeals from the decision of a district court to an appellate circuit court under 28 U.S.C. § 1291, rather than appeals from a magistrate judge to a district court judge under Fed. R. Cr. P. 59. *See* Government Response, at 7. This argument elevates form over substance because a district court acts in an appellate capacity when reviewing a magistrate's order, thus making these cases relevant to the Court's analysis.

B. Google Has a Right to Challenge the Nondisclosure Provision in the Order

The government erroneously claims that Judge [redacted] "concluded that Google has no statutory basis to challenge the non-disclosure and sealing provisions in the Order." *See* Government Response, at 10. In fact, Judge Davis partially granted Google's motion by limiting the nondisclosure period in the Order to 90 days, which he certainly would not have done had he concluded that Google had no right to bring the motion in the first place.

Furthermore, 18 U.S.C. § 2703(d) gives providers the right to ask a court to quash or modify an order when compliance "would cause an undue burden on such provider." This right must include the ability to challenge a provision in a § 2703(d) order that a provider believes is not adequately supported by fact or law. Were it otherwise, providers would be forced to blindly produce records even if they received an order that did not make any of the requisite findings under § 2703(d). *See* 18 U.S.C. § 2703(d) (requiring "specific and articulable facts showing that

there are reasonable grounds to believe that . . . the records or other information sought, are relevant and material to an ongoing criminal investigation."). The government's interpretation of § 2703(d) must be rejected so as to avoid this absurd result. *Aremu v. Dep't of Homeland Security*, 450 F.3d 578, 583 (4th Cir. 2006) ("[A] court must, if possible, interpret statutes to avoid absurd results.").

C. The Government Cannot Show a Need for Secrecy of the Order or the Preservation Request

Regardless of what standard of review the Court applies, the government cannot satisfy the standard set forth in 18 U.S.C. § 2705(b)(5), which provides for nondisclosure when notification will result in "seriously jeopardizing an investigation."

First, the government attempts to justify the nondisclosure provision by claiming that unsealing this Order may cause the targets to "alter their modes of communication to evade future investigative efforts." *See* Government Response, at 17. However, the government has already conceded that the targets of the investigation are already working under the assumption that their Google accounts are the subject of legal process from this grand jury investigation. *See* Government Response (dated January 28, 2011), at 14; *see also* Government Exhibits 3-4.[3] Therefore, disclosing this Order will do nothing to alter anyone's behavior, except that [redacted] may exercise the right to defend his or her legal interests in court. And of course, to the extent [redacted] has already destroyed evidence, unsealing the Order will not reverse those actions either.

Second, the government rehashes its claim that unsealing the Order may result in "witness intimidation" in the form of encouraging providers "to feel pressure to challenge non-disclosure orders." *See* Government Response, at 18. This argument is specious for the reasons

[3] Roche Decl., Ex. 7; *see also* [redacted] retweet of Jan. 7, 2011 @ 9:26 p.m. ("Note that we can assume Google & Facebook also have secret US government subpoenas. They make no comment. Did they fold?"), http://twitter.com/[redacted] last visited Jan. 18, 2011).

previously noted in Google's Objections. Google will only add that if a provider believes a nondisclosure provision in an order is unlawful, then it *should* challenge the order. The government confuses witness intimidation with a provider's legitimate right to protect its First Amendment rights and the privacy of its users.

Finally, the government claims that its employees were harassed after the disclosure of the Twitter Order and that the same can be expected if this Order is disclosed. *See* Government Response, at 18. No public servant deserves such treatment, and in order to avoid any such incidents in the future, the government should request that the Court order any personal identifiers of government personnel redacted before unsealing the Order or preservation letter. Google would certainly agree that such a measure is appropriate here.

D. The Order May Raise Significant Constitutional and Statutory Issues

As Google noted in its Objections, three of the users identified in the Twitter Order, including Twitter's [redacted] user, filed a motion to vacate that order on Constitutional and statutory grounds.[4] That motion was argued on February 15th, and as of this writing is still under advisement before Judge [redacted]. One can only assume that if the users' arguments were as meritless as the government claims,[5] Judge [redacted] would have disposed of them from the bench, or without entertaining any oral argument at all, rather than considering them as Her Honor has for the better part of a month. And one can only surmise whether knowledge of the Order here would affect the users' claims or Judge [redacted]s decision-making. The gag order here serves the purpose only of preventing the user from fully articulating objections based on the full scope of the information sought.

---

[4] Roche Decl., Ex. 3.

[5] Government's Response, at 13.

E. The Order is a Prior Restraint on Google's Right to Free Speech

The government cannot seriously dispute the fact that the non-disclosure provision in the Order is a prior restraint on Google's First Amendment rights. *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 882 (S.D. Tex. 2008) ("a non-disclosure order imposes a prior restraint on speech."). The only question is whether the government can carry its "heavy burden of showing justification for the imposition of such a restraint." *Id.* (quoting *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983).

Google respectfully submits that because the government's interest in [redacted] electronic communications is already so well-publicized and there is absolutely no risk of destruction of evidence, the balance tips decidedly in favor of Google's First Amendment rights.

II. CONCLUSION

For the reasons stated here and in Google's Objections, Google respectfully requests that the Court sustain its Objections and modify the Order pursuant to the terms of Google's proposed order.

DATED this 7th day of March, 2011.

Respectfully submitted,

By _____

John K. Roche (VSB# 68594)
Perkins Coie LLP
700 13th St., N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202-434-1627
Fax: 202-654-9106
JRoche@perkinscoie.com

Albert Gidari (*admitted pro hac vice*)
Perkins Coie LLP

1201 Third Avenue, Suite 4800
Seattle, Washington 98101
Phone: 206-359-8000
Fax: 206-359-9000
AGidari@perkinscoie.com

Attorneys for Google Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2011, the foregoing document was sent via hand delivery and email to the following persons:

[redacted]
Assistant United States Attorney
United States Attorney's Office
Eastern District of Virginia
Justin W. Williams United States Attorney's Building
2100 Jamieson Avenue
Alexandria, VA 22314-5794
[redacted]

Attorneys for the United States

By _____
John K. Roche (VSB# 68594)
Perkins Coie, LLP
700 13th St., N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202-434-1627
Fax: 202-654-9106
JRoche@perkinscoie.com

Attorneys for Google Inc.