



## I. ARGUMENT

### A. The Court Should Grant a Stay of Production Pending Google's Appeal

#### 1. Google Has Made a Strong Showing of Likely Success on the Merits

There is no dispute that the government's investigation of Wikileaks generally, and its interest in the [REDACTED] user name specifically, is a matter of public record. Moreover, as noted in Google's Reply in Support of its Objections, the government has offered no plausible justification for its assertion that disclosure of the Order will seriously jeopardize its investigation. Accordingly, Google respectfully submits it has a strong likelihood of success on the merits of this Court's *de novo*<sup>3</sup> review of Judge [REDACTED]'s ruling on Google's motion to modify the Order.

#### 2. Google's Subscriber and Google Will Suffer Irreparable Injury Absent a Stay

The government claims that Google will not be injured absent a stay because "[t]he Order does not prevent Google from notifying the [REDACTED] subscriber forever." See Government Response, at 7. The point of Google's motion is to permit Google to notify its user before it produces anything to the government. Notification after the fact will be small solace to Google's user because by then the government will have spent the previous 3-5 months poring over his or her account records in the hope of finding "investigative leads" and "other subscriber information of which the government is unaware [which] might include transactional information helpful to obtain search warrant(s)." See Government Response, at 8-9. Moreover, despite the government's claims to the contrary, it is not at all clear that the user will in fact be able to challenge the introduction of these records in court at a later date. *U.S. v. Qing Li*, No. 07

<sup>3</sup> *U.S. v. Rosen*, 447 F. Supp. 2d 538, 545 (E.D. Va. 2006) (judicial orders based on sealed certifications from the government are reviewed *de novo*).

CR 2915 JM, 2008 WL 789899, at \*3 (S.D. Cal. Mar. 20, 2008) (holding that the Stored Communications Act provides no suppression remedy) (collecting cases).

Furthermore, 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. Accordingly, Google and its user will suffer irreparable injury absent a stay.

### **3. A Stay Will Not Injure the Government or Harm the Public Interest**

The government conceded it would not be injured by a stay when it moved to delay the hearing on Google's original motion until after Judge [REDACTED] had an opportunity to rule on the motions raised in regard to the Twitter Order. Judge [REDACTED] has had those motions under advisement for nearly three weeks now, and the government utterly fails to explain why it suddenly needs the documents immediately when it previously indicated it would be satisfied to wait until a ruling from Judge [REDACTED] in the Twitter matter. This unexplained contradiction is enough to establish that the government has no urgent need for these records and will not be injured by a stay. In addition, Google has preserved the responsive records so there is no danger that the data will be lost while this Court addresses the underlying Objections. It follows then that if the government admittedly has no urgent need for these records and the records are not at

risk of loss, there will be no harm to “the public interest in effective law enforcement and efficient administration of the criminal justice system” as the government claims. See Government Response, at 9.

## II. CONCLUSION

For the reasons stated, Google requests an order to stay production of records and information in response to the Order while its concurrently filed Objections are pending.

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Respectfully submitted,

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**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:

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