THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE 2703(d) ORDER AND 2703(f) PRESERVATION REQUEST RELATING TO GMAIL ACCOUNT	Case No. 1:10GJ3793 11-DM-2 **UNDER SEAL**

RESPONSE OF THE UNITED STATES TO GOOGLE'S MOTION TO STAY PRODUCTION PENDING RULING ON GOOGLE'S OBJECTION TO MAGISTRATE'S ORDER

The United States, by and through Neil H. MacBride, United States Attorney, opposes Google Inc.'s ("Google") motion to stay production of documents ("Google Motion to Stay") pending this Court's ruling on Google's motion objecting to ("Google Motion") Magistrate Judge [redacted] decisions that the court-ordered legal process for business records pursuant to the Stored Communications Act ("SCA") (18 U.S.C. §§ 2701-12) should remain under seal and not be disclosed for a limited period of time pending the ongoing criminal investigation.

As further described in the factual background of the Government's Response to Google's Motion ("Government Response"), incorporated here by reference, Google has objected to Magistrate [redacted] ruling on February 9, 2011 that denied in part and granted in part Google's motion to modify the court's order of January 4, 2011 (the "Order") requiring Google to produce subscriber and transaction records related to the Gmail account [redacted] (the "[redacted] subscriber") under 18 U.S.C. § 2703(d). Google had asked Judge [redacted] to unseal and vacate the Order's non-disclosure provisions, which the court had properly included pursuant to 18 U.S.C. § 2705 and Local Criminal Rule 49, so that Google could "provide *immediate* notice" to the ioerror subscriber. Google Mot. at 2 (emphasis added). Magistrate

[redacted] adopted, instead, the government's reasonable proposal to modify the Order to authorize Google to provide notice to the [redacted] subscriber "within (90) days of providing . . . the information requested in [the] Order, unless the government files a motion for an extension of that non-notification period." Roche Decl. Ex. 4. Magistrate Davis further ordered "that the government may request an extension of the [Order's] non-notification period for a maximum of sixty (60) days." ("Order 2") *Id.*

For the reasons set forth below, the United States opposes Google's Motion to Stay its production of documents and information pending the court's consideration of its objections. Google has failed to meet its burden to show that this Court should exercise its discretion and grant a stay. It failed to show a strong likelihood of success on the merits and irreparable injury absent a stay. To the contrary, a stay will injure the United States and is contrary to the public's interest.

Standard of Review

In deciding whether to stay enforcement of an order, the Court should consider the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) whe[re] the public interest lies." *GTSI Corp. v. Wildflower Int'l, Inc.*, No. 1:09cv123, 2009 WL 3245396 at *1 (E.D.Va. Sept. 29, 2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (collecting cases) and James Wm. Moore, *Moore's Federal Practice* § 62.06[3] (3d ed.2007)); *United States v. Clark*, Nos. C-79-190-G, 193G, 1980 WL 1502 at *1 (M.D.N.C. Feb. 6, 1980) (citing 11 Wright & Miller, *Federal Practice and Procedure* § 2904 at

316 (1973) and *Long v. Robinson*, 432 F. 2d 977 (4th Cir. 1970)); *see also United States v. Dyer*, 750 F.Supp. 1278, 1299 n. 40 (E.D.Va. 1990).

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 129 S.Ct. 1749, 1760-61 (2009) (quoting *Virginia R. Co., v. United States*, 272 U.S. 658, 672 (1926)). It is "an exercise of judicial discretion," and its issuance depends "upon the circumstances of the particular case." *Nken*, 129 S.Ct. at 1761 (citing *Virginia R. Co*, 272 U.S. at 672-673 and *Hilton*, 481 U.S. at 777). The party seeking a stay bears the burden to show "that the circumstances justify an exercise of that discretion." *Nken*, 129 S.Ct. at 1761 (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997); *Landis v. North American Co.*, 299 U.S. 248, 255 (1936)).

Analysis

I. Google Has Failed to Make a Strong Showing that It is Likely to Succeed on the Merits

The Court must consider the following two aspects in weighing Google's likelihood of success: (1) the standard of review used to determine whether to overturn Magistrate [redacted] determination of a non-dispositive motion; and (2) the underlying merits. *GTSI Corp.*, 2009 WL 3245396 at *1.

A. Standard of Review

The parties disagree on the appropriate standard of review. *See* Google Mot. at 8; Gov't Resp. at 4-6. The United States believes that Google's motion involves non-dispositive matters under Rule 59(a) of the Federal Rules of Criminal Procedure. *See In re U.S. for Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, Mag. No. 07-524M, 2008 WL 4191511, at *1 (W.D. Pa. Sept. 10, 2008), *vacated on other grounds by* 620 F.3d 304 (3d Cir. 2010) (reviewing objections to magistrate judge's denial of a § 2703(d) court order under Fed. R. Crim. P. 59(a) and 28 U.S.C. § 636(b)(1)); *In re U.S. for an Order*

Authorizing the Disclosure of Prospective Cell Site Information, No. 06-MISC-004, 2006 WL 2871743, at *1 (E.D. Wisc. Oct. 6, 2006) (same).

Non-dispositive orders are overturned only if "clearly erroneous or contrary to law." *See* Fed.R.Crim.P. 59(a); *see also* 28 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."); *GTSI Corp.*, 2009 WL 3245896 at *2 (district court should overturn magistrate judge's civil discovery order only if it is "clearly erroneous or contrary to law").

Google argues for a de novo standard of review on the basis that the Orders are dispositive as to Google, a third-party recipient of court-ordered process. Google is wrong as demonstrated by the plain reading of Rule 59 of the Federal Rules of Criminal Procedure.[1] Further, the cases Google cites in support of *de novo* review are inapposite, applying to whether a district court order is an immediately appealable final order for purposes of appellate review under 28 U.S.C. § 1291, not to whether a Magistrate's Order is dispositive or non-dispositive under Rule 59.

Therefore, the appropriate standard of review is the standard set forth in Rule 59(a), clearly erroneous or contrary to law. In any event, even were the court to conduct a de novo review, Judge [redacted] Orders are correct, not contrary to law. No error was committed, let alone clear error.

[1] Rule 59(a) authorizes a party to file objections to a magistrate judge order that determines "any matter that does not dispose of a charge or defense," Fed. R. Crim. P. 59(a), while Rule 59(b) authorizes a party to file objections to a magistrate judge's "proposed findings and recommendations" for disposing of "a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense." Fed. R. Crim. P. 59(b)(1), (2).

B. Merits of Google's Objections

Google objects to the Orders principally because it wishes to immediately disclose the existence of the Order to the [redacted] subscriber *before* producing the required records instead of waiting 90 days *following* its production to make the disclosure. Thus, Google disagrees with Magistrate Judge [redacted] decision to include non-disclosure and sealing provisions in the Order.

As discussed in the Government's Response, however, Judge [redacted] has already limited the duration of the non-disclosure and sealing provisions, and Google has failed to demonstrate that Magistrate [redacted]' order of such provisions was unlawful or erroneous in any respect. Gov't Resp. at 10-11. Google has failed to articulate (1) how compliance with the non-disclosure and sealing provisions unduly burdened Google under § 2703(d)[2] and (2) any other statutory provision authorizing Google to challenge such provisions. *Id.*

Google's Motion does not even discuss this issue except for proffering its opinion that there is no need for secrecy. Google Mot. at 9-12. The Government's Response refutes this opinion, amply demonstrating that: (1) the non-disclosure and sealing provisions in the Order remain valid and warranted more than ever (Gov't Response at 8-10); and (2) the unsealing and disclosure of the Twitter Order has already seriously jeopardized the investigation, and additional disclosures will exacerbate the harm caused by that disclosure. Gov't Resp. at 16-18.

It is not enough that Google's "chance of success on the merits be 'better than negligible.'" *Nken,* 129 S.Ct. at 1761 (quoting *Sofinet v. INS,* 188 F.3d 703, 707 (7th Cir. 1999). Google must make a "strong showing," *GTSI Corp.* 2009 WL 3245396, at *1, that it is likely to succeed. It has not made such a showing. Google has failed to show that Judge [redacted]

[2] Pursuant to this section, a service provider, such as Google, may move to quash or modify an order "if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider." 18 U.S.C. § 2703(d).

conclusions were erroneous, and it has certainly not shown that they were clearly erroneous or contrary to law. Gov't Resp. at 10-11. Google is not likely to succeed on the merits of its objections, and its motion to stay should fail for this reason alone.

Google, however, persists in claiming that the non-disclosure and sealing provisions may prevent the [redacted] subscriber from raising constitutional issues and that such provisions constitute an unconstitutional prior restraint on Google's free speech. Google Mot. at 11-12. To the contrary, as is more fully described in the Government's Response, at 11-16, Google has failed to show -- and has not even come close to establishing a "strong" showing -- that it is likely to succeed on these claims. The Orders satisfy all statutory and constitutional requirements, and the sealing and non-disclosure provisions, which are now of limited duration, should remain in effect. Google has established no statutory basis for it to challenge the Order and has no meritorious First Amendment challenge to a 90-day non-disclosure provision (with the potential for 60 additional days), pending the ongoing investigation. *Id.* The [redacted] subscriber is not entitled to notice under § 2703(d), and the [redacted] subscriber would not have a valid basis to challenge the Order even if Google did provide him with notice. *Id.*

II. Google Has Failed to Show that it will be Irreparably Injured Absent a Stay

Google has failed to show how *its* rights will be injured by producing the required records pending a court decision on the delayed disclosure provisions of the Order. Although Google alludes to possible injury of its First Amendment rights, this misses the mark. Google seeks to stay its production of records from the [redacted] subscriber account – not to stay the non-disclosure and sealing provisions. And, Google has wholly failed to explain how production of such records implicates its First Amendment interests whatsoever. In other words, pending this Court's decision on Google's objections, the non-disclosure and sealing provisions of the Order

apply to Google. In the meantime, Google cannot disclose the Order's existence irrespective of the outcome. Thus, granting or denying Google's motion to stay the production of records is irrelevant to Google's alleged First Amendment rights to disclosure. Denying the stay does not irreparably injure any such right, even assuming such a right exists.

Google attempts to overcome its lack of injury by linking itself to alleged injuries that it speculates the [redacted] subscriber might suffer. Thus, Google's Motion to Stay primarily rests on the claim that once Google produces the records, the Court cannot "unring the bell." Google Mot. to Stay at 4-5 (citing *Maness v. Meyers*, 419 U.S. 449, 460 (1975)). Even assuming Google can properly step into the shoes of the [redacted] subscriber, its conclusory statements insufficiently establish irreparable injury. The Order does not prevent Google from notifying the [redacted] subscriber forever. It simply delays notification until after Google has produced the documents for a reasonable period of time pending the ongoing criminal investigation. Google presumably will notify the [redacted] subscriber at the appropriate time after the records have been produced. The subscriber remains free, at that time, to attempt to challenge the disclosure or wait to challenge any use of such records in court. Google has not asserted that the production of the relevant records would waive any privilege or claim that the [redacted] subscriber might have. Even if there were such a claim or privilege, the subscriber would not suffer "irreparable injury" because he could adjudicate any such claims at another stage in the proceedings. *See generally, New York Times Co. v. Jascalevich*, 439 U.S. 1301, 1302 (1978) (denying application for stay of New Jersey Supreme Court order that refused to stay and denied leave to appeal an order of a state trial court refusing to quash a subpoena to New York Times and reporter issued in a criminal trial: applicants would have a full hearing and there was no authority that a newsman need not produce material documents; the Court would prefer to address any issues at a later

stage in the proceedings, and because the trial court viewed the documents sufficiently material to conduct an *in camera* inspection, no perceptible irreparable injury); *Mohawk Industries Inc. v. Carpenter,* --- U.S. ----, 130 S.Ct. 599, 607 (2009) (in ruling that a disclosure order of attorney-client privilege documents did not qualify for immediate appeal, explaining that [a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence."); *United States v. Myers,* 593 F.3d 338, 346 (4th Cir. 2010).

III. The Issuance of a Stay will Substantially Injure the United States

Google argues that the government will suffer no harm if the Court grants the motion to stay production of the subscriber and transactional records from the [redacted] account. Google claims that there is no risk that the records will be destroyed, so the only issue is when the government will receive the records. Google Mot. to Stay at 5.

To the contrary, Google's resistance to providing the records has already frustrated the government's ability to efficiently conduct a lawful criminal investigation. The Order was issued by a neutral magistrate judge on January 4, 2011. Google's compliance was due within three days thereafter. The two-month delay in getting the sought-after records has already prejudiced the investigation. *See Nken,* 129 S.Ct. at 1757 ("[t]he parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final."). First, the delay has deprived the government of potential evidence. Second, the delay has prevented the government from sending follow-up legal process, as needed, on investigative leads from the records. For instance, the records might identify accounts or other subscriber information of which the

government is unaware or might include transactional information helpful to obtain search warrant(s).

Google's attempt to stay production of routine legal process based on its unfounded objections to the non-disclosure and sealing provisions of the Order have diverted time and attention from the investigation. Google attempts to escape this by claiming the government is not harmed because it agreed to a stay on the Twitter matter and moved to continue Magistrate [redacted] hearing until Judge [redacted] could rule on the underlying merits of the Twitter subscribers' claims.[3] That is not the legal standard. The harms suffered by the government are synonymous with the public's interest in effective law enforcement and the efficient conduct of the criminal justice system. Indeed, "these [two] factors merge when the Government is the opposing party." *Nken*, 129 S.Ct. at 1762. The public's interest is addressed further below.

IV. The Public's Interest in Law Enforcement and the Effective and Efficient Administration of the Criminal Justice System is Best Served by Requiring Google to Disclose the Records Pending the Court's Consideration of its Objections

Google focuses on whether the public interest is served by its *disclosure of the Order to the [redacted] subscriber*. Google Mot. to Stay at 5-6 ("the public can have no interest in the enforcement of a nondisclosure provision" where the investigation is public). Again, this is not at issue in the instant motion. The issue presented here is whether a stay on Google's *production of the required records* serves the public interest. It does not. Conversely, the public interest in effective law enforcement and the efficient administration of the criminal just system has been firmly established in a variety of contexts. *See generally, e.g., Zurcher v. Stanford Daily*, 436 U.S. 547, 560-62 n. 8 (1970) (recognizing the fundamental public interest in implementing the

[3] The government made this motion on the basis of Google's concern that a decision by Magistrate [redacted] would "prejudge[] any free speech or privilege objections that Google's user may wish to raise by describing them as meritless." *See* Gov't Motion to Continue Hearing at 1.

and effective administration of the criminal justice system will be harmed by a stay. Thus, the Court should deny Google's Motion to Stay.

Respectfully Submitted,

[redacted]
United States Attorney

By: [redacted]
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was delivered on this 28th day of February 2011 to the Clerk's Office and that service will be made on the following individuals by electronic mail and otherwise:

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