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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In the Matter of the Search Warrant for: [Redacted].com

Case No. 16-2316M

ADOBE SYSTEMS INCORPORATED'S EX PARTE APPLICATION TO AMEND INDEFINITE NONDISCLOSURE ORDER ACCOMPANYING A SEARCH WARRANT

CASE FILED UNDER SEAL

I. INTRODUCTION

Adobe Systems Incorporated ("Adobe") moves this Court to amend an overbroad and perpetual nondisclosure order ("NDO") in a November 22, 2016 search warrant ("Warrant"). The NDO purports to prohibit Adobe from notifying "any person, including the subscriber ... of the existence of the warrant" for an indefinite period of time. Courts have consistently held that such perpetual NDOs violate both the Stored Communications Act ("SCA") and the First Amendment. Adobe therefore respectfully requests that the Court amend the NDO to designate a specific and limited period of time during which Adobe is prohibited from disclosing the existence of the warrant.

Adobe also respectfully requests that the Court unseal this application and the Court's resulting order. The underlying issues raised by the Warrant and Adobe's application are issues of widespread public interest. Adobe has drafted its application to avoid revealing any specific facts that would compromise the government's investigation. Adobe also does not object to limited redactions if the government requests them and the Court deems them appropriate.

II. FACTS

On November 22, 2016, Adobe received the Warrant from the Federal Bureau of Investigation ("FBI"). Declaration of Mary Catherine Wirth In Support of Adobe Systems Incorporated's Ex Parte Application to Amend Indefinite Nondisclosure Order Accompanying a Search Warrant ("Wirth Decl."), Ex. A.[1] The Warrant ordered Adobe to produce certain records, and the NDO ordered that Adobe "not notify any person, including the subscriber(s) of each account identified in Attachment A, of the existence of the warrant." *Id.* The nondisclosure period is

[1] Out of an abundance of caution, Adobe has redacted the email address for the subscriber to ensure confidentiality. Adobe can provide an unredacted copy to the Court for in camera review upon request.

indefinite; the NDO does not specify a period of time during which Adobe is prohibited from speaking about the warrant.

That same day, Adobe contacted the FBI to explain that Adobe was preserving and compiling information to produce in response to the Warrant. *Id.* ¶ 3. Adobe also requested that the government obtain an NDO of a finite period, as required by the SCA and the First Amendment. *Id.* ¶¶ 3-4. Although Adobe provided the government with dispositive California case law supporting its position, the government refused Adobe's request for a modified, time-limited order – stating, without evidence, that the issuing Court had found that nondisclosure in perpetuity was appropriate here. *Id.* ¶ 4; *id.* Ex. B.

Adobe places a high value on transparency with respect to law enforcement requests for user communications, evidenced, in part, by its annual Government Requests Transparency Report. *Id.* Ex. C. Adobe's public policy is to notify users when a nondisclosure order expires. Published on Adobe's website, the policy states: "It is Adobe policy to give notice to our customers whenever someone seeks access to their information unless we are legally prohibited from doing so. For example, if we receive a Delayed Notice Order under 18 USC Section 2705(b), we will delay notice for the time period specified in the order and then notify the customer once the order expires." *See id.* Ex. D (Adobe law enforcement guidelines). The NDO here prohibits Adobe from speaking indefinitely, preventing it from complying with its public policy.

Accordingly, Adobe respectfully requests that the Court amend the NDO to specify a finite period of nondisclosure consistent with the SCA, the First Amendment, and California case law.

III. ARGUMENT

A. The SCA Requires a Court to Specify a Finite Nondisclosure Period in an NDO

The SCA requires a court to specify a finite nondisclosure period in an NDO. It states that a court may prohibit a provider from disclosing the existence of a warrant "for [a] period . . . the court deems appropriate."[2] 18 U.S.C. § 2705(b). The requirement that a court specify an appropriate period would be mere surplusage -- meaningless text -- if a court could make an NDO indefinite simply by not including a period at all. *See In Matter of Search Warrant for [Redacted]@hotmail.com ("Hotmail")*, 74 F. Supp. 3d 1184, 1185 (N.D. Cal. 2014) (striking perpetual NDO on the grounds that "section 2705(b) clearly requires the court to define some end"); *In the Matter of the Grand Jury Subpoena for: [Redacted]@yahoo.com ("Yahoo")*, 79 F. Supp. 3d 1091 (N.D. Cal. 2015) (same). Canons of statutory interpretation strongly disfavor interpretations that render statutory text meaningless; rather, they require a court to presume that Congress said what it meant and meant what it said. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructurers Grp.*, 387 F.3d 1046, 1051 (9th Cir. 2004) (same). The NDO in this case does not satisfy the SCA's requirement that it specify a finite period of nondisclosure. Wirth Decl. Ex. A.

[2] The SCA authorizes a court to issue a nondisclosure order only "if it determines that there is reason to believe that notification of the warrant . . . will result in" one of five enumerated consequences. 18 U.S.C. § 2705(b)(2)-(5). The NDO in this case does not identify which of these consequences is at issue or indicate that the Court reached such conclusion after engaging in the requisite independent inquiry.

B. The First Amendment Requires that a Prior Restraint Such As the NDO Be Limited in Time and Scope.

The First Amendment also requires that a prior restraint such as the NDO be limited in time and scope. An indefinite nondisclosure provision would violate the First Amendment. *See Hotmail*, 74 F. Supp. 3d at 1186 (holding that perpetual NDOs do not square with "the First Amendment rights of both [the service provider] and the public, to say nothing of the rights of the target."); *Yahoo*, 79 F Supp. 3d at 1091 (holding that an order prohibiting Yahoo from disclosing the existence of a grand jury subpoena for an indefinite period "would amount to an undue prior restraint of Yahoo!'s First Amendment right to inform the public of its role in searching and seizing its information"); *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders (Pen Trap)*, 562 F. Supp. 2d 876, 878 (S.D. Tex. 2008) (holding that "a fixed expiration date on sealing and non-disclosure of electronic surveillance orders is . . . required by law; in particular, the First Amendment prohibition against prior restraint of speech and the common law right of access to judicial records").

There is a "heavy presumption" against the constitutional validity of prior restraints such as the NDO. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect."). Such a prior restraint violates the First Amendment unless it survives strict scrutiny. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). It must be narrowly tailored to achieve a compelling government interest. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (holding that a prohibition "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"). Adobe does not question the government's interest, but there are powerful private interests at play, too. *See United States v. Chadwick*, 433 U.S. 1, 9 (1967) (noting that a purpose of the Fourth Amendment's warrant requirement is to "insure the individual whose property is searched or

seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search"); *United States v. Donovan*, 429 U.S. 413, 439 (1977) ("[P]ostintercept notice was designed . . . to assure the community that the wiretap technique is reasonably employed."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572, 575 (1980) (noting that the First Amendment requires "freedom of communication on matters relating to the functioning of government" absent an overriding interest).[3] The NDO is not tailored to accomplish the government's interest without unnecessarily infringing the rights of the provider and its affected customer. The NDO's indefinite term means its temporal scope is not tailored at all, let alone narrowly. *See Hotmail*, 74 F. Supp. 3d at 1186; *Pen Trap*, 562 F. Supp. 2d at 877-78 (S.D. Tex. 2008); *Yahoo*, 79 F. Supp. 3d at 1091.

As currently constituted, the NDO is therefore unconstitutional. Adobe respectfully requests that it be amended to specify a limited period of nondisclosure.[4]

C. The Court Should Unseal This Application And Its Resulting Order.

Adobe also moves this Court to unseal this application and any resulting order. *See, e.g.*, L.R. 79-5.2.2 (requiring, in civil cases, good cause or compelling reasons to overcome a "strong presumption of public access"). As noted in section B, above, strict scrutiny requires that any infringement of Adobe's right to speak be narrowly tailored in both time and scope to achieve the government's interest.

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[3] These interests are heightened here, where electronic searches are at issue. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (cell phone technology "does not make the information any less worthy of the protection for which the Founders fought"); *United States v. Galpin*, 720 F.3d 436, 447 (2d Cir. 2013) ("The potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is enormous" and "is compounded by the nature of digital storage."); *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009) (Fourth Amendment protections "much more important" because computers "increase[] law enforcement's ability to conduct a wide-ranging search into a person's private affairs").

[4] If necessary, the government may seek an extension of the NDO by establishing that any risks justifying an amended order still exist.

Moreover, public access to court documents protects the rights of the public and the parties. *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516 (9th Cir. 1988). Consistent with those rights, "[m]otions to unseal judicial proceedings and orders ruling on those motions have historically been open to the public." *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1096 (9th Cir. 2014). This presumption may only be overcome if (1) sealing serves a compelling interest; (2) there is a substantial probability that, in the absence of sealing, this compelling interest would be harmed; and (3) there are no alternatives to sealing that would adequately protect the compelling interest. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986).

Adobe concedes the government's interest in preventing the disclosure of certain specific facts that might comprise its investigation. Adobe's application does not, and the Court's order need not, contain any such specific facts. They need not be sealed, therefore, to protect the government's interest and, if the Court's wishes to include such facts in its order, it can redact those facts to protect the government's investigation without unnecessarily burdening Adobe's right to speak and the public's right of access. *See, e.g., Index Newspapers LLC*, 766 F.3d at 1095 (9th Cir. 2014) ("redaction is an adequate alternative to closure . . . and is preferred given our strong tradition of open court proceedings"); *Yahoo*, 79 F. Supp. 3d 1091; *Hotmail*, 74 F. Supp. 3d 1184; *see also In re Search of Google Accounts*, 99 F. Supp. 3d 992, 998 (D. Alaska 2015) (unsealing Google's motion to amend a search warrant and resulting court order because "the Court's order" and "Google's filings" contain nothing that "would compromise the government's investigation"). Accordingly, Adobe respectfully requests that the Court unseal its application and any resulting order or, in the alternative, make redacted versions available on the public docket.

DATED: December 5, 2016

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