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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN THE MATTER OF THE SEARCH WARRANT FOR [redacted].com	No. 16-2316M (FFM) OPPOSITION TO ADOBE SYSTEMS INCORPORATED'S MOTION TO CHANGE THE NONDISCLOSURE ORDER; DECLARATION OF TRACY L. WILKISON; EXHIBITS

Applicant United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorneys Tracy L. Wilkison and Andrew Brown, hereby files its opposition to Adobe Systems Incorporated's motion to change the nondisclosure order issued by this court on November 22, 2016.

This opposition is based upon the attached memorandum of points and authorities, the attached declaration of Tracy L. Wilkison with

its attached exhibits, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: January 13, 2017

Respectfully submitted,

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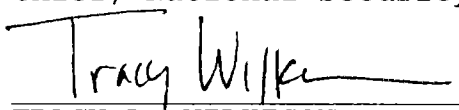

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I. INTRODUCTION

In connection with an ongoing federal criminal investigation into serious fraud offenses, the United States sought a search warrant pursuant to 18 U.S.C. § 2703 for an account used by a subscriber of Adobe Systems Incorporated ("Adobe"). The affidavit stated probable cause to support the warrant, and provided significant information to support a request for a nondisclosure order that would limit Adobe's ability to inform the subscriber about the warrant. Based on the information provided, this Court issued the warrant and related orders.

Adobe, which was not and still is not privy to the justification for the nondisclosure order, contends that this Court erred in not setting an expiration date for the order of just 90 days, even though most federal fraud investigations, such as this one, typically last far longer. Adobe argues first that the Stored Communications Act ("SCA") should be interpreted to include extra language which would require that nondisclosure orders be date-limited with a specific end date, rather than permit a judicially limited order which would remain in place until another court order is issued allowing disclosure. Adobe also argues that a judicially limited nondisclosure order violates Adobe's First Amendment right to notify the subscriber about the investigation.

Neither of Adobe's arguments has merit. The SCA does not have any requirement that the period of nondisclosure be stated in days, much less the 90 days demanded by Adobe, and there is no basis for reading such a requirement into the statute. Moreover, Adobe does not have any protected First Amendment right to disclose information

that it obtained by receiving the warrant, and even if it did, the limits on Adobe's speech imposed by the order are appropriately tailored given the government's interest in protecting the investigation. Accordingly, the Court should deny Adobe's motion.

II. STATEMENT OF FACTS

On November 22, 2016, upon probable cause shown and as part of an ongoing criminal investigation, this Court issued a search warrant pursuant to 18 U.S.C. § 2703(b) for a cloud computer account used by a customer of Adobe. The search warrant ordered that Adobe provide to law enforcement certain content related to the account that was relevant to the investigation.[1] The search warrant also ordered that Adobe "shall not notify any person, including the subscriber(s) of each account identified in Attachment A, of the existence of the warrant." The nondisclosure order did not set a specific time limit for its expiration, with the result that it was judicially limited, and would remain in place until further order of the Court, which typically and absent special circumstances would issue at the end of the investigation.

This order was necessitated by Adobe's policy to notify the subscriber absent an order otherwise. (Motion at 2). The nondisclosure order was supported by the agent's training and experience with similar investigations that notifying targets of such search warrants will result in the destruction of or tampering with evidence, and the intimidation of potential witnesses. Those fears were amplified by the overall investigation laid out in the

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[1] While Adobe ultimately provided the material required by the warrant, Adobe did not do so within the time ordered by the Court. Based on what appears to be a misunderstanding of the terms of the warrant, Adobe provided the materials four days late. (Exhibit 1).

affidavit, which concerned the manipulation and falsification of electronic documents, and the corruption of employees at the target's and third-party businesses, who then became accessories to the crimes. The period of preclusion was warranted based on the nature of the investigation, including the amount of time needed to obtain and review the sought materials, obtain and review additional evidence, and the lengthy nature of similar investigations into similar target offenses, for which the statutes of limitation range from five to ten years. 18 U.S.C. §§ 3282, 3293.

Upon reviewing the affidavit, this Court issued the warrant and nondisclosure order. As Adobe acknowledges, the order did not preclude it from making public aggregate disclosures about Section 2703 process, as it does in its Transparency Reports. (Motion, Exhibit C). In these reports, Adobe discloses the fact of receipt of process, the type of process received, the aggregate number of process and user accounts impacted, the number of nondisclosure orders, the countries from which process was received, and the Adobe services for which the process sought information. (Id.).

III. ARGUMENT

A. The Plain Language of the SCA Provides for Judicially Limited Nondisclosure Orders

The parties agree that the SCA, in particular 18 U.S.C. §§ 2703(b) and 2705, governs nondisclosure orders for search warrants directed at providers of remote computing services, such as Adobe. Section 2705 is divided into two parts: "Delay of notification," 18 U.S.C. § 2705(a), which addresses how long the government may delay providing its own notice to subscribers when required to do so by law; and "Preclusion of notice to subject of governmental access," 18

U.S.C. § 2705(b), which governs orders precluding providers of remote computer services from providing their own notice to subscribers. It is pursuant to Section 2705(b) that this Court issued its preclusion order to Adobe.

"Statutory interpretation begins with the wording of the provision at issue." New York State Conference v. Travelers Ins. Co., 514 U.S. 645, 655 (1995). By demanding a date restriction to the preclusion order, Adobe would have this Court ignore the different – virtually opposite – captions and plain language of the two subsections. Section 2705(a), which not even Adobe contends applies in this case, instructs that a delay of government notification can be sought "for a period not to exceed ninety days." Section 2705(b), conversely provides:

> A governmental entity . . . may apply to a court for an order commanding a provider of . . . remote computing service to whom a warrant . . . is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant . . . .

(emphasis added). Adobe would have this Court interpret "for such period as the court deems appropriate," to constrain the Court's discretion to a specific number of months or days, even though that language nowhere appears in that subsection, and its caption is "Preclusion of notice." Further, Adobe insists that Congress silently implied that the specific date range listed in subsection (a) should be the period required in subsection (b) despite the fact that when a warrant for content is issued pursuant to 18 U.S.C. § 2703(b)(1)(A) the government is not required to provide any notice under subsection (a). (Motion at 3).

There is nothing in the statute that supports the requested interpretation. An as-yet indeterminate, but judicially limited

period is a period nonetheless. There is nothing about the word "period" that requires a prospective determination of its ending, and it is within the Court's discretion to decline to do so. So long as the court deems the period appropriate based on the evidence before it, the period can be until the court says otherwise based on new information.

In truth, Congress knows how to impose or require a date limit on the duration of a non-disclosure order when it wants to do so, and could have chosen to have subsection (b) mirror subsection (a). It did not do so, and chose instead to have the obligation not to disclose information about the investigation be governed not by an arbitrary date, but by the need to keep the investigation secret. This choice is telling. See Brogan v. United States, 522 U.S. 398, 408 (1998) ("[c]ourts may not create their own limitations on legislation"); Smith v. United States, 508 U.S. 223, 229 (1993) ("Had Congress intended the narrow construction petitioner urges, it could have so indicated."); Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (statute providing liability for denying rights "secured by the Constitution and laws" not limited "to some subset of laws," "[g]iven that Congress attached no modifiers to the phrase"); Lewis v. United States, 445 U.S. 55, 60 (1980) (statute applied to any person who "has been convicted by a court;" "no modifier is present, and nothing suggests any restriction on the scope of the term 'convicted'"); United States v. 103 Elec. Gambling Devices, 223 F.3d 1091, 1097-98 (9th Cir. 2000). Even more, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Russello v. United States, 464 U.S. 16, 23 (1983); Dep't of Homeland Sec. v. MacLean, --- U.S. ---, 135 S. Ct. 913, 919 (2015) (same). Congress clearly intended that the Court have the discretion to evaluate the circumstances and set a nondisclosure order accordingly.

The discretion given to this Court by Congress is not unprecedented. For example, the pen register statute requires nondisclosure "unless or until otherwise ordered by the Court." 18 U.S.C. § 3123(d)(2). Similarly, 18 U.S.C. § 2511(2)(a)(ii)(B) flatly prohibits disclosure of a wiretap by the provider. Congress' grant of this discretion makes sense from a practical standpoint as well. In a complicated, extended criminal investigation, there may be many subpoenas, orders, and warrants pursuant to 18 U.S.C. § 2703 over a period of years. If the nondisclosure orders were limited to 90 days each, all with different end dates, courts would be inundated with requests for extensions. Instead, Congress rightly gave courts the ability to weigh the nature of the investigation and conclude that a judicially limited preclusion is more appropriate.

In support of its argument to read in additional language to the statute, Adobe points to In re Hotmail Search Warrant, 74 F.Supp.3d 1184 (N.D. Cal. 2014) and In re Yahoo Subpoena, 79 F.Supp.3d 1091 (N.D. Cal. 2015). But this reliance is unfounded. These opinions, both written by the same, now-former magistrate judge,[2] contain very little legal analysis and incomplete, unsupported conclusions. As such, the opinions neither require the same result here nor are persuasive authority for such.

[2] http://fortune.com/2016/05/16/federal-judge-quits-to-join-facebook/

In In re Hotmail Search Warrant, 74 F.Supp.3d 1184 (N.D. Cal. 2014), the government sought a judicially limited nondisclosure order ("until further notice of this Court") for its search warrant directed at a provider of remote computing services. Although the court was satisfied that notification of the warrant would jeopardize the investigation, it nevertheless denied the government's nondisclosure order request. Id. at 1186. The opinion provided scant legal reasoning, but simply concluded that a date-limited period "better squared" with Section 2703. Id. A few months later, the same magistrate judge issued essentially the same opinion again in In re Yahoo Subpoena, 79 F.Supp.3d 1091 (N.D. Cal. 2015), relying on his own earlier opinion in Hotmail to conclude that the statute requires a date limitation and (as discussed further below) a misapprehension of Butterworth v. Smith, 494 U.S. 624 (1990) to conclude that a judicially limited nondisclosure order would violate the provider's First Amendment rights. Nonetheless, the Court stated that while the government had made an insufficient showing for a judicially limited nondisclosure order, "the government is free to try again to make such a showing." 79. F.Supp.3d at 1095.

These opinions do not, as Adobe asserts, control this case. First, as out-of-district magistrate judge opinions, they are not binding authority on this court. Moreover, simply because the magistrate judge in those cases found the sealed showings in the affidavits to be insufficient to warrant judicially limited nondisclosure orders does not mean that all other magistrate judges must similarly decide on the different factual showings before them. Here, the Court considered facts specific to this case and issued a reasonable order well within its discretion to make. Second, the

opinions have only superficial legal underpinnings for their conclusions which do not survive rigorous analysis. For example, the opinions assume that a period that begins without a known end date but controlled by a further court order must necessarily be forever and thus cannot actually be a "period." As discussed above, this assumption, critical to the opinions' conclusions, does not comport with the plain language of the statute, a common understanding of language, Congressional intent in providing the Court with the discretion to issue the appropriate order given the specific nature of the investigation, and other similar statutes.[3]

Other courts have reached different conclusions in similar contexts. In In re Application for 2705(b) Order, 131 F.Supp.3d 1266 (D. Utah 2015), the court granted the government's application for a preclusion of notice order after an exhaustive analysis of Section 2705(b). While the focus of the opinion was on whether a nondisclosure order could be obtained in conjunction with a subpoena, the analysis of the statute is instructive. The district judge explained that under Section 2705(a), "notice from the government to the subscriber may be *delayed* for a limited time," but that under Section 2705(b), "notice from the provider [of remote computing services] to the subscriber may be indefinitely restrained." Id. at 1270 (emphasis in the original), 1271-72 ("The combined effect of §§ 2703(b)(1)(A) and 2705(b) is that the subscriber may never receive

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[3] Nor, as discussed below, are the opinions' First Amendment conclusions sound. This is particularly true given that the court permitted the government to resubmit an application with a greater showing to obtain a judicially limited nondisclosure order, which would be meaningless if the opinions were truly holding that the First Amendment forbids judicially limited nondisclosure orders in all situations.

notice of a warrant to obtain content information from a remote computer service and the government may seek an order under § 2705(b) that restrains the provider indefinitely from notifying the subscriber.").

As that court also noted, in this district, United States District Judge R. Gary Klausner reversed an order denying a similar nondisclosure order. Id. at 1272. In addition, United States District Judge Philip S. Gutierrez, in this district, also reversed such an order denying a nondisclosure order, and while not addressing the length of the order directly, did order that "the Provider shall not disclose the existence of the attached subpoena to the listed subscribers or to any other person, unless and until otherwise authorized to do so by the Court." (Exhibit 2, In Re Application of the United States for an Order Pursuant to 18 U.S.C. § 2705(b), No. 14-698M, December 18, 2014). As this Court likely knows, most magistrate judges in this district have ruled similarly in unpublished decisions, particularly in relation to search warrants, upon a sufficient showing under the statute.

Because Section 2705(b) plainly provides for the preclusion of notice to subscribers by providers for such period as this Court decides, and that period can be defined by the Court's discretion and understanding of the facts and nature of the investigation, this Court's Order complies with the statute and should not be modified.[4]

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[4] To the extent that it would clarify the Order, the government would agree to have the Order modified to state that "the PROVIDER shall not notify any person, including the subscriber(s) of each account identified in Attachment A, of the existence of the warrant until further order of the Court or until written notice is provided by the United States Attorney's Office that nondisclosure is no longer required." Absent special circumstances, the government agrees

B. The First Amendment Does Not Compel the Court to Set a Specific Date for Disclosure

Adobe next claims that the nondisclosure order violates its First Amendment right to notify the subscriber of the federal criminal investigation. This argument fails because Adobe does not have a First Amendment right to share that information, and even if it does, the restraint in the Court's order is a reasonable limit.

1. Adobe Does Not Have a First Amendment Right to Notify the Subscriber

Not all speech is protected speech. "Freedom of speech ... does not comprehend the right to speak on any subject at any time." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31 (1984) citing American Communications Assn. v. Douds, 339 U.S. 382, 394-395, (1950). This is especially true in the context of a criminal investigation, which is distinct both in its need for secrecy and its judicial oversight. Courts have long recognized the sensitive and special nature of a criminal investigation, and distinguished it from the post-investigation stage as needing more protection from public view. Compare Times Mirror Co. v. United States, 873 F.2d 1210, 1221 (9th Cir. 1989)(common law right of access does not apply to warrant materials during the pre-indictment stage of an ongoing criminal investigation) with United States v. Business of Custer Battlefield Museum and Store, 658 F.3d 1188, 1192 (9th Cir. 2011)(common law right of access does apply to warrant materials after "an investigation has been terminated"); see also Butterworth, 494 U.S. at 632-33 (noting that the important need for secrecy during an

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that notification upon the conclusion of an investigation is usually appropriate.

investigation decreases after the investigation is over). If a criminal investigation is revealed prematurely, as Section 2705 recognizes, very real consequences are possible, from the destruction of evidence to the intimidation of witnesses. Criminal investigations also have strong judicial oversight, in that all investigative process greater than a mere subpoena is reviewed and approved by a neutral magistrate judge.

Here, Adobe wrongly assumes as an initial premise that the First Amendment authorizes it to share with a subscriber information obtained solely by receipt of confidential, judicially-supervised investigatory process, during the pendency of an ongoing criminal investigation. (Motion at 4). Adobe cites Yahoo and Hotmail to support this claim, but these opinions misapprehend an important distinction by the Supreme Court in Butterworth, 494 U.S. 624, that renders their conclusions unreliable as persuasive authority.

In Butterworth, the Supreme Court considered limits on grand jury nondisclosure orders. In doing so, the Court distinguished between two types of information: that which a person has before he is subpoenaed, and that which he obtains as a result of his participation in the proceedings. Restrictions on the former deserve First Amendment protection; restrictions on the latter do not. 494 U.S. at 632; Seattle Times Company, 467 U.S. at 33-34 (protective order limiting disclosure of information obtained specifically in pretrial discovery does not offend the First Amendment); In re Subpoena, 864 F.2d 1559, 1562 (11th Cir. 1989) (nondisclosure order restraining parties from disclosing content of pleadings in connection with an ongoing grand jury investigation is "not a case of prior restraint of protected First Amendment activity"); Hoffmann-

Pugh v. Keenan, 338 F.3d 1136, 1140 (10th Cir. 2003) (agreeing state court grand jury witness could be precluded from disclosing information learned through giving testimony).

The case at hand is an ongoing grand jury investigation where a search warrant has been issued. Adobe has learned of the specific information that it wishes to share – that there is a federal criminal investigation related to one of its subscribers and that judicially supervised process has been issued for that particular account – only by way of its participation in the proceedings and receipt of the warrant. It is not precluded by the nondisclosure order from stating information which it held prior to learning of the warrant, only from disclosing any information that would notify the subscriber about the warrant. Because the nondisclosure order restricts only a limited category of information, which Adobe learned only through its receipt of the judicially authorized legal process, Adobe may be prohibited from disclosing this information without offending the First Amendment. Butterworth, 494 U.S. at 632.

Moreover, the nondisclosure order does not limit Adobe's ability to disseminate "matters of public concern," which are at the apex of First Amendment protection. United States v. Richey, 924 F.2d 857, 860 (9th Cir. 1991); see also Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("where matters of purely private significance are at issue, First Amendment protections are often less rigorous"). Thus, as Adobe has done in its Transparency Reports (Motion, Exhibit C), Adobe may disclose aggregate information to the public at large about Section 2703 process, such as the fact of receipt of the order, the place in which the order was received, or the total number of orders it receives. It may freely discuss its experience with Section 2703

legal process requiring the disclosure of user identities or information, and Section 2705(b) orders protecting the confidentiality of that process. The narrow limitation on Adobe's ability to make a singular notification to a subscriber about information that it learned by receipt of a warrant thus does not violate the First Amendment.

2. The Nondisclosure Order is Not a Content-Based Restriction Requiring Greater Scrutiny

Even if the nondisclosure order is presumed to implicate Adobe's First Amendment rights, the order is constitutionally permissible. First, Adobe contends that the nondisclosure order is a content-based prior restraint of speech, requiring greater protection, citing In re Sealing & Non-disclosure of Pen/Trap/2703(d) Orders, 562 F.Supp.2d 876 (S.D. Tex. 2008)(Magistrate judge holding that, in the post-investigation stage, indeterminate nondisclosure order for pen register application was a content-based prior restraint of speech). The analysis of In re Sealing – another non-binding, out-of-district magistrate judge decision – does not hold sway in this case, and is distinguishable based on additional showings here in any event.

As In re Sealing states, "a regulation that merely limits the time, place, or manner of speech is constitutionally permissible if it serves a significant governmental interest and leaves ample alternative channels for communication." 562 F.Supp.2d at 881, citing Cox v. New Hampshire, 312 U.S. 569 (1941). A restriction cannot be placed on the content of the speech, however, either by favoring speech on the basis of the views expressed, or closing off entirely a particular subject matter from public discourse. Id. In re Sealing reasoned that in that case the nondisclosure order

completely precluded speech on a topic – "the electronic surveillance order and its underlying criminal investigation" – and thus was a content-based limitation subject to higher scrutiny. Id. at 881-82.

In this case, though, as discussed above, the nondisclosure order does not completely preclude Adobe's speech. Adobe is not precluded from reporting the fact of receipt of the order and other information which it publishes in its transparency reports. In addition, Adobe may well be relieved of the specific restriction to not notify the subscriber of this warrant when, as is anticipated in this case, the investigation ends and Adobe is notified that the nondisclosure order is no longer in effect. Furthermore, Adobe is not prohibited from challenging the nondisclosure again in the future. The nondisclosure order at issue simply is not a "forever ban" on all speech; it is an as yet indeterminate, judicially limited order on disclosure of particular information that Adobe obtained solely as the result of its receipt of the search warrant. These facts, absent from the discussion in In re Sealing, are distinguishing, and compel the conclusion that the nondisclosure order here is not content-based and does not require greater Constitutional scrutiny. Moreover, as discussed below, even In re Sealing recognized that judicially limited nondisclosure orders surpass intense scrutiny during an ongoing investigation. 562 F.Supp.2d at 887.

3. The Nondisclosure Order is Narrowly Tailored

Even assuming that the nondisclosure order is both content-based and a prior restraint on Adobe's speech, it is narrowly tailored to achieve a compelling government interest. Adobe concedes that there is a compelling government interest in preserving the integrity of an

ongoing federal criminal investigation. (Motion at 4, 6). Adobe argues instead that the judicially limited nondisclosure order is not sufficiently tailored, while a date-limited nondisclosure would be.[5] Adobe cites for this premise primarily the In re Sealing case. But that case expressly limited its holding to the post-investigation stage, in line with the other cases which make this distinction. 562 F.Supp.2d at 878, 895 ("such restrictions on speech and public access are presumptively justified while the investigation is ongoing, but that justification has an expiration date. Publicity will not threaten the integrity of a criminal investigation that is no longer active.")(emphasis added). Furthermore, the court noted that even at that late stage, "the government may be able to demonstrate that a particular order or portion thereof should not be disclosed [even] when the investigation ends." Id. at 887.

In fact, the limits imposed by the nondisclosure order in this case on what Adobe may disclose are narrowly tailored to the government's interest. The reach of the nondisclosure order is limited to facts about this particular judicially supervised investigative process for an ongoing investigation, the precise information that Congress concluded could create the requisite harm, leaving Adobe free to speak on other matters of public importance in its transparency reports. The nondisclosure order is also limited by the fact that to obtain the order, the government was required to make, and did make, a precise showing that notification "will result in endangering the life or physical safety of an individual, flight

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[5] While Adobe has stated a preference for 2705(a)'s 90-day limitation, it is not clear from Adobe's filing whether it considers any date limitation to be sufficiently limited; for example, 10 years.

from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. § 2705(b)(1)-(5). And, the nondisclosure order is limited by the Court's discretion and authority to set an end at some later date. By placing the question of the appropriate length of the nondisclosure order in the hands of this Court, Congress has provided a procedure to tailor the duration of the order to the particular circumstances. See ACLU v. Holder, 673 F.3d 245, 257 (4th Cir. 2011) (statute authorizing sealing was narrowly-tailored where sealing order stemmed from "federal court's independent decision" on the basis for secrecy).

The simple fact of an as-yet indeterminate, judicially limited order does not render the order too widely tailored. Where determining the appropriate duration requires predictions about the future course of an investigation and future law enforcement harms, narrow tailoring does not require that these predictions be perfect. See Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1671 (2015) ("narrowly tailored" does not equal "perfectly tailored"); cf. First Am. Coalition v. Judicial Inquiry and Review Board, 784 F.2d 467, 479 (3rd Cir. 1986)(similarly relying on predictive judgments about future harms). This is particularly true at early stages of a multi-step investigation, and Congress has provided courts with the discretion to assess whether the proffered predictions are persuasive and to determine the appropriate duration of secrecy. For this reason, for many forms of investigation-stage legal process, such as pen registers and wiretaps as discussed above, and with respect to grand jury subpoenas, Congress has permitted indeterminate,

judicially limited nondisclosure orders. See 18 U.S.C. §§ 2511(2)(a)(ii)(B), 3123(d)(2); Federal Rule of Criminal Procedure 6 ("...kept under seal...as long as necessary"); Hoffman-Pugh, 338 F.3d at 1140. In Times Mirror Co., the Ninth Circuit held that the "polic[ies] behind grand jury secrecy apply with equal force to warrant proceedings," and accordingly affirmed orders that, while an investigation remained ongoing, warrant materials be under judicially limited, indeterminate seal. 873 F.2d at 1215-18, 21. Moreover, it is not true that a date-limited nondisclosure order is necessarily the more narrowly tailored order. In fact, a date-limited order has a high risk of being either under-inclusive (too short) or over-inclusive (too-long), particularly with the difficulties stated herein. Since a judicially limited order makes way for both the government and Adobe to apply for the order to be lifted after its *raison d'etre* fades, it is as narrowly tailored as required.

In sum, the nondisclosure order in this case was well within this Court's discretion to make, and neither the SCA nor the First Amendment requires a different result. Adobe has shown no just cause to demand a specific end date, much less one as short as 90 days, when investigations such as this one can take years to conclude. Adobe's motion should therefore be denied.

C. The Court May Unseal Its Order, But Should Not Unseal The Underlying Briefs And Exhibits

While the government has no objection to the Court publicly filing an order in this case that does not reference any specific facts relating to the ongoing investigation, the underlying warrant, briefs and exhibits should remain under seal. There is neither a First Amendment right nor a common-law right of access to these

underlying materials. In the Matter of the Application of the United States for an Order of Nondisclosure, 41 F.Supp.3d 1, 7 (D.D.C. 2014); Times Mirror, 873 F.2d at 1218-21 ("The public has no qualified First Amendment right of access to warrant materials during the pre-indictment stage of an ongoing criminal investigation. Nor is the public entitled to access to the materials under either the common law or Fed.R.Crim.P. 41(g)."). Because this litigation relates to an ongoing investigation, and the briefs and exhibits reference aspects of that investigation and underlying warrant, the need for continued sealing outweighs any desire by Adobe to publicly share its brief.

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny Adobe's motion to modify the nondisclosure order in this case.

CERTIFICATE OF SERVICE

I, **SUSAN M. CRUZ,** declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is the Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction I served a copy of:

OPPOSITION TO ADOBE SYSTEMS INCORPORATE'S MOTION TO CHANGE THE NONDISCLOSURE ORDER; DECLARATION OF TRACY L. WILKISON

service was:

[] Placed in a closed envelope, for collection and interoffice delivery addressed as follows:

[√] Placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

James G. Snell, Esq.
Christian Lee, Esq.
PERKINS COIE, LLP.
3150 Porter Drive
Palo Alto, CA 94304-1212

This Certificate is executed on **April 19, 2017,** at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/
SUSAN M. CRUZ