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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 REPLY TO THE OPPOSITION TO ITS EX PARTE APPLICATION TO AMEND INDEFINITE NONDISCLOSURE ORDER ACCOMPANYING A SEARCH WARRANT

CASE FILED UNDER SEAL

I. INTRODUCTION

The government's Opposition to Adobe Systems Incorporated's ("Adobe") Ex Parte Application to Amend Indefinite Nondisclosure Order Accompanying a Search Warrant ("Motion to Amend") mischaracterizes Adobe's position and the law. Adobe does not claim that nondisclosure orders ("NDOs") are presumptively invalid, or claim that NDOs may last only 90 days. Rather, Adobe contends that the plain language of 18 U.S.C. § 2705(b) requires that an NDO be time-limited "for [a] period . . . the court deems appropriate," which must be some specified period of time, as recognized by federal courts in California and elsewhere. An NDO that does not ever expire – like the one here – is not allowed by the plain language of the statute, and is also an unnecessary, overly-broad, and unconstitutional prior restraint on Adobe's speech. The government routinely issues time-limited NDOs even in the most extremely sensitive of cases, as described in the Supplemental Declaration of Mary Wirth ("Supplemental Wirth Decl."), submitted herewith. And the government cannot articulate a single reason why an indefinite restraint on speech, even if it were allowed (it isn't), is warranted here. Accordingly, Adobe asks that the Court amend the NDO to end on a specific date or after a defined period that the Court deems appropriate based on the facts. The government can always seek to renew the NDO if further facts warrant it. Adobe also asks that the Court unseal the briefs and the Court's order because this issue is a matter of public importance.

II. ARGUMENT

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

The government spends much of its brief setting up a straw man ("Adobe . . . contends that this Court erred in not setting an expiration date for the order of just 90 days," Opp'n at 1) so the government can then knock it down. Adobe, however, does not claim that the NDO must be limited to 90 days. Instead, as clearly

explained in the Motion to Amend, Section 2705(b) requires that an NDO should be time-limited "for [a] period . . . the court deems appropriate" on the facts of the case before it.[1] That is all Adobe requests here.

The government turns the plain language of Section 2705(b) on its head by referring to the NDO here as one of an "indeterminate, but judicially limited period." Opp'n at 4-5. That phrase makes no sense. An "indeterminate" NDO has no time period at all. *In Matter of Search Warrant for [Redacted]@hotmail.com ("Hotmail")*, 74 F. Supp. 3d 1184 (N.D. Cal. 2014) ("Forever is by definition without end."). The government's construction of Section 2705(b) therefore does not square with the language of the statute.

And the possibility that a court might later "judicially limit" the "indeterminate" NDO to a "period" at some future point does not make the current "indeterminate" NDO fit within the bounds of Section 2705(b) which requires, at the time of issuance, "[a] period . . . the court deems appropriate." 18 U.S.C. § 2705(b).

Moreover, as described in more detail in the Motion to Amend, courts rarely "judicially limit" "indeterminate" NDOs. *Pen Trap*, 562 F. Supp. 2d at 878 (finding that 99.7% of indefinite orders issued by a federal court were still not lifted "many years after issuance."); *In the Matter of the Grand Jury Subpoena for: [Redacted]@yahoo.com ("Yahoo")*, 79 F. Supp. 3d 1091, 1094 fn.15 (N.D. Cal. 2015) ("Busy federal prosecutors rightly focus more on the present and future investigation and prosecution of criminal activity, not the reexamination of [NDOs of] long-concluded cases and investigations.") (citation and quotation marks

[1] The government's references (Opp'n at 6) to two different statutes with different wording and context from § 2705(b) are not instructive to interpreting Section 2705(b). Moreover, such statutes are susceptible to similar arguments made here. *See In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders ("Pen Trap")*, 562 F. Supp. 2d 876, 895 (S.D. Tex. 2008) (denying as unconstitutional government request for an indefinite NDO regarding a pen register, and adding a 180 day expiration date).

omitted); Stephen Wm. Smith, *Gagged, Sealed, and Delivered: Reforming ECPA's Secret Docket,* 6 Harv. L. & Pol'y Rev. 313, 325 (2012) (noting that "judges almost never have occasion to revisit these cases, so the 'further order' lifting the seal rarely arrives").[2] The Court should not adopt a construction that will most likely result in the NDO never being amended.[3]

The government's Opposition also ignores the realities of standard NDO practice. Every month, Adobe receives search warrants or court orders from the government that contain NDOs. Supplemental Wirth Decl., ¶ 2. These NDOs routinely and uniformly are time-limited, and typically last for periods of 90, 120, or 180 days. Occasionally, in an extraordinarily sensitive case such as a terrorism investigation, an NDO might expire after a year. *Id.* Even if NDOs could be indefinite (they cannot), the government has made no argument as to why this case is so extraordinary or unique that such a major deviation from standard practice is warranted. *Id.* The government routinely specifies a defined period for the NDOs it seeks, even in terrorism investigations, and it can and is required to do so here.[4]

The three cases cited in Adobe's Motion to Amend (*Hotmail*, 74 F. Supp. 3d 1184; *Pen Trap*, 562 F. Supp. 2d 876; *Yahoo*, 79 F. Supp. 3d 1091) are the only decisions of which Adobe is aware that analyze indefinite NDOs, and all three are squarely aligned in Adobe's favor. The government does not unearth any other cases that analyze the issues, let alone cases that support the government's position.

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[2] The government also acknowledges (Opp'n at 1) that Adobe is not privy to the underlying facts and thus would not know when to make a future motion to lift the NDO.

[3] The government's construction of the statute, as described further below, would raise serious constitutional issues that would be avoided under the proper construction proposed by Adobe. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (finding that courts "are obligated to construe [statutes] to avoid [serious constitutional problems]").

[4] Time limiting the NDO presents no risk of prejudice to the government. Like most service providers, Adobe routinely calendars NDO expiration dates and gives the government a courtesy notice a week in advance of expiration so that there will be no inadvertent disclosure. Supplemental Wirth Decl., ¶ 3.

Instead, the government relies on a published non-California case and two unpublished opinions in the Central District that address issues different than those at hand and provide no analysis as to the interpretation of Section 2705(b) or the First Amendment issues raised by indefinite NDOs. Opp'n at 8-9.

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

The government here sets up another straw man by incorrectly claiming that Adobe seeks the immediate right to notify the subscriber of the federal criminal investigation. Opp'n at 10. Adobe says and wants no such thing. Instead, Adobe contends that the First Amendment requires that the NDO be limited in time and scope to properly balance the government's interests in the investigation with Adobe's First Amendment right to speak about receipt of government process. The government acknowledges in its Opposition that its interests in nondisclosure do not last forever, *see, e.g.,* Opp'n at 10, but provides no justification why the indeterminate NDO here satisfies the First Amendment. It does not.

Contrary to the government's argument, First Amendment rights do extend to recipients of criminal legal process, such as Adobe. *Butterworth v. Smith*, 494 U.S. 624, 635 (1990) (holding that a statute violated the First Amendment to the extent it imposed a nondisclosure obligation on a grand jury witness "into the indefinite future"); *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1071 (N.D. Cal. 2013) (nondisclosure provisions in administrative subpoenas must "meet the heightened justifications for sustaining prior-restraints"); *Pen Trap*, 562 F. Supp. 2d at 884 ("*Butterworth*'s concerns about indefinite bans of silence are no less applicable to § 2705(b)" because "[t]he basic context is the same[.]").

Moreover, since the NDO "effectively preclude[s]" Adobe from discussing an entire topic (i.e., "the existence of the warrant," Wirth Decl., Ex. A) for an indeterminate time, it is necessarily a content-based restriction. *Pen Trap*, 562 F. Supp. 2d at 881-82 (holding that an indeterminate NDO is a content-based "gag

order" and noting that "[i]f the recipients of [law enforcement process] are forever enjoined from discussing them, the individual targets may never learn that they had been subjected to such surveillance, and this lack of information will inevitably stifle public debate about the proper scope and extent of this important law enforcement tool."). The NDO cannot be considered a time, place, or manner restriction because it does not simply regulate the speech: it prohibits Adobe from discussing the warrant *at all*. *Id.* It is thus a prior restraint that must be narrowly tailored for a specific duration. *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 321 (2002) (holding that prior restraint "can be imposed only for a specified brief period" and the government "must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court") (citations omitted). The NDO here is not tailored at all in time and is therefore unconstitutional.

The government provides no authority to the contrary. Indeed, the government's primary authority favors Adobe. *See, e.g., Butterworth*, 494 U.S. at 626-27 (statute prohibiting grand jury witness from ever disclosing testimony violates the First Amendment). Other cases cited by the government involve the different issue of *right of access* (*Times Mirror Co. v. United States*, 873 F.2d 1210, 1211 (9th Cir. 1989), *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1561 (11th Cir. 1989), and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)) rather than the right of *disclosure* Adobe seeks here. Nothing in the right of access line of cases suggests that a recipient of legal process may be gagged *indefinitely* from speaking about it.

The Court should thus balance the respective interests and amend the NDO to expire on an appropriate defined date based on the facts. Such an amendment imposes no prejudice on the government or its investigation: if the government believes that later facts justify continued nondisclosure before the NDO expires, the government is free to so demonstrate at that later time.

C. The Court Should Unseal Its Order and the Parties' Briefing, With Redactions as Needed.

The Court should grant Adobe's Motion to Amend and issue an unsealed order, as the government concedes that the Court can unseal any order issued regarding Adobe's briefs. Opp'n at 17-18. The government argues that the underlying briefs and exhibits, however, should remain under seal to avoid compromising the investigation. *Id.* Adobe's and the government's briefing, however, was drafted to avoid revealing any information that would prejudice the government's investigation, so there is no reason those briefs should remain sealed. Moreover, if the government contends some information should be redacted to protect the investigation, and the Court agrees, the briefs can be redacted to avoid compromising the investigation. The Court could and should therefore unseal the briefing as well.

III. CONCLUSION

For the foregoing reasons, Adobe respectfully requests that the Court grant its Motion to Amend.

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