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GOOGLE INC.

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15
16 Case No. 3-16-80263-RS

17 **In the Matter of the Search of Content**
18 **Stored at Premises Controlled by Google**
19 **Inc. and Further Described in**
20 **Attachment A**

Non-Party Google Inc.’s Administrative
Motion for an Order of Civil Contempt
[Civil Local Rule 7-11]

21 **I. Introduction**

22 On August 14, 2017, the Court denied Google’s Motion to Quash and ordered Google Inc.
23 (“Google”) to produce certain foreign-stored communications to the government in response to a
24 search warrant. *See In re Search of Content Stored at Premises Controlled by Google Inc. and*
25 *Further Described in Attachment A*, No. 16-mc-80263-RS, 2017 WL 3478809 (N.D. Cal. Aug.
26 14, 2017) (the “August 14 Order”). Because the August 14 Order conflicts directly with the
27 ruling of the Second Circuit Court of Appeals, *see In re Warrant to Search a Certain E-Mail*
28 *Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197 (2d Cir. 2016)

1 (“*Microsoft*”); *reh’g denied en banc*, 855 F.3d 53 (2d Cir. 2017) (“*En Banc Denial*”), the only
2 appellate court to have addressed the issue, Google intends to appeal to obtain legal clarity from
3 the appellate court in its home district. Google therefore does not intend to comply with the
4 August 14 Order while seeking appellate review.¹

5 Because entry of a civil contempt order is necessary to remove doubt as to the basis for
6 appellate jurisdiction and would facilitate prompt appellate review, and because compliance with
7 the Court’s August 14 Order would undermine Google’s ability to seek legal clarity in its home
8 district, Google sought the government’s agreement to enter into a stipulation of civil contempt
9 with any sanctions stayed pending appellate review of the August 14 Order. The government
10 agreed to a similar stipulation in the *Microsoft* case, and indeed it recently entered into such a
11 stipulation with Google in another jurisdiction with stayed sanctions identical to those Google
12 sought here. In this case, however—despite this Court’s recognition that Google is proceeding in
13 good faith in this litigation to seek clarity on an important legal issue—the government refused to
14 enter into any stipulation with a stay of sanctions. Google accordingly brings this motion to
15 respectfully request that the Court enter the proposed Order finding Google in civil contempt,
16 devise an appropriate sanction, and stay any sanctions during the pendency of Google’s appeal.²
17 Google will continue to preserve information in its possession that is called for by the warrant but
18 stored outside of the United States, and would immediately produce this information if, after
19 exhausting its appellate options, it does not prevail.³

19 ¹ Google understands that complying with the August 14 Order would potentially undermine the
20 Ninth Circuit Court of Appeals’ jurisdiction over this matter and therefore Google’s ability to
21 obtain the legal clarity it seeks.

22 ² Consistent with common practice, and based in part on this Court’s finding that Google has
23 made “diligent, good faith efforts to comply with current law” in this matter, Aug. 14 Order, 2017
24 WL 3478809, at *5, Google requested that the government stipulate to civil contempt with stayed
25 sanctions to facilitate a prompt appeal. Although the government has in related litigation in
26 another jurisdiction stipulated to the terms Google proposed, *see* Declaration of John R. Tyler
27 (“Tyler Decl.”), ¶¶ 3-4, Ex. B-C, it declined to do so here. The government instead indicated that
28 it would oppose Google’s exercise of its right to appeal unless Google was required to pay
coercive sanctions for each day the appeal was pending. *See* Tyler Decl., ¶ 6.

³ This motion is properly styled as an administrative motion pursuant to Civil Local Rule 7-11
because it concerns a matter “not otherwise governed by a federal statute, Federal or local rule or
standing order.” Civil Local Rule 7-8, which otherwise governs “motion[s] for sanctions,” does
not apply here because Google is not asking the court to sanction another party. There is no
dispute that Google does not intend to comply with the August 14 Order while it seeks appellate
review, and by this motion Google is simply so advising the Court and requesting an appropriate
order to facilitate review.

II. Argument

A. An Order of Civil Contempt Is a Final, Appealable Order.

It is well established that an order finding a non-party in civil contempt is a final, appealable order. *See, e.g., Estate of Domingo v. Republic of Philippines*, 808 F.2d 1349, 1350 (9th Cir. 1987) (recognizing a non-party’s “right of appeal” once he submits to contempt) (citing *David v. Hooker, Ltd.*, 560 F.2d 412, 416 (9th Cir. 1977)); *In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847, 853 (9th Cir. 1991) (same); *see also In re Sealed Case*, 141 F.3d 337, 339 (D.C. Cir. 1998) (contempt order against a non-party “is considered final” and subject to appellate review). The Supreme Court has held that the claims of a non-party that receives an adverse discovery order become “ripe for appellate review” when a finding of contempt is entered. *United States v. Ryan*, 402 U.S. 530, 532 (1971); *see also Church of Scientology of California v. United States*, 506 U.S. 9, 18, n. 11 (1992).

Indeed, the government has recently stipulated, and an appellate court has recently found, that such an order of civil contempt provides an appropriate basis for appellate review in a case that raised the same legal issues as this matter. In *Microsoft*—the case that lies at the root of this litigation—the Second Circuit Court of Appeals recognized that an order finding a service provider in civil contempt was a final appealable order. *See Microsoft*, 829 F.3d at 205 & n. 9. In *Microsoft*, after the U.S. District Court for the Southern District of New York denied Microsoft’s motion to quash a search warrant that purported to compel Microsoft to disclose foreign-stored data, the government and Microsoft stipulated to a finding of contempt, and the Second Circuit acknowledged that the contempt finding rendered the decision sufficiently final for purposes of appellate jurisdiction. *See id.*

B. A Contempt Order is Final Even If Contempt Sanctions Are Stayed Pending Appeal and a Stay is Appropriate in this Matter.

Where a non-party seeks review “so that the merits of” a discovery order “can be tested,” courts have found that it is appropriate to stay contempt sanctions during the pendency of appeal. *Harris v. United States*, 413 F.2d 314, 315 (9th Cir. 1969); *see also Stone v. City and County of San Francisco*, 968 F.2d 850, 854-55 (9th Cir. 1992); Federal Practice & Procedure § 3917 (“A nonparty witness could appeal an adjudication of contempt for failure to obey a discovery order, even though the district court stayed the imposition of sanctions.”). Google here seeks in good faith to test the legal merits of the August 14 Order in light of contrary precedent in the Second

1 Circuit. Given that providers like Google face legal uncertainty in the Ninth Circuit on the
2 important issues raised by this case, the public interest strongly favors allowing Google to
3 proceed with this appeal, and to stay any sanctions so that Google need not comply prematurely at
4 the risk of undermining appellate jurisdiction. Google will continue to preserve the information
5 requested by the warrant, thereby minimizing any harm to the government. Accordingly, Google
6 requests that the Court enter an order of contempt against Google with an appropriate sanction, to
7 be stayed during the pendency of Google’s appeal in this matter.

8 **1. Google Seeks In Good Faith to Clarify an Unsettled Issue of Law in this
9 Circuit.**

10 The Second Circuit’s decision in *Microsoft* has created substantial legal uncertainty regarding
11 whether a warrant issued under the SCA can compel a provider to search and retrieve private
12 customer communications from a foreign data center. The Ninth Circuit has not yet addressed the
13 matter; in fact, the Second Circuit is the only federal appellate court to have done so and the
14 August 14 Order conflicts with the Second Circuit’s decision. Because Google has its
15 headquarters within the jurisdiction of the Ninth Circuit, it is particularly important for Google’s
16 continued operations to obtain the Ninth Circuit’s guidance on this important issue.

17 The Court’s August 14 Order recognized that Google has proceeded in good faith in this
18 matter to seek legal clarity regarding legal issues important to its operations, holding: “In light of
19 the Second Circuit decision in *Microsoft* and the absence of relevant Ninth Circuit precedent,
20 Google’s diligent, good faith efforts to comply with current law do not warrant contempt at this
21 stage of the proceedings.” August 14 Order, 2017 WL 3478809, at *5. Google brings this
22 motion for contempt to enable it to obtain “relevant Ninth Circuit precedent” clarifying what is
23 required for Google to “comply with current law” in light of the uncertainty resulting from
24 *Microsoft*.

25 The contempt order Google seeks here is similar to that entered in *Microsoft* pursuant to a
26 stipulation between Microsoft and the government. Whereas Microsoft sought to appeal in the
27 absence of case law clearly and directly supporting its position, Google seeks to appeal partly on
28 the basis of appellate case law (the *Microsoft* decision) contrary to this Court’s decision.
Google’s basis for appeal and need for clarifying certainty is therefore, if anything, stronger than
Microsoft’s was. Nonetheless, in *Microsoft*, the government stipulated to a finding of civil
contempt without sanctions to facilitate appeal. Here, where the basis for appeal is still stronger,

1 the government takes the position that Google cannot appeal without incurring coercive, daily
2 sanctions. There is no legitimate basis for the government's change of position.

3 **2. The Government Commonly Agrees to Stay Sanctions Pending Appeal in**
4 **Similar Circumstances.**

5 The government's position is all the more inexplicable because it is has consistently entered
6 into stipulations of contempt with no sanctions or stayed sanctions to facilitate appeal by Internet
7 service providers. As noted above, it entered into a stipulation with Microsoft and agreed that,
8 because the provider only sought "in good faith" to obtain review of the trial court's decision,
9 contempt sanctions were not appropriate during the pendency of the appeal. *See Microsoft*, 829
10 F.3d at 205 & n. 9.; *see also* Tyler Decl., ¶ 2, Ex. A (Joint Stip. Regarding Contempt Order, Case
11 Nos. 13-MAG-2184; M9-150). It has also recently entered into a stipulation with Google in
12 another jurisdiction with stayed sanctions nearly identical to the stipulation Google proposed
13 here. *See* Tyler Decl., Exs. B-C. And it has elsewhere entered into a stipulation with stayed
14 sanctions with another service provider to facilitate appeal in the Ninth Circuit as recently as this
15 spring. *Id.*, Exs. D-E. There is no sound basis for the government to break with its past practice
16 in this matter, where Google seeks in good faith to exercise its right to appeal to obtain clarifying
17 guidance from the Ninth Circuit in light of the decision contrary to this Court's order of the
18 Second Circuit in *Microsoft*.

19 **III. Conclusion**

20 As this Court held, Google brought this matter as part of a diligent, good faith effort to clarify
21 and comply with current law. Continuing that effort, Google seeks prompt appellate review of
22 the August 14 Order to clarify the law within the Ninth Circuit in light of precedent contrary to
23 the August 14 Order in the Second Circuit, the only appellate court to have addressed the issue.
24 Accordingly, Google respectfully requests that the Court enter the proposed Order finding Google
25 in civil contempt, devise an appropriate sanction, and stay any sanctions during the pendency of
26 Google's appeal.
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DATED: September 13, 2017

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