

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Case No.: 16cr265 (LMB)
)
 NICHOLAS YOUNG,)
)
 Defendant.)
 _____)

**YAHOO! INC.'S OPPOSITION TO DEFENDANT NICHOLAS YOUNG'S MOTION TO
COMPEL COMPLIANCE WITH PRETRIAL SUBPOENA DUCES TECUM**

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INTRODUCTION

As set forth in nonparty Yahoo! Inc.'s ("Yahoo") opposition to defendant's Motion for Order to Show Cause, filed concurrently herewith, the Court should deny defendant Nicholas Young's motion to compel for the simple reason that Young never gave Yahoo notice of the motion or an opportunity to be heard. Instead, Young falsely represented to this Court that Yahoo did not oppose the motion. Sanctions are thus warranted for Young's misconduct.

Despite Young's failure to follow basic procedural rules and requirements, however, Yahoo does not oppose the relief granted by this Court, provided certain legal requirements are met.

BACKGROUND

A full summary of the background of this matter is set forth in Yahoo's opposition to defendant's Motion for Order to Show Cause, filed concurrently herewith. For purposes of this opposition, the undisputed fact is that Defendant never served the underlying motion to compel on Yahoo, thus stripping Yahoo of the right to oppose the motion. Despite Defendant's false claim that Yahoo agreed not to oppose such motion, Yahoo never agreed to waive service of the underlying motion to compel and counsel for Defendant informed Yahoo's counsel that he would email her the motion to compel so Yahoo can determine whether it would oppose. (Declaration of Anna Hsia in Support of Yahoo! Inc.'s Opposition to Defendant Nicholas Young's Motion to Compel Compliance with Pretrial Subpoena Duces Tecum ("Hsia Decl."), filed concurrently herewith, ¶¶ 9-11, Ex. 7.)

ARGUMENT

I. Defendant's Motion Should Be Denied Because Defendant Never Served the Underlying Motion on Yahoo

It is black letter procedural law that a party must serve motions on interested parties. Fed. R. Crim. P. 49 (requiring service of motions); *see also* Local Criminal Rule 47(F) (requiring a party

moving for relief to serve the motion). Here, Defendant admits he never served the motion to compel on Yahoo, contending instead that Yahoo agreed not to oppose the motion to compel. Not so.

Yahoo cannot, did not, and would not agree not to oppose a motion, sight unseen. Counsel for Young's statements otherwise are pure fabrication. In reality, Yahoo informed Young's counsel that it would not oppose a motion to compel, provided the motion was consistent with the parties' earlier agreement via the meet and confer process, and provided Young did not seek sanctions against Yahoo. (Hsia Decl. ¶ 9.)¹ Indeed, counsel for Young agreed to provide Yahoo with a copy of the motion to compel it intended to file, so that Yahoo could determine whether it would oppose. (*Id.*) Despite those representations, Young never served the motion, and Yahoo never had notice and an opportunity to be heard. This alone warrants denial of the motion.

II. Defendant Misstates the Impact of the Stored Communications Act

Defendant makes a critical misstatement regarding the requirements of the Stored Communications Act ("SCA"). Defendant contends that Yahoo should be compelled to comply with the subpoena, because "the SCA creates two relevant (and commonsense) exceptions to the nondisclosure rule." This argument conflates two prongs of the SCA: one that imposes compulsory disclosure, and one that allows permissive disclosure.

The SCA's compulsory prong (18 U.S.C. § 2703) prohibits communications providers like Yahoo from disclosing the content of email communications, unless one of the specifically enumerated exceptions is satisfied. Significantly, none of those exceptions allow disclosure in response to legal process issued by a non-governmental entity like Nicholas Young. *See, e.g., Suzlon*

¹ Moreover, Defendant incorrectly asserts that Yahoo "encourage[d]" the filing of his motion to compel. Yahoo has never "encouraged" such a filing. Yahoo is a nonparty and has no interest in this matter. Yahoo has only suggested possible ways in which Defendant can obtain the information he seeks while respecting Yahoo's independent legal obligations.

Energy Ltd. v. Microsoft Corp., 671 F.3d 726, 731 (9th Cir. 2011) (affirming lower court’s decision to deny a request to order production of emails to a non-governmental entity because the emails were protected from disclosure by the SCA); *U.S. v. Amawi*, 552 F. Supp. 2d 679, 680 (N.D. Oh. 2008) (rejecting defendant’s motion under 18 U.S.C. § 2703(d) to compel disclosure of electronic communications because “the Office of the Federal Public Defender is not a ‘governmental entity’ within the meaning of § 2703”); *cf. In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 611 (E.D. Va. 2008) (holding that the “clear and unambiguous language” of the SCA prohibited AOL from divulging communications content because the SCA “does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas.”). Accordingly, Yahoo cannot be compelled to comply under Section 2703, because Mr. Young is not a governmental entity.

Young instead points to the permissive prong of the SCA (18 U.S.C. § 2702), which *permits*—but does not compel—a communications provider to disclose email content in certain circumstances. 18 U.S.C. § 2702(b) (“A provider described in subsection (a) *may* divulge the contents of a communication”) (emphasis added). Accordingly, the SCA does not require Yahoo to disclose emails pursuant to a subpoena relying solely on the originator exception. Instead, the SCA clearly sets forth a permissive standard by which Yahoo *may*, but is not required, to disclose such communications. The SCA thus does not support Defendant’s motion to compel.

III. Though Yahoo Opposes the Motion Substantively and Procedurally, Yahoo Does not Object to the Relief Ordered by the Court, Provided Certain Criteria Are Met

Despite Defendant’s failure to follow basic procedural rules and Defendant’s misrepresentations to this Court, Yahoo remains willing to provide the emails to Young, provided Young first meets certain criteria. As set forth in meet and confer correspondence from Yahoo’s counsel, Yahoo can provide all emails from the Libya Account to the Mohamed Account in the

specified time period² provided (1) it receives an affidavit from Mr. Young establishing that Mr. Young created the freedomforlibya777@yahoo.com account, and that Mr. Young is the originator of the emails in question and consents to their production by Yahoo; and (2) Yahoo receives an Order from this Court requiring production of the aforementioned emails from Yahoo only after (a) Yahoo receives an affidavit from Mr. Young as described above, and (b) the mohamed_2060@yahoo.com account holder does not object to production within 7 days after receiving notice from Yahoo about the court order.

IV. The Court Should Impose Sanctions Against Young

Courts may impose sanctions in criminal matters where defense counsel “files a motion solely for the purpose of delay which he knows is totally frivolous and without merit.” 18 U.S.C. § 3162(b).³ Federal law also authorizes courts to “punish by fine or imprisonment, or both, at its discretion” where there is “[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.” 18 U.S.C. § 401; *see also* Fed. R. Crim. P. 42 (authorizing sanctions for criminal contempt).

Here, counsel for Young has (1) failed to comply with the Federal Rules of Criminal Procedure and this Court’s Local Rules by failing to serve Yahoo with the underlying motion to compel and (2) misrepresented to this Court that Yahoo did not oppose the underlying motion to compel. By failing to

² Furthermore, while Young appears to only seek emails sent from the Libya Account to the Mohamed Account in June 2011, Yahoo is—and has made clear to counsel for Young that it is—willing to provide *all* emails sent from the Libya Account to the Mohamed Account (i.e., regardless of time period).

³ For court-appointed attorneys like the ones representing Mr. Young, the Court may (1) reduce the amount of compensation that would otherwise have been paid to such counsel; (2) deny such counsel the right to practice before the court considering such case for a period of not to exceed ninety days; or (3) file a report with an appropriate disciplinary committee.

follow basic procedural requirements and making material misrepresentations to this Court, sanctions are warranted.

CONCLUSION

For the foregoing reasons, non-party Yahoo respectfully requests that the Court impose sanctions against Young for making material misrepresentations to this Court.

DATED: January 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2017, I will cause the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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