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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	Cr. No. CR-10-148-N-BLW
	)	
Plaintiff,	)	MEMORANDUM OPPOSING
	)	DEFENDANT'S MOTION FOR
vs.	)	PRELIMINARY INJUNCTION
	)	FROM SEARCH OR
EDGAR STEELE,	)	INVESTIGATION OF
	)	COMPUTERS AND FILES SEIZED
Defendant.	)	FROM DEFENDANT'S HOME
	)	
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	)	
	)	

The United States of America, by and through Wendy J. Olson, United States Attorney, and the undersigned Assistant United States Attorney for the District of Idaho, submits the following memorandum opposing the defendant's motion for a temporary injunction to prevent the search of any computer seized from the defendant's residence.

**I. STATEMENT OF FACTS**

On June 11, 2010, the defendant was arrested on federal charges of Use of Interstate Commerce Facilities in the commission of Murder for Hire, a violation of 18 U.S.C. § 1958. Pursuant to a federal search warrant signed by U.S. Magistrate Judge Mikel H. Williams, federal agents seized items from the defendant's home, including multiple computers. The United States

had probable cause to believe that items within the defendant's residence, including computers, contained evidence of a crime. The U.S. Magistrate Judge agreed. Presently, the United States has not conducted any search of the computers seized from the defendant's residence and will not search without another search warrant.

## **II. SUMMARY OF THE ARGUMENT**

The items taken from the defendant's residence were seized pursuant to a lawful federal search warrant, and will be searched pursuant to a lawful federal search warrant. The United States has exercised "special care to avoid unnecessary intrusion on attorney-client communications" and will seek a second search warrant consistent with the Ninth Circuit's opinion in *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009) before the computers will be searched. This will limit the scope of the information obtained by the investigatory agents and already addresses the concerns expressed by the defendant in his motion.

## **III. ARGUMENT**

The defendant, who is an attorney, asserts that he has "client files and information on his computer and in his home." Defendant's Motion, 2. He states that some of the information is "covered by attorney-client confidentiality and privilege issues." Defendant's Motion, 2. He requests a preliminary injunction to prevent "all investigation activity with respect to case files, computer records, and all other materials seized from Mr. Steele's law office, and to preserve the confidentiality of the seized materials until this Court has an opportunity to review the search warrant and make determinations as to what material are privileged and should be returned under Federal Rule of Criminal Procedure 41(g)." Defendant's Motion 2. The defendant points to the procedures set forth in *Comprehensive Drug Testing, Inc.* as a method of ensuring that law enforcement limits the scope of the information to be seized during the search of the defendant's computer files. Defendant's Motion, 5-6; *Comprehensive Drug Testing, Inc.*, 579 F.3d 989.

Case law is clear that the defendant's residence, even if used in his practice of law, is

“not immune from search warrants.” *United States v. Mittleman*, 999 F.2d 440, 445 (9th Cir. 1993), citing *In re Grand Jury Subpoenas Dated Dec. 10 1987*, 926 F.2d 847, 855-58 (9th Cir. 1991). “Although a law office search should be executed with special care to avoid unnecessary intrusion on attorney-client communications, it is nevertheless proper if there is reasonable cause to believe that the specific items are located on the property to be searched.” *Mittleman*, 999 F.2d at 445, quoting *National City Trading Corp. V. United States*, 635 F.2d 1020, 1025-26 (2nd Cir. 1980).

In this case items, including computers, were lawfully seized from the defendant’s residence pursuant to a search warrant signed by a U.S. Magistrate Judge. However, recognizing that the computers could potentially store attorney-client communications, the computers have not been searched by the United States. Instead, the United States has been taking steps to prepare a second search warrant authorizing a search consistent with the procedures in *Comprehensive Drug Testing, Inc.* 579 F.3d at 1000. Consistent with this opinion, the search warrant would provide for the formation of a CDT Review Team who will segregate and redact data so that the investigatory agents will only receive data that is authorized to be seized in the search warrant. *Id.* The CDT Review Team will “not communicate any [other] information they learn during the segregation process absent further approval of the court.” *Id.* The CDT Review Team will use search protocol designed to uncover only the information for which it has probable cause to seize *Id.* Thus, the investigatory agents will only obtain information relating to this case, and not unrelated attorney-client information from the computers.

The Supreme Court recently clarified that the preliminary injunctive relief sought by the defendant is available only if he can “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter v. National Resources Defense Counsel, Inc.*, 129 S.Ct. 365, 375 (2008). In so doing, the Court rejected the Ninth Circuit’s “possibility of irreparable harm” test, noting that “[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may

only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* at 375-76.

The defendant cannot show that an irreparably injury is likely since the United States is taking steps to put in place search procedures designed to exercise “special care to avoid unnecessary intrusion on attorney-client communications.” *Mittleman*, 999 F.2d at 445. However, our efforts to search the defendant’s computers is “proper” because there is “reasonable cause to believe that [evidence] is located on the property to be searched.” *Mittleman*, 999 F.2d at 445. Moreover, the United States’ efforts to search the computers will be reviewed by a U.S. Magistrate Judge who can authorize or decline the search based upon the Court’s review of the affidavit and current law. The defendants request for a preliminary injunction is unnecessary in light of these efforts, and the defendant has failed to meet his burden of showing that “irreparable harm is likely.” *Winter*, 129 S.Ct. at 375.

#### **IV. CONCLUSION**

For the reasons set forth above, the defendant’s motion for preliminary injunction from search or investigation of computers and files seized from defendant’s home should be denied.

Respectfully submitted this 19th day of July, 2010.

WENDY J. OLSON  
UNITED STATES ATTORNEY  
By:

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/s/ Michael W. Mitchell  
Assistant United States Attorney