

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Google Inc. Street View Electronic
Communications Litigation

NO. C 10-MD-02184 JW

**ORDER GRANTING DEFENDANT’S
MOTION FOR CERTIFICATION;
CERTIFYING ORDER FOR IMMEDIATE
APPEAL; STAYING CASE**

Presently before the Court is Defendant’s Motion for Certification Under 28 U.S.C. § 1292(b). (hereafter, “Motion,” Docket Item No. 83.) Plaintiffs have filed a timely Opposition. (Docket Item No. 89.) The Court finds it appropriate to take the Motion under submission without oral argument. See Civ. L.R. 7-1(b).

A. Discussion

Defendant moves the Court to certify its June 29, 2011 Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss with Leave to Amend¹ and stay the case pending appeal on the ground that the June 29 Order’s interpretation of the term “radio communication” in 18 U.S.C. § 2510(16) of the Wiretap Act presents a novel question of controlling law, the immediate appeal of which would materially advance the ultimate termination of the case. (Motion at 2-6.)

Title 28 U.S.C. § 1292(b) provides, in pertinent part, that a district judge may certify an order for immediate interlocutory appeal if the judge is “of the opinion” that: (1) the order involves “a

¹ (hereafter, “June 29 Order,” Docket Item No. 82.)

1 controlling question of law”; (2) there “is substantial ground for difference of opinion” as to the
2 resolution of that question; and (3) “an immediate appeal from the order may materially advance the
3 ultimate termination of the litigation[.]” Certification should “be used only in extraordinary cases
4 where decision of an interlocutory appeal might avoid protracted and expensive litigation.” U.S.
5 Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966).

6 An issue involves a “controlling question of law” under § 1292(b) if the “resolution of the
7 issue on appeal could materially affect the outcome of the litigation in the district court.” In re
8 Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982). “To determine if a ‘substantial
9 ground for difference of opinion’ exists under § 1292(b), courts must examine to what extent the
10 controlling law is unclear.” Couch v. Telescope, Inc., 611 F.3d 629, 633 (9th Cir. 2010). The
11 controlling law is unclear where the matter certified for appeal “involves an issue over which
12 reasonable judges might differ,” and where uncertainty over the certified matters “provides a
13 credible basis for a difference of opinion.” Reese v. BP Exploration (Alaska), Inc., No. 10-35128,
14 2011 WL 2557238, at *5 (9th Cir. June 29, 2011) (citation omitted). Finally, to determine whether
15 an issue on appeal would “materially advance the litigation,” courts need not find “that the
16 interlocutory appeal [would] have a final, dispositive effect on the litigation.” Reese, 2011 WL
17 2557238, at *5. It is sufficient that a court find that a reversal of the underlying issue “may” take
18 parties or claims out of the case. Id.

19 Here, in its June 29 Order, the Court explained that this case “presents a case of first
20 impression as to whether the Wiretap Act imposes liability upon a defendant who allegedly
21 intentionally intercepts data packets from a wireless home network,” as well as a “novel question of
22 statutory interpretation” regarding Section 2510(16).² (June 29 Order at 7-8.) Thus, in light of the
23 novelty of the issues presented, the Court finds that its June 29 Order involves a controlling question
24 of law as to which there is a credible basis for a difference of opinion, and also finds that

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26 ² When novel questions of first impression are presented, “[c]ourts traditionally will find that
27 a substantial ground for difference of opinion exists.” Couch, 611 F.3d at 633 (citation omitted). “[A]
28 novel issue may be certified for interlocutory appeal without first awaiting development of contradictory
precedent.” Reese, 2011 WL 2557238, at *5.

1 certification of the June 29 Order for appeal would materially advance the litigation under Section
2 1292(b).

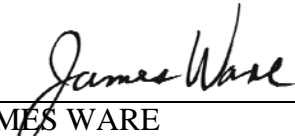
3 Accordingly, the Court GRANTS Defendant's Motion for Certification of the June 29 Order.

4 **B. Conclusion**

5 The Court GRANTS Defendant's Motion for Certification and certifies this case for
6 immediate appeal pursuant to 28 U.S.C. § 1292(b).

7 The Court STAYS the case pending resolution of this matter on appeal. Upon resolution of
8 the appeal, either party may move the Court to lift its stay.

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11 Dated: July 18, 2011



JAMES WARE
United States District Chief Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

- 2 John A. Macoretta jmacoretta@srkw-law.com
3 David H. Kramer dkramer@wsgr.com
4 Bart Edward Volkmer bvolkmer@wsgr.com
5 Bobbie Jean Wilson BWilson@perkinscoie.com
6 Caroline Elizabeth Wilson cwilson@wsgr.com
7 Michael H. Rubin mrubin@wsgr.com
8 Susan D. Fahringer sfahringer@perkinscoie.com
9 Aaron Michael Zigler azigler@koreintillery.com
10 Robert A. Curtis rcurtis@foleybezek.com
11 Michael James Aschenbrener maschenbrener@edelson.com
12 Jay Edelson jedelson@edelson.com
13 Eric H. Gibbs ehg@girardgibbs.com
14 Reginald Von Terrell reggiet2@aol.com

9 **Dated: July 18, 2011**

Richard W. Wieking, Clerk

11 **By: /s/ JW Chambers**
12 **Susan Imbriani**
13 **Courtroom Deputy**

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