IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

KEITH DUNBAR, Individually, and as Representative on Behalf of all Similarly Situated Persons,	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION NO. 5:10-CV-194-DF**
GOOGLE, INC.,	§	
Defendant.	§	

REDACTED ORDER[1]

Before the Court is Plaintiff's Motion for Preliminary Injunction. Dkt. No. 11. Also before the Court are Defendant Google, Inc.'s ("Google's") response, Plaintiff's reply, and Google's sur-reply. Dkt. Nos. 20, 33, & 49. The Court held a hearing on May 10, 2011. *See* 5/10/2011 Minute Entry, Dkt. No. 57. As the findings of fact and conclusions of law herein reflect, the Court finds that Plaintiff's motion should be DENIED.

I. BACKGROUND AND THE PARTIES' POSITIONS

Plaintiff Keith Dunbar brings this putative class action alleging violation of the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 *et seq.* ("ECPA"), the relevant portions of which are sometimes referred to as the "Wiretap Act." Plaintiff seeks statutory damages, punitive damages, costs, attorney's fees, and a permanent injunction.

Title 18 U.S.C. § 2511 provides, in relevant part:

(1) Except as otherwise specifically provided in this chapter any person who--

[1]This Redacted Order is entered pursuant to an unopposed motion granted by the Court. *See* Dkt. Nos. 63 & 64. The unredacted Order was entered May 23, 2011, and is under seal. *See* Dkt. No. 60.

EXHIBIT 5

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; . . .
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . .
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Plaintiff argues that Google violates the ECPA by intentionally intercepting "non-Gmail users' e-mails" and using them in "behavioral advertising sales." Dkt. No. 11 at 3. In other words, when a Gmail user receives an e-mail from a non-Gmail user, Google's system reads the e-mail and serves ads to the Gmail user based on keywords in the e-mail. *See id.* at 4-6. Plaintiff further argues that none of the exceptions to the ECPA are applicable because Google's use of a non-Gmail user's e-mail content for advertising purposes is not "necessary incident to the rendition" of the service or for protection of the service (such as virus scanning). *Id.* at 10.

Plaintiff analogizes that "it would be irreparable and illegal if AT&T monitored telephone calls to suggest ads to one party, if the postman read the mail being delivered in order to insert coupons, or if a UPS delivery man re-wrapped a box after placing a new sales catalog inside." *Id.* at 12. Plaintiff urges that this on-going, irreparable invasion of privacy warrants preliminary injunctive relief, and Plaintiff argues the injury to privacy outweighs any prospective harm to Google because, for example, other e-mail providers are able to operate satisfactorily without reading the content of their user's e-mail. *Id.* at 12-14. Plaintiff submits that a preliminary injunction will serve the public interest by protecting privacy. *Id.* at 14. Finally, Plaintiff requests that no bond be ordered because "there is no injury to Google." *Id.*

Google responds first that its "scanning technology is not a 'device' under ECPA because it is used routinely, indiscriminately and openly in the ordinary course of business as to all Gmail users." Dkt. No. 20 at 1 & 4-7. Second, Google argues that its "scanning technology is a 'necessary incident' to the rendition of Gmail services" because "targeted ads are an essential component of the very services delivered in Gmail" and are "the means by which the free rendition of those Gmail services are 'paid for' and thus provided to users." *Id.* at 1 & 7-9. Google also notes that its "scanning and matching process to deliver ads is completely automated and involves no humans." *Id.* at 9. Third, Google argues that "one party to the communication has consented to any alleged interception" because Gmail account holders have explicitly agreed to e-mail scanning and because the scanning is done without any contemporaneous criminal or tortious purpose. *Id.* at 2 & 9-12.

As to alleged harm, Google argues that Plaintiff does not advance any evidence that he ever sent e-mail to a Gmail user, let alone that he is suffering any irreparable harm or that any other non-Gmail user is suffering irreparable harm. *Id.* at 2 & 12-13. Google also notes that "more than 6 years have passed without Plaintiff calling into question Google's email scanning practice," which has been "a well-known, integral part of Google's Gmail services since 2004." *Id.* at 13. Fourth, Google urges that Plaintiff's requested injunction would shut down Google's entire business model for Gmail [redacted] *Id.* at 2 & 13-15. Finally, Google argues that "Plaintiff's attempt to avoid posting a bond must be rejected" because Federal Rule of Civil Procedure 65 expressly requires a bond. *Id.* at 15 (citing *Nichols v. Alcatel USA*, Inc., 532 F.3d 364, 379 (5th Cir. 2008)).

Plaintiff replies that the parties dispute only three issues: "(1) does the exception to a 'device' expressed at 18 U.S.C. § 2510(5)(a) apply; (2) does the 'necessary rendition of service' exception of 18 U.S.C. 2511(2)(a)(i) apply; and (3) have Gmail users consented to Google's interception." Dkt. No. 33 at 2. Plaintiff urges that the exceptions should not apply to Google's interception activity because although it may increase Google's profits, such activity is "unrelated to the ability to send or receive (or even service) electronic communications." *Id.* at 2-5. Finally, Plaintiff argues that Google's Terms of Services, the Gmail Legal Notices, Privacy Policy, and Program Policy provide no basis for finding that Gmail users have consented to interception of e-mail. *Id.* at 5. As to harm, Plaintiff attaches a declaration stating that he has transmitted to Gmail users approximately 40 e-mails, "many of which are covered by the attorney-client privilege or are sensitive business affairs." *Id.* at 6.

In sur-reply, Google reiterates its responsive arguments and submits that Plaintiff fails to acknowledge evidence "that an injunction would have a dramatic, negative impact on Google's business." Dkt. No. 49 at 1. Google submits that the "necessary incident" exception applies interceptions by automated devices as well as human beings. *Id.* at 2. Google also re-urges that users consent to content scanning and targeted advertising when they create a Google account. *Id.* at 3-4. Google further submits that Plaintiff's vague assertions cannot support any finding of irreparable harm, particularly because Plaintiff "admits he has continued to send emails to Gmail users since he commenced this action." *Id.* at 5.

II. FINDINGS OF FACT

1. Google provides an e-mail service known as Gmail. When a Gmail user receives an e-mail from a non-Gmail user, Google's system reads the e-mail and serves advertisements ("ads") to

the Gmail user based on keywords in the e-mail. Because serving of ads is based on e-mail content, these ads are often referred to as "targeted ads." *See* First Amended Class Action Complaint, Dkt. No. 17 at ¶ 8.

2. Plaintiff is not a Gmail user. *Id.* at ¶ 7. Plaintiff has sent e-mail messages to Gmail users. *See id.* Since the filing of the above-captioned case, most of the e-mails Plaintiff has sent to Gmail users have "involved confidential client or business related matters." 3/28/2011 Dunbar Decl., Dkt. No. 33-1.

3. Google scans e-mails of Gmail account holders and uses the content obtained to place advertisements on Gmail account holders' Internet browser windows. *See id.* at ¶ 10. Scanning of e-mail content is the means by which Google serves targeted ads to Gmail users. 3/7/2011 Crossan Decl., Dkt. No. 20, Ex. at ¶¶ 3-4.

4. Plaintiff alleges not only that interceptions for the targeted ad system violates the ECPA but also that "Google intercepts and acquires the content of Plaintiff's and Class Members' electronic communications for purposes *other than* Service of Gmail to users." Dkt. No. 17 at ¶ 173 (emphasis added); *see also id.* at ¶ 171; Dkt. No. 53 at 3 (Sur-Reply in Opposition to Google's Motion to Dismiss).

5. Upon creation of a Gmail account, a Gmail user agrees to the Google Terms of Service, Program Policy, and Privacy Policy, which explain that Gmail serves targeted ads by scanning e-mail content. *See* Dkt. No. 17 at ¶ 17; *see, e.g.,* Terms of Service, Dkt. No. 17, Ex. D at ¶¶ 8.3, 17.1, & 17.3.

6. Revenue from targeted ads allows Google to provide e-mail services to Gmail users for free. *See* Dkt. No. 17 at ¶¶ 12 & 160.

7. Gmail has over 100 million users. *See* Dkt. No. 17 at ¶ 191.

8. Enjoining content scanning (and, as a result, preventing Google from serving targeted ads in Gmail) would interfere with Google's ability to provide free e-mail services through Gmail and would also interrupt [redacted]

III. CONCLUSIONS OF LAW

9. This Court has subject matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331.

10. Federal Rule of Civil Procedure ("Rule") 65 governs the issuance of a preliminary injunction. "A preliminary injunction is an extraordinary equitable remedy that may be granted only if plaintiff establishes the following four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied, (3) that the threatened injury outweighs any damage that the injunction might cause defendants, and (4) that the injunction will not disserve the public interest." *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999). "Where the other factors are strong, a showing of some likelihood of success on the merits will justify temporary injunctive relief." *Productos Carnic, S.A. v. Central Am. Beef and Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980). Nonetheless, "a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

11. First, the Court considers likelihood of success on the merits. Google has asserted at least three defenses: (1) content-scanning equipment is not a "device" under the ECPA; (2) content scanning fits within the "necessary incident" exception to the ECPA; and (3) Gmail users consent

to interception. Plaintiff has presented arguments in opposition to each of these grounds. For example, in addition to his various legal arguments, Plaintiff alleges that Gmail's use of e-mail content "is not limited to the placement of targeted advertising on Gmail user's screens." Dkt. No. 17 at ¶ 171; *see also id.* at ¶ 173. Whether Plaintiff can present evidence to substantiate these and other claims remains to be seen. In short, Plaintiff has shown some possibility of overcoming Google's defenses, but at this early stage, Plaintiff has not shown a "substantial likelihood" as required by Rule 65.

12. Second, the Court considers the threat that plaintiff will suffer irreparable injury if the preliminary injunction is denied. On one hand, by its very nature, the exposure caused by a privacy invasion cannot be reversed with monetary damages. On the other hand, Plaintiff continues to send e-mail messages to Gmail users even after the filing of the above-captioned case, which weighs against Plaintiff's argument that harm going forward will be irreparable. In other words, Plaintiff's ongoing communications with Gmail users demonstrate that the harm can be addressed by damages because if the harm of such communications were truly irreparable, presumably Plaintiff would use a different mode of communication instead. Plaintiff has thus failed to show that denial of a preliminary injunction would irreparably harm Plaintiff.

13. Third, the Court considers whether the threatened injury outweighs any damage that the injunction might cause Google. A preliminary injunction against Google's use of targeted ads [redacted] Plaintiff has not shown how denial of a preliminary injunction would harm him to any degree that would rival the likely dramatic harm to Google.

14. Fourth, the Court considers whether the requested injunction would disserve the public interest. On one hand, e-mail users have an interest in the privacy of their communications. On the other hand, a preliminary injunction would interfere with advertising and would likely disrupt or burden the business and personal communications of substantially all users of Gmail [redacted] either through a shutdown or through charging of fees. *See* Dkt. No. 17 at ¶ 191 (alleging that Gmail has over 100 million users); [redacted] On balance, Plaintiff has failed to show that any purported invasion of privacy outweighs the interests of Gmail users and advertisers in continued service.

15. In sum, Plaintiff has failed to "clearly carr[y] the burden of persuasion" on any of the four requirements, let alone all four. *PCI Transp.*, 418 F.3d at 545. Plaintiff's motion for a preliminary injunction should therefore be DENIED.

IV. CONCLUSION

Plaintiff's Motion for Preliminary Injunction (Dkt. No. 11) is hereby **DENIED**.

IT IS SO ORDERED.

SIGNED this 25th day of May, 2011.

DAVID FOLSOM
UNITED STATES DISTRICT JUDGE