

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

irth Solutions, LLC,

Plaintiff,

vs.

Windstream Communications, LLC,

Defendant.

Case No.: 2:16-cv-00219

Judge James L. Graham

Magistrate Judge Kimberly A. Jolson

**DEFENDANT WINDSTREAM COMMUNICATIONS, LLC'S MOTION TO STAY THE
EFFECT OF AUGUST 2, 2017 OPINION AND ORDER (DOC. 58) PENDING
RESOLUTION OF DEFENDANT'S OBJECTIONS**

On August 2, 2017, Magistrate Judge Jolson issued an Opinion and Order (the "Order," Doc. 58) finding that Defendant Windstream Communications, LLC ("Windstream") had waived the attorney-client privilege that otherwise protected forty-three documents that were inadvertently produced by Windstream in discovery. (Order at 24). Further, the Order declined Windstream's request to order Plaintiff to return or destroy the documents in question and otherwise prevent Plaintiff from using the documents in the litigation. (Order at 30).

Windstream intends to file timely objections to the Order no later than August 16, 2017. Pursuant to the Order, as well as Local Rule 72.3, the Order will remain "in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge." (Order at 31). Windstream hereby requests that the Court stay the effect of the Order until it rules on the objections that Windstream will file next week.

In deciding whether to stay an order, the Court looks to the same four factors that guide its decision to issue a temporary restraining order. *Summit Cnty. Democratic Central & Exec. Comm. v. Blackwell*, 388 F.3d 547, 550-51 (6th Cir. 2004) (observing that a stay turns on "(1)

whether the movant has a ‘strong’ likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a [stay] would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a [stay]”). Here, these factors favor a stay.

First, there are “at least serious questions going to the merits,” which satisfies the first factor. *Martinez v. United States*, No. 3:14-CV-00174, 2014 WL 4446924, at *3 (E.D. Tenn. Sept. 9, 2014) (quoting *Green Party of Tenn. v. Hargett*, 493 F. App’x. 686, 689 (6th Cir. 2012)). The Order acknowledges that “[t]he United States Court of Appeals for the Sixth Circuit has not yet addressed how clawback agreements and Rule 502(b) interlace,” and expressly rejects a line of authority advanced by Windstream that would preclude a finding a waiver. (Order at 17, 22).

Second, absent a stay, Windstream will suffer irreparable harm should the Court ultimately set aside the Order. Once privileged information is freely disseminated, it cannot be placed back in the proverbial bottle upon a judicial decree that the privilege was never actually waived. *Zander v. Craig Hospital*, No. 09-CV-2121, 2010 WL 1571213, at * 2 (D. Col. April 20, 2010) (recognizing appropriateness of a stay—even without a likelihood of success—“where enforcing the existing discovery order would require the disclosure of arguably privileged information”) (internal quotations omitted).

Third, Plaintiff will not suffer any substantial harm from a stay. Windstream will file its objections within a week, and the stay will remain in place only until the Court rules on those objections. Given the gravity of the privilege matter at issue, a short additional delay is of no moment. *Id.* (finding “no substantial harm will result from the brief stay necessary for a review” of order addressing privilege).

Fourth, for the same reason, the public interest is advanced by a stay. The attorney-client privilege is the oldest privilege under the law, and it serves to “promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Order found a waiver of this critically important privilege only after addressing a matter of first impression in the Sixth Circuit. Under these circumstances, the public interest favors a stay that preserves the privilege for a short time longer to give the Court an opportunity to assess the new path the Order sets for privilege waiver. *Zander*, 2010 WL 1571213, at * 2 (“In addition, construction of the state law privilege is a matter of first impression, and under these circumstances the public interest is served by a stay.”).

Accordingly, Windstream respectfully asks the Court for a stay of the Order pending resolution of the objections it will submit to the Court. A proposed order granting the requested stay is attached for the Court’s convenience.

Respectfully submitted,

/s/ Michael J. Montgomery

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant Windstream Communications, LLC's Motion to Stay was served on this 8th day of August 2017 via the Court's CM/ECF system to each individual listed on the Court's Electronic Mail Notice List.

/s/ Michael J. Montgomery
Attorney for Windstream Communications,
LLC

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**[PROPOSED] ORDER GRANTING DEFENDANT WINDSTREAM
COMMUNICATIONS, LLC'S MOTION TO STAY
THE EFFECT OF AUGUST 2, 2017 OPINION AND ORDER (DOC. 58)
PENDING RESOLUTION OF DEFENDANT'S OBJECTIONS**

This matter came before the Court on the motion of Defendant Windstream Communications, LLC ("Windstream") for a stay of Magistrate Judge Jolson's August 2, 2017 Order and Opinion (the "Order," Doc. 58). The Court, having considered the motion, hereby GRANTS Windstream's motion. The Order is hereby stayed, and Plaintiff is hereby ordered to refrain from using or disclosing the information at issue in the Order, until this Court resolves Windstream's objections to the Order.

Judge

Submitted by:

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