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12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA

14 IN RE THE SEIZURE OF VARIOUS
15 WEB DOMAINS

16 Case No.:

17 **NOTICE OF MOTION AND**
18 **MOTION FOR RETURN OF**
19 **PROPERTY; MEMORANDUM OF**
20 **POINTS AND AUTHORITIES**

21 **[Declarations of Beverly Luu and**
22 **Steven R. Welk filed concurrently**
23 **herewith]**

24 [Fed. R. Crim. Proc. 41(g)]

25 DATE: TBD after case assignment

26 TIME: TBD after case assignment

27 CTRM: TBD after case assignment

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF**
2 **RECORD:**

3 **PLEASE TAKE NOTICE** that on a date and time to be set upon
4 assignment of this matter, Movant Sky Global, Inc. (“Movant” or “Sky Global”)
5 will and hereby does move under Federal Rule of Criminal Procedure 41(g) for an
6 Order requiring the United States of America (the “United States” or “the
7 government”) to return to Movant possession of and control over the internet
8 domains more specifically described below that Movant owned and/or controlled
9 until they were seized by the government in March and May 2021 pursuant to
10 undisclosed federal seizure warrants issued in this district without notice to Sky
11 Global. Pursuant to Rule 41(g), Movant further requests that the Court hold an
12 evidentiary hearing on the instant motion to receive evidence on any factual issue
13 necessary to decide the motion, which raises substantial constitutional questions.

14 The government should be ordered to return the seized internet domains
15 because the government’s seizure and retention of the domains is improper and
16 contrary to law. The seizures violate the very statutory authority upon which the
17 government purports to have relied in seeking the seizure warrants, and constitute
18 an ongoing and direct violation of Sky Global’s First and Fifth Amendment rights
19 under the United States Constitution.

20 Since its inception, Sky Global has taken all reasonable and necessary steps
21 to ensure that its domains were used for their intended, legitimate purposes.
22 Nevertheless, the government seized Sky Global’s property, directly resulting in
23 the sudden, involuntary suspension of an ongoing legitimate business with global
24 operations and customers. To make matters worse, the government has refused to
25 provide Sky Global with copies of the seizure warrants or any further information
26 regarding the government’s purported legal basis for its seizure and retention of
27 Sky Global’s property, thus depriving it of any meaningful opportunity for judicial
28 review. The government’s continued retention of Sky Global’s property pursuant

1 to undisclosed and legally deficient seizure warrants is a direct violation of Sky
2 Global’s rights and has caused (and will continue to cause) irreparable harm to Sky
3 Global and its ongoing business unless remedied. The seized domains must be
4 relinquished immediately.

5 Accordingly, Sky Global respectfully requests that this Court vacate the
6 seizure warrants and order the government to restore forthwith possession, custody
7 and control of the following seized internet domains¹ to Sky Global:

8 Group 1 Domains (seized in March 2021): www.skyglobal.com;
9 www.skyecconline.com; www.skyecc.com; www.skysecure.com;
10 www.skysecure.us; www.skychat.info; www.skywork.com; www.skywork.net;
11 www.skychat.net; www.skysecure.cc; www.skysecure.info; www.skysecure.mobi;
12 www.skysecure.co; www.skysecure.me; www.skysecure.org; www.skyglobal.org;
13 www.skyglobal.co; www.skyglobal.ca; www.skyecc.mobi; www.skyuem.com;
14 www.skychat.mobi; www.sky.global; www.skywork.mobi; www.skywork.online;
15 www.skychat.biz; sky.skysecure.im; ios.skysecure.im; ios.a.skysecure.im;
16 ios.b.skysecure.im; skya.skysecure.im; skyb.skysecure.im; sky3.skysecure.im;
17 ns.skysecure.im; smtp.skysecure.im; dev.skysecure.im; hermes.skysecure.im;
18 mx.skysecure.im; mx2.skysecure.im; im.skysecure.im; and nox.skysecure.im;

19 Group 2 Domains (seized in May 2021): skyinc.com; skybuzz.com;
20 xsecure.biz; xsecure.mobi; evosecure.net; cryptickey.com; crypticshield.com;
21 xsecure.cc; xsecure.ca; xsecure.us; securezap.com; fullysecuredcom.com;
22 ninjasecure.com; globalsecured.net; solidsecure.me; paramountsecure.com;
23 blacksecure.com; worldsecure.cc; securebusiness.co; infinitelock.com;

24
25 ¹The seized domains (collectively referred to hereinafter as the “Subject Domains”)
26 are owned and controlled by Sky Global. See declaration of specially appointed
27 corporate custodian of records Beverly Luu, together with the names of their
28 respective points of contact. Because the government has refused to produce
copies of any warrants used to effect the seizures, Sky Global seeks by this motion
to vacate all warrants that authorized seizure of any of the Subject Domains.

1 securecentral.cc; titan secure.cc; skymobility.com; digitalmask.cc; safe168.co;
2 gsecc.cc; berrysecure.co; ghostmail.biz; securecity.cc; encryptcity.cc;
3 solidmobile.co; absolutesecure.cc; ghostsecure.cc; solidmobile.net;
4 theproxynet.com; skyhedge.com; skychat.cc; skychat.site; skychat.shop;
5 skychat.buzz; sky-chat.io; sky-chat.ca; skychat.tips; skychat.email; skychats.co;
6 skychats.ca; skychat.global; skyinc.club; skychat.club; skychat.support;
7 skychat.pro; skychat.luxury; skychat.info; skychat.biz; sky.global; skychat.mobi;
8 skywork.mobi; skywork.online; skyglobal.guru; skyglobal.technology; sky.photos;
9 skyglobal.online; skyglobal.store; skyglobal.xyz; sky.expert; sky.guru;
10 skyglobal.shop; skyglobal.app; sky.one; skyglobal.ventures; skychat.co;
11 skychat.live; skychat.xyz; skyglobal.uk; skyglobal.vip; and skyecc.vip.

12 This motion is based on the attached memorandum of points and authorities,
13 the declarations of Beverly Luu and Steven R. Welk, exhibits A through Z, and
14 such further evidence and argument as the Court may permit.

15
16 Dated: November 16, 2021

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This motion under Federal Rule of Criminal Procedure 41(g) seeks the
4 immediate return of internet domains that were improperly and illegally seized
5 from Sky Global, Inc. (“Sky Global” or “Movant”).

6 Sky Global is a Canadian technology company based in Vancouver, British
7 Columbia. Founded in 2010 by entrepreneur Jean-François Eap, Sky Global
8 focused on the provision of telecommunications services to corporations,
9 governmental entities, and individual consumers throughout the world. Sky
10 Global’s products focus on privacy and security solutions that protect its customers
11 from identity theft, hacking, malicious attacks, and espionage. Its primary goal has
12 always been to ensure that its customers maintain the confidentiality of their most
13 sensitive information and communications. At its peak, Sky Global and its related
14 companies employed over 70 people in Vancouver, Canada.²

15 Sky Global has expanded from its focus on encrypted messaging services to
16 include diverse business lines ranging from restaurants to digital gift card
17 applications. Originally, however, one of Sky Global’s main products was Sky
18 ECC, a proprietary platform that offered encrypted messaging services to its
19 customers. The Sky ECC encryption platform was developed in 2013 in response
20 to global increases in cellphone hacking and high-profile data breaches, as well the
21 rapidly rising cost of data roaming packages. To address these problems, Sky
22

23 _____
24 ² As discussed below, third-party distributors and the agents and resellers of these
25 distributors – who primarily sold Sky Global’s encrypted messaging services to
26 end-users – were not Sky Global employees or otherwise subject to the control of
27 Sky Global beyond the contractual obligations that Sky Global imposed on all
28 third-party distributors, including policies and rules prohibiting the use of
encrypted messaging services for illegal purposes and prohibiting marketing or
selling encrypted messaging services to any customer who appeared likely to
engage in such activity.

1 Global offered Sky ECC customers a secure device pre-loaded with an application
2 that provided state-of-the art anti-hacking protections and a data package that
3 included unlimited roaming. While other companies provide some level of
4 encryption services to consumers, Sky Global has always marketed Sky ECC to
5 entities and individuals with heightened data privacy and confidentiality concerns,
6 such as doctors, lawyers, government contractors, celebrities, and even law
7 enforcement agencies.

8 In developing and marketing Sky ECC, Sky Global was mindful of the
9 possibility that its technology (like any encrypted messaging system) could be used
10 for improper or illegal purposes. To minimize this risk, Sky Global implemented
11 specific measures to limit the ability of Sky ECC customers to use the product's
12 privacy features in furtherance of illicit activity. It established strict and
13 unambiguous policies prohibiting the use of Sky ECC for illegal purposes, and
14 prohibited its third-party distributors from marketing or selling Sky ECC to any
15 customer who appeared likely to engage in such activity. If Sky Global suspected
16 that an existing customer or third-party distributor was engaged in illicit activity or
17 otherwise violating Sky Global's policies, Sky Global deactivated the customer's
18 account or terminated the business relationship. Sky Global also routinely
19 cooperated with law enforcement whenever asked to do so. As Sky Global
20 continued to grow and develop as a company, it updated and improved its policies
21 and procedures in an effort to address emerging challenges and better ensure that
22 its products were not falling into the wrong hands. At no time prior to March 2021
23 did any government agency express any concern to Sky Global that its products
24 were routinely being used for illicit purposes or that its compliance policies were
25 insufficient.

26 In March 2021, however, Sky Global's business operations were brought to
27 an abrupt halt through the actions of the United States government. On March 12,
28 ///

1 2021, the government indicted Mr. Eap³ and Thomas Herdman (a reseller of one of
2 the third-party distributors who sold Sky ECC products) for racketeering
3 conspiracy and conspiracy to distribute controlled substances, falsely alleging that
4 Sky ECC was created by Mr. Eap and used by Mr. Herdman to facilitate drug
5 trafficking and other illegal activity. *United States v. Eap, et al.*, No. 21-CR-822-
6 GPC (S.D. Cal. Mar. 12, 2021) (the “San Diego Indictment” or the “San Diego
7 Prosecution”). Although Sky Global was not and has not been charged with any
8 crime, the government also crippled Sky Global’s business operations by
9 improperly seizing Sky Global’s property.

10 Specifically, in March and May 2021, the government seized a total of 116
11 internet domains belonging to Sky Global, thus denying Sky Global all access to
12 and control over the domains. Anyone visiting one of Sky Global’s internet
13 domains, including www.SkyGlobal.com, sees one of two banners notifying the
14 visitor that the website has been seized by the government. It is impossible to
15 navigate away from these banners to find the original or any other website content.
16 Not surprisingly, the government’s seizures of the domains made it very difficult
17 for Sky Global to continue to operate and, in combination with other government
18 actions, have caused irreparable harm to its business and reputation. This Court
19 should order the seized domains returned to Sky Global immediately under Rule
20 41(g) for three reasons.

21 *First*, there is no legitimate statutory basis for the seizure of Sky Global’s
22 property. Although the government has indicated that it intends to criminally
23 forfeit the seized domains in connection with the San Diego Prosecution, all of the
24

25 ³ To date, the government has not made any meaningful efforts to pursue the
26 pending charges against Mr. Eap. The government does not appear to have
27 initiated extradition proceedings, and has declined to engage in discussions with
28 Mr. Eap’s counsel regarding an appropriate bond package so that Mr. Eap could
appear voluntarily to resolve the charges against him. *See* Declaration of Steven R.
Welk (“Welk Decl.”), ¶ 3.

1 seized domains are owned and controlled by Sky Global, which has (appropriately)
2 not been charged with any crime. Criminal forfeiture of property is explicitly
3 limited by statute and rule to property of a convicted defendant where the
4 government is able to establish a statutorily-defined nexus between the property
5 sought and the crime of conviction. The seizure of property for purposes of
6 criminal forfeiture – which is what appears to have occurred here based on the
7 government’s own public actions and representations – imposes further limitations,
8 including a requirement that the government seek the least intrusive method of
9 restraint that will serve the goal of preserving allegedly forfeitable property for
10 forfeiture in the event of conviction. The government’s seizure of Sky Global’s
11 domains was and is in flagrant disregard of all of these limitations.

12 *Second*, the seizures constitute a clear violation of Sky Global’s due process
13 rights under the Fifth Amendment. Eight months after the March 2021 seizures,
14 neither Sky Global nor its counsel have been provided notice of the seizures or a
15 copy of the applicable seizure warrants. Instead, Sky Global and its counsel have
16 been left to speculate about the statutory bases for the seizures by attempting to
17 interpret the limited (and potentially inaccurate) statutory references in the banners
18 posted on the seized domains’ homepages. There is no legitimate basis for the
19 government’s delay in notifying Sky Global of the legal basis for the seizures of its
20 property, particularly given that the charges in the *Eap* case are publicly known
21 and have been highly publicized by the government. By refusing to provide such
22 notice, the government has significantly hindered Sky Global’s ability to seek
23 judicial oversight or challenge the seizures and demonstrated a callous disregard
24 for Sky Global’s constitutional rights.

25 *Third*, the seizures of the domains constitute an impermissible prior restraint
26 on Sky Global’s speech in violation of the First Amendment. The prior restraint
27 and seizure of speech-related materials without a judicial determination that the
28 speech is harmful, unprotected, or otherwise illegal is strictly prohibited. Here, by

1 seizing Sky Global’s domains, the government has preemptively prevented Sky
2 Global from communicating with its customers and responding to the serious and
3 inaccurate allegations contained in the San Diego Indictment. Moreover, there is
4 no indication that any of the seized domains (many of which were dormant) were
5 being used to disseminate information that was harmful, illegal, or otherwise
6 unprotected by the First Amendment.

7 Providing encrypted messaging solutions and protecting consumers’ privacy
8 rights is not illegal. Indeed, numerous high-profile companies, including
9 WhatsApp, Signal and Apple provide consumers with encrypted messaging
10 services. And no matter what measures a company takes to prevent the improper
11 use of its technology, it is inevitable that someone will attempt to use that
12 technology for illegal purposes. However, the fact that technology *can* be used for
13 an improper purpose does not mean that the technology was designed or intended
14 for that use. What has happened here is the equivalent of the government seizing
15 Apple.com because drug dealers use iPhone encryption features to communicate
16 with each other. Such a seizure would never be allowed to happen to Apple or any
17 other high-profile tech company, and it should not be allowed to happen to Sky
18 Global. While Sky Global appreciates and applauds – and would have assisted –
19 the government’s efforts to identify and prosecute those individuals who used Sky
20 ECC to engage in illicit activity, those efforts do not justify the illegal and
21 improper seizure of Sky Global’s property or the irreparable and ongoing harm to
22 Sky Global’s business caused by the seizures.

23 The government has executed an unlawful seizure of Sky Global’s property,
24 caused irreparable harm to its business, and demonstrated a callous disregard for its
25 rights. Accordingly, this Court should hold an evidentiary hearing to resolve any

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1 significant factual issues raised herein, and order the seized domains immediately
2 returned to Sky Global pursuant to Rule 41(g).⁴

3 **II. STATEMENT OF FACTS**

4 **A. Sky Global's Development of the Sky ECC Platform**

5 Sky Global is a Canadian technology company based in Vancouver, British
6 Columbia. Sky Global was established in 2010 and is registered under the British
7 Columbia Business Corporation Act. Declaration of Beverly Luu ("Luu Decl."), ¶
8 2. Jean-François Eap, an entrepreneur with a background in computer science and
9 the telecommunications industry, is Sky Global's founder and Chief Executive
10 Officer. *Id.*

11 Sky Global's primary focus has always been on building security and
12 privacy solutions for corporations, government entities, and individual consumers.
13 In 2013, Sky Global created its flagship product, Sky ECC. *Id.* At the time, the
14 cost of data roaming packages was skyrocketing, and there had been a significant
15 global increase in cellphone hacking and high-profile data breaches.⁵ Sky ECC
16 was a proprietary platform designed to address both of these problems, providing
17 customers a phone pre-loaded with an encrypted messaging application that
18 provided heightened anti-hacking protections, as well as a data package with
19

20 ⁴ Although the government has seized other Sky Global property, this motion is
21 limited to the return of the seized domains. Sky Global reserves the right to seek
22 the return of other property, if appropriate, at a later time.

23 ⁵ See, e.g., Press Release, *Florida Man Convicted in Wiretapping Scheme*
24 *Targeting Celebrities Sentenced to 10 Years in Federal Prison for Stealing*
25 *Personal Data*, Federal Bureau of Investigation (Dec. 17, 2012),
26 <https://archives.fbi.gov/archives/losangeles/press-releases/2012/florida-man-convicted-in-wiretapping-scheme-targeting-celebrities-sentenced-to-10-years-in-federal-prison-for-stealing-personal-data>; Jim Finkle and Dhanya Skariachan,
27 *Target cyber breach hits 40 million payment cards at holiday peak*, Reuters (Dec.
28 18, 2013), <https://www.reuters.com/article/us-target-breach/target-cyber-breach-hits-40-million-payment-cards-at-holiday-peak-idUSBRE9BH1GX20131219>.

1 unlimited international roaming. Purchasers of Sky ECC devices were able to
2 securely message one another from anywhere in the world without being subjected
3 to variable roaming charges, using end-to-end encryption through a security system
4 managed by Blackberry unified endpoint management (“UEM”). This allowed
5 Sky Global’s customers to communicate freely with confidence that their most
6 sensitive personal or business information would not be intercepted or
7 misappropriated by bad actors. Although Sky ECC initially launched on
8 BlackBerry devices, it was eventually made available on Android and Apple iOS
9 devices as well. Luu Decl., ¶¶ 2, 3.

10 Because Sky ECC was a technology startup, it did not have its own sales or
11 marketing channels at first. As a result, Sky ECC devices were sold through a
12 third-party distribution network typical of early-stage wireless cellphone
13 companies. Sky Global entered into distribution agreements with third-party
14 distributors, who then separately employed their own resellers and agents. Sky
15 Global referred to these third-party distributors, resellers, and agents collectively as
16 “partners,” but none of them were employed by Sky Global. *Id.*, ¶ 4.

17 Whereas encryption products from much larger competitors, such as
18 WhatsApp, SnapChat and Apple targeted average consumers, Sky Global focused
19 its marketing efforts on individuals and industries with heightened privacy
20 concerns that had a need for much more robust privacy and security protections.
21 From the outset, Sky Global viewed Sky ECC’s ideal customer base as consisting
22 of government entities, military contractors, celebrities, and members of the legal,
23 healthcare, and financial industries. Indeed, Sky Global regularly provided Sky
24 ECC partners with marketing materials specifically targeting these key industries.
25 *Id.*, Ex. M (listing categories of potential Sky ECC customers). In its own
26 marketing of Sky ECC on its website and through social media, Sky Global
27 consistently promoted Sky ECC as an attractive product to these same individuals
28 and industries. *Id.*, Exs. N (*Communications Security is Essential for Lawyers and*

1 *Law Firms*, Blog Post, (Dec. 16, 2019), and O (Tweet, Sky ECC, Mar. 20, 2020)
2 (describing the need for increased digital and communications security at
3 universities).

4 By March 2021, Sky ECC had approximately 120,000 active users. Luu
5 Decl., ¶ 7.

6 **B. Sky Global’s Substantial Efforts to Prevent the Use of its Products**
7 **for Illicit or Illegal Activity**

8 As noted above, Sky Global was mindful of the possibility that some might
9 seek to use its encrypted messaging service for improper purposes. In an attempt
10 to minimize this possibility as much as possible, Sky Global implemented specific
11 measures to limit the ability of Sky ECC customers to exploit the product for illicit
12 activities.

13 *First*, Sky Global established strict and unambiguous policies to prevent the
14 use of Sky ECC for any criminal activity. *See, e.g.*, Luu Decl., Ex. A (Sky ECC
15 Terms of Service). Every Sky ECC customer was required to agree to the Terms
16 of Service before using the Sky ECC platform. Luu Decl., ¶ 12. The Terms of
17 Service expressly required customers to agree not to use Sky ECC to “undertake or
18 facilitate any illicit, illegal or criminal activity.” Luu Decl., Ex. A at Section 5(h).
19 The Terms of Service also prohibited the use of Sky ECC to “create, upload, send,
20 receive, or store content that is...illegal or promotes an illicit, illegal or criminal
21 activity.” *Id.* at Section 5(a). Lastly, the Terms of Service included a catch-all
22 provision that prohibited the use of Sky ECC to “encourage or promote any
23 activity that violate[d] [its] Terms.” *Id.* at Section 5(j).

24 Sky Global’s third-party distributors and the respective agents and resellers
25 of these distributors (*i.e.*, Sky ECC “partners”) were likewise prohibited from
26 selling the product to any customers likely to violate the Terms of Service. *See,*
27 *e.g.*, Luu Decl., Ex. B (Sky ECC Master Distribution Agreement (“MDA”)) at
28 Section 5 (entitled “No Sale to Customer For Criminal Use”). Even though the

1 Sky ECC distributors and the agents and resellers of such distributors were not Sky
2 Global employees and did not owe any fiduciary or other heightened duties to Sky
3 Global, each Sky ECC distributor was bound by the MDA, which barred the
4 knowing sale or other distribution of Sky ECC for any “illicit, illegal or criminal
5 use.” *Id.* at Section 5.2. The MDA also expressly prohibited distributors from
6 marketing or promoting Sky ECC for criminal purposes, stating, in relevant part:

7 The Distributor acknowledges and agrees that the Product and
8 Services are not designed for illicit, illegal or criminal use. To the
9 extent that the Distributor markets or promotes the Product and/or
10 Services, such marketing and promotion shall be limited to the
11 legitimate use of the Product and/or Services for (i) the prevention of
12 identity theft, hacking, malicious attack or espionage; (ii) the
13 protection of personal privacy rights; and (iii) the secure operation of
14 legitimate personal or business affairs. The Distributor shall not
15 market or promote the Products and Services in connection with any
16 illicit, illegal or criminal activity.

17 *Id.* at Section 5.1. *See also* Luu Decl., Ex. C, Part 1 (Marketing Guidelines
18 prohibiting the marketing, promotion or distribution of materials suggesting or
19 implying that Sky ECC was appropriate for use in “(i) the facilitation of any illicit,
20 illegal or criminal activities or (ii) the prevention or obstruction of legal
21 investigations.”).

22 The MDA further required that any agent or reseller employed by a
23 distributor agree to comply with the MDA:

24 Upon execution of this Agreement, the Supplier will be deemed to
25 have designated the Distributor to be an “Authorized Distributor”. An
26 Authorized Distributor may subcontract certain provisions and
27 obligations under this agreement to one or more resellers or agents
28 (each, an “Authorized Subcontractor”), provided that (i) such
29 Authorized Subcontractor agrees to and submits to the Supplier the
30 Assumption of MDA (in the form attached as Schedule “D”), pursuant
31 to which the Authorized Subcontractor shall assume the Distributor’s
32 obligations and liabilities under this Agreement; (ii) the Supplier
33 consents in writing to the subcontractor acting as an Authorized

1 Subcontractor (which consent may be withheld for any reason or for
2 no reason); and (iii) such Authorized Subcontractor registers as an
3 Authorized Subcontractor through the Portal or through SKY ECC’s
4 support staff.

5 Luu Decl., Ex. B, Section 6.2. *See also id.*, Ex. D, ¶ C(1) (Assumption of MDA)
6 (requiring Subcontractors to agree to “assume and perform all of the covenants,
7 obligations, agreements, and liabilities of the Distributor under the MDA . . . to the
8 same extent as if the Subcontractor had been named a party to the MDA . . . in
9 place of the Distributor.”); and Ex. E, ¶ 2.2 (Sample Subcontracting Agreement)
10 (requiring the same).

11 Sky Global even directed Sky ECC third-party distributors to refuse to sell
12 the product to any potential customer whom the seller merely *suspected* might use
13 Sky ECC for criminal purposes:

14 [I]f you are in a sales conversation with a potential customer, and you
15 learn that they intend to use Sky’s products in a manner that breaches
16 the Terms of Use, you must inform the potential customer that the sale
17 cannot be authorized and refuse the sale. You should err on the side
18 of caution: if your customer is making “jokes” about using Sky’s
19 products for crime, or otherwise discussing their intended use in a
20 manner that makes you suspect such use would breach Sky’s Terms of
21 Use, you should refuse the sale.

22 Luu Decl., Ex. F at 1 (Instructions for Breach).

23 *Second*, Sky Global’s policies allowed it to take affirmative remedial action
24 against any customer, distributor, reseller, or agent who violated its policies. For
25 example, the Terms of Service included a provision stating that if Sky Global
26 learned of a violation of the Terms of Service the offending customer’s account
27 would be deactivated. *See* Luu Decl., Ex. A at Section 5; Ex. G (deactivation of
28 Sky ECC customer for breaching Section 5(h) of the Terms of Service). The Sky
ECC portal, through which Sky ECC third-party distributors and their agents
managed customer accounts, was governed by its own Terms of Use (“Portal

1 Terms”) that required Sky ECC third-party distributors to report customer
2 violations of the TOS so that Sky Global could deactivate the customer’s account.
3 *Id.*, Ex. H (Portal Terms) at 2:

4 You may not knowingly sell or otherwise provide the Products and
5 Services to any Customer for illicit, illegal or criminal use. You may
6 not create a Customer Account for any Customer whom you know
7 will use the Products and Services for illicit, illegal or criminal
8 purposes. If you become aware that a Customer is using the Products
9 and Services for illicit, illegal or criminal activity, you must (i)
10 immediately cease to provide Products and Services to such
11 Customer, and (ii) within one business day, notify SKY ECC that you
12 have ceased to provide Products and Services to such Customer, as
13 well as provide us with the Customer Account ID of such Customer
14 (do not provide us with any other customer information).

15 If you breach this provision, we will immediately revoke your access
16 to the Portal, and terminate your license to sell our Products and
17 Services under the Master Distribution Agreement. SKY ECC will no
18 longer consider you to be an Authorized Dealer, and any continued
19 sale or distribution of our Products and Services to anyone, anywhere,
20 is subject to further legal action against you by SKY ECC or its
21 affiliates.

22 *See also id.*, Ex. F at 1 (“Upon receipt of written notice, we will deactivate the
23 customer’s account, and send the customer notice of deactivation.”).

24 If Sky Global learned that a third-party distributors or one of its agents had
25 violated the MDA, the offending individual would also be terminated. *Id.*, Ex. I
26 (example of termination of Sky ECC partner for “[w]illingness to sell SKY ECC
27 service to an individual wanting to use the service for illicit activity”). Sky Global
28 refused to work with any potential partners whom it viewed as interested in
promoting Sky ECC for criminal purposes. *Id.*, Exs. J (termination of onboarding
discussion after potential Sky ECC partner indicated an intent to market Sky ECC
for criminal activity); K (reporting same); and L (webpage describing “Partner
Program”).

1 *Third*, as an added compliance measure, Sky Global regularly reviewed the
2 web presence of Sky ECC to ensure that it was being marketed in accordance with
3 Sky Global policies. *Id.*, Ex. P (describing efforts to address inappropriate online
4 marketing activity, including marketing for criminal purposes). Sky Global’s
5 efforts included creating surreptitious social media accounts to detect improper
6 promotions of Sky ECC. *Id.* When those activities were detected, Sky Global
7 submitted requests to the specific social media platform to terminate the offending
8 accounts. *Id.*, Ex. Q (reporting remedial action taken against an unauthorized Sky
9 ECC partner who promoted Sky ECC for criminal purposes). Sky Global also
10 worked to remove website references suggesting any improper use of Sky ECC.
11 *Id.*, Ex. P. *See also id.*, Ex. R (request to remove reference to ability to remotely
12 wipe devices “detained” by third parties and replace with “we can remotely delete
13 all data if the Unit is lost.”). Beginning in April 2020, Sky Global took an even
14 more active role by requiring that all Sky ECC third-party distributors obtain its
15 approval for any new websites, advertisements, or social media posts. *Id.*, Ex. S
16 (April 3, 2020 email sent to Sky ECC third-party distributors).

17 *Fourth*, Sky Global consistently cooperated with law enforcement and
18 refused to knowingly engage in any efforts to obstruct legitimate law enforcement
19 activity. Customers seeking to have their Sky ECC devices remotely wiped were
20 required to submit a request to a Sky ECC partner or Sky Global support staff.
21 Wipe requests for devices that were known to be the subject of a legal
22 investigation were required to be denied. The Portal TOU included a specific
23 requirement that Sky ECC third-party distributors and their agents refuse to wipe
24 devices known to be part of legal investigations:

25 Generally speaking, if a Customer asks you to remote-wipe their SKY
26 ECC device, you may use the Portal to access their Customer Account
27 and remote-wipe their device. However, in the event that you have
28 actual knowledge that the Customer’s SKY ECC device is being
investigated by an authority, you may not remote-wipe the device.
Instead, refer the Customer to our Law Enforcement Guidelines[.]

1 Luu Decl., Ex. H at 2. Sky Global support staff consistently denied requests to
2 wipe devices known or believed to be in the hands of law enforcement, and
3 responded to those wipe requests with the following script:

4 As per our Terms of Service <http://skyecc.com/terms-of->
5 [service.html/\[,\]](http://skyecc.com/terms-of-service.html/) if a device is being investigated as part of a valid legal
6 process with proper jurisdiction in connection with any illicit, illegal
7 or criminal activity, we will deactivate the account associated with
8 that device. We will also decline a customer's request to remote wipe
9 a device that we know is subject to a valid legal investigation;
10 however, it should be noted that our software automatically erases all
11 data at least every seven days (fewer, if users change their settings),
12 and we are unable to prevent such data from being erased, or provide
13 any access to any decipherable user content.

14 *Id.*, Ex. T; *see also id.*, Ex. U (examples of denials of wipe requests on the same
15 basis).

16 Whenever Sky Global received law enforcement requests for customer
17 information, it provided whatever customer information it retained. *Id.*, Ex. V
18 (Law Enforcement Guidelines). Indeed, Sky Global even provided Canadian law
19 enforcement officials with Sky ECC devices in an effort to attract their business.

20 *Id.*, Ex. W.

21 At no time prior to the March 2021 indictment of Mr. Eap and seizure of the
22 Group 1 domains did the United States or any other government notify Sky Global
23 of any concerns that Sky ECC was being used for illicit purposes by anyone. Nor
24 did any government agency raise concerns regarding Sky Global's compliance
25 policies. Had *any* government agency contacted Sky Global and expressed such
26 concerns, Sky Global would have immediately taken all necessary steps to address
27 and resolve the concerns and further assist law enforcement in their efforts.

28 Instead of raising these concerns with Sky Global or its management, however, the
government took the extraordinary step, without any notice whatsoever, of making
it impossible for the company to continue operations.

1 **C. The Government’s Indictment**

2 Despite Sky Global’s extensive efforts to prevent the illicit use of the Sky
3 ECC platform, on March 12, 2021, the government filed an indictment charging
4 Mr. Eap and Thomas Herdman (a third-party reseller of Sky ECC) with RICO
5 conspiracy in violation of 18 U.S.C. § 1962(d), and conspiracy to distribute
6 controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and 846. At its core,
7 the indictment alleges (erroneously) that Mr. Eap developed Sky ECC to facilitate
8 drug trafficking. The indictment was highly publicized by the government, which
9 issued a press release and held a separate press conference. *See Welk Decl., Ex. Z*
10 *(Press Release, Sky Global Executive and Associate Indicted for Providing*
11 *Encrypted Communication Devices to Help International Drug Traffickers Avoid*
12 *Law Enforcement, U.S. Department of Justice (Mar. 12, 2021)).* While Sky
13 Global, the Movant here, is referenced in the San Diego Indictment, it is not a
14 named defendant, nor is it alleged to have been a participant in either the “criminal
15 enterprise”⁶ or drug distribution conspiracy alleged in the indictment.

16 The San Diego Indictment also includes two forfeiture allegations. The first,
17 pursuant to 18 U.S.C. § 1963, gives notice that in the event of a conviction of any
18 defendant on the RICO Conspiracy count, the government will seek the forfeiture
19 of “at least \$100,000,000,” the convicted defendant’s interests in seven Blackberry
20 Unified Endpoint Management Server Routing Protocol Identifiers, four Google
21 Android for Work Enterprise Accounts; and 40 internet domains. San Diego
22 Indictment, Dkt. No. 1 at 7 (the “RICO forfeiture allegation”). The second,
23 pursuant to 21 U.S.C. § 853, gives notice that in the event of conviction of any
24

25 _____
26 ⁶ The indictment alleges that the “Sky Global Enterprise” consisted of (1) natural
27 persons operating as “administrators” (defined as “front office staff”);
28 (2) “distributors” (defined as natural persons who “coordinated agents and
resellers”); and (3) “agents” (defined as natural persons who “physically source[d]
and engage[d] with new customers”). San Diego Indictment, Dkt. No. 1, ¶¶ 8-10.

1 defendant on the drug conspiracy count, the government will seek the forfeiture of
2 all property representing proceeds of, or used to facilitate, the crime of conviction.
3 *Id.* at 9 (the “drug forfeiture allegation”). Notably, the drug forfeiture allegation
4 does not specifically identify any sum of money, the seized domains, or any other
5 specific property. *Id.*

6 To date, the government’s efforts to pursue the San Diego Prosecution
7 appear to be minimal. The government has not, to counsel’s knowledge, initiated
8 extradition proceedings against Mr. Eap, a Canadian citizen and resident. Welk
9 Decl., ¶ 3. And the government has declined to engage in substantive discussions
10 with Mr. Eap’s counsel regarding a bail package that would allow Mr. Eap to
11 appear voluntarily and seek to clear his name. *Id.*

12 **D. The Government Improperly Seizes Sky Global’s Property**

13 In March and May 2021, the government seized property belonging to Sky
14 Global – which, again, is not a defendant in the San Diego Prosecution – including
15 all of Sky Global’s internet domains.

16 **1. The March 2021 Seizure of the Group 1 Domains**

17 On or about March 15, 2021, the government seized 40 internet domains
18 (the “Group 1 Domains”), denying Sky Global all access to and control over them.
19 Luu Decl., ¶ 6. The content on the respective home page of each of the Group 1
20 Domains was replaced by a banner bearing the headline: “THIS WEBSITE HAS
21 BEEN SEIZED.” *Id.*, ¶ 8. Thus, a visit to Sky Global’s main internet domain now
22 reveals the following banner:

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13 The banner indicates that the domains were seized by the FBI pursuant to a seizure
14 warrant issued by this court pursuant to 18 U.S.C. §§ 1962(d) and 1963(a), and 21
15 U.S.C. §§ 841 and 846.⁷

16 Sky Global received no prior notice of the Group 1 Domain seizures and, to
17 date, has not been provided with either a copy of the purported warrant authorizing
18 the seizure or the application and supporting affidavit offered in support of the
19 request for the warrant. Indeed, Sky Global’s counsel has been advised by Go
20 Daddy (the registrar of the Group 1 Domains) that the government instructed it to
21 refuse to provide a copy of the warrant or any information concerning the seizure
22 to Sky Global or its counsel. Welk Decl., ¶¶ 4 and 5.

23 **2. The May 2021 Seizure of the Group 2 Domains**

24 Essentially the same course of events was repeated in May 2021, when the
25 government seized an additional 76 internet domains belonging to Sky Global (the
26 “Group 2 Domains”). As with the March 2021 seizures, Sky Global was

27
28 ⁷ A screenshot of the banner posted on the home page of www.SkyGlobal.com is attached to the Luu Decl. as exhibit X.

1 immediately denied all access to and control over its property. However, the
2 government posted a different banner on the homepages of the Group 2 domains:
3 Luu Decl., ¶ 9 and Ex. Y. According to the Group 2 Domains banner, each
4 respective website was seized by ICE – Homeland Security Investigations (“HSI”)
5 pursuant to a seizure warrant issued by “a United States District Court under the
6 authority of 18 U.S.C. §§ 981 and 2323.” The banner goes on warn of penalties
7 that may be imposed against those who violate 17 U.S.C. § 506 and 18 U.S.C. §
8 2319, prohibiting “[w]illful copyright infringement.”



22 As with the seizure of the Group 1 Domains, Sky Global received no prior
23 notice of the Group 2 Domain seizures and has not been provided with a copy of
24 the purported seizure warrant or the application and supporting affidavit offered in
25 support of the warrant. On September 28, 2021, however, the government filed a
26 Bill of Particulars in the San Diego Prosecution in which it gave notice of its intent
27 to seek criminal forfeiture of the Group 2 Domains in the event of a conviction on
28 the RICO conspiracy count of the indictment. San Diego Prosecution, Dkt. No. 5.

1 **E. The Government’s Actions Cripple Sky Global’s Operations**

2 Predictably, the government’s seizures of Sky Global’s domains crippled
3 Sky Global’s business operations. Among other things, Sky Global has had to lay
4 off 27 staff members and 14 contractors. Luu Decl., ¶ 6. The seizures also made it
5 difficult for Sky Global to operate its other legitimate businesses because of the
6 reputational issues that arise when someone visits the Sky Global domains and the
7 difficulty of communicating with business partners without the use of its main
8 email domain.

9 The fact is that the government’s seizures had the easily foreseeable effect of
10 shutting down Sky ECC operations, which appears to have been the government’s
11 primary objective. Prior to the March 2021 seizure of the Group 1 Domains, Sky
12 ECC had over 120,000 active customer accounts. Luu Decl., ¶ 7. In the aftermath
13 of the seizure of the Group 1 Domains, approximately 6,000 Sky ECC users
14 migrated to “ANOM,” the government’s own surreptitious encrypted messaging
15 company that was created and maintained by the FBI to capture drug trafficking
16 communications. See Affidavit in Support of Application for Search Warrant, *In*
17 *the Matter of the Search of Google LLC, Host of expliamdavis@gmail.com*, No.
18 3:21-mj-01948, Dkt. No. 1, ¶ 21 (S.D. Cal. May 18, 2021). The government later
19 touted the efficacy of this strategy, claiming in a press release that the dismantling
20 of Sky Global led “ANOM” to grow “exponentially.” See Press Release, *FBI’s*
21 *Encrypted Phone Platform Infiltrated Hundreds of Criminal Syndicates; Result is*
22 *Massive Worldwide Takedown*, U.S. Department of Justice (June 8, 2021),
23 [https://www.justice.gov/usao-sdca/pr/fbi-s-encrypted-phone-platform-infiltrated-](https://www.justice.gov/usao-sdca/pr/fbi-s-encrypted-phone-platform-infiltrated-hundreds-criminal-syndicates-result-massive)
24 [hundreds-criminal-syndicates-result-massive](https://www.justice.gov/usao-sdca/pr/fbi-s-encrypted-phone-platform-infiltrated-hundreds-criminal-syndicates-result-massive).⁸ Thus, it appears that the

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28 ⁸ The FBI’s use of the term “exponentially” is, at best, relative, given the relatively small number of Sky ECC users who were purported to have migrated to ANOM. If anything, the number of migrations cited by the FBI supports the conclusion that

1 government’s seizure of the Subject Domains, which effectively eliminated Sky
2 ECC, was done not to preserve any of the seized property for forfeiture, as required
3 by the statutes the government relied upon in making the seizures, but to bolster a
4 separate law enforcement operation at the expense of a thriving and legal private
5 business. The government’s own estimate that only 6,000 Sky ECC users migrated
6 to ANOM after the seizure suggests that, at most, a mere five percent (5%) of Sky
7 ECC’s 120,000 users were potentially involved in the criminal activity alleged to
8 have occurred in its investigation and related prosecution.

9 **F. Sky Global’s Discussions with the Government**

10 In July 2021, counsel for Sky Global and Mr. Eap affirmatively contacted
11 government counsel to discuss the pending charges and explore the possibility of
12 cooperating with the government in its investigation. In connection with these
13 discussions, Sky Global voluntarily produced internal documents and other
14 information to the government.

15 Sky Global’s counsel also attempted to resolve, without court intervention,
16 the concerns expressed in this motion regarding the seizure of its domains. The
17 government, however, has declined to engage in substantive discussions regarding
18 the forfeiture issues raised here. The government has also declined to provide Sky
19 Global’s counsel with copies of the seizure warrants or any other information
20 regarding the seizures. Accordingly, Sky Global has been left with no option other
21 than the filing of the instant motion for the return of its property.

22 **III. LEGAL STANDARD**

23 Under Rule 41(g), a “person aggrieved by an unlawful search and seizure of
24 property or by the deprivation of property may move for the property’s return.”
25 Fed. R. Crim. P. 41(g). Where, as here, the motion is made by a party against
26 whom no criminal charges have been filed, the motion is treated as a civil equitable

27 _____
28 the overwhelming majority of SKY ECC users were not using the platform for
illicit purposes.

1 proceeding. *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162,
2 1172 (9th Cir. 2010) (*en banc*); *Ramsden v. United States*, 2 F.3d 322, 324 (9th
3 Cir. 1993). Courts are required to “receive evidence on any factual issue necessary
4 to decide the motion.” Fed. R. Crim. P. 41(g); *see also United States v. Burum*,
5 639 F. App’x 503 (9th Cir. 2016) (holding failure to hold an evidentiary hearing
6 was an abuse of discretion).

7 Rule 41(g) is broader than the exclusionary rule, and allows for the return of
8 property that was lawfully seized so long as the movant is aggrieved by the seizure.
9 *Comprehensive Drug Testing*, 621 F.3d at 1173-74, citing Fed. R. Crim P. 41(g).
10 In deciding whether to exercise jurisdiction and grant a Rule 41(g) motion, courts
11 must balance four factors: (1) whether the movants are aggrieved by the
12 deprivation of property; (2) whether the government displayed a callous disregard
13 for the rights of the movants; (3) whether the movants are likely to suffer
14 irreparable injury if the property is not returned; and (4) whether there is an
15 adequate remedy at law for the grievance. *Id.*

16 The motion should be granted “either when the movant is aggrieved by an
17 unlawful seizure or, if the seizure was lawful, when the movant is aggrieved by the
18 government’s continued possession of the seized property.” *In re Grand Jury*
19 *Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853, 856 (9th Cir.
20 1997). “[R]easonableness under all of the circumstances must be the test when a
21 person seeks to obtain the return of property.” Fed. R. Crim. P. 41(g) advisory
22 committee notes, 1989. When the party from whom the property was seized is not
23 the subject of an ongoing investigation or prosecution, “the person from whom the
24 property [was] seized is presumed to have a right to its return, and the government
25 has the burden of demonstrating that it has a legitimate reason to retain the
26 property.” *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987).
27
28

1 **IV. ARGUMENT**

2 **A. Sky Global Has Been Aggrieved by the Unlawful Seizure and**
3 **Retention of its Internet Domains**

4 The first factor this Court must consider in deciding Sky Global’s motion for
5 return of property is whether Sky Global has been aggrieved by the deprivation of
6 property. *Comprehensive Drug Testing*, 621 F.3d at 1173-74. Because the seizure
7 of Sky Global’s domains directly violates the applicable forfeiture statutes, this
8 factor has been satisfied.

9 **1. The Rules Applicable to the Government’s Ability to Seize**
10 **and Forfeit Property Are Strictly Limited**

11 There is no general forfeiture authority in the United States Code. Forfeiture
12 – whether civil (*in rem*) or criminal (*in personam*) – is governed entirely by strict,
13 mandatory statutes and rules, as is the government’s ability to seize property for
14 purposes of forfeiture.⁹ Criminal forfeiture, which the government is seeking here
15 with respect to all of the seized domains,¹⁰ is a post-conviction remedy, an element
16 of a convicted defendant’s sentence, the primary purpose of which is to punish the
17 defendant. *See Libretti v. United States*, 516 U.S. 29, 39 (1995); and *United States*
18

19 ⁹ While the government has denied requests by Sky Global’s counsel to produce
20 copies of the applicable seizure warrants, each of the banners lists one statute that
21 provides restraint or seizure authority. The banner placed on the homepages of the
22 Group 1 Domains lists 18 U.S.C. § 1963 as the applicable seizure authority, and
23 the banner for the Group 2 Domains lists 18 U.S.C. § 981. Section 1963 is a
24 criminal forfeiture statute; § 981 is a civil forfeiture statute that, under certain
25 circumstances, may be used to seek criminal forfeiture of property.

26 ¹⁰ The Group 2 Domains were purportedly seized pursuant to § 981 (civil forfeiture
27 authority), but the government has not initiated any formal civil forfeiture
28 proceedings of any kind against them. The time for initiating and providing notice
of administrative forfeiture proceedings against any of the Subject Domains (no
later than 60 days after the date of seizure – *see* 18 U.S.C. § 981(a)(1)(A)(i)) has
expired, eliminating administrative proceedings as an option, assuming that there
are no additional secret orders involving the Subject Domains.

1 *v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007). Criminal forfeiture is therefore
2 necessarily *in personam*, meaning that it may be imposed only against a defendant
3 who has been convicted of a crime for which Congress has provided specific
4 statutory forfeiture authority. *See United States v. Padilla-Galarza*, 886 F.3d 1
5 (1st Cir. 2018). Moreover, the remedy is available only against property of a
6 convicted defendant and, to the extent the government seeks specific property of a
7 defendant – as the government purports to be seeking in the San Diego Prosecution
8 with respect to the Subject Domains – the government must demonstrate the
9 requisite nexus between the property and the crime for which forfeiture is
10 statutorily allowed, as described in the statute relied upon. *United States v.*
11 *Capoccia*, 503 F.3d 103, 110, 114 (2d Cir. 2007); *United States v. Bornfield*, 145
12 F.3d 1123, 1138 (10th Cir. 1998).

13 Seizure or restraint of property for purposes of forfeiture is also governed by
14 specific statutes and rules. To obtain a warrant authorizing the pre-conviction
15 seizure or restraint of specific property for the purpose of civil or criminal
16 forfeiture, the government must establish probable cause to believe that a
17 qualifying crime was committed and that the applicable statutorily-required nexus
18 exists. *See* 18 U.S.C. §§ 981(b)(2), 982(b)(1) and 1963(d)(1); and 21 U.S.C.
19 §§ 853(f) and 881(b). However, where a seizure warrant is obtained solely for
20 purposes of *criminal* forfeiture—which, based on the limited information available
21 to Sky Global, appears to have been the case here—the government is subject to
22 significant additional restrictions, depending on the statute relied upon. If the
23 seizure does not comply with these statutory requirements, it is unlawful.

24 Here, the seizures of Sky Global’s domains was improper and unlawful for
25 three independent reasons. First, the RICO forfeiture statute (18 U.S.C. § 1963),
26 upon which the government appears to have relied for at least the Group 1
27 Domains, does not authorize the issuance of seizure warrants. Second, even if a
28 seizure warrant were authorized under the RICO forfeiture statute (and it is not),

1 the seizures were unlawful because Sky Global’s domains do not constitute
2 property subject to forfeiture. Third, the seizures constituted an unreasonable,
3 unnecessary and unconstitutional restraint of Sky Global’s property.

4 **2. The Government Was Not Authorized to Seize the Group 1**
5 **Domains Under 18 U.S.C. § 1963(a)**

6 The only statutory authority the government has cited in connection with the
7 seizure of Sky Global’s Group 1 domains – 18 U.S.C. § 1963 – *does not authorize*
8 the Court to issue seizure warrants. The banner the government posted on the
9 homepages of the Group 1 Domains lists four federal statutes as having authorized
10 the seizure warrant purportedly issued by this Court: 18 U.S.C. §§ 1962(d) and
11 1963(a); and 21 U.S.C. §§ 841 and 846. Luu Decl., exhibit X. Of those four, only
12 one § 1963(a) – provides forfeiture authority of any kind, and that authority applies
13 only to the RICO count of the indictment and authorizes only criminal forfeiture.
14 The other three statutes listed in the Group 1 banner set out substantive violations
15 for which forfeiture authority is provided in some other statute.

16 The plain text of § 1963 does not contain any language authorizing the
17 issuance of seizure warrants. The absence of this language is particularly
18 noteworthy because the primary criminal drug forfeiture statute (21 U.S.C. § 853)
19 – the procedural aspects of which are incorporated into most other federal statutes
20 providing criminal forfeiture authority, but not into § 1963 – *does* include specific
21 seizure warrant authority. Indeed, § 853 contains a separate subsection, § 853(f),
22 which explicitly provides that the government “may request the issuance of a
23 warrant authorizing the seizure of property subject to forfeiture.” 21 U.S.C. §
24 853(f). In contrast, 18 U.S.C. § 1963 not only does not include the term “seizure
25 warrant” anywhere in its text, and does not incorporate any of the procedural
26 provisions of § 853. Instead, in enacting § 1963, Congress opted to affirmatively
27 *include* many of § 853’s procedural provisions, in some instances *verbatim*. *See*,
28

1 e.g., § 1963(f), addressing the disposition of forfeited property, which includes a
2 *verbatim* recitation of the text addressing that same topic at § 853(h). The decision
3 neither to incorporate nor include § 853’s seizure warrant authority in § 1963,
4 while including other procedural provisions of that section, cannot be dismissed as
5 inadvertent or unintentional. Under the plain text of § 1963 and basic principles of
6 statutory interpretation, the issuing court lacked the authority to issue a warrant for
7 the seizure of Sky Global domains under § 1963.

8 The government itself has reached the same legal conclusion concerning the
9 absence of seizure warrant authority in § 1963. While the restraint provision of
10 § 1963(d) includes general language authorizing “any other action to preserve the
11 availability of property,” the government’s own textbook on RICO prosecutions
12 expressly states that § 1963 restraint authority does not include seizure warrants.
13 *See* U.S. Department of Justice, *Criminal RICO: 18 U.S.C. §§ 1961-1968, A*
14 *Manual for Federal Prosecutors*, 243-44 (May 2016),
15 <https://www.justice.gov/archives/usam/file/870856/download> (the “*RICO*
16 *Manual*”). The *RICO Manual* notes that the procedural provisions of 21 U.S.C. §
17 853(f), which includes specific seizure warrant authority, were not incorporated
18 into § 1963 as it was in virtually every other criminal forfeiture statute in the U.S.
19 Code. *Id.* The fact that the procedural provisions of § 1963 and § 853 are
20 otherwise virtually (and, as demonstrated above, in many instances literally)
21 identical led the government to conclude that “*seizure warrants available under §*
22 *853(f) cannot be used in RICO cases*, because 18 U.S.C. § 1963 has no similar
23 provision for seizure warrants.” *Id.* (emphasis in original).

25 Because § 1963 does not authorize courts to issue seizure warrants, the
26 seizure of Sky Global’s property pursuant to § 1963 was plainly unlawful. This
27 alone requires the Court to order the return of the seized domains under Rule 41(g).
28 But even if the Court were to conclude that § 1963(d) authorizes seizure warrants,

1 the government’s seizures would still be improper because they fail to satisfy the
2 other statutory seizure and forfeiture requirements.

3 **3. The Government’s Seizure Was Unlawful Because Sky**
4 **Global—the Owner of the Domains—Has Not Been**
5 **Charged with a Crime**

6 Assuming *arguendo* that seizure warrants were available under § 1963
7 (which they are not), the government must still establish that the seized property
8 would be subject to forfeiture under § 1963(a). *See* 18 U.S.C. § 1963(d)(1)
9 (allowing actions to “preserve the availability of property described in subsection
10 (a) for forfeiture”). The government cannot satisfy this basic statutory requirement
11 because Sky Global has not been charged with a crime.

12 Section 1963(a) requires that if a “person” is convicted of a violation of
13 § 1962, he or she shall be subject to forfeit certain categories of property related to
14 that conviction.¹¹ Section 1962 makes it illegal for any person to benefit from,
15 acquire an interest in, or participate in an “enterprise” engaged in a pattern of
16 racketeering activity.¹² However, § 1962 does not impose criminal liability on
17 either the RICO enterprise itself or “persons” alleged to be members of the
18 enterprise unless they are charged as defendants. And while corporations *can* be
19 charged with certain violations of 1962, the government opted not to charge either
20 Sky Global or the alleged “Sky Global Enterprise” described in the indictment, and
21 therefore cannot forfeit any property of either. *Schreiber Distrib .Co. v. Serv-Well*
22 *Furniture Co., Inc*, 806 F.2d 1393, 1397 (9th Cir. 1986), citing *Haroco, Inc. v. Am.*
23

24
25
26 ¹¹ A “person” is defined as including “any individual or entity capable of holding a
legal or beneficial interest in property.” 18 U.S.C. § 1961(3).

27 ¹² An “enterprise” includes “any individual, partnership, corporation, association, or
28 other legal entity, and any union or group of individuals associated in fact although
not a legal entity.” 18 U.S.C. § 1961(4).

1 *Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984) (While corporate RICO
2 liability can result where a corporate defendant is in fact a direct or indirect
3 beneficiary of the pattern of racketeering activity alleged, it cannot result where the
4 corporation “is merely the victim, prize or passive instrument of racketeering.”)).
5 A corporation obviously cannot be held criminally liable where, as here, it is not
6 even charged with a crime.

7 In the San Diego Indictment, the government seeks forfeiture of the seized
8 domains pursuant to 18 U.S.C. § 1963(a). *See* Sani Diego Indictment Dkt. No. 1 at
9 8; *id.*, Dkt. No. 5 (Government’s Bill of Particulars) at 2-4. That statute provides,
10 in pertinent part, that a person convicted of a violation of 18 U.S.C. § 1962, in
11 addition to being imprisoned and fined, shall forfeit to the United States (1) the
12 convicted RICO defendant’s property acquired as a result of racketeering activity;
13 (2) the convicted RICO defendant’s property interest in the RICO enterprise; and
14 (3) the convicted RICO defendant’s property interests that afforded a source of
15 influence over the RICO enterprise. 18 U.S.C. § 1963(a).
16

17 While the government may argue that the forfeiture provisions of § 1963 are
18 broad in scope, § 1963 is not without limits and it certainly does not extend to
19 uncharged third parties. *See United States v. Busher*, 817 F.2d 1409, 1412 (9th
20 Cir. 1987) (holding that § 1963 only reaches property interests of the convicted
21 defendant). It is again telling to consider how the government itself interprets and
22 applies § 1963, particularly the pre-trial restraint provisions of § 1963(d). In the
23 government’s *RICO Manual*, it openly acknowledges that § 1963 reaches only
24 interests of a convicted defendant, and can result in forfeiture of all of the property
25 used by a RICO enterprise only “in cases where the defendant is the sole owner of
26 the enterprise, or in which the enterprise is a company that is also named as a
27 defendant.” *RICO Manual* at 220-21. Even property belonging only to the
28

1 enterprise (a circumstance not extant here) is exempt from forfeiture if the
2 enterprise is not a defendant. *See Busher*, 817 F.2d at 1413 n.7.

3 This conclusion is also compelled by the fact that § 1963 provides only
4 criminal forfeiture authority, which by its essential nature is an *in personam* – as
5 opposed to an *in rem* – remedy. *See Busher*, 817 F.2d at 1412 n.4 (“Section 1963
6 [was] the first modern statute to impose forfeiture as a criminal sanction directly
7 upon an individual defendant rather than through a separate *in rem* proceeding
8 against property involved in criminal conduct”); *United States v. Nava*, 404 F.3d
9 1119, 1124 (9th Cir. 2005) (discussing the *in personam* nature of § 1963 and 21
10 U.S.C. § 853, criminal forfeiture statutes that act against a defendant’s property as
11 a penalty for his conviction, in contrast to civil forfeiture statutes such as 18 U.S.C.
12 § 981 and 21 U.S.C. § 881 that operate under the legal fiction that the property
13 itself is guilty of wrongdoing); *United States v. Angiulo*, 897 F.2d 1169, 1210 (1st
14 Cir. 1990) (“RICO forfeiture, unlike forfeiture under other statutes, ‘is a sanction
15 against the individual rather than a judgment against the property itself.’”) (citation
16 omitted)).

17
18 Nor will the government find safe harbor arguing the general proposition
19 that § 1963 has been interpreted to authorize the forfeiture of the entire enterprise
20 alleged in an indictment. As explained in the *RICO Manual*, this principle applies
21 only where the entire enterprise is the property of one or more convicted
22 defendants, or where a corporation is convicted of having violated § 1962. *RICO*
23 *Manual* at 221. Section 1963’s plain language does not purport to subject the
24 entire criminal enterprise to forfeiture – it merely authorizes the forfeiture of the
25 entirety of any “interest” a convicted defendant has in the enterprise. 18 U.S.C. §
26 1963(a)(2)(1).

27 As the Eighth Circuit explained in *United States v. Riley*, 78 F.3d 367, 370-
28 71 (8th Cir. 1996), even where the government alleges in an indictment that non-

1 defendant corporate entities were used to commit the underlying RICO offenses or
2 predicate acts, “an allegation that an enterprise was used to commit RICO
3 violations is not enough to make the enterprise forfeitable, only defendants’
4 interest in that enterprise.” The RICO forfeiture remedy “does not permit the
5 government to seize control of an enterprise the defendants used to accomplish
6 their racketeering” unless the enterprise or its corporate component are indicted.

7 *Id.*

8 In *Riley*, the government charged three natural persons under the RICO
9 statute, and alleged that they had used three companies to commit the alleged
10 offenses, but did not charge either the companies or the alleged enterprise. A
11 forfeiture allegation in the indictment sought to recover the gross proceeds the
12 government claimed were obtained by the companies as a result of the violations.
13 At the government’s request, and over the companies’ objection, the district court
14 entered a § 1963(d)(1)(A) post-indictment restraining order that put the companies
15 under the control of first a monitor, and later a receiver, which order was appealed
16 by the companies. The *Riley* panel, noting that “preconviction restraints are
17 extreme measures” and “strong medicine that should not be used where measures
18 that are adequate and less burdensome” are available (78 F.3d at 370), concluded
19 that the order exceeded the scope of § 1963’s statutory authority because (1)
20 neither the companies nor the enterprise they were alleged to have been a part of
21 were defendants; (2) there had been no showing by the government that the
22 property restrained would be subject to forfeiture in the event of a conviction of the
23 actual defendants; and (3) the order did not accomplish the statutory directive that
24 the restraint imposed preserve the availability of property subject to forfeiture. Sky
25 Global’s connection to the conduct alleged in the San Diego Indictment is far more
26 attenuated than was the case in *Riley*.
27
28

1 Sky Global has owned and controlled the seized domains since their initial
2 registration. Because Sky Global is not a defendant in the San Diego Prosecution
3 and thus cannot be “convicted of a violation of § 1962,” Sky Global’s property is
4 not subject to forfeiture under the plain language of § 1963(a). And if Sky
5 Global’s property is not subject to forfeiture, it cannot be seized under the plain
6 language of the statute.

7 **4. The Government’s Seizure of the Domains Is Unlawful**
8 **Because It Was Not Necessary to Preserve their Availability**

9 The government’s seizure of the domains was also unlawful because it was a
10 plainly unjustified extension of the limited statutory seizure authority provided in
11 § 1963. Even if § 1963 authorized seizure warrants (it does not) and Sky Global’s
12 property were subject to forfeiture (it is not), the government was still required to
13 comply with § 1963(d)(1)’s requirement that any order to restrain property
14 pursuant to that provision be entered “to preserve the availability of property
15 described in subsection (a) for forfeiture under this section.” The seizure of Sky
16 Global’s domains here undoubtedly fails to satisfy this requirement.

17 To prevent disposal of forfeitable property, § 1963(d) authorizes district
18 courts to enter restraining orders or “take any other action necessary to *preserve*
19 *the availability of the property . . . for forfeiture.*” *Id.* (emphasis added). As the
20 government itself instructs its prosecutors, 18 U.S.C. § 1963(d) was motivated by
21 the concern that “[w]hen a defendant (or prospective defendant) learns that his
22 assets may be subject to forfeiture, the defendant may seek to dispose of or transfer
23 assets to conceal them from the Government in an attempt to avoid forfeiture.”
24 *RICO Manual* at 244. If the requested restraint does not serve to preserve the
25 availability of the property, such restraint is inappropriate under § 1963(d).

26 There is no question that a restraining order or injunction can be properly
27 imposed under § 1963(d) with respect to certain categories of property, including
28 property that can be hidden or easily removed from the Court’s jurisdiction (such

1 as currency, precious metals, jewelry, aircraft and vessels), or likely to create a
2 public safety hazard if neglected or abandoned. However, the restraint of property
3 that is not likely to be hidden, transferred, or disposed of during the pendency of
4 the case is presumptively (and intentionally) exempt from § 1963(d) restraint. *See*
5 *RICO Manual* at 255 (“A court may impose reasonable restraints on third parties,
6 such as banks, where necessary to preserve the status quo. Of course, any restraint
7 must be tailored to cause the *least intrusion possible* and should be sought *only*
8 *when necessary.*” (citing *United States v. Regan*, 858 F.2d 115, 121 (2d Cir. 1988)
9 (emphasis added)).

10 Here, it is self-evident that the seizure of Sky Global’s domains was not a
11 reasonable restraint of property that was necessary to preserve the status quo. If
12 the government wanted to preserve the content of the domains, it did not need any
13 court order at all – the government could have simply downloaded or made digital
14 copies of each domain’s content at any time. Indeed, the seizure of the domains
15 and replacement of all content on the websites with the government’s ambiguously
16 sinister banner achieved exactly the opposite result contemplated by the statute by
17 essentially erasing the websites from the internet.

18 Additionally, internet domains are not mobile in any sense of the word.
19 They are electronic destinations on the largest open source depository of
20 information in the world. They are not physical assets, and they have no use other
21 than as a placeholder on the internet used for the dissemination of speech. The
22 seizure of the domains did nothing to preserve either the availability or the value of
23 the domains. As commercial domains licensed to uncharged parties, used for what
24 were ongoing businesses at the time of seizures, they have no value to anyone
25 other than the registrants. Their lack of market value is demonstrated no more
26 clearly than by the fact that, upon seizure, the government has done nothing more
27 than leave post a banner touting its success in wiping the domains from the
28 internet. There is thus no credible argument that the government’s actions have

1 done anything to preserve the availability or value of the domains. If anything, the
2 seizure has decreased or eliminated their value.

3 Nor was the government’s request for a seizure warrant narrowly tailored to
4 cause the least intrusion possible. To the contrary, it eliminated the most effective
5 channel of communication between Sky Global and its clients and legitimate
6 business partners. The seizure has not only prevented Sky Global from informing
7 its clients and business partners that it has *not* been charged with any crime in
8 connection with what the Group 1 Domain banner described as a “joint law
9 enforcement operation and action” by a host of U.S. and Canadian federal law
10 enforcement agencies, it allowed the government to use Sky Global’s own
11 websites to suggest that Sky Global was the subject of criminal allegations in both
12 the United States and Canada despite the fact it has never been charged with any
13 crime.¹³

14 Congress included significant limitations on the restraint authority articulated in §
15 1963(d)(1)(A) because it wanted to minimize the potential damage – economic and
16 reputational – that could easily (and would obviously) result from abuse of the
17 restraint, a point vividly demonstrated by the facts here. Had the government’s
18 intent been to ensure that the domains would not be transferred by the non-
19 defendant licensees, it could have asked for an order preventing such transfer.
20 Alternatively, the government could have described the illegal manner in which the
21 domains were alleged to have been used, and requested an order enjoining that use.

23
24 ¹³ The seizures also made it impossible for Sky Global to respond in any
25 meaningful way to the March 12, 2021 press release issued by the U.S. Attorney’s
26 Office in this district concerning the San Diego Indictment (*see* exhibit Z to the
27 Welk Decl.), which is replete with references to alleged illegal conduct by “Sky
28 Global,” despite the fact that Sky Global, Inc. was neither a named defendant nor
alleged to have been a member of the alleged criminal enterprise, which is referred
to in the indictment not as “Sky Global” but as the “Sky Global Enterprise,” a
distinction that was not carried through to the press release.

1 It chose to do neither of these things, opting instead to request the most extreme
2 form of restraint possible in an order that far exceeds the explicit scope of § 1963.

3 At a minimum, the fact that Congress built specific limitations into what it
4 intended to be broad restraint authority is one of the reasons that courts considering
5 requests for § 1963(d)(1)(A) post-indictment restraint should scrutinize such
6 requests more carefully than applications for ordinary injunctions. As the *Regan*
7 court explained, where a normal civil injunction is sought, the parties are all before
8 the court, with an opportunity to litigate and be heard on the propriety and scope of
9 the restraint requested, and the resulting order applies only to parties before the
10 court. 858 F.2d at 120. This is the procedure applicable to pre-indictment restraint
11 requests made pursuant to § 1963(d)(1)(B). However, post-indictment requests,
12 like the one made here, are conducted *ex parte*, prior to any conviction and, if not
13 used properly, can have a momentous negative effect on third parties who are not
14 defendants. *Id.* For this reason, the requirement that any pre-conviction restraint
15 be for the specific purpose of assuring the availability of property subject to
16 forfeiture is particularly important. *Riley*, 78 F.3d at 370.

17 Finally, the restraint provision in 1963(d) allowing for the issuance of
18 restraining orders on an *ex parte* basis was premised on the proposition that
19 “probable cause established in the indictment or information is, in itself, a
20 sufficient basis for issuance of a restraining order.” S. Rep. No. 98-225, 98th
21 Cong., 1st Sess. 202 (1983); *see also United States v. Musson*, 802 F.2d 384, 386-
22 87 (10th Cir. 1986) (indictment supplied sufficient probable cause necessary for
23 restraint). However, neither that proposition nor the post-indictment restraint
24 provision extends a grand jury’s findings of probable cause to uncharged parties.
25 While an indictment can act as a basis for restraint against property and property
26 interests of a charged defendant where the requisite nexus is sufficiently alleged, it
27 cannot be the basis for restraint against property of a non-defendant, because a
28

1 grand jury finding of probable cause does not extend to uncharged parties who are
2 outside the four corners of the indictment.

3 As set forth above, the seized domains are not subject to forfeiture in the
4 event of a conviction of either of the defendants in the San Diego Indictment
5 because neither of those defendants owns the domains – Sky Global does. The
6 seizure and retention of the domains therefore cannot preserve the seized property
7 for forfeiture. And even if the domains were subject to forfeiture, any
8 representation that the seizures were intended to preserve the domains for
9 forfeiture would be entirely disingenuous given the nature and use of the Sky
10 Global domains. The only actual result of the government’s seizure and
11 repurposing of Sky Global’s domains was to deny Sky Global access to its primary
12 form of communication and give the government a platform to publish directly to
13 Sky Global’s customers and clients its own ambiguous and damaging suggestions
14 of criminality, devoid of context or detail. Because the seizures were completely
15 unnecessary to preserve the domains for forfeiture, the seizures were unlawful and
16 the domains must be returned.

17 **5. The Purported Statutory Authority for the Government’s**
18 **Seizure of the Group 2 Domains Is Nonsensical**

19 The seizure of the Group 2 Domains is improper for the same reasons
20 articulated above with respect to the Group 1 Domains, but has an additional – and
21 bizarre – twist. According to the banner posted on the homepages of the Group 2
22 Domains, those domains were seized by ICE – Homeland Security Investigations
23 (“HSI”) pursuant to a seizure warrant issued by “a United States District Court
24 under the authority of 18 U.S.C. §§ 981 and 2323.” The banner goes on to
25 describe the penalties that can be imposed for “willful copyright infringement,”
26 citing 17 U.S.C. § 506 and 18 U.S.C. § 2319. *See* exhibit Y to Luu Decl.
27 (screenshot of Group 2 banner).
28

1 The San Diego Indictment charges violations of 18 U.S.C. § 1962(d) (Count
2 One) and 21 U.S.C. §§ 841 and 846 (Count Two). It includes forfeiture allegations
3 based upon 18 U.S.C. § 1963 and 21 U.S.C. § 853. The acts alleged to have been
4 committed as part of the pattern of racketeering activity are “multiple offenses
5 involving trafficking in controlled substances in violation of Title 21, United States
6 Code, Sections 841(a)(1), 846, 952, 960, and 963,” and “multiple acts indictable
7 under Title 18, United States Code, Section 1512 (obstruction of justice).”
8 Indictment at 6. The indictment does not include a single reference to 18 U.S.C.
9 § 2319 or 18 U.S.C. § 981. Neither of the terms “copyright” nor “infringement”
10 appear anywhere in the charging document, either together or separately. Finally,
11 the government, on September 28, 2021, filed a Bill of Particulars in the San Diego
12 Prosecution in which it gave notice that it intended to seek the forfeiture of the
13 Group 2 Domains “pursuant to 18 U.S.C. § 1963(a)(1), (a)(2), and (a)(3)” in
14 connection with “the violations of Title 18, United States Code, Section 1962, as
15 alleged in Paragraphs 1 through 15 and Count 1 of the Indictment.”

16 Section 981 (identified in the Group 2 Domains banner as the legal authority
17 for those seizures) provides authority for the forfeiture of several categories of
18 assets derived from or used to facilitate numerous federal crimes, but assets
19 relating to violations of 17 U.S.C. § 506 or 18 U.S.C. § 2319 (the two other
20 provisions listed in the Group 2 Domain banner) are not among them. The
21 forfeiture authority for such violations is set out at 18 U.S.C. § 2323 which, for
22 purposes of criminal forfeiture, incorporates the procedural provisions of 21 U.S.C.
23 § 853. In other words, the government has not only refused to provide Sky Global
24 with notice of the seizure of the Group 2 Domains or a copy of the warrant used to
25 seize them, it has posted a banner on the Group 2 Domains’ websites that fails to
26 identify the court that purportedly issued the seizure warrant and appears to
27 erroneously identify both the seizure authority and the underlying violation(s) for
28 which the domains were seized.

1 It is entirely possible that the government simply made a careless mistake by
2 posting a banner on the Group 2 websites from some unrelated case against
3 unrelated defendants in which it alleged completely different violations. Had Sky
4 Global been provided with a copy of the seizure warrant or a statement of the legal
5 basis for the warrant, such a mistake could potentially be excused as mere
6 negligence and corrected. However, because the government has refused to
7 provide Sky Global with notice of the factual and legal bases for the Group 2
8 Domain seizures, the posting of a banner that is materially erroneous has the effect
9 of compounding the due process violations described further below, as Sky Global
10 and the general public have been actively misled by information the government
11 posted on Sky Global's own websites.

12 Finally, even if the government has in fact seized the Group 2 domains
13 based on some sort of unknown copyright infringement or counterfeiting
14 allegations (which is difficult to fathom), the seizure would still be improper. At a
15 minimum, the government would still have to demonstrate that the domains were
16 subject to forfeiture and that seizure was necessary to preserve the availability of
17 the domains. But, as discussed above, the government cannot satisfy either of
18 those statutory requirements.

19 **B. The Seizure and Continued Restraint of Sky Global's Domains**
20 **Demonstrates Callous Disregard of Its Constitutional Rights**

21 The government's seizure of Sky Global's domains also demonstrates a callous
22 disregard for Sky Global's rights, including its right to due process under the Fifth
23 Amendment and its First Amendment right to be protected from an unlawful prior
24 restraint on its free expression. These serious constitutional violations of Sky
25 Global's rights further justify relief under Rule 41(g).

1 **1. The Government Has Failed to Comply with Fifth**
2 **Amendment Due Process Requirements**

3 Despite requests by Sky Global’s counsel, the government has steadfastly
4 refused to provide any information concerning the seizures of Sky Global’s
5 property, including copies of the warrants that are purported to have authorized the
6 seizures or the seizure authority relied upon in obtaining the warrants. The
7 government’s refusal to provide this basic information regarding the seizure of Sky
8 Global’s property violates the requirements of Rule 41 governing the execution of
9 warrants issued in criminal investigations and prosecutions and is fundamentally
10 inconsistent with the Fifth Amendment’s due process protections.

11 While Rule 41 applies specifically to search warrants, the statutory authority
12 that permits the issuance of seizure warrants for purposes of forfeiture, including
13 18 U.S.C. § 981(b)(2) (*i.e.*, the statutory authority the government purports to have
14 relied upon in obtaining the seizure warrant for the Group 2 Domains), requires
15 that the procedures to be followed are those set out in Rule 41. *See* 18 U.S.C. §
16 981(b)(2) (“Seizures pursuant to this section shall be made pursuant to a warrant
17 obtained in the same manner as provided for a search warrant under the Federal
18 Rules of Criminal Procedure . . .”); 21 U.S.C. Section 881(b) (“Any property
19 subject to forfeiture to the United States under this section may be seized by the
20 Attorney General in the manner set forth in Section 981(b) of Title 18.”); and 21
21 U.S.C. Section 853(f) (“The Government may request the issuance of a warrant
22 authorizing the seizure of property subject to forfeiture under this section in the
23 same manner as provided for a search warrant.”).¹⁴

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26 ¹⁴ As discussed above, there is no seizure warrant authority articulated in the
27 RICO forfeiture statute (18 U.S.C. Section 1963, the only forfeiture statute
28 referenced in the Group 1 banner), nor is there a proper basis to read such authority
into the statute, but if § 1963 did include seizure warrant authority, it would
necessarily be *criminal* forfeiture authority, as the RICO statute does not provide

1 Rule 41(f)(1)(C) in turn requires that an officer executing a warrant obtained
2 pursuant to Rule 41 “must give a copy of the warrant and a receipt for the property
3 taken to the person from whom, or from whose premises, the property was taken or
4 leave a copy of the warrant and receipt at the place where the officer took the
5 property.” The Ninth Circuit has recognized the significance of this plain language
6 and the important due process purposes it serves. *See, e.g., United States v.*
7 *Celestine*, 324 F.3d 1095, 1100-01 (9th Cir. 2003) (“To comport with Rule 41, the
8 government must serve ‘a complete copy of the warrant at the outset of the
9 search.’”) (quoting *United States v. Gantt*, 194 F.3d 987, 990 (9th Cir. 1999)
10 (analyzing the policies underlying the warrant requirement as support for requiring
11 service of warrant under Rule 41 at outset of search absent exigent
12 circumstances)). Providing a copy of the warrant serves critical due process
13 purposes because it informs the citizen of the legality and scope of the seizure and
14 the legal basis for the taking of his property. *Gantt*, 194 F.3d at 990-91.

15 But other than the claims in the banners that are currently posted on Sky
16 Global’s domains, the government has provided neither evidence that the seizures
17 of the domains were judicially authorized nor any indication of the scope of or
18 legal bases for the seizures. Moreover, the banners are inconsistent, confusing and
19 possibly misleading. The government simply commandeered the websites and
20 posted ambiguous declarations asserting that it was acting under the authority of
21 this (or some other unidentified) Court. Attempts by Sky Global’s counsel to
22 discover the legal bases for the seizures have been refused without justification,
23 despite the fact that an indictment that appears to have resulted from the same
24 investigation was filed in March 2021, more than eight months ago.

25 While Rule 41(f)(3) authorizes an issuing court to *delay* notice of a warrant
26 where such delay is authorized by statute, nothing in the rule suggests that such

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28 for civil forfeiture, and there is no reason to believe that warrants issued pursuant
to § 1963 would not also be governed by Rule 41.

1 delay can be indefinite or perpetual. *See, e.g., United States v.*
2 *Alahmedalabdalklah*, No. CR-12-01263-PHX-NVW, 2017 WL 2839645, at *8
3 (D. Ariz. July 3, 2017) (“[P]ermitting extension of notice delay periods does not
4 mean that notice can be delayed indefinitely.”). Here, the government seized the
5 domains and posted vague, accusatory banners, providing *no notice whatsoever* of
6 either the seizures or the factual or legal bases for them. In response to requests for
7 information about the warrants, the prosecutors have replied simply that they were
8 under seal. The government has failed and refused to respond to written inquiries
9 for the warrants, the legal grounds for the seizures, or the legal authority under
10 which notice was delayed. Go Daddy, the registrar of most of the domains, has
11 advised that the warrant served on them contained an explicit prohibition on
12 revealing the warrants to Movant or anyone else. Welk Decl., ¶ 5.

13 The fundamental requirements of procedural due process are notice and an
14 opportunity to be heard before the government may deprive a person of a protected
15 liberty or property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Here,
16 the government has deprived Sky Global of its property for months without
17 providing any explanation whatsoever of the factual or legal bases for the seizures.
18 At the same time, the government has filed an indictment that does not name Sky
19 Global as a defendant, and given notice in the indictment that it nevertheless
20 intends to seek to forfeit Sky Global’s property in that action. This scenario is
21 materially at odds with basic principles underlying both the Fourth and Fifth
22 Amendments.

23 There is no authority for the proposition that the government can simply
24 refuse indefinitely to reveal its reasons for interfering with the property rights of
25 uncharged parties. Sky Global is entitled to know the statutory basis for the
26 restraint of its property, and if delayed notice of the warrants was authorized
27 pursuant to Rule 41(f)(3), the government should be required to identify the legal
28 basis for such delayed notice and the period of delay authorized.

1 The government’s claim that it cannot provide Sky Global with copies of the
2 warrants because they were filed under seal is a red herring. The reason to
3 maintain filings under seal is to preserve the integrity of a non-public
4 investigation. Here, the charges in the San Diego Prosecution have been publicly
5 filed, and the seizure of the property acknowledged in both the banners on the
6 seized domain homepages and the listing of the domains in the San Diego
7 Indictment and recently-filed Bill of Particulars. Details of the investigation were
8 also revealed in press releases from DOJ and IRS-CI, as well as at a public press
9 conference. Moreover, the government has already unsealed the warrant and
10 supporting affidavit from its “ANOM” investigation. *See* Affidavit in Support of
11 Application for Search Warrant, *In the Matter of the Search of Google LLC, Host*
12 *of expliamdavis@gmail.com*, No. 3:21-mj-01948, Dkt. No. 1, ¶ 21 (S.D. Cal. May
13 18, 2021). It is unfathomable that the government can justify maintaining the Sky
14 Global seizure warrants and supporting affidavits under seal when it has already
15 moved to unseal the ANOM warrant and affidavit, which explicitly references Sky
16 Global. *Id.* Even if the warrants themselves were initially sealed, the necessity for
17 maintaining the seal has expired.

18 The Due Process Clause simply does not permit the ongoing concealment of
19 the warrants or their supporting materials. Because Sky Global was afforded
20 neither notice of the seizures nor any information concerning the grounds for the
21 government’s seizure of the domains, it had no opportunity to review, much less
22 challenge the seizures, the first of which occurred more than eight months ago. By
23 continuing to conceal the legal and factual bases for the seizure of Sky Global’s
24 property, the government has compounded this Fifth Amendment violation and
25 further hindered Sky Global’s ability to seek judicial review of the seizures.

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1 **2. The Seizure and Retention of the Sky Global Domains**
2 **Constitutes a Prior Restraint in Violation of the First**
3 **Amendment**

4 The government’s seizure and retention of Sky Global’s property has also
5 resulted in an ongoing violation of Sky Global’s First Amendment rights of
6 expression. The Supreme Court has recognized that “‘implicit in the right to
7 engage in activities protected by the First Amendment’ is ‘a corresponding right to
8 associate with others in pursuit of a wide variety of political, social, economic,
9 educational, religious, and cultural ends.’ This right is crucial in preventing the
10 majority from imposing its views on groups that would rather express other,
11 perhaps unpopular, ideas.” *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48
12 (2000), quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

13 To the extent the government is seeking to frustrate Sky Global’s ability to
14 address the government’s allegations in the San Diego Indictment, there is no
15 question that severing the most convenient, expedient, and efficient form of
16 communication between Sky Global and its current and potential clients has gone a
17 long way towards achieving that goal. The seizure of Sky Global’s domains and
18 placement of the banners has made it impossible for Sky Global to communicate
19 with that audience at all, and provided the added benefit (to the government) of
20 planting the suggestion in the mind of members of the general public that Sky
21 Global was somehow involved in the serious allegations laid out in the indictment.
22 The problem, of course, is that the suggestion is false and Sky Global has not been
23 charged with any crime.

24 Generally speaking, the prior restraint and seizure of speech-related
25 materials without a judicial determination that the speech is harmful, unprotected,
26 or otherwise illegal is strictly prohibited. *Adult Video Ass’n v. Barr*, 960 F.2d 781,
27 788 (9th Cir. 1992) (“The First Amendment will not tolerate such seizures until the
28

1 government’s reasons for seizure weather the crucible of an adversary hearing.”).¹⁵
2 There is no question that the domains are instruments of speech, and are therefore
3 expressive by definition. Equally clear is that, despite its corporate identity, Sky
4 Global is entitled to protection against such prior restraints and seizures. *See First*
5 *Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).

6 Even in the unlikely event that the seizures were supported by allegations
7 that the websites were being used to promote or encourage some kind of unlawful
8 activity – for which, it must be noted, there is no objective evidence, either in the
9 indictment or elsewhere – it is well-settled that “the mere tendency of speech to
10 encourage unlawful acts is not a sufficient reason for banning it. . . . First
11 Amendment freedoms are most in danger when the government seeks to control
12 thought or to justify its laws for that impermissible end.” *Ashcroft v. Free Speech*
13 *Coalition*, 535 U.S. 234, 253 (2002). There is no indication here that the
14 government sought – or the court that issued the warrant made – a determination
15 that the domains were being used to distribute information that was harmful,
16 unprotected, or otherwise illegal. Indeed, many of the domains seized by the
17 government were not even in use at the time of their seizure, suggesting that the
18 government sought not only to muzzle Sky Global’s ability to communicate with
19 its customers through existing channels, but to block its use of alternate available
20 channels not currently in active use.

21 **C. The Seizure and Retention of Sky Global’s Domains Has Caused,**
22 **and Continues to Cause, Irreparable Harm to Sky Global**

23 The government’s unlawful seizure and retention of Sky Global’s domains
24 has caused, and continues to cause, irreparable harm to Sky Global, its business,
25 and its employees. Carried out without notice and shielded from any meaningful
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27 ¹⁵ While *Barr* was vacated in *Reno v. Adult Video Ass’n*, 509 U.S. 917 (1993), the
28 *Barr* Court’s analysis of pretrial seizures was re-adopted in *Adult Video Ass’n v.*
Reno, 41 F.3d 503 (9th Cir. 1994).

1 opportunity for judicial review, the government’s seizures effectively erased a
2 legitimate and essential technology business from the internet and caused a
3 shutdown of the business during a global pandemic that had already presented
4 historic challenges for businesses all over the world. Had the government sought a
5 restraining order, Sky Global would have had the opportunity to defend itself
6 publicly in court and make reasonable accommodations to address any
7 improprieties alleged by the government.

8 The government’s actions have caused and continue to cause irreparable
9 harm to Sky Global’s business reputation. Despite not having been charged with
10 any crime, Sky Global’s own websites are being used by the government to
11 broadcast to the world the false and damaging suggestion that Sky Global was
12 involved in serious criminal conduct in the United States and Canada. These
13 suggestions are likely to have an adverse impact on relationships between Sky
14 Global and related entities that have no connection to Sky ECC. Moreover, any
15 potential new business partner considering doing business with Sky Global would
16 encounter the government’s banners upon visiting any of the websites bearing the
17 Subject Domains.

18 In addition, the harm to business operations resulting from a shutdown of
19 operations is self-evident and disastrous for both the affected companies and their
20 employees.

21 Finally, Sky Global is suffering additional irreparable injury as a result of
22 the constitutional violations described above.

23
24 **D. There Is No Other Adequate Remedy Available to Sky Global**

25 Relief under Rule 41(g) is also necessary because Sky Global has no other
26 adequate remedy, legal or otherwise. Sky Global has not been indicted in the San
27 Diego Prosecution, which remains dormant at this time, so it cannot seek to defend
28 itself in that case. The government has not initiated any civil forfeiture

1 proceedings against the Subject Domains or any other assets seized from Sky
2 Global. Indeed, as of now, it appears that the government intends simply to hold
3 onto Sky Global's domains indefinitely, without providing Sky Global any
4 opportunity to vindicate its rights or seek return of its property. Thus, the only way
5 to remedy the irreparable harm that Sky Global has suffered due to the unlawful
6 seizure of its property, is for this Court to order the government to immediately
7 return the property.

8 **V. CONCLUSION**

9 For all of the reasons explained above, both the initial seizure and continued
10 restraint of Sky Global's internet domains was and is unlawful because it exceeded
11 the scope of the statutory authority relied upon to obtain the seizure warrant and
12 resulted in violations of Sky Global's constitutional rights. The domains are not
13 property of a charged defendant, and therefore are not subject to forfeiture in the
14 event of any conviction in the San Diego Prosecution. Sky Global was provided
15 no notice of the seizures (other than its having lost control over them), and the
16 government has refused to explain the factual or legal bases for the seizures, in
17 violation of the Due Process Clause of the Fifth Amendment to the United States
18 Constitution. In addition, the seizure and retention of the domains have had the
19 effect of suppressing the speech of Sky Global in what cannot reasonably be
20 characterized as the least restrictive form of restraint applicable to obviously
21 expressive property, in violation of the First Amendment to the United States
22 Constitution. Because Sky Global has been aggrieved by an unlawful seizure that
23 has caused irreparable harm, Sky Global respectfully requests that this Court

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1 vacate the seizure warrants and order the government immediately to return
2 possession and control of the seized domains pursuant to Rule 41(g).

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4 Dated: November 16, 2021

Respectfully submitted,

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