General Docket United States Court of Appeals for the Fourth Circuit

Appeal From: United States District Court for the Eastern District of

Virginia at Alexandria **Fee Status:** fee paid

Case Type Information:

1) Grand Jury Proceeding

2) Interlocutory

3) null

Originating Court Information:

District: 0422-1: 1:13-ec-00297-TCB-1

Presiding Judge: Claude M. Hilton, Senior U. S. District Court Judge

Date Filed: 07/09/2013

Date Date Order/Judgment Date NOA Date Rec'd Order/Judgment: EOD: Filed: COA:

01/07/2016 01/07/2016 02/03/2016 02/04/2016

Prior Cases:

13-4625 Date Filed: 08/29/2013 Date Disposed: 04/16/2014 Disposition:

opn.p.arg

13-4626 Date Filed: 08/29/2013 Date Disposed: 04/16/2014 Disposition:

opn.p.arg

Current Cases:

 Lead
 Member
 Start
 End

 Consolidated
 16-4052
 16-4053
 02/05/2016

In re: PEN REGISTER

UNITED STATES OF AMERICA Tracy Doherty-McCormick, Assistant U. S.

Plaintiff - Appellee Attorney

Direct: 703-299-3753

Email: tracy.d.mccormick@usdoj.gov

[COR NTC Government]

OFFICE OF THE UNITED STATES

ATTORNEY

2100 Jamieson Avenue Alexandria, VA 22314-5194

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LAVABIT LLC Jesse Ryan Binnall

Movant - Appellant Email: jbinnall@harveybinnall.com

[COR NTC Retained]

BRONLEY & BINNALL, PLLC

10387 Main Street Fairfax, VA 22030-0000

Louise Tavey Gitcheva Direct: 703-888-1943

Email: lgitcheva@harveybinnall.com

[COR NTC Retained] HARVEY & BINALL, PLLC

Suite 300 717 King Street Alexandria, VA 22314

LADAR LEVISON Movant - Appellant Jesse Ryan Binnall [COR NTC Retained]

(see above)

Louise Tavey Gitcheva Direct: 703-888-1943 [COR NTC Retained]

(see above)

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	In re: PEN REGISTER
	UNITED STATES OF AMERICA
	Plaintiff - Appellee
	V.
	LAVABIT LLC; LADAR LEVISON
	Movants - Appellants

02/05/2016	□ <u>1</u> 1 pg, 11.9 KB	Grand jury case docketed. Originating case number: 1:13-ec-00297-TCB. Date notice of appeal filed: 02/03/2016. Case manager: TFischer. [16-4053] (TF)
02/05/2016	□ 2	SEALED district court document (court access only). Description of document: case opening documents. Originating case number: 1:13-ec-00297-TCB. [16-4053] (TF)
02/05/2016	□ <u>3</u> 2 pg, 9.11 KB	ORDER filed [999750501] consolidating case 16-4053 with 16-4052 Copies to all parties [16-4052, 16-4053] (TF)
02/05/2016		DOCKETING NOTICE issued Re: [999750465-2] case docketed, [1] case docketed Initial forms due within 14 days. Originating case number: 1:13-sw-00522-CMH-1 [16-4052, 16-4053] (TF)
02/17/2016		ORDER filed [999756749] sealing Copies to all parties [16-4052, 16-4053] (TF)
02/19/2016		APPEARANCE OF COUNSEL (Local Rule 46(c)) by Louise T. Gitcheva for Lavabit LLC and Ladar Levison in 16-4052, 16-4053.[999758532] [16-4052, 16-4053] Louise Gitcheva
02/19/2016		APPEARANCE OF COUNSEL (Local Rule 46(c)) by Jesse R. Binnall for Lavabit LLC and Ladar Levison in 16-4052, 16-4053.[999758592] [16-4052, 16-4053] Jesse Binnall
02/19/2016		DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) by Appellant Lavabit LLC in 16-4052, 16-4053. Was any question on Disclosure Form answered yes? No [999758594] [16-4052, 16-4053] Jesse Binnall
02/19/2016		APPEARANCE OF COUNSEL (Local Rule 46(c)) by Tracy Doherty-McCormick for US in 16-4052, 16-4053. [999758640] [16-4052, 16-4053] Tracy Doherty-McCormick
02/22/2016		DOCKETING FORMS FOLLOW-UP NOTICE ISSUED to Jesse Ryan Binnall for Appellants Ladar Levison and Lavabit LLC and Ms. Louise Tavey Gitcheva for Appellants Ladar Levison and Lavabit LLC in 16-4052, 16-4053 re: filing of disclosure form (Loc.R. 26.1) Disclosure statement due from Ladar Levison on 02/25/2016 [16-4052, 16-4053] (TF)
02/22/2016	□ <u>11</u> 3 pg, 20.7 KB	BRIEFING ORDER filed Opening brief and appendix due 03/28/2016. Response brief due 04/21/2016 [16-4052, 16-4053] (TF)
02/23/2016		DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) by Appellant Ladar Levison in 16-4052, 16-4053. Was any question on Disclosure Form answered yes? No [999760110] [16-4052, 16-4053] Jesse Binnall

Appeal: 16-4053 Doc: 11 Filed: 02/22/2016 Pg: 1 of 3

Filed: February 22, 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEFING ORDER - CRIMINAL/GRAND JURY

No. 16-4052 (L), <u>In re: Information Associated</u> 1:13-sw-00522-CMH-1

Briefing shall proceed on the following schedule:

Appendix due: 03/28/2016

Opening brief due: 03/28/2016

Response brief due: 04/21/2016

Reply brief permitted within 10 days of service of response brief.

Effective October 1, 2015, the court requires only one paper copy of briefs and appendices unless the case is to be argued, in which event four paper copies are required. (Local Rules 30(b)(4) & 31(d)). The notice tentatively assigning a case for argument requires counsel to file three additional paper copies of their previously filed briefs and appendices.

The briefs and appendix must conform to the Fourth Circuit Brief & Appendix Requirements (available as a link from this order and at www.ca4.uscourts.gov). All parties to a side must join in a single brief, even in consolidated cases, unless the court has granted a motion for leave to file separate briefs pursuant to Local Rules 28(a) and 28(d).

Failure to file an opening brief within the scheduled time may lead to imposition of sanctions against court-appointed counsel or dismissal of the case pursuant to Local Rule 45 for failure to prosecute; failure to file a response brief will result in loss of the right to be heard at oral argument. The court discourages motions for extension of time and grants extensions of the briefing schedule only in extraordinary circumstances upon a showing of good cause. Local Rule 31(c). If a

Appeal: 16-4053 Doc: 11 Filed: 02/22/2016 Pg: 2 of 3

brief is filed after its due date, the time for filing subsequent briefs will be extended by the number of days the brief was late.

Pursuant to Local Rule 34(a), the court may, on its own initiative and without prior notice, screen an appeal for decision on the parties' briefs without oral argument. If a case is selected for the oral argument calendar, counsel will receive notice that the case has been tentatively calendared for a specific court session approximately two months in advance of the session.

<u>Anders</u> Procedures: If defendant's counsel finds no appealable issue and therefore intends to file a brief under <u>Anders v. California</u>, 386 U.S. 738 (1967), the following procedures apply:

- (1) If the <u>Anders</u> brief is being filed in a consolidated case in which codefendants are not proceeding under <u>Anders</u>, counsel must prepare a separate opening brief and move to deconsolidate the <u>Anders</u> appeal.
- (2) An <u>Anders</u> brief that simply states there are no appealable issues is insufficient--rather, counsel's opening brief must identify any arguable issues with appropriate record citations and state, in a brief discussion with case citation, why such issues lack merit.
- (3) Because counsel must review the entire record in an <u>Anders</u> appeal, counsel must order all transcript in the case, including pre-trial, trial, guilty plea, and sentencing proceedings. It is not necessary to order arraignments, bail hearings, voir dire, or opening and closing arguments unless those portions of the record might support an arguable issue on appeal. Since the court must review the entire record, an appendix is unnecessary, and copying expenses for an <u>Anders</u> appendix are not recoverable under the Criminal Justice Act unless the court has directed the filing of an appendix. The costs for providing transcripts to the defendant are reimbursable.
- (4) Counsel must file a <u>certificate of service of Anders brief</u> on defendant, stating that the defendant has been provided with a copy of the <u>Anders</u> brief and advised of his right to file a supplemental pro se brief within 30 days. If the defendant is not English-speaking, the certificate must also state that the substance of the <u>Anders</u> brief and the right to file a supplemental pro se brief have been communicated to the defendant in a language the defendant understands. CJA counsel must obtain court authorization based upon the estimated costs of necessary interpreter or translator services before securing such services under the Criminal Justice Act.

Appeal: 16-4053 Doc: 11 Filed: 02/22/2016 Pg: 3 of 3

The <u>Anders</u> procedures do **not** apply to hybrid briefs in which counsel raises meritorious issues as well as <u>Anders</u> issues, and counsel filing a hybrid brief should **not** advise his client that he has a right to file a pro se supplemental brief.

/s/ PATRICIA S. CONNOR, CLERK By: T. Fischer, Deputy Clerk Appeal: 16-4053 Doc: 10 Filed: 02/22/2016 Pg: 1 of 1

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1100 East Main Street, Suite 501, Richmond, Virginia 23219

February 22, 2016

DOCKETING FORMS FOLLOW-UP NOTICE

No. 16-4052 (L), <u>In re: Information Associated</u>

1:13-sw-00522-CMH-1

TO: Jesse Ryan Binnall

Louise Tavey Gitcheva

REQUESTED FORM(S) DUE: February 25, 2016

The form(s) identified below must be filed in the clerk's office electronically by the due date shown. The forms are available for completion as links from this notice and at the court's Web site. Noncompliance with the court's filing requirements will lead to initiation of disciplinary proceedings pursuant to Local Rule 46(g) and will result in dismissal as to appellant pursuant to Local Rule 45.

[x] Disclosure of corporate affiliations on behalf of Ladar Levison

T. Fischer, Deputy Clerk 804-916-2704

Appeal: 16-4053 Doc: 12 Filed: 02/23/2016 Pg: 1 of 2

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of <u>all</u> parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No.	16-4052 Caption: In re Information Associated with [redacted]
Pursi	uant to FRAP 26.1 and Local Rule 26.1,
Lada	ar Levison
(nam	ne of party/amicus)
who	o is Appellant, makes the following disclosure: ellant/appellee/petitioner/respondent/amicus/intervenor)
\ 11	
1	Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2.	Does party/amicus have any parent corporations? If yes, identify all parent corporations, including all generations of parent corporations:
3.	Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ✓ NO If yes, identify all such owners:

08/05/2015 SCC - 1 -

4.	Is there any other publicly held corporation or other publicly financial interest in the outcome of the litigation (Local Rule If yes, identify entity and nature of interest:	y held entity e 26.1(b))?	that has a direct
5.	Is party a trade association? (amici curiae do not complete the lifyes, identify any publicly held member whose stock or equivalent substantially by the outcome of the proceeding or whose claim pursuing in a representative capacity, or state that there is not state that the s	uity value co ims the trade	ould be affected association is
6.	Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors	s' committee	YES☑NC
	cure: /s/ Jesse R. Binnall	Date: Feb	ruary 23, 2016
	CERTIFICATE OF SERVICE	E	
counse	fy that on <u>February 23, 2016</u> the foregoing document was sel of record through the CM/ECF system if they are registered a true and correct copy at the addresses listed below:		
Assista United Justin 2100 J	s L. Trump ant United States Attorney States Attorney's Office W. Williams U.S. Attorney's Building Jamieson Avenue Indria, Virginia 22314		
/s/ Je	esse R. Binnall		ry 23, 2016
	(signature)		(date)

Appeal: 16-4053 Doc: 12 Filed: 02/23/2016 Pg: 2 of 2

Appeal: 16-4053 Doc: 3 Filed: 02/05/2016 Pg: 1 of 2

FILED: February 5, 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

	No. 16-4052 (L) (1:13-sw-00522-CMH-1)
In re: INFORMATION AS	SSOCIATED with [redacted]
UNITED STATES OF AM	MERICA
Plaintiff - Ap	pellee
v.	
LAVABIT LLC; LADAR	LEVISON
Movants - Ap	ppellants
	No. 16-4053 (1:13-ec-00297-TCB)
In re: PEN REGISTER	
UNITED STATES OF AM	MERICA

Plaintiff - Appellee

v.

Appeal: 16-4053 Doc: 3 Filed: 02/05/2016 Pg: 2 of 2

LAVABIT LLC; LADAR LEVISON

Movants - Appellants

ORDER

The court consolidates Case No. 16-4052 and Case No. 16-4053. Entry of appearance forms and disclosure statements filed by counsel and parties to the lead case are deemed filed in the secondary case.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

Appeal: 16-4053 Doc: 4 Filed: 02/05/2016 Pg: 1 of 7

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1100 East Main Street, Suite 501, Richmond, Virginia 23219

www.ca4.uscourts.gov February 5, 2016

No. 16-4052 (L) (1:13-sw-00522-CMH-1)

In re: INFORMATION ASSOCIATED with [redacted]

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LAVABIT LLC; LADAR LEVISON

Movants - Appellants

DOCKETING NOTICE--CRIMINAL CASE

TO: Counsel

ATTACHMENT(S): Memorandum on Sealed and Confidential Information

DUE DATE: 14 days from this notice

- This case has been placed on the court's docket under the above-referenced number, which should be used on all documents filed in this case.
- Counsel should review the above caption and promptly bring any necessary corrections to the case manager's attention.

Appeal: 16-4053 Doc: 4 Filed: 02/05/2016 Pg: 2 of 7

• In consolidated cases, filings should be made using all case numbers to which the filing applies, beginning with the lead case number.

- Electronic filing is mandatory for counsel in all Fourth Circuit cases. Information on obtaining an electronic filing account is available on the court's Internet site.
- In cases in which more than one attorney represents a party, future notices will be sent only to attorneys who have entered an appearance as counsel of record; other attorneys will be removed from the case.
- Counsel must remove from documents filed with this court any social security numbers, juvenile names, dates of birth, financial account numbers, home addresses in criminal cases, and protected information regarding unexecuted summonses, jurors, presentence investigations, statements of reasons in criminal judgments, and substantial assistance agreements. Any sealed material must be filed in accordance with the enclosed Memorandum on Sealed and Confidential Material. The court does **not** seal its docket; therefore, counsel must use sealed entries for all sealed filings.
- Initial forms must be filed as directed in the following table of forms. The forms, available through the links below or on the court's Internet site, can be completed online and saved for filing in electronic form.

Form:	Required From:	Due:
Appearance of Counsel	Counsel of record for any party to the appeal (If not admitted to this court, counsel must complete and submit an application for admission.)	Within 14 days of this notice
Disclosure Statement	All parties to a civil or bankruptcy case and all corporate defendants in a criminal case (not required from the United States, from indigent parties, or from state or local governments in pro se cases)	Within 14 days of this notice
Docketing Statement	Appellant's counsel	Within 14 days of this notice
Transcript Order	Appellant, only if ordering transcript	Attach to docketing statement and submit to court reporter and district court clerk
CJA 24	Appellant, only if transcript is at court expense under Criminal Justice Act	Attach to docketing statement and submit to court reporter and district court clerk. If required by district court, also submit "Auth-24" request through district court's CJA eVoucher system.

Appeal: 16-4053 Doc: 4 Filed: 02/05/2016 Pg: 3 of 7

I will be the case manager for this case. Please contact me at the number listed below if you have any questions regarding your case.

T. Fischer, Deputy Clerk 804-916-2704

Appeal: 16-4053 Doc: 4 Filed: 02/05/2016 Pg: 4 of 7

SEALED & CONFIDENTIAL MATERIALS

Internet Availability of Docket & Documents

Fourth Circuit case dockets and documents are available on the Internet via the Judiciary's PACER system (Public Access to Court Electronic Records). The Fourth Circuit docket is available on the Internet even if the district court docket was sealed. If a party's name was sealed in the district court, it should be replaced by "Under Seal" or a pseudonym on appeal.

Due to the electronic availability of court documents, the federal rules prohibit including certain personal data identifiers in court filings. In addition, parties should not include any data in their filings that they would not want on the Internet. Counsel should advise their clients on this subject so that an informed decision can be made. Responsibility rests with counsel and the parties, not with the clerk.

Documents filed by the parties in immigration and social security cases are not accessible over the Internet to the public. In immigration and social security cases, public Internet access is limited to the court's docket, orders, and opinions.

Federal Rules of Procedure

The federal rules of procedure require filers to redact any of the following personal data identifiers (PDIs) if included in court filings: (1) social security and tax ID numbers must be limited to last four digits; (2) minor children must be identified by their initials only; (3) dates of birth must show the year only; (4) financial account numbers must be limited to the last four digits only; and (5) home addresses in criminal cases must be limited to city and state only. The federal rules establish limited exceptions to these redaction requirements. See Fed. R. App. P. 25(a)(5); Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037

Judicial Conference Privacy Policy

In addition, the judiciary's regulation on <u>Privacy Policy for Electronic Case Files</u> prohibits filers from including any of the following criminal documents in the public file: (1) unexecuted summonses or warrants; (2) bail or presentence reports; (3) statement of reasons in judgment of conviction; (4) juvenile records; (5) identifying information about jurors or potential jurors; (6) CJA financial affidavits; (7) ex parte requests to authorize CJA services and (8) any sealed documents, such as motions for downward departure for substantial assistance, plea agreements

Appeal: 16-4053 Doc: 4 Filed: 02/05/2016 Pg: 5 of 7

indicating cooperation, or victim statements.

Local Rule 25(c)

Local Rule 25(c) limits the sealing of documents by requiring that sealed record material be separated from unsealed material and placed in a sealed volume of the appendix and by requiring the filing of both sealed, highlighted versions and public, redacted versions of briefs and other documents.

Documents that were not sealed before the agency or district court will not be sealed in this court unless a motion to seal is filed and granted in this court.

Since the ECF events for sealed filings make the documents accessible only to the court, counsel must serve sealed documents on the other parties in paper form.

Sealed Volume of Appendix

If sealed record material needs to be included in the appendix, it must be placed in a **separate**, **sealed volume** of the appendix and filed with a certificate of confidentiality. In consolidated criminal cases in which presentence reports are being filed for multiple defendants, each presentence report must be placed in a separate, sealed volume served only on Government counsel and counsel for the defendant who is the subject of the report.

- Use ECF event-**SEALED APPENDIX** to file sealed electronic appendix volume(s). One sealed paper volume must be sent to the court. If the case is tentatively calendared for oral argument, 3 additional paper copies of the sealed appendix must be filed, with additional copies being ordered by the court if otherwise needed. Cover of sealed appendix volume must be marked SEALED, and paper copies must be placed in envelopes marked SEALED. Sealed volume must be served on other parties in paper form.
- Use ECF event-**Certificate of confidentiality** to identify authority for treating material as sealed and to identify who may have access to sealed material. A paper copy of the certificate of confidentiality must accompany the paper copy of the sealed appendix filed with the court.
- Use ECF event-**APPENDIX** to file public electronic appendix volumes(s). One public paper volume must be sent to the court. If the case is tentatively calendared for oral argument, 3 additional paper copies of the appendix must be filed, with additional copies being ordered by the court if otherwise needed. Paper copies of public volumes of appendix do not need to be served on other parties if they were served with public appendix in electronic form.

Appeal: 16-4053 Doc: 4 Filed: 02/05/2016 Pg: 6 of 7

Sealed Version of Brief

If sealed material needs to be referenced in a brief, counsel must file both a **sealed**, **highlighted version** of the brief and a **public**, **redacted version** of the brief, as well as a certificate of confidentiality.

- Use ECF event-**SEALED BRIEF** to file sealed electronic version of brief in which sealed material has been highlighted. One sealed paper copy must be sent to the court. If the case is tentatively calendared for oral argument, 3 additional paper copies of the sealedbrief must be filed, with additional copies being ordered by the court if otherwise needed. Cover of sealed brief must be marked SEALED, and paper copies must be placed in envelopes marked SEALED. Sealed version must be served on other parties in paper form.
- Use ECF event-**Certificate of confidentiality** to identify authority for treating material as sealed and to identify who may have access to sealed material. A paper copy of certificate of confidentiality must accompany the paper copy of the sealed brief filed with the court.
- Use ECF event-**BRIEF** to file public electronic version of brief from which sealed material has been redacted. One paper copy must be sent to the court. If the case is tentatively calendared for oral argument, 3 additional paper copies of the brief must be filed, with additional copies being ordered by the court if otherwise needed. Paper copies of public brief do not need to be served on other parties.

Sealed Version of Motions and Other Documents

If sealed material needs to be referenced in a motion or other document, counsel must file both a **sealed**, **highlighted version** and a **public**, **redacted version**, as well as a certificate of confidentiality.

- Use ECF event-SEALED DOCUMENT to file sealed electronic version of document in which sealed material has been highlighted. First page of document must be marked SEALED. No paper copies need be filed, but other parties must be served in paper form.
- Use ECF event-**Certificate of confidentiality** to identify authority for treating material as sealed and to identify who may have access to sealed material.
- Use the appropriate ECF event (e.g., **MOTION** or **RESPONSE/ANSWER**) to file public electronic version of document from which sealed material has been redacted. No paper copies of public document are needed for filing or

Appeal: 16-4053 Doc: 4 Filed: 02/05/2016 Pg: 7 of 7

service.

Motions to Seal

Counsel should file a motion to seal if the material was not previously sealed by virtue of the Privacy Policy for Electronic Case Files, or by statute, rule, regulation, or order. Counsel should also file a motion to seal if it is necessary to seal the entire brief or motion and not possible to create a public, redacted version.

The motion to seal must appear on the public docket for five days; therefore, counsel must file both a **sealed, highlighted version** of the motion to seal (along with a certificate of confidentiality) and a **public, redacted version** of the motion to seal. The motion to seal must identify the document or portions thereof for which sealing is requested, the reasons why sealing is necessary, the reasons a less drastic alternative will not afford adequate protection, and the period of time for which sealing is required.

For further information on redacting information from filings, please see No. 19, How do I redact items from pleadings?

Appeal: 16-4053 Doc: 5 Filed: 02/17/2016 Pg: 1 of 2

FILED: February 17, 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-4052 (L) (1:13-sw-00522-CMH-1)

In re: INFORMATION ASSOCIATED with [redacted]

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LAVABIT LLC; LADAR LEVISON

Movants - Appellants

ORDER

Upon consideration of the district court's initial sealed transmission of

documents, the court places under seal in this court the documents so transmitted by

the district court.

The parties are advised that all cases in this court are available on the public

docket. If sealed information must be included in a document filed on appeal,

counsel must file both a sealed, highlighted version of the document using a

Appeal: 16-4053 Doc: 5 Filed: 02/17/2016 Pg: 2 of 2

SEALED entry and a public, redacted version of the document using the appropriate public entry. Copies of sealed documents included in the appendix must be placed in a separate, sealed volume of the appendix. If counsel wishes to file appellate documents entirely under seal, counsel must file a motion to seal. A redacted version of the motion to seal must be available on the public docket for five days prior to ruling by the court. Any motion to argue the case under seal should be filed only after notice that the case has been scheduled for argument. See Memorandum on Sealed and Confidential Materials for additional information.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

Appeal: 16-4053 Doc: 6 Filed: 02/19/2016 Pg: 1 of 1

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an <u>Application for Admission</u> before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at <u>Register for eFiling</u>.

THE CLERK WILL ENTER MY APPEARANCE IN	NAPPEAL NO. 16-4052(L); 16-4053 as
✓ Retained Court-appointed(CJA) Court-assigned	d(non-CJA) Federal Defender Pro Bono Governmen
COUNSEL FOR: Ladar Levison & Lavabit LLC	
	as the
(party n	
appellant(s) appellee(s) petitioner(s) resp	pondent(s) amicus curiae intervenor(s) movant(s)
/s/ Louise T. Gitcheva (signature)	
Louise T. Gitcheva Name (printed or typed)	(703) 888-1943 Voice Phone
Harvey & Binnall, PLLC Firm Name (if applicable)	(703) 888-1930 Fax Number
717 King Street, Suite 300	
Alexandria, Virginia 22314	lgitcheva@harveybinnall.com
Address	E-mail address (print or type)
I certify that on February 19, 2016 the foregoing docu	TE OF SERVICE ment was served on all parties or their counsel of record or, if they are not, by serving a true and correct copy at the
James L. Trump Senior Litigation Counsel United States Attorney's Office Eastern Ditrict of Virginia 2100 Jamieson Avenue Alexandria, Virginia 22314	
/s/ Louise T. Gitcheva	February 19, 2016
Signature	Date

Appeal: 16-4053 Doc: 7 Filed: 02/19/2016 Pg: 1 of 1

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT APPEARANCE OF COUNSEL FORM

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THE CLERK WILL ENTER MY APPEARANCE IN A	APPEAL NO. 16-4052(L); 16-4053 as
✓ Retained Court-appointed(CJA) Court-assigned(non-CJA) Federal Defender Pro Bono Governmen
COUNSEL FOR: Ladar Levison & Lavabit LLC	
	as the
(party na	
appellant(s) appellee(s) petitioner(s) response	ondent(s) amicus curiae intervenor(s) movant(s)
/s/ Jesse R. Blnnall (signature)	
Jesse R. Binnall Name (printed or typed)	(703) 888-1943 Voice Phone
Harvey & Binnall, PLLC Firm Name (if applicable)	(703) 888-1930 Fax Number
717 King Street, Suite 300	
Alexandria, Virginia 22314 Address	jbinnall@harveybinnall.com E-mail address (print or type)
CERTIFICATE I certify that on February 19, 2016 the foregoing docum	
through the CM/ECF system if they are registered users or, addresses listed below:	, if they are not, by serving a true and correct copy at the
James L. Trump Senior Litigation Counsel United States Attorney's Office Eastern Ditrict of Virginia 2100 Jamieson Avenue Alexandria, Virginia 22314	
/s/ Jesse R. Binnall	February 19, 2016
Signature	Date

Appeal: 16-4053 Doc: 8 Filed: 02/19/2016 Pg: 1 of 2

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of <u>all</u> parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No.	16-4052 Caption: In re Information Associated with [redacted]
Pursi	uant to FRAP 26.1 and Local Rule 26.1,
Lava	bit LLC
(nam	ne of party/amicus)
who (appe	is Appellant, makes the following disclosure: ellant/appellee/petitioner/respondent/amicus/intervenor)
1.	Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ✓ NO
2.	Does party/amicus have any parent corporations? ☐ YES ✓ NO If yes, identify all parent corporations, including all generations of parent corporations:
3.	Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ✓ NO If yes, identify all such owners:

08/05/2015 SCC - 1 -

4.	Is there any other publicly held corporation or other publicly financial interest in the outcome of the litigation (Local Rule If yes, identify entity and nature of interest:		
5.	Is party a trade association? (amici curiae do not complete the If yes, identify any publicly held member whose stock or equivolve substantially by the outcome of the proceeding or whose claim pursuing in a representative capacity, or state that there is no	uity valums the t	rade association is
6.	Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors	' commi	☐ YES ☑NO
	ure: <u>/s/ Jesse R. Binnall</u> el for: <u>Lavabit LLC</u>	Date:	February 19, 2016
	CERTIFICATE OF SERVICE		
counse serving James	fy that on February 19, 2016 the foregoing document was sel of record through the CM/ECF system if they are registered g a true and correct copy at the addresses listed below: L. Trump		•
United Justin 2100 J	ant United States Attorney States Attorney's Office W. Williams U.S. Attorney's Building amieson Avenue dria, Virginia 22314		
/s/ Je	sse R. Binnall (signature)		(date)

Appeal: 16-4053 Doc: 8 Filed: 02/19/2016 Pg: 2 of 2

Appeal: 16-4053 Doc: 1 Filed: 02/05/2016 Pg: 1 of 1

FILED: February 5, 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-4053 (1:13-ec-00297-TCB)

In re: PEN REGISTER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LAVABIT LLC; LADAR LEVISON

Movants - Appellants

This case has been opened on appeal.

Originating Court	United States District Court for the Eastern District of Virginia at Alexandria
Originating Case Number	1:13-ec-00297-TCB
Date notice of appeal filed in originating court:	02/03/2016
Appellant (s)	Lavabit, Levison
Appellate Case Number	16-4053
Case Manager	T. Fischer 804-916-2704

U.S. District Court Eastern District of Virginia - (Alexandria) CRIMINAL DOCKET FOR CASE #: 1:13-ec-00297-TCB All Defendants

Case title: USA v. In Re: Pen Register Date Filed: 07/09/2013

Date Terminated: 07/09/2013

Assigned to: Magistrate Judge Theresa

Carroll Buchanan

Defendant (1)

In Re: Pen Register represented by Jesse R. Binnall

TERMINATED: 07/09/2013 Harvey & Binnall PLLC 717 King Street

Suite 300

Alexandria, VA 22314 703-888-1943 Fax: 703-888-1930

Email: jbinnall@harveybinnall.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Designation: Retained

Pending Counts Disposition

None

Highest Offense Level (Opening)

None

Terminated Counts Disposition

None

Highest Offense Level (Terminated)

None

<u>Complaints</u> <u>Disposition</u>

None

Plaintiff

USA represented by James L. Trump

United States Attorney's Office 2100 Jamieson Ave Alexandria, VA 22314

(703)299-3700

Email: jim.trump@usdoj.gov

LEAD ATTORNEY ATTORNEY TO BE NOTICED

Tracy Doherty McCormick

US Attorney's Office (Alexandria-NA) 2100 Jamieson Avenue Alexandria, VA 22314 NA 703 299-3715

Email: tracy.d.mccormick@usdoj.gov

ATTORNEY TO BE NOTICED Designation: US Attorney

Date Filed	#	Docket Text
02/24/2016	<u>25</u>	ORDER granting 24 Motion to Unseal Document as to In Re: Pen Register (1). ORDERED that the above-captioned cases are unsealed to allow the Clerk's Office to file on the public docket and make electronically available through CM/ECF the following pleadings, transcripts, and order as redacted in accordance with the Attachments to this Order. Signed by District Judge Claude M. Hilton on 2/24/2016. (Attachments: # 1 Attachment 1, # 2 Attachment 2, # 3 Attachment 3, # 4 Attachment 4, # 5 Attachment 5, # 6 Attachment 6, # 7 Attachment 7, # 8 Attachment 8, # 9 Attachment 9, # 10 Attachment 10, # 11 Attachment 11 Part 1, # 12 Attachment 11 Part 2, # 13 Attachment 11 Part 3, # 14 Attachment 12 Part 1, # 15 Attachment 12 Part 2, # 16 Attachment 12 Part 3, # 17 Attachment 13, # 18 Attachment 14, # 19 Attachment 15, # 20 Attachment 16, # 21 Attachment 17) (rban,) (Additional attachment(s) added on 3/4/2016: # 22 Redacted Docket Sheet) (rban,). (Entered: 03/04/2016)
03/04/2016		Case unsealed as to In Re: Pen Register (rban,) (Entered: 03/04/2016)

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)	No. 1:13EC297
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	
IN THE MATTER OF THE SEARCH AND)	No. 1:13SW522
SEIZURE OF INFORMATION)	
ASSOCIATED WITH [REDACTED])	
THAT IS STORED AT PREMISES)	
CONTROLLED BY LAVABIT LLC)	
)	
In re Grand Jury)	No. 13-1

ORDER

WHEREAS, on January 7, 2016, the Court denied the Motion to Unseal Records and Vacate Non-Disclosure Orders respecting case numbers 1:13EC297, 1:13SW522, and No. 13-1 and ordered the United States to file on the public docket copies of all the previously filed pleadings, transcripts, and orders with redactions for only the identity of the subscriber and the subscriber's email address;

WHEREAS, on February 24, 2016, the United States moved to publicly file *ex parte* documents redacted of sensitive, nonpublic facts the disclosure of which could damage the ongoing investigation;

WHEREAS, on February 24, 2016, the United States moved to redact publicly filed documents of (a) information specific to the grand jury target that would disclose, in effect, the target's identity or would be protected from disclosure under Fed.R.Crim.P. 6(e), such as the

criminal statutes under investigation by the grand jury; and (b) information, such as the home address of Mr. Levison that should be redacted pursuant to Fed.R.Crim.P. 49.1 and EDVA Local Rule 49;

The court hereby finds that the government has a compelling interest in keeping under seal certain facts, the disclosure of which could damage the ongoing investigation or is protected by Fed.R.Crim.P. 6(e) and 49.1; the government's interest in keeping the redacted material sealed outweighs any public interest in disclosure; and having considered alternatives to the proposed redactions none will adequately protect those interests; it is hereby

ORDERED that the above-captioned cases are unsealed to allow the Clerk's office to file on the public docket and make electronically available through the CM/ECF system the following pleadings, transcripts, and orders as redacted in accordance with the Attachments to this Order:

I. Case Number 1:13EC297

- Redacted Docket Sheet 1:13EC297
- 2. Redacted Motion for Order to Show Cause as to In Re: Pen Register (Dkt. #1)
- 3. Redacted ORDER Granting Motion for Order to Show Cause (Dkt. #2)
- 4. Redacted Summons Issued in case as to In Re: Pen Register (Dkt.. #3)
- 5. Redacted Supplement re Motion for Order to Show Cause (Dkt. #4)
- 6. Redacted Minute Entry for proceedings (Dkt. #5)
- 7. Redacted Order Denying Motion to Unseal (Dkt. #6)
- 8. Redacted Motion to Seal the grand jury subpoena (Dkt. #7)
- 9. Redacted Order Granting Motion to Seal the grand jury subpoena (Dkt. #8)
- 10. Redacted Minute Entry for Proceedings (Dkt. #9)
- 11. Redacted Sealed Transcript of Proceedings (Dkt. #10)
- 12. Redacted Under Seal Ex Parte Motion (Dkt. #11)
- 13. Redacted Sealed Order re UNDER SEAL EX PARTE MOTION (Dkt. #12)
- 14. Redacted version of Sealed Order (Dkt. #13)
- 15. Redacted Motion to Unseal Case (Dkt. #14)
- 16. Redacted Order to Respond to Motion to Unseal Case (Dkt. #15)

- 17. Redacted Response by US to In Re: Pen Register (Dkt. #16)
- 18. Redacted Protective Order as to In Re: Pen Register (Dkt. #17)

II. Case Number 1:13SW522

- 1. Redacted Docket Sheet 1:13SW522
- 2. Redacted Search Warrant Application and Affidavit (Dkt. #1)
- 3. Redacted Search Warrant Issued (Dkt. #2)
- 4. Redacted Motion to Seal Search Warrant (Dkt. #3)
- 5. Redacted Order to Seal (Dkt. #4)
- 6. Redacted Application for Non-Disclosure (Dkt. #5)
- 7. Redacted Nondisclosure Order (Dkt. #6)
- 8. Redacted Waiver of Personal Appearance (Dkt. #7)
- 9. Redacted Motion to Unseal Court Records (Dkt. #8)
- 10. Redacted Motion to Quash Subpoena (Dkt. #9)
- 11. Redacted Order denying Motion to Unseal and Motion to Quash (Dkt. #10)
- 12. Redacted Minute Entry (Dkt. #11)
- 13. Redacted Motion for Sanctions (Dkt. #12)
- 14. Redacted Order Granting Motion for Sanctions (Dkt. #13)
- 15. Redacted Notice of Appeal (Dkt. #14)
- 16. Redacted Transmission of Notice of Appeal (Dkt. #15)
- 17. Redacted Transcript of Proceedings (Dkt. #16)
- 18. Redacted USCA Case Number 13-4626 (Dkt. #17)
- 19. Redacted Order of USCA Consolidating Case No. 13-4625 and 4626 (Dkt. #18)
- 20. Redacted Under Seal Ex Parte Motion (Dkt. #19)
- 21. Redacted Sealed Order re Under Seal Ex Parte Motion (Dkt. #20)
- 22. Redacted version of Sealed Order (Dkt. #21)
- 23. Redacted Published Opinion of USCA (Dkt. #22)
- 24. Redacted Judgment of USCA (Dkt. #23)
- 25. Redacted USCA Mandate re Notice of Appeal (Dkt. #24)
- 26. Redacted Motion to Unseal Case (Dkt. #25)
- 27. Redacted Order to Respond to Motion to Unseal Case (Dkt. #26)
- 28. Redacted Response by US (Dkt. #27)
- 29. Redacted Protective Order (Dkt. #28)
- Redacted Response of the United States in Opposition to Motion to Quash Subpoena and Unseal Court Records (Filed July 31, 2013) (Dkt. #TBD)

It is further ORDERED that the originally filed, unredacted pleadings, transcripts, and orders in matters 1:13EC297, 1:13SW522, and No. 13-1 remain under seal, and that no part of

them may be disclosed without Court order except to the extent provided above and in the Court's January 7, 2016 Order.

It is so ORDERED.

ENTERED this 24 day of February 2016, at Alexandria, Virginia.

Claude M. Hilton

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)	FILED UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	



MOTION OF THE UNITED STATES FOR AN ORDER TO SHOW CAUSE

The United States, through the undersigned counsel, pursuant to Title 18, United States Code, Section 401, hereby moves for the issuance of an order directing Ladar Levison, the owner and operator of Lavabit LLC, an electronic communications service provider, to show cause why Lavabit LLC has failed to comply with the orders entered June 28, 2013, in this matter and, as a result, why this Court should not hold Mr. Levison and Lavabit LLC in contempt for its disobedience and resistence to these lawful orders. The United States further requests that the Court convene a hearing on this motion on July 16, 2013, at 10:00 a.m., and issue a summons directing Mr. Levison to appear before this Court on that date. In support of this motion, the United States represents:

1. The United States is conducting a criminal investigation of violations of a number of federal statutes, including 18 U.S.C.

18 U.S.C. §

and 18 U.S.C. §

On , a criminal complaint was filed charging

with these offenses. remains a fugitive.

- 2. The investigation has revealed that has utilized and continues to utilize an email account obtained through Lavabit LLC, an electronic communications service provider (see http://lavabit.com/). On or about June 8, 2013, a grand jury subpoena was served on Lavabit LLC through Ladar Levison for billing and subscriber information for Lavabit email account. Mr. Levison provided that information. On June 10, 2013, the United States obtained an order pursuant to 18 U.S.C. § 2703(d) directing Lavabit LLC to provide, within ten days, additional records and information about email account. Mr. Levison received that order on June 11, 2013. Mr. Levison responded by mail, which was not received by the government until June 27, 2013. Mr. Levison provided very little of the information sought by the June 10, 2013 order.
- 3. On June 28, 2013, the United States obtained a pen register/trap and trace order on email account, a copy of which is attached together with the application for that order.
- 4. On June 28, 2013, FBI special agents met Mr. Levison at his residence in Dallas, Texas, and discussed the prior grand jury subpoena served on Lavabit LLC and the pen register order entered that day. Mr. Levison did not have a copy of the order when he spoke with the agents, but he received a copy from the FBI within a few minutes of their conversation. Mr. Levison told the agents that he would not comply with the pen register order and wanted to speak to an attorney. It was unclear whether Mr. Levison would not comply with the order because it was technically not feasible or difficult or because it was not consistent with his business practice of providing secure, encrypted email service for his customers.

- On June 28, 2013, after this conversation with Mr. Levison, the United States
 obtained an Order Compelling Compliance Forthwith, which directed Lavabit to comply with the pen register order. Copies of that motion and order are attached.
- 6. Since June 28, 2013, the FBI has made numerous attempts, without success, to speak and meet directly with Mr. Levison to discuss the pen register order and his failure to provide "all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device" as required by that order. As of this date, Lavabit LLC has not complied with the order.
- 7. The United States requests that the Court enter the attached proposed order directing Mr. Levison to show cause why Lavabit LLC has failed to comply with the pen register order and why, therefore, he should not be held in contempt. The United States requests that this show cause hearing be scheduled for July 16, 2013, at 10:00 a.m., and that a summons be issued directing Mr. Levison to appear before this Court on that date.
- 8. The June 10, 2013 Section 2703(d) Order and the June 28, 2013 pen register order remain under seal. In addition, these orders provide that Lavabit LLC shall not disclose the existence of the government's applications and the orders to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders. The United States requests that these documents remain under seal, that the non-disclosure

provisions of the orders remain in effect, and that this motion and order and any subsequent pleadings and/or proceedings regarding this motion also be sealed.

Respectfully submitted,

Neil H. MacBride United States Attorney

1

dmes L. Trump

United States Attorney's Office

Justin W. Williams U.S. Attorney's Building

2100 Jamieson Avenue

Alexandria, Virginia 22314

Phone: 703-299-3700

PROPOSED ORDER TO SHOW CAUSE

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)	UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	

ORDER TO SHOW CAUSE

Upon motion of the United States pursuant to Title 18, United States Code, Section 401, good cause having been shown, IT IS HEREBY ORDERED:

- Ladar Levison, the owner and operator of Lavabit LLC, an electronic
 communications service provider, shall appear before this Court on July 16, 2013, at 10:00 a.m.,
 at which time he shall show cause why Lavabit LLC has failed to comply with the orders entered
 June 28, 2013, in this matter and why this Court should not hold Mr. Levison and Lavabit LLC in
 contempt for its disobedience and resistence to these lawful orders;
- The Clerk's Office shall issue a summons for the appearance of Mr. Levison on
 July 16, 2013, at 10:00 a.m. The Clerk's Office shall provide the Federal Bureau of Investigation
 with a certified copy of the summons for service on Mr. Levison and Lavabit LLC.
- The Federal Bureau of Investigation shall serve the summons on Mr. Levison together with a copy of the Motion of the United States for an Order to Show Cause and a certified copy of this Order to Show Cause.
- 4. The sealing and non-disclosure provisions of the June 10, 2013 Section 2703(d) order and the June 28, 2013 pen register order shall remain in full force and effect. Mr. Levison

and Lavabit LLC shall not disclose the existence of these applications, motions, and court orders, including this Order to Show Cause, to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders.

 This Order, the Motion of the United States for an Order to Show Cause, and any subsequent pleadings and proceedings regarding this matter shall be placed under seal until further order of this Court.

Entered in Alexandria, Virginia, this ____ day of July, 2013

Claude M. Hilton United States District Judge

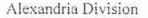
REDACTED

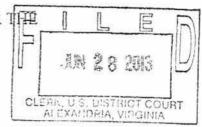
PEN REGISTER APPLICATION AND ORDER

Case 1:13-ec-00297-TCB Document 25-1 Filed 02/24/16 Page 9 of 22 PageID# 473

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA





IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA	?
FOR AN ORDER AUTHORIZING THE	(<u>Under Seal</u>)
INSTALLATION AND USE OF A PEN REGISTER/TRAP AND TRACE DEVICE) 1:13 EC 297
ON AN ELECTRONIC MAIL ACCOUNT)

APPLICATION

Andrew Peterson, Assistant United States Attorney for the Eastern District of Virginia, applies to the Court pursuant to 18 U.S.C. § 3122 for an Order authorizing the installation and use of a pen register/trap and trace device or process ("pen/trap device") on all electronic communications being sent from or sent to the account associated with

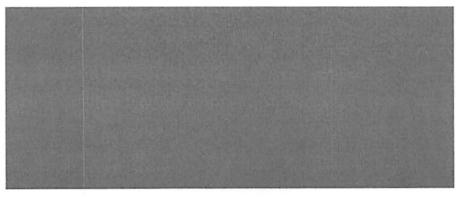
that is registered to subscriber at Lavabit, LLC ("Lavabit"), (hereinafter referred to as the "SUBJECT ELECTRONIC MAIL ACCOUNT").

In support of this Application, s/he states the following:

- 1. Applicant is an "attorney for the Government" as defined in Rule 1(b)(1) of the Federal Rules of Criminal Procedure, and therefore, pursuant to 18 U.S.C. §§ 3122(a)(1) and 3123(a)(1), may apply for an <u>ex parte</u> order authorizing the installation and use of pen register and trap and trace devices and processes anywhere within the United States.
- 2. I certify that this request is made in connection with the criminal investigation by Federal Bureau of Investigation into possible violations of 18 U.S.C. §§ _______, and
- 3. In support of this Application, I proffer that I have discussed this investigation with an agent of the Federal Bureau of Investigation, who has informed me that he is involved in the criminal investigation of for evidence of possible violations of 18 U.S.C.

 §§ Through my discussions with this agent, I have learned that information likely to be transmitted to or from the SUBJECT ELECTRONIC MAIL ACCOUNT

is relevant to the ongoing criminal investigation:	has admitted to
	A resume belonging to
identified the SUBJECT ELECTRONIC MAIL ACC	OUNT as belonging to
A subpoena to Lavabit, LLC indicated that the SUBJECT ELEC	CTRONIC MAIL ACCOUNT is
registered to an individual named On Ju	ne 27, 2013, an individual using
the account sent an e-mail that stated:	



- 4. Based on the foregoing information, I certify that the information likely to be obtained from the pen/trap device on the SUBJECT ELECTRONIC MAIL ACCOUNT is relevant to an ongoing criminal investigation in that this information will concern the aforementioned offenses and will aid in the investigation.
- 5. The term "pen register," as defined at 18 U.S.C. § 3127(3), as amended, is "a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted." A "trap and trace device," defined at 18 U.S.C. § 3127(4), as amended, is "a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication."
- 6. In the traditional telephone context, a pen/trap device collects origin and destination information such as the telephone numbers dialed for a telephone call. The same principles apply in the context of Internet electronic mail: a pen/trap device collects addressing information contained in mail headers. Mail headers are portions of Internet communications

that contain addressing information analogous to "To:" and "From:" addresses for traditional letters and to origin and destination telephone numbers for telephone calls. Importantly, mail headers (except the subject lines of e-mails, which may themselves include content) do not contain the contents of electronic communications. Accordingly, this Application does <u>not</u> seek authority to intercept the contents of any electronic communications, and, in particular, does not seek the subject lines of electronic mails.

- 7. In the instant investigation, the pen/trap device sought by this Application will intercept electronic mail headers. According to Federal Bureau of Investigation agents, the device will only retrieve all non-content dialing, routing, addressing, and signaling information (including Internet Protocol addresses, port number assignments, and electronic mail addresses). Specifically, the "To:" portion of the mail header will be the destination electronic mail address in the mail headers; while the "From:" portion of the mail header will be the sender's electronic mail address (in this case, the user of the SUBJECT ELECTRONIC MAIL ACCOUNT). The device will not capture any "Subject:" portion, which could possibly contain content. The system will also record the date and time of the initiation and receipt of such transmissions, and record their duration. This system also records user log-in data (date, time, duration, and Internet Protocol address of all log-ins to the SUBJECT ELECTRONIC MAIL ACCOUNT).
- 8. Based upon the above certification, and pursuant to 18 U.S.C. §§ 3122 and 3123, I hereby request that the Court issue an Order authorizing the installation and use of a pen/trap device to capture all non-content dialing, routing, addressing, and signaling information (including Internet Protocol addresses, port number assignments, and electronic mail addresses), sent to or from the SUBJECT ELECTRONIC MAIL ACCOUNT, to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data (date, time, duration, and Internet Protocol address of all log-ins) on the SUBJECT ELECTRONIC MAIL ACCOUNT, all for a period of sixty (60) days from the date of such Order or the date the monitoring equipment becomes operational, whichever occurs later.

- 9. Pursuant to 18 U.S.C. § 3123(b)(2), I further request that the Court order the Lavabit to furnish information, facilities, and technical assistance necessary to accomplish the installation of the pen/trap device unobtrusively, with reasonable compensation to be paid by the Federal Bureau of Investigation for reasonable expenses incurred in providing such facilities and assistance.
- United States (including but not limited to the Federal Bureau of Investigation) may find it necessary to install and use its own pen/trap device on a packet-switched data network of the public provider. In that event, as required by 18 U.S.C. § 3123(a)(3), the United States shall ensure that a record is maintained that will identify: (a) any officer(s) who installed the device and any officer(s) who accessed the device to obtain information from the network; (b) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (c) the configuration of the device at the time of its installation and any subsequent modification thereof; and (d) any information which has been collected by the device. To the extent that the pen/trap device can be set to automatically record this information electronically, the record shall be maintained electronically throughout the installation and use of the pen/trap device. Pursuant to 18 U.S.C. § 3123(a)(3)(B), as amended, such record(s) shall be provided ex parte and under seal to this Court within 30 days of the termination of the Order (including any extensions thereof).
- and Order be filed under seal until unsealed by the Court, and that Lavabit be directed not to disclose the existence of this investigation and Order. Based on the information provided in this application, I believe that disclosure of the requested Order may seriously jeopardize the investigation in that the parties currently using the SUBJECT ELECTRONIC MAIL ACCOUNT will cease to use the account to conduct their illegal activities and may destroy evidence of past activities. Notwithstanding this request, I would ask that copies of the Order be furnished to the Federal Bureau of Investigation, the United States Attorney's Office, and Lavabit.

12. WHEREFORE, it is respectfully requested that the Court grant an Order (1) that authorizes the installation and use of a pen/trap device to capture all non-content dialing, routing, addressing, and signaling information (including Internet Protocol addresses, port number assignments, and electronic mail addresses) sent to or from the SUBJECT ELECTRONIC MAIL ACCOUNT, to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data (date, time, duration, and Internet Protocol address of all log-ins) on the SUBJECT ELECTRONIC MAIL ACCOUNT, all for a period of sixty (60) days from the date of such Order or the date the monitoring equipment becomes operational, whichever occurs later; (2) that directs Lavabit to furnish the United States (including but not limited to the Federal Bureau of Investigation) forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the device unobtrusively and with a minimum of interference to the service presently accorded persons whose transmissions are the subject of the pen/trap device; (3) that requires that Lavabit be compensated by the Federal Bureau of Investigation for reasonable expenses incurred in providing technical assistance; (4) that places this Application and Order under seal until otherwise ordered by the Court; (5) that allows copies of such Order to be furnished to the Federal Bureau of Investigation, the United States Attorney's Office, and Lavabit; and (6) that directs that Lavabit and its agents and employees, not disclose to the listed subscriber, or to any other person, the existence of the pen/trap device or of this investigation unless or until otherwise ordered by the Court.

The foregoing is based on information provided to me in my official capacity by agents of the Federal Bureau of Investigation.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on this 28th day of June, 2013.

Andrew Peterson

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION)	
OF THE UNITED STATES OF AMERICA)	(11 1 0 1)
FOR AN ORDER AUTHORIZING THE NSTALLATION AND USE OF A PEN	(Under Seal)
REGISTER/TRAP AND TRACE DEVICE	1:13 EC 297
ON AN ELECTRONIC MAIL ACCOUNT)	

ORDER

This matter having come before the Court pursuant to an Application under 18 U.S.C. § 3122, by Andrew Peterson, Assistant United States Attorney, an attorney for the Government as defined by Fed. R. Crim. P. 1(b)(1), requesting an Order under 18 U.S.C. § 3123, authorizing the installation and use of a pen register and the use of a trap and trace device or process ("pen/trap device") on all electronic communications being sent from or sent to the account associated with that is registered to subscriber at Lavabit, LLC (hereinafter referred to as the "SUBJECT ELECTRONIC MAIL ACCOUNT"). The Court finds that the applicant has certified that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation into possible violation(s) of 18 U.S.C. §§

IT APPEARING that the information likely to be obtained by the pen/trap device is relevant to an ongoing criminal investigation of the specified offense;

IT IS ORDERED, pursuant to 18 U.S.C. § 3123, that a pen/trap device may be installed and used by Lavabit and the Federal Bureau of Investigation to capture all non-content dialing, routing, addressing, and signaling information (as described and limited in the Application), sent from or sent to the SUBJECT ELECTRONIC MAIL ACCOUNT, to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data (date, time, duration, and Internet Protocol address of all log-ins) on the

SUBJECT ELECTRONIC MAIL ACCOUNT, all for a period of sixty (60) days from the date of such Order or the date the monitoring equipment becomes operational, whichever occurs later;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(b)(2), that Lavabit shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device unobtrusively and with minimum interference to the services that are accorded persons with respect to whom the installation and use is to take place;

IT IS FURTHER ORDERED that the United States take reasonable steps to ensure that the monitoring equipment is not used to capture any "Subject:" portion of an electronic mail message, which could possibly contain content;

IT IS FURTHER ORDERED that Lavabit shall be compensated by the Federal Bureau of Investigation for reasonable expenses incurred in providing technical assistance;

agency seeks to install and use its own pen/trap device on a packet-switched data network of a public provider, the United States shall ensure that a record is maintained which will identify: (a) any officer(s) who installed the device and any officer(s) who accessed the device to obtain information from the network; (b) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (c) the configuration of the device at the time of its installation and any subsequent modification thereof; and (d) any information which has been collected by the device. To the extent that the pen/trap device can be set to automatically record this information electronically, the record shall be maintained electronically throughout the installation and use of the pen/trap device. Pursuant to 18 U.S.C. § 3123(a)(3)(B), as amended, such record(s) shall be provided ex parte and under seal to this Court within 30 days of the termination of this Order, including any extensions thereof;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(d), that this Order and the Application be sealed until otherwise ordered by the Court, and that copies of such Order may be

furnished to the Federal Bureau of Investigation, the United States Attorney's Office, and Lavabit;

IT IS FURTHER ORDERED that Lavabit shall not disclose the existence of the pen/trap device, or the existence of the investigation to any person, except as necessary to effectuate this Order, unless or until otherwise ordered by the Court.

SO ORDERED:

Theresa Carroll Buchanan United States Magistrate Judge

Hon. Theresa C. Buchanan United States Magistrate Judge

Date: 4/28/13

COMPULSION MOTION AND ORDER

REDACTED

ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION)	
OF THE UNITED STATES OF AMERICA)	
FOR AN ORDER AUTHORIZING THE)	(Under Seal)
INSTALLATION AND USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	1:13 EC 297
ON AN ELECTRONIC MAIL ACCOUNT)	

MOTION FOR ENTRY OF AN ORDER TO COMPEL

The United States, by and through its undersigned counsel, hereby requests the Court enter an Order directing Lavabit, LLC, to comply with the Court's June 28, 2013 Pen Register/Trap and Trace Order. In support of the motion the United States declares as follows:

- 1. On June 28, 2013, at approximately 4 p.m., this Court entered an Order pursuant to 18 U.S.C. § 3123 authorizing the installation and use of a pen register and the use of a trap and trace device ("pen/trap device") on all electronic communications being sent from or sent to the electronic mail account.

 That e-mail account is controlled by Lavabit, LLC.
- 2. In its Order, the Court found that the information to be collected by the pen/trap device would be relevant to an ongoing criminal investigation. In addition, the Court ordered Lavabit "shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device."
- 3. The Federal Bureau of Investigation served a copy of the Order on Lavabit that same afternoon. A representative of Lavabit stated that it could not provide the requested information because the user of the account had enabled Lavabit's encryption services, and thus

Case 1:13-ec-00297-TCB Document 25-1 Filed 02/24/16 Page 19 of 22 PageID# 483 **REDACTED**

Lavabit would not provide the requested information. The representative of Lavabit indicated that Lavabit had the technical capability to decrypt the information but that Lavabit did not want to "defeat [its] own system."

- The representative of Lavabit did not comply with the Order, and indicated he first wanted to seek legal advice.
- 5. The Pen Register and Trap and Trace Act gives this Court the authority to order a provider to assist the government in the execution of a lawful pen register or trap and trace order, including by providing information. Section 3122 of Title 18, United States Code, provides in part: "An order issued under this section-- ... shall direct, upon the request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device under section 3124 of this title." Section 3124(a) provides, "Upon the request of an attorney for the Government or an officer of a law enforcement agency authorized to install and use a pen register under this chapter, a provider of wire or electronic communication service... shall furnish such investigative or law enforcement officer forthwith all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference... if such

Case 1:13-ec-00297-TCB Document 25-1 Filed 02/24/16 Page 20 of 22 PageID# 484 **REDACTED**

assistance is directed by a court order as provided in section 3123(b)(2) of this title." Section 3124(b) contains a similar provision governing trap and trace orders.

Wherefore, the United States requests an Order directing Lavabit to comply forthwith with the Court's June 28, 2013 Order.

Respectfully submitted, NEIL H. MACBRIDE United States Attorney

By:

Andrew Peterson

Assistant United States Attorney

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE



Alexandria Division

IN THE MATTER OF THE APPLICATION)	
OF THE UNITED STATES OF AMERICA)	
FOR AN ORDER AUTHORIZING THE)	(Under Seal)
INSTALLATION AND USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	1:13 EC 297
ON AN ELECTRONIC MAIL ACCOUNT)	

ORDER COMPELLING COMPLIANCE FORTHWITH

WHEREAS, on June 28, 2013, at approximately 4:00 p.m., this Court entered an Order pursuant to 18 U.S.C. § 3123 authorizing the installation and use of a pen register and the use of a trap and trace device ("pen/trap device") on all electronic communications being sent from or sent to the electronic mail account which is an e-mail account controlled by Lavabit, LLC ("Lavabit"); and

WHEREAS, this Court found that the information obtained by the pen/trap device would be relevant to an ongoing criminal investigation; and

WHEREAS, the Court's Order directed that Lavabit "shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device;" and

WHEREAS, Lavabit informed the Federal Bureau of Investigation that the user of the account had enabled Lavabit's encryption services and thus the pen/trap device would not collect the relevant information; and

WHEREAS, Lavabit informed the FBI that it had the technological capability to obtain the information but did not want to "defeat [its] own system;"

REDACTED

IT IS HEREBY ORDERED that Lavabit LLC is directed to comply forthwith with the Court's June 28, 2013 Order, and provide the Federal Bureau of Investigation with unencrypted data pursuant to the Order. To the extent any information, facilities, or technical assistance are under the control of Lavabit are needed to provide the FBI with the unencrypted data, Lavabit shall provide such information, facilities, or technical assistance forthwith.

Failure to comply with this Order shall subject Lavabit to any penalty within the power of

the Court, ixcluding the possibility of criminal contempt of Court. Jes

SO ORDERED.

6/28/13

Hon. Theresa C. Buchanan
United States Magistrate Judge
Hon. Theresa C. Buchanan
United States Magistrate Judge

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED)	UNDER SEAL	JUL - 9 2013	
STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN)	No. 1:13EC297	CLERK, U.S. DISTRICT COURT ALEXANDRIA, VIRGINIA]
REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT)			

ORDER TO SHOW CAUSE

Upon motion of the United States pursuant to Title 18, United States Code, Section 401, good cause having been shown, IT IS HEREBY ORDERED:

- Ladar Levison, the owner and operator of Lavabit LLC, an electronic
 communications service provider, shall appear before this Court on July 16, 2013, at 10:00 a.m.,
 at which time he shall show cause why Lavabit LLC has failed to comply with the orders entered
 June 28, 2013, in this matter and why this Court should not hold Mr. Levison and Lavabit LLC in
 contempt for its disobedience and resistence to these lawful orders;
- The Clerk's Office shall issue a summons for the appearance of Mr. Levison on
 July 16, 2013, at 10:00 a.m. The Clerk's Office shall provide the Federal Bureau of Investigation
 with a certified copy of the summons for service on Mr. Levison and Lavabit LLC.
- 3. The Federal Bureau of Investigation shall serve the summons on Mr. Levison together with a copy of the Motion of the United States for an Order to Show Cause and a certified copy of this Order to Show Cause.
- The sealing and non-disclosure provisions of the June 10, 2013 Section 2703(d)
 order and the June 28, 2013 pen register order shall remain in full force and effect. Mr. Levison

REDACTED

and Lavabit LLC shall not disclose the existence of these applications, motions, and court orders, including this Order to Show Cause, to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders.

 This Order, the Motion of the United States for an Order to Show Cause, and any subsequent pleadings and proceedings regarding this matter shall be placed under seal until further order of this Court.

Entered in Alexandria, Virginia, this 4th day of July, 2013

Claude M. Hilton

United States District Judge

A TRUE COPY, TESTE: CLERK, U.S. DISTRICT COURT

DEPUTY CLE

-2-

United States District Court

REDACTED

for the Eastern District of Virginia United States of America Case No. 1:13ec297 Ladar Levison Defendant SUMMONS IN A CRIMINAL CASE YOU ARE SUMMONED to appear before the United States district court at the time, date, and place set forth below to answer to one or more offenses or violations based on the following document filed with the court: ☐ Indictment ☐ Superseding Indictment ☐ Information ☐ Superseding Information ☐ Complaint ☐ Probation Violation Petition ☐ Supervised Release Violation Petition ☐ Violation Notice ☑ Order of Court Courtroom No.: Place: 401 Courthouse Square 800- Judge Hilton Alexandria, VA 22314 Date and Time: 7/16/13 @ 10:00 am This offense is briefly described as follows: See Attached Order 07/09/2013 Date: Kathy Roberts - Deputy Clerk Printed name and title I declare under penalty of perjury that I have: Executed and returned this summons ☐ Returned this summons unexecuted A TRUE COPY, TESTE: CLERK, U.S. DISTRICT COURT Date: DEPUTY CLERK

Printed name and title

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)	UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	



ORDER TO SHOW CAUSE

Upon motion of the United States pursuant to Title 18, United States Code, Section 401, good cause having been shown, IT IS HEREBY ORDERED:

- Ladar Levison, the owner and operator of Lavabit LLC, an electronic communications service provider, shall appear before this Court on July 16, 2013, at 10:00 a.m., at which time he shall show cause why Lavabit LLC has failed to comply with the orders entered June 28, 2013, in this matter and why this Court should not hold Mr. Levison and Lavabit LLC in contempt for its disobedience and resistence to these lawful orders;
- The Clerk's Office shall issue a summons for the appearance of Mr. Levison on
 July 16, 2013, at 10:00 a.m. The Clerk's Office shall provide the Federal Bureau of Investigation
 with a certified copy of the summons for service on Mr. Levison and Lavabit LLC.
- 3. The Federal Bureau of Investigation shall serve the summons on Mr. Levison together with a copy of the Motion of the United States for an Order to Show Cause and a certified copy of this Order to Show Cause.
- 4. The sealing and non-disclosure provisions of the June 10, 2013 Section 2703(d) order and the June 28, 2013 pen register order shall remain in full force and effect. Mr. Levison

Case 1:13-ec-00297-TCB Document 25-3 Filed 02/24/16 Page 3 of 3 PageID# 491 **REDACTED**

and Lavabit LLC shall not disclose the existence of these applications, motions, and court orders, including this Order to Show Cause, to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders.

 This Order, the Motion of the United States for an Order to Show Cause, and any subsequent pleadings and proceedings regarding this matter shall be placed under seal until further order of this Court.

Entered in Alexandria, Virginia, this _9th day of July, 2013

Claude M. Hilton

United States District Judge

A TRUE COPY, TESTE: CLERK, U.S. DISTRICT COLIST

DEPUTY CLERK

-2-

EASTERN DISTRICT OF VIRGINIA Alexandria Division IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT IN THE UNITED STATES DISTRICT COURT FOR 1 FILED UNDER SEAL No. 1:13EC297

SUPPLEMENT TO THE MOTION OF THE UNITED STATES FOR AN ORDER TO SHOW CAUSE

The United States, through the undersigned counsel, submits the following additional information in support of its show cause motion filed July 9, 2013:

- 1. Following the issuance of the Court's Order to Show Cause, the government had a meeting/conference call with Mr. Levison and his then counsel. Mr. Levison was in Dallas,

 Texas, at the FBI field office, at the time, and his counsel from San Francisco, California, and prosecutors and FBI agents from the Washington, D.C. field office participated by telephone. The conference call was convened to discuss Mr. Levison's questions and concerns about the installation and operation of a pen register on the targeted email account. Mr. Levison's concerns focused primarily on how the pen register device would be installed on the Lavabit LLC system, what data would be captured by the device, what data would be viewed and preserved by the government. The parties also discussed whether Mr. Levison would be able to provide "keys" for encrypted information.
- During the conference call, the FBI explained to Mr. Levison that the pen register could be installed with minimal impact to the Lavabit LLC system, and the agents told Mr.

Levison that they would meet with him when they were ready to install the device and go over with him any of the technical details regarding the installation and use of the pen register. As for the data collected by the device, the agents assured Mr. Levison that the only data that the agents would review is that which is stated in the order and nothing more (*i.e.*, user log-in information and the date, time, and duration of the transmissions for the target account).

- 3. Lavabit LLC provides encryption service to paid users (such as on the conference call with Mr. Levison, the FBI is reasonably confident that with the encryption keys, which Mr. Levison can access, it would be able view in an un-encrypted format any encrypted information required to be produced through the use of the pen register.
- 4. Mr. Levison and his attorney did not commit to the installation and use of the pen register at the conclusion of the July 10 conference call. On July 11, 2013, counsel who participated in the conference call informed the government that she no longer represented Mr. Levison or Lavabit LLC. In addition, Mr. Levison indicated that he would not come to court unless the government paid for his travel.
- 5. On July 11, 2013, FBI agents served Mr. Levison with a grand jury subpoena directing him to appear before the grand jury in this district on July 16, 2013. As a grand jury witness, the government was responsible for making Mr. Levison's travel arrangements.
- 6. On July 11, 2013, the undersigned counsel sent Mr. Levison an email indicating that he has been served with a show cause order from this Court requiring his appearance on July 16, 2013, and a subpoena requiring his appearance on the same date before a federal grand jury. The email further advised Mr. Levison that he should contact the United States Attorney's Office as soon as possible to make his travel arrangements.

- 7. On July 13, 2013, Mr. Levison, who was no longer represented by counsel. sent government prosecutors an email indicating that he would be able to collect the data required by the pen register and provide that data to the government after 60 days (the period of the pen register order). For this service, Mr. Levison indicated that the government would have to pay him \$2000 for "developmental time and equipment" plus an additional \$1500 if the government wanted the data "more frequently" than after 60 days.
- 8. On July 13, 2013, the government responded to Mr. Levison's proposal. The prosecutors informed Mr. Levison that the pen register is a devise used to monitor ongoing email traffic on a real-time basis and providing the FBI with data after 60 days was not sufficient.

 Furthermore, prosecutors informed him that the statute authorizes the government to compensate a service provider for "reasonable expenses," and the amount he quoted did not appear to be reasonable. Mr. Levison responded by email stating that the pen register order, in his opinion, does not require real-time access (although this fact was discussed at length during the July 10 conference call). Moreover, he indicated that the cost of reissuing the "SSL certificate" (for encryption service) would be \$2000. It was unclear in his email if this \$2000 was an additional expense to be added to the \$3500 previously claimed. Mr. Levison indicated that he would try to contact the person responsible for making his travel arrangements at the United States Attorney's office on Sunday afternoon.
- 9. On July 15, 2013, Mr. Levison spoke with the person responsible for making his travel arrangements. He was told that he was booked on a flight from Dallas, Texas, to Reagan National Airport departing that same evening. He also had a hotel reservation. Mr. Levison indicated that he needed a doctor's approval before traveling.

- Mr. Levison should be held in civil contempt. Civil contempt, as compared to criminal contempt under rule 42 of the Federal Rules of Criminal Procedure, is intended to coerce compliance with a court order. There are four elements to civil contempt: (1) the existence of valid order of which Lavabit LLC and Mr. Levison had actual or constructive knowledge; (2) the order was in the government's "favor"; (3) Lavabit LLC and Mr. Levison violated the terms of the order and had knowledge, or constructive knowledge, of such violation; and (4) the government suffered harm as a result. *In re Grand Jury Subpoena* (T-112), 597 F.3d 189, 202 (4th Cir. 2012).
- 11. Here, each of these elements has been met. Lavabit LLC, through direct communication between the government and Mr. Levison, its owner and operator, has had actual knowledge of the pen register order and the subsequent June 28 order of the magistrate judge compelling compliance with that order. This Court's show cause order, which was personally served on Mr. Levison, provided further notice of the violation of those orders by Lavabit LLC. The government clearly has suffered harm in that it has lost 20 days of information as a result of non-compliance.
- 12. Lavabit LLC may comply with the pen register order by simply allowing the FBI to install the pen register devise and provide the FBI with the encryption keys. If Lavabit LLC informs the Court it will comply with the order, the government will not seek sanctions. If, however, Mr. Levison informs the Court that Lavabit LLC will not comply, the government requests that the Court impose a fine of \$1000 per day, commencing July 17, 2013, until Lavabit LLC fully complies with the pen register order.
 - 13. To the extent that Lavabit LLC takes the position that the pen register does not

Case 1:13-ec-00297-TCB Document 25-4 Filed 02/24/16 Page 5 of 5 PageID# 496 REDACTED

authorize the production of the encryption keys, the government has asked the Court to authorize the seizure of that information pursuant to a warrant under Title 18, United States Code, Section 2703, thus rendering this argument moot.

14. The Court has sealed this proceeding. This pleading has also been filed under seal.
The United States will hand deliver a copy of this pleading to Mr. Levison at today's hearing.

Respectfully submitted,

Neil H. MacBride United States Attorney

By:

James L. Trump

United States Attorney's Office

Justin W. Williams U.S. Attorney's Building

2100 Jamieson Avenue

Alexandria, Virginia 22314

Phone: 703-299-3700

REDACTED

Date: 7/16/13	Judge: Hilton	Reporter: Westfall
Time: 10:40 - 11:00		Interpreter:
		Language:
	UNDER SEAL HEARING	ę

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES OF AMERICA FOR AN ORDER
AUTHORIZING THE USE OF A PEN
REGISTER/TRAP AND TRACE DEVICE
ON AN ELECTRONIC MAIL ACCOUNT

Case Number: 1:13EC00297-001

Counsel for Government: James Trump	Respondent: Ladar Levison, pro se
Andrew Peterson Brandon Van Grack	
Matthew Braverman Michael Ben'Ary	

Appearances of Counsel for (✓) Government (✓) Respondent Pro Se Respondent's motion to unseal – Denied.

Matter re: pen register resolved at this time; hearing set for July 26, 2013 @ 10:00.

Case 1:13-ec-00297-TCB Document 25-6 Filed 02/24/16 Page 1 of 1 PageID# 498 **REDACTED**

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE OF
A PEN REGISTER/TRAP AND TRACE
DEVICE ON AN ELECTRONIC MAIL
ACCOUNT



Criminal No. 1:13EC297

ORDER

This matter comes before the Court on the Government's Motion that Ladar Levinson, the owner and operator of Lavabit, LLC show cause as to why Lavabit, LLC has failed to comply with the Court's Order of June 28, 2013 and why this Court should not hold Mr. Levinson and Lavabit, LLC in contempt, and Ladar Levinson's oral Motion To Unseal. For the reasons stated from the bench, it is hereby

ORDERED that Ladar Levinson's Motion To Unseal is DENIED and this matter is continued to Friday, July 26, 2013 at 10:00 a.m. for further proceedings.

CLAUDE M. HILTON

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia July /6 , 2013 Case 1:13-ec-00297-TCB Document 25-7 Filed 02/24/16 Page 1 of 4 PageID# 499

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)	FILED UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	
IN THE MATTER OF THE SEARCH AND)	
SEIZURE OF INFORMATION)	
ASSOCIATED WITH)	No. 1:13SW522
THAT IS)	
STORED AT PREMISES CONTROLLED)	
BY LAVABIT LLC)	
)	
In re Grand Jury)	No. 13-1

MOTION OF THE UNITED STATES TO PLACE GRAND JURY SUBPOENA UNDER SEAL

The United States, through the undersigned counsel, moves to place under seal the grand jury subpoena served on Ladar Levison, the owner and operator of Lavabit LLC. In support of this motion, the government submits:

- 1. The captioned proceedings have been placed under seal. The underlying investigation to which these matters relate is ongoing, and the public disclosure of the pen register order and the search warrant would undermine that investigation.
- Mr. Levison was served with a grand jury subpoena for an appearance related to
 the matters under seal, namely the implementation of the pen register order issued in No.
 1:13EC297 and the warrant to seize certain information from Lavabit LLC to implement the pen register in No. 1:13SW522. A copy of that subpoena is attached.

Case 1:13-ec-00297-TCB Document 25-7 Filed 02/24/16 Page 2 of 4 PageID# 500 **REDACTED**

3. The same issues raised by the subpoena were discussed at the under seal hearing

held today before this Court. At the hearing, Mr. Levison moved to unseal certain aspects of

these proceedings so that the issues could be litigated publicly. That motion was denied.

4. The grand jury subpoena specifically refers to Lavabit LLC and the pen register

order. Hence, public disclosure of the subpoena would alert the target of the investigation that

the government has sought a pen register order and search warrant to obtain information about

his email communications, thus defeating the purpose of utilizing those investigative methods.

5. The government and the Court are under an obligation to maintain the secrecy of

the grand jury, and an order compelling the government to place the grand jury subpoena under

seal is unnecessary. Mr. Levison, however, is under no such obligation. Accordingly, consistent

with the Court's denial of Mr. Levison's motion to unseal the pen register proceedings, the

United States asks the Court to enter an order placing the grand jury subpoena under seal.

Respectfully submitted,

Neil H. MacBride

Onited States Attorney

7 / -----

James L. Trump

United States Attorney's Office

Justin W. Williams U.S. Attorney's Building

2100 Jamieson Avenue

Alexandria, Virginia 22314

Phone: 703-299-3700

AO 110 (Rev. 01/09) Subpocha to Testify Before a Grand Jury

13-1 / 13GJ2527 / 13 - 2451

United States District Court

Eastern District of Virginia

SUBPOENA TO TESTIFY BEFORE THE GRAND JURY

TO:	Ladar Norman	Levison
	Dallas, TX 7520	4

YOU ARE COMMANDED to appear and testify before the United States district court at the time, date, and place shown below to tesify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place:	UNITED STATES DISTRICT COURT	Date and Time:	July 16, 2013	9:30 AM
	401 Courthouse Square			
	Alexandria, Virginia 22314	1		

You must also bring with you the following documents, electronically stored information, or objects (blank if not applicable):

In addition to your personal appearance, you are directed to bring to the grand jury the public and private encryption keys used by lavabit.com in any SSL (Secure Socket Layer) or TLS (Transport Security Layer) sessions, including HTPPS sessions with clients using the lavabit.com web site and encrypted SMTP communications (or Internet communications using other protocols) with mail servers;

Any other information necessary to accomplish the installation and use of the pen/trap device ordered by Judge Buchanan on June 28, 2013, unobtrusively and with minimum interference to the services that are accorded persons with respect to whom the installation and use is to take place;

If such information is electronically stored or unable to be physically transported to the grand jury, you may provide a copy of the information to the Federal Bureau of Investigation. Provision of this information to the FBI does not excuse your personal appearance.

Dete:

July 11, 2013

CLERK OF COURT

Signature of the Clerk or Deputy Cler

The name, address, email, and telephone number of the United States attorney, or assistant United States attorney, who requests this subpoend, are:

Andrew Peterson, AUSA COffice of the United States Attorney
Justin W. Williams United States Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314 (703) 299-3700

110 (Rev. 01/09) Subpoena to Testify Before a Grand Jury (Page 2)		
PROOF OF	SERVICE	
his subpoena for (name of individual or organization raceived by me on (date)	on) Ladar Norman Lewis	<u>~</u>
I personally served the subpoena on the individu	on (date) July 11, 2013	; or
I left the subpoena at the individual's residence (date) , a person of and mailed	or usual place of abode with (name) suitable age and discretion who resides a copy to the individual's last known add	there, on dress; or
I served the subpoens on (name of inidividual)_		, who is
designated by law to accept service of process of	on behalf of (name of organization) on (date)	; or
I returned the subpoena unexecuted because		;
Other (specify):		
I declare under the penalty of perjury that this in	formation is true.	
	\bigcirc	
Date: July 11, 20,3	Server's signature	
		oil An
	PBF - Octiles Server's address	

Additional information regarding attempted services, etc:

Case 1:13-ec-00297-TCB Document 25-8 Filed 02/24/16 Page 1 of 1 Page 1 # 503

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

FILED UNDER SEAI IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER No. 1:13EC297 AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION No. 1:13SW522 ASSOCIATED WITH THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT LLC No. 13-1 In re Grand Jury

SEALING ORDER

Upon the motion of the United States, good cause having been shown, it is hereby ORDERED that:

The grand jury subpoena issued to Ladar Norman Levison for an appearance on July 16, 2013, shall be placed under seal until further order of this Court;

It is further ORDERED that the government shall serve Mr. Levison with a copy of this Order along with a copy of its motion to seal; and

It is further ORDERED that the government's motion to seal the grand jury subpoena and this Order shall be placed under seal.

Alexandria, Virginia July *j* , 2013 Claude M. Hilton

United States District Judge

Case 1:13-ec-00297-TCB Document 25-9 Filed 02/24/16 Page 1 of 1 PageID# 504 **REDACTED**

Date: 8/1/13	Judge: Hilton	Reporter: Westfall	
Time: 10:00 - 10:20		Interpreter:	
		Language:	
	UNDER SEAL HEARING		

Case Numbers: 1:13EC00297, 1:13SW522, GJ 13-1

Counsel for Government: James Trump Brandon Van Grack Michael Ben'Ary Josh Goldfoot Ben Fitzpatrick	Respondent: Jesse Binnall for Ladar Levison (Levison's appearance waived)
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Appearances of Counsel for () Government () Respondent

Lavabit's Motion to Quash – Denied, Mr. Levison Ordered to turn over the encryption keys. Respondent's request for 5 days to do so – Denied, Respondant given 24 hours. Lavabit's Motion to Unseal – Denied.

п	REDACTED		
1	UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA		
2	ALEXANDRIA DIVISION		
3)		
4	IN THE MATTER OF THE) APPLICATION OF THE UNITED) 1:13 EC 297		
5	STATES OF AMERICA FOR AN) ORDER AUTHORIZING THE) UNDER SEAL		
6	INSTALLATION AND USE OF A) PEN REGISTER/TRAP AND TRACE) Alexandria, Virginia		
7	DEVICE ON AN ELECTRONIC) July 16, 2013 MAIL ACCOUNT) 10:41 a.m.		
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10	MDANCODIDE OF HEADING		
11	TRANSCRIPT OF HEARING		
12	BEFORE THE HONORABLE CLAUDE M. HILTON		
13	UNITED STATES DISTRICT JUDGE		
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15			
16			
17			
18			
19	APPEARANCES:		
20	For the United States: James Trump, Esq.		
21	Andrew Peterson, Esq. Brandon Van Grack, Esq. Michael Ben'Ary, Esq.		
22	For the Respondent: Ladar Levison, Respondent		
23	Court Reporter: Tracy L. Westfall, RPR, CMRS, CCR		
24	Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.		
I.			

PROCEEDINGS

THE CLERK: In Re: Case No. 1:13 EC 297.

MR. TRUMP: Good morning, Judge. Jim Trump on behalf of the United States. With me is Andy Peterson, Brandon Van Grack from the United States Department of Justice, Mr. Ben'Ary behind me, and Matt Braverman, special agent for the FBI.

THE COURT: All right.

MR. LEVISON: Ladar Levison, the subject of the summons.

THE COURT: All right. Mr. Trump.

MR. TRUMP: Your Honor, we submitted our supplemental paper this morning describing the communication we've had with Lavabit, LLC, through Mr. Levison. And I think, very simply, we would like this Court to inquire of Mr. Levison whether he intends to comply with the pen register order which would require him to allow the FBI access to his server to install a device which will extract data, filter that data, and provide that data to the FBI, and to provide the FBI with the encryption keys to the extent there is encrypted information, included among within the body of information called for by the pen register order.

As the Court is aware, and as we will provide with Mr. Levison, we obtained a search warrant this morning from Your Honor for the same encryption keys. Thus, to the extent there's

order and the search warrant, the seizure warrant.

any question as to whether Mr. Levison would be required to provide these keys, it's now subject both to the pen register

That's where we stand, Your Honor. If Mr. Levison agrees to comply with the order, we would not seek any sanctions. We would ask that he be directed to forthwith make his servers available so the FBI can install that device and to extract the encryption keys.

If, however, he informs the Court he is not willing to comply with the order, we would ask the Court to impose sanctions. We suggested in our pleading a thousand dollars a day to be paid to the United States government until he complies. If he doesn't comply with that sanction, then we would be back in court seeking additional sanctions or charging additional offenses.

THE COURT: All right. Mr. Levison.

MR. LEVISON: Good morning, Your Honor. I'm not sure what order I should make these in, but I would like to request a couple of things by motion.

I'd like to move that all of the nonsensitive portions of the documents that were provided, i.e., everything except the account in question, be unsealed. I believe it's important for the industry and the people to understand what the government is requesting by demanding that I turn over these encryption keys for the entire service.

THE COURT: All right. What do you say to that, Mr. Trump? Deal with the motions before I --

MR. TRUMP: What Mr. Levison is trying to do, Your
Honor, is invite industry to come in and litigate as a surrogate
for him the issue of whether the encryption keys are part and
parcel of the pen register order. And that's one of the reasons
we sought the search warrant, to make it clear, whether through
the search warrant or pen register order, he is required to
provide these keys.

We know he's been in contact with attorneys who also represent industry groups and others who have litigated issues like this in the WikiLeaks context and others. But we would object to unsealing this matter because it's just Mr. --

THE COURT: And they've done that in connection with the issuance of a pen register?

MR. TRUMP: They have litigated privacy-related issues in the context of process under 2703. I'm not sure -- not a pen register, but with respect to 2703.

But we discussed this issue with Mr. Levison and his counsel by conference call. We indicated that the only data that the government seeks is that which is required by the pen register order. That it's just the basic header to e-mail traffic, sender, recipient, time, duration, that sort of thing.

If Mr. Levison wants to object to providing the keys, he can certainly object to doing that and then we can proceed

from there, but I don't think he's entitled to try to make this 1 a public proceeding to invite others in to litigate those issues 2 3 on his behalf. THE COURT: All right. Well, I believe that to be 4 correct. I mean, this is a criminal investigation. A pen 5 register has been ordered and is here at issue, and any motion 6 to unseal that will be denied. 7 You said you had another motion, I believe? 8 MR. LEVISON: Yeah. My issue is only with the SSL 9 So if that is litigated separately and that portion of 10 the proceeding is unsealed, I'm comfortable with that. 11 12 THE COURT: I don't understand what you're saying, 13 separate proceedings. MR. LEVISON: Sorry. I have always agreed to the 14 15 installation of the pen register device. I have only ever 16 objected to turning over the SSL keys because that would 17 compromise all of the secure communications in and out of my 18 network, including my own administrative traffic. 19 THE COURT: Well, didn't my order already include that? 20 MR. LEVISON: I do not believe so, sir. 21 THE COURT: Did my initial order -- I don't recall at 22 the moment. Did my initial order recall the encrypted devices 23 with the installation of a pen register? 24 MR. TRUMP: The pen register, as issued, just required all assistance, technical assistance, facilities, and

information, to facilitate the pen register.

This morning the search warrant required --

THE COURT: Yeah, but the search warrant's a different matter now. That's not before me this morning. The only thing that's before me this morning is the pen register.

MR. TRUMP: Correct.

THE COURT: So as I understand it, my initial order ordered nothing but that the pen register be put in place.

MR. TRUMP: And all technical assistance, information, and facilities necessary to implement the pen register. And it's our position that without the encryption keys, the data from the pen register will be meaningless. So to facilitate the actual monitoring required by the pen register, the FBI also requires the encryption keys.

THE COURT: Well, that could be, but I don't know that I need -- I don't know that I need to reach that because I've issued a search warrant for that.

MR. TRUMP: Correct, Your Honor. That the -- to avoid litigating this issue, we asked the Court to enter the seizure warrant.

THE COURT: Well, what I'm saying is if he agrees that the pen register be established, and that the only thing he doesn't want to do in connection with the pen register is to give up the encryption device or code --

MR. LEVISON: I've always maintained that.

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1
             THE COURT: -- so we've got no issue here. You're
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    ready to do that?
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             MR. LEVISON: I've been ready to do that since Agent
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    Howard spoke to me the first time.
5
             THE COURT: All right. So that ends our --
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             MR. TRUMP: Well, then we have to inquire of
    Mr. Levison whether he will produce the encryption keys pursuant
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    to the search warrant that Your Honor just signed.
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             THE COURT: But I can't deal with that this morning,
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    can I?
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             MR. TRUMP: Well, it's the same issue. You could ask
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    him, Your Honor. We can serve him with the warrant and ask him
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    if he's going to comply rather than --
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             MR. LEVISON: Your Honor, I've also been issued a
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    subpoena demanding those same keys, which I brought with me in
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    the event that we would have to address that subpoena.
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             THE COURT: I don't know, Mr. Trump. I don't think I
    want to get involved in asking him. You can talk with him and
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    see whether he's going to produce them or not and let him tell
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    you. But I don't think I ought to go asking what he's going to
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    do and what he's not going to do because I can't take any action
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    about it anyway.
23
             If he does not comply with the subpoena, there are
24
    remedies for that one way or another.
25
             MR. TRUMP: Well, the original pen register order was
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followed by a compulsion order from Judge Buchanan. The compulsion order required the encryption keys to be produced.

So, yes, part of the show cause order is to require compliance both with the pen register order and the compulsion order issued by Judge Buchanan.

And that order, which was attached to the show cause order, states, "To the extent any information, facilities, or technical assistance are under the control of Lavabit are needed to provide the FBI with the encrypted data, Lavabit shall provide such information, facilities, or technical assistance forthwith."

MR. LEVISON: I would object to that statement. I don't know if I'm wording this correctly, but what was in that order to compel was a statement that was incorrect.

Agent Howard seemed to believe that I had the ability to encrypt the e-mail content stored on our servers, which is not the case. I only have the keys that govern communications into and out of the network, and those keys are used to secure the traffic for all users, not just the user in question.

So the statement in that order compelling me to decrypt stuff and Agent Howard stating that I have the ability to do that is technically false or incorrect. There was never an explicit demand that I turn over these keys.

THE COURT: I don't know what bearing that would have, would it? I mean, I don't have a problem -- Judge Buchanan

issued an order in addition to mine, and I'm not sure I ought to be enforcing Judge Buchanan's order.

My order, if he says that he will produce or allow the installation of the pen register, and in addition I have issued a search warrant for the codes that you want, which I did this morning, that's been entered, it seems that this issue is over as far as I'm concerned except I need to see that he allows the pen register and complies with the subpoena.

MR. TRUMP: Correct.

THE COURT: If he doesn't comply -- if he doesn't comply with the subpoena, then that has -- I have to address that.

MR. TRUMP: Right.

THE COURT: But right now there's nothing for me to address here unless he is not telling me correctly about the pen register.

MR. TRUMP: Well, we can -- Your Honor, if we can talk to Mr. Levison for five minutes, we can ask him whether he will honor the warrant that you just issued.

MR. LEVISON: Before we do that, can I --

THE COURT: Well, what can I do about it if he doesn't, if he tells you he's not going to? You've got the right to go out and search and get it.

MR. TRUMP: Well, we can't get the information without his assistance. He's the only who knows and has possession of

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We can't take it from him involuntarily.
1
    it.
             MR. LEVISON: If I may, sir, my other --
2
             THE COURT: Wait just a second.
3
             You're trying to get me ahead. You're trying to get me
4
    to deal with a contempt before there's any contempt, and I have
5
    a problem with that.
6
7
             MR. TRUMP: I'm trying to avoid contempt altogether,
    Your Honor.
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             THE COURT: I know you are. And I'd love for you-all
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    to get together and do that. I don't want to deal with it
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    either. But I don't think we can sit around and agree that
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    there's going to be a default and I will address it before it
12
13
    occurs.
             MR. TRUMP: I'm just trying to figure out whether
14
    there's going to be a default. We'll take care of that, Judge.
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16
             THE COURT: You can. I think the way we've got to do
    this -- and I'll listen to you. I'm cutting you off, I know,
17
    but I'll listen to you in a minute.
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19
             The way we have to do this, the hearing that's before
20
    me this morning on this issue of the pen register, that's been
    resolved, or so he's told me. I don't know whether you want to
21
    continue this one week and see if he complies with that, which I
22
    quess would be prudent to do, or a few days for him to comply
23
24
    with the pen register. Then we will wait and see what happens
25
    with the subpoena.
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When that warrant is served, we'll know what he's going to do. I think we've got -- I don't see another way to do it.

MR. TRUMP: That's fine, Your Honor. We will serve the warrant on him as soon as we conclude this hearing, and we'll find out whether he will provide the keys or not.

THE COURT: Okay. Now, did you want to say anything else?

MR. LEVISON: Well, I mean, I've always maintained that all the government needs to do is contact me and set up an appointment to install that pen register. So I don't know why there has never been any confusion about my willingness to install it. I've only ever objected to the providing of those keys which secure any sensitive information going back and forth.

But my motion, and I'm not sure if it's relevant or not because it deals more with the issue of the subpoena demanding the keys and for what will be the forthcoming search warrant, would be a continuance so that I can retain counsel to address

that particular issue.

THE COURT: Well, I mean, there's nothing before me with that. I've issued the subpoena. Whatever happens with that, that's -- you're trying to get me to do what Mr. Trump wanted to do and to arrange this beforehand.

MR. LEVISON: Well, I don't know if I have to appear before that grand jury right now and give the keys over or face arrest. I'm not a lawyer so I don't understand the procedure.

THE COURT: I don't know either. You need to have -- it would be wise to have a lawyer.

MR. LEVISON: Okay.

THE COURT: I don't know what's going to happen. I don't know. They haven't served the warrant yet. I have no idea. Don't know what's going to happen with it. You'll just have to figure that out, and it be wise to have a lawyer to do it, I would think.

MR. LEVISON: I guess while I'm here in regards to the pen register, would it be possible to request some sort of external audit to ensure that your orders are followed to the letter in terms of the information collected and preserved?

THE COURT: No. The law provides for those things, and any other additional or extra monitoring you might want or think is appropriate will be denied, if that's what you're requesting.

MR. LEVISON: Okay. I mean, it requests that the government return to the Court records --

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1
             THE COURT: You need to talk to a lawyer about what the
 2
    law requires for the issuance of a pen register.
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             MR. LEVISON: They can handle that separately. That's
    fine.
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 5
             THE COURT: The law sets out what is done in that
 6
    regard. Your lawyer can fill you in if you want to know.
 7
             MR. LEVISON: I've always been willing to accept the
 8
    device. I just have some concern about ensuring that it's used
 9
    properly.
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             THE COURT: Should we continue this to some specific
11
    date to see that he complies with the pen register?
12
             MR. TRUMP: We can, Your Honor. It's a moot issue
13
    without the encryption keys.
14
             THE COURT: Well, that is a practical matter --
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             MR. TRUMP: That's a practical --
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             THE COURT: -- but I don't think it is a moot issue.
17
    mean, you-all have got the right to go in and put on that pen
18
    register. He says that he will do it. That's all that I've
    ordered.
19
20
             Now, the other business about ordering that, Judge
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    Buchanan made an order that he's going to have to supply what
22
    you say is the encryption codes to make the information useful.
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    I don't know. I didn't enter that order. I have trouble making
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    that connection.
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             If you're going to -- I don't know whether you want to
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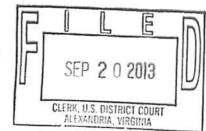
1	do something in front of Judge Buchanan or not.
2	MR. LEVISON: You see, Judge, though that I've always
3	been willing. They just didn't feel the need to set up an
4	appointment.
5	THE COURT: What do you want me to do with this case?
6	You want me to continue it? You want me to say it's moot right
7	now and just end it?
8	MR. TRUMP: No. I think we can continue it. I don't
9	know Mr. Levison's schedule. It can be done within hours of his
10	return to Dallas.
11	THE COURT: Of course he can. You want to continue it
12	till a week from Friday?
13	MR. TRUMP: Or a week from today.
14	MR. LEVISON: I'm not available within hours of my
15	return, but I can meet with you on Thursday.
16	THE COURT: Let's continue it a week from Friday.
17	MR. TRUMP: A week from Friday.
18	THE COURT: What date's that? The
19	THE CLERK: 26th.
20	THE COURT: The 26th?
21	MR. LEVISON: Acceptable to me.
22	THE COURT: We'll continue it to the 26th, and that's
23	for determining whether or not that pen register has been
24	installed as you request.
25	We can make it 10 o'clock.

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MR. LEVISON: I'll remember 10:00 instead of 10:30 this
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2
    time.
             THE COURT: All right. Thank you.
3
             All right. Thank you-all. We'll adjourn till tomorrow
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    morning at 9:30.
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         (Proceedings concluded at 11:02 a.m.)
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CERTIFICATION I certify, this 17th day of September 2013, that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my ability.

Case 1:13-ec-00297-TCB Document 25-11 Filed 02/24/16 Page 1 of 82 PageID# 521

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION



IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE OF
A PEN REGISTER/TRAP AND TRACE
DEVICE ON AN ELECTRONIC MAIL
ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

IN RE GRAND JURY SUBPOENA

NO. 1:13 EC 297

NO. 1:13 SW 522

NO. 13-1

EX PARTE AND UNDER SEAL

MOTION OF THE UNITED STATES TO UNSEAL CERTAIN DOCUMENTS RELATED TO LITIGATION WITH LAVABIT, LLC, AND SEALED STATEMENT OF REASONS THAT OTHER INFORMATION SHOULD REMAIN UNDER SEAL

The United States, by and through its undersigned attorneys, hereby requests that the Court partially unseal certain pleadings and orders that were filed in the above-captioned matters. The government originally requested the Court seal these documents because their public release would damage an ongoing criminal investigation. Since that time, Lavabit, LLC, and its proprietor, Ladar Levison, shut down its e-mail service. In addition, Mr. Levison made numerous public statements that his decision to shut down was in response to government attempts to obtain data related to a user or users of his service (a statement which, as discussed further below, Lavabit had previously represented it was prohibited from making due to the Court's sealing orders). The shutdown, and the attendant publicity generated by Mr. Levison

and his counsel's numerous media appearances, ended the government's ability to obtain evidence from any e-mail account hosted by Lavabit, LLC and alerted the target of the government's ongoing investigative actions. Thus, a substantial amount of the damage the government cited in its earlier sealing requests has been done. As such, the government hereby requests the Court partially unseal certain pleadings, as explained in more detail below.

BACKGROUND

The United States is conducting a criminal investigation of violations of numerous criminal statutes. On , a criminal complaint was filing remains a charging with violations of 18 U.S.C. fugitive. As part of the investigation, the United States discovered a number of e-mail accounts that were hosted at the domain lavabit.com. That domain believed to be used by belongs to Lavabit, LLC, which, prior to August 8, 2013, offered e-mail services to the general public. As part of the investigation into the United States began to investigate the email accounts believed to belong to him that were provided by Lavabit. On June 8, 2013, a grand jury subpoena was issued to Lavabit requesting billing and subscriber information for one Lavabit e-mail account Lavabit provided the information requested in the subpoena, via e-mail, on June 8. On June 10, 2013, the United States obtained an order pursuant to 18 U.S.C. § 2703(d) directing Lavabit to provide, within ten days, additional records and information about the same Lavabit e-mail account. The Application and Order were sealed. and Mr. Levison was directed not to disclose the Order to any other person other than his attorney. Mr. Levison received the Order on June 11, 2013. He responded, by mail, on June 27,

2013. Mr. Levison provided very little of the information sought by the June 10, 2013 Order.
For example, Mr. Levison provided no transactional records for the account.

On June 28, 2013, the United States obtained a pen register/trap and trace order for this Lavabit e-mail account (Dkt. No. 1:13 EC 297). The pen register application and Order were sealed. That same day, agents of the Federal Bureau of Investigation met with Mr. Levison to discuss the grand jury subpoena, the June 27, 2013 § 2703(d) Order, and pen register Order. Mr. Levison told the agents he would not comply with the pen register order and that he wanted to speak with an attorney. Later that same day, the United States obtained an Order from Magistrate Judge Theresa C. Buchanan directing Lavabit to comply with the pen register Order forthwith. Lavabit still did not comply with the pen register order.

On July 9, 2013, the United States requested that this Court enter an Order to Show Cause why Lavabit and Mr. Levison should not be held in contempt for failing to comply with the pen register order. A hearing on the United States motion was held on July 16, 2013.

On July 11, 2013, the United States issued a grand jury subpoena requiring Mr. Levison to appear before the grand jury on July 16, 2013. Mr. Levison was directed to bring copies of Lavabit's encryption keys, and any other information necessary to accomplish the installation and use of a pen register/trap and trace device pursuant to the June 28, 2013 pen register Order.

On July 16, 2013, prior to the hearing on the United States' request for an Order to Show Cause, this Court authorized a search warrant, issued pursuant to 18 U.S.C. § 2703, commanding Lavabit to produce any information necessary to decrypt communications sent to and from the Lavabit e-mail account listed in the pen register Order (Dkt. No. 1:13 SW 522). The search warrant, application, and affidavit in support were sealed, and Lavabit was ordered not to disclose the search warrant.

Case 1:13-ec-00297-TCB Document 25-11 Filed 02/24/16 Page 4 of 82 PageID# 524 REDACTED

At the July 16, 2013, hearing, Mr. Levison appeared *pro se*. Mr. Levison agreed to allow the United States to install a pen register/trap and trace device on his system. He did not provide any decryption assistance, nor did he provide copies of Lavabit's encryption keys. The United States withdrew the grand jury subpoena and Mr. Levison did not appear before the grand jury. After the hearing, this Court placed the grand jury subpoena that Mr. Levison had received under seal.

On July 25, 2013, Lavabit and Mr. Levison, through counsel, moved to quash the withdrawn subpoena and search warrant 1:13 SW 522. He also moved to unseal four categories of documents, which Mr. Levison described as "records concerning the United States government's attempt to obtain certain encryption keys": (1) all orders and documents filed in this matter¹ before the Court's issuance of the July 16, 2013 Sealing Order; (2) all orders and documents filed in this matter after the issuance of the July 16, 2013 Sealing Order; (3) all grand jury subpoenas and search and seizure warrants issued before or after issuance of the Sealing Order; and (4) all documents filed in connection with such orders or requests for such orders. As a basis for unsealing, Mr. Levison argued that the sealing order "unjustly restrained [him] from contacting Lavabit subscribers who could be subjected to government surveillance. . . . " Mot. for Unsealing of Sealed Court Records and Removal of Non-Disclosure Order and Mem. of Law in Supp. of Mot. 1-2, 5 ("Lavabit Mot. to Unseal").

On August 1, 2013, this Court held a hearing on Lavabit's motions. The motions were denied by written Order. The Court also ordered Mr. Levison and Lavabit to provide Lavabit's

¹ Mr. Levison's pleading did not define the "matter" at issue. However, the document was filed with a caption that included docket numbers 1:13 EC 297, 1:13 SW 522, and Grand Jury No. 13-1.

encryption keys and any other information necessary to accomplish the use of the pen register/trap and trace device to the government no later than 5 p.m. on August 2, 2013.

Mr. Levison did not provide the keys in a usable format by the Court's deadline.² On August 5, 2013, the United States moved for sanctions against Mr. Levison and Lavabit. That same day, the Court ordered that if Lavabit and Mr. Levison did not comply with the Court's directive by noon on August 5, 2013, the Court would impose a fine of \$5,000 each day until Lavabit complied.

On August 7, Mr. Levison provided a usable version of Lavabit's encryption keys to the United States. On August 8, 2013, Mr. Levison ceased operating Lavabit, LLC. He posted a message to the website "lavabit.com" which stated, in part: "I have been forced to make a difficult decision: to become complicit in crimes against the American people or walk away from nearly ten years of hard work by shutting down Lavabit. After significant soul searching, I have decided to suspend operations." Mr. Levison's statement on the website concluded with a request for donations.

Mr. Levison's decision to shut down Lavabit drew significant media attention, and Mr. Levison and his attorney subsequently gave numerous media interviews relating to his decision.

A list of some of those interviews is attached to this pleading as Exhibit 24. Within a day of Mr. Levison's public announcement, The Guardian published a statement, purported to be from

lauding Lavabit's decision.

² Mr. Levison had provided an illegible, printed version of the encryption keys, which was useless.

On August 15, 2013, Lavabit filed two notices of appeal. Both notices of appeal indicated that Lavabit and Mr. Levison would appeal the Court's August 1 and August 5 Orders. One notice of appeal was captioned with docket numbers 1:13 EC 297 and 1:13 SW 522. The other notice of appeal was captioned with Grand Jury No. 13-1. The Fourth Circuit has consolidated the appeals.

At present, the United States seeks to partially unseal the following documents:

Document	Case Number	Exhibit No.
18 U.S.C. § 2703(d) Order	1:13 EC 254	1(2) 2
Pen Register Order	1:13 EC 297	2
Motion for Entry of an Order to Compel	1:13 EC 297	3
Order Compelling Compliance Forthwith	1:13 EC 297	4
Motion of the United States for an Order to Show Cause	1:13 EC 297	
Order to Show Cause	1:13 EC 297	6
Summons	1:13 EC 297	7.
Grand Jury Subpoena dated July 11, 2013	13-1; 13 GJ 2527; 13-2451	8
Search Warrant	1:13 SW 522	9
Order to Seal	1:13 SW 522	10
18 U.S.C. § 2705(b) Order	1:13 SW 522	11
USA Supplement to Motion for Order to Show Cause	1:13 EC 297	12
Hearing Transcript		13

Order Denying Motion to Unse	al 1:13 EC 297	14
Motion to Quash Subpoens and Search Warrant and Memorandum of Law in Suppo of Motion		/ 522;-No: 13-1 15
Motion for Unsealing of Sealed Court Records and Removal of Non-Disclosure Order and Memorandum of Law in Suppo of Motion		7 522; No. 13-1 16
Response of the United States in Opposition to Lavabit's Motion to Quash Subpoena and Motion For Unsealing of Sealed Court Records		/*522; No. 13-1
Hearing Transcript		18
Order Denying Motions	1:13 EC 297; 1:13 SV	v 522; Nóv 13-1 19
Motion for Sanctions	1:13 EC 297; 1:13 SV	V 522; No. 13-1 20
Order [Imposing Sanctions]	बन्दर 1:13 EC 297, 1:13 SV	V 522; No 13-1, 3.21
Notices of Appeal	1:13 EC 297; 1:13 SV	W 522; No. 13-1 22
Notice of Appeal (Amended)	⊆ = 1:13 SW 522	23.

Redacted versions of each document are attached to this pleading as exhibits 1-23.

ARGUMENT

Lavabit no longer provides e-mail services to the target of the government's investigation. Moreover, Lavabit has notified the target of the government's investigation regarding the government's interest in the target's Lavabit accounts. Lavabit's failure to provide e-mail service means that the target's Lavabit e-mail accounts are no longer viable sources of information or evidence in the government's investigation. Lavabit's notification of the user

means that the damage from user notification, such as the destruction of electronic evidence by the target, has likely already occurred. Thus, some of the reasons for sealing certain sealed pleadings no longer apply. The United States therefore requests that certain documents be partially unsealed.

However, the criminal investigation into

remains ongoing, and Lavabit's violations of the sealing order have not

entirely eliminated the reasons for sealing documents that are at issue in this matter. The

justifications for sealing outlined in the government's original motion still apply to certain

categories of information, and such information should remain sealed. The United States hereby

reasserts (and incorporates by reference) those justifications as to the following categories of

information:

1) Investigative Facts, Including Applications for Legal Process and Affidavits in Support of Those Applications. The above-captioned matters, which relate to a pen register, search warrant, and grand jury subpoena, include pleadings outlining the government's ongoing criminal investigation into Though the target of the investigation has been charged with certain offenses, the government's investigation into his criminal conduct is ongoing. The government continues to investigate the scope of unlawful activity, as well as whether he conspired with others. As such, the documents in this category, which contain recitations of the basis for obtaining the orders sought and their relevance to the investigation, contain "sensitive nonpublic facts," the disclosure of which could damage the ongoing investigation. This is sufficient justification for sealing. See In re Application of the United States of America for an Order Pursuant to 18 U.S.C. Section 2703(d), 707 F.3d 283, 293-94 (4th Cir. 2013); see also ACLU v. Holder, 673 F.3d 245, 253 (4th

REDACTED

Cir. 2011) (noting government has compelling interest in protecting the integrity of ongoing investigations).

The United States has also redacted the specific accounts targeted by the government. Though these accounts, due to Mr. Levison's actions, are no longer operational, knowledge of the specific accounts known to the government could alert the target as to what information the government has, or does not have, about his activities. This could allow him to alter or destroy electronic evidence stored in other places. Such action would damage the investigation and thus this information should remain sealed. See In re Application, 707 F.3d at 293-94.

- 2) The Identities of Law Enforcement Personnel Involved in the Ongoing Investigation.

 The United States has redacted the identities of court and law enforcement personnel. Law enforcement personnel are redacted because, in other investigations individuals who did not support the investigation attempted to harass individuals working on the case by publishing their home addresses, work telephone numbers, and work e-mail addresses, and encouraged others to directly contact them. Some individuals also researched court personnel and placed personal information about such personnel on the internet. As such, this information has been redacted to minimize disruption to the investigation and to the operation of the courts. This is a valid justification for sealing. See, e.g., United States v. Ramey, 791 F.2d 317, 318-20 (4th Cir. 1986) (noting that a case may be sealed for legitimate prosecutorial needs and that protection of witness identities is a valid justification for sealing an indictment).
- 3) <u>Information Required to be Sealed by Law</u>. Some information contained in the records should be sealed by operation of law. For instance, some of the facts contained in various applications is derived from the returns of grand jury subpoenas, which should be sealed

pursuant to Federal Rule of Criminal Procedure 6(e). Other documents contain the address of Mr. Levison's personal residence, which is where his business is headquartered. This is personal information which must be redacted pursuant to the E-Government Act of 2002. See E.D. Va. Local R. 49.

One document specifically bears mention in this category: the grand jury subpoena issued to Mr. Levison. This subpoena was issued to Mr. Levison but later withdrawn after the government obtained a search warrant for the same information. Mr. Levison never appeared before the grand jury, and the government's interest in the information sought by the subpoena will be revealed by the unsealing of the government's search warrant. Thus, the government does not believe that the grand jury subpoena needs to remain sealed at this time. To the extent the court believes the release of the subpoena would disclose a "matter before the grand jury," the government seeks permission from the Court to disclose the subpoena as part of the record, if necessary, in the Court of Appeals.

CONCLUSION

For the foregoing reasons, the United States requests that the Court sign the proposed order (Exhibit 25) partially unsealing the documents described in this motion, and authorize the release of the redacted versions attached to this pleading as Exhibits 1-23. A redacted version of the proposed order suitable for public release is attached as Exhibit 26.

Respectfully submitted,

Kathleen M Kahoe

Acting Wited States Attorney

By:

Andrew Peterson
Assistant United States Attorney
United States Attorney's Office
Eastern District of Virginia
Alexandria, VA 22314
703-299-3700
Andy.peterson@usdoj.gov

EXHIBIT 1

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA



IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER PURSUANT TO 18 U.S.C. § 2703(d)

MISC. NO. 1:13 EC 254

REDACTED

Filed Under Seal

ORDER

The United States has submitted an application pursuant to 18 U.S.C. § 2703(d), requesting that the Court issue an Order requiring Lavabit LLC, an electronic communications service provider and/or a remote computing service located in Dallas, TX, to disclose the records and other information described in Attachment A to this Order.

The Court finds that the United States has offered specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation.

The Court determines that there is reason to believe that notification of the existence of this Order will seriously jeopardize the ongoing investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates. See 18 U.S.C. § 2705(b)(2), (3), (5).

IT IS THEREFORE ORDERED, pursuant to 18 U.S.C. § 2703(d), that Lavabit LLC shall, within ten days of the date of this Order, disclose to the United States the records and other information described in Attachment A to this Order.

IT IS FURTHER ORDERED that Lavabit LLC shall not disclose the existence of the application of the United States, or the existence of this Order of the Court, to the subscribers of the account(s) listed in Attachment A, or to any other person, unless and until otherwise

Case 1:13-ec-00297-TCB Document 25-11 Filed 02/24/16 Page 14 of 82 Page 153452 Case 1:13-ec-00297-TCB *SEALED* Document 11-1 Filed 09/20/13 Page 3 of 3 Page 15452

REDACTED

authorized to do so by the Court, except that Lavabit LLC may disclose this Order to an attorney for Lavabit LLC for the purpose of receiving legal advice.

IT IS FURTHER ORDERED that the application and this Order are sealed until otherwise ordered by the Court.

John F. Anderson United States Magistrate Judge

Juny 10, 2013

A TRUE COPY, TESTE:
CLERK, U.S. DISTRICT COURT

DEFORY CLERK

ATTACHMENT A

I. The Account(s)

The Order applies to certain records and information associated with the following email account(s):

II. Records and Other Information to Be Disclosed

Lavabit LLC is required to disclose the following records and other information, if available, to the United States for each account or identifier listed in Part I of this Attachment ("Account"), for the time period from inception to the present:

- A. The following information about the customers or subscribers of the Account:
 - Names (including subscriber names, user names, and screen names);
 - Addresses (including mailing addresses, residential addresses, business addresses, and e-mail addresses);
 - Local and long distance telephone connection records;
 - Records of session times and durations, and the temporarily assigned network addresses (such as Internet Protocol ("IP") addresses) associated with those sessions;
 - Length of service (including start date) and types of service utilized;
 - Telephone or instrument numbers (including MAC addresses);
 - Other subscriber numbers or identities (including the registration Internet Protocol ("IP") address); and
 - Means and source of payment for such service (including any credit card or bank account number) and billing records.
- B. All records and other information (not including the contents of communications) relating to the Account, including:
 - Records of user activity for each connection made to or from the Account, including log files; messaging logs; the date, time, length, and method of connections; data transfer volume; user names; and source and destination Internet Protocol addresses;
 - Information about each communication sent or received by the Account, including the date and time of the communication, the method of communication, and the source and destination of the communication (such as source and destination email addresses, IP addresses, and telephone numbers).

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CERTIFICATE OF AUTHENTICITY OF DOMESTIC BUSINESS RECORDS PURSUANT TO FEDERAL RULE OF EVIDENCE 902(11)

Ĩ,	, attest, under penalties of perjury under the			
laws of the Ur	nited States of America pursuant to 28 U.S.C. § 1746, that the information			
	his declaration is true and correct. I am employed by Lavabit LLC, and my official			
	. I am a custodian of records for Lavabit LLC. I state			
	ne records attached hereto is the original record or a true duplicate of the original			
	custody of Lavabit LLC, and that I am the custodian of the attached records			
	(pages/CDs/kilobytes). I further state that:			
a.	all records attached to this certificate were made at or near the time of the			
occurrence of	f the matter set forth, by, or from information transmitted by, a person with			
knowledge of those matters;				
b.	such records were kept in the ordinary course of a regularly conducted business			
activity of La	avabit LLC; and			
c.	such records were made by Lavabit LLC as a regular practice.			
1 furt	her state that this certification is intended to satisfy Rule 902(11) of the Federal			
Rules of Evi				
Date	Signature			

EXHIBIT 2



IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INSTALLATION AND USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	(Under Seal) 1:13 EC 297
opp	TD

ORDER

This matter having come before the Court pursuant to an Application under 18 U.S.C. Assistant United States Attorney, an attorney for the Government § 3122, by as defined by Fed. R. Crim. P. 1(b)(1), requesting an Order under 18 U.S.C. § 3123, authorizing the installation and use of a pen register and the use of a trap and trace device or process ("pen/trap device") on all electronic communications being sent from or sent to the account that is registered to subscriber at associated with Lavabit, LLC (hereinafter referred to as the "SUBJECT ELECTRONIC MAIL ACCOUNT"). The Court finds that the applicant has certified that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation into possible violation(s) of 18 U.S.C. §§ 641, 793(d)-(e), and 798(a)(3) by

IT APPEARING that the information likely to be obtained by the pen/trap device is relevant to an ongoing criminal investigation of the specified offense;

IT IS ORDERED, pursuant to 18 U.S.C. § 3123, that a pen/trap device may be installed and used by Lavabit and the Federal Bureau of Investigation to capture all non-content dialing, routing, addressing, and signaling information (as described and limited in the Application), sent from or sent to the SUBJECT ELECTRONIC MAIL ACCOUNT, to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data (date, time, duration, and Internet Protocol address of all log-ins) on the

SUBJECT ELECTRONIC MAIL ACCOUNT, all for a period of sixty (60) days from the date of such Order or the date the monitoring equipment becomes operational, whichever occurs later;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(b)(2), that Lavabit shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device unobtrusively and with minimum interference to the services that are accorded persons with respect to whom the installation and use is to take place;

IT IS FURTHER ORDERED that the United States take reasonable steps to ensure that the monitoring equipment is not used to capture any "Subject:" portion of an electronic mail message, which could possibly contain content;

IT IS FURTHER ORDERED that Lavabit shall be compensated by the Federal Bureau of Investigation for reasonable expenses incurred in providing technical assistance;

agency seeks to install and use its own pen/trap device on a packet-switched data network of a public provider, the United States shall ensure that a record is maintained which will identify: (a) any officer(s) who installed the device and any officer(s) who accessed the device to obtain information from the network; (b) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (c) the configuration of the device at the time of its installation and any subsequent modification thereof; and (d) any information which has been collected by the device. To the extent that the pen/trap device can be set to automatically record this information electronically, the record shall be maintained electronically throughout the installation and use of the pen/trap device. Pursuant to 18 U.S.C. § 3123(a)(3)(B), as amended, such record(s) shall be provided ex parte and under seal to this Court within 30 days of the termination of this Order, including any extensions thereof;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(d), that this Order and the Application be sealed until otherwise ordered by the Court, and that copies of such Order may be

Case 1:13-ec-00297-TCB Document 25-11 Filed 02/24/16 Page 20 of 82 Page 1540-58 Case 1:13-ec-00297-TCB *SEALED* Document 11-2 Filed 09/20/19 Page 20 of 82 Page 1540-58 RED_{ACTED}

furnished to the Federal Bureau of Investigation, the United States Attorney's Office, and Lavabit;

IT IS FURTHER ORDERED that Lavabit shall not disclose the existence of the pen/trap device, or the existence of the investigation to any person, except as necessary to effectuate this Order, unless or until otherwise ordered by the Court.

SO ORDERED:

Theresa Carroll Buchanan United States Magistrate Judge

Hon. Theresa C. Buchanan United States Magistrate Judge



EVZLEKA DIZERICE OF VIRGINIA IN THE UNITED STATES DISTRICT COURT FOR THE

Alexandria Division

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1:13 EC 564	(SECIZLER/LISVIS VAD LISVCE DEAICE
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(Under Seal)	(OR YN ORDER YUTHORIZING THE
	(JETHE UNITED STATES OF AMERICA
	(NAME WYLLER OF THE APPLICATION

MOTION FOR ENTRY OF AN ORDER TO COMPEL.

intee device ("pen/trap device") on all electronic communications being sent from or sent to the to 18 U.S.C. § 3123 authorizing the installation and use of a pen register and the use of a trap and On June 28, 2013, at approximately 4 p.m., this Court entered an Order pursuant Register/Trap and Trace Order. In support of the motion the United States declares as follows: enter an Order directing Lavabit, LLC, to comply with the Court's June 28, 2013 Pen The United States, by and through its undersigned counsel, hereby requests the Court

TTC: electronic mail account That e-mail account is controlled by Lavabit,

In its Order, the Court found that the information to be collected by the pen/trap

The Federal Bureau of Investigation served a copy of the Order on Lavabit that of the pentrap device." information, facilities, and technical assistance necessary to accomplish the installation and use Lavabit "shall furnish agents from the Federal Bureau of Investigation, forthwith, all device would be relevant to an ongoing criminal investigation. In addition, the Court ordered

information because the user of the account had enabled Lavabit's energption services, and thus same afternoon. A representative of Lavabit stated that it could not provide the requested

Lavabit would not provide the requested information. The representative of Lavabit indicated that Lavabit had the technical capability to decrypt the information but that Lavabit did not want to "defeat [its] own system."

- the representative of Lavabit did not comply with the Order, and indicated he first wanted to seek legal advice.
- 5. The Pen Register and Trap and Trace Act gives this Court the authority to order a provider to assist the government in the execution of a lawful pen register or trap and trace order, including by providing information. Section 3122 of Title 18. United States Code, provides in part: "An order issued under this section-- ... shall direct, upon the request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device under section 3124 of this title." Section 3124(a) provides, "Upon the request of an attorney for the Government or an officer of a law enforcement agency authorized to install and use a pen register under this chapter, a provider of wire or electronic communication service... shall furnish such investigative or law enforcement officer forthwith all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference... if such

Case 1:13-ec-00297-TCB Document 25-11 Filed 02/24/16, Page 24 of 82 Page ID# 544 62 Case 1:13-ec-00297-TCB *SEALED* Document 11-3 Filed 09/20/13 Page 4 of 4 ge age 15# 62

assistance is directed by a court order as provided in section 3123(b)(2) of this title." Section
3124(b) contains a similar provision governing trap and trace orders.

Wherefore, the United States requests an Order directing Lavabit to comply forthwith with the Court's June 28, 2013 Order.

Respectfully submitted, NEIL II. MACBRIDE United States Attorney

By:



Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RE	DA	C_{1}	n
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IN THE MATTER OF THE APPLICATION)	
OF THE UNITED STATES OF AMERICA)	
FOR AN ORDER AUTHORIZING THE)	(Under Scal)
INSTALLATION AND USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	1:13 EC 297
ON AN FLECTRONIC MAIL ACCOUNT)	

ORDER COMPELLING COMPLIANCE FORTHWITH

WHEREAS, on June 28, 2013, at approximately 4:00 p.m., this Court entered an Order pursuant to 18 U.S.C. § 3123 authorizing the installation and use of a pen register and the use of a trap and trace device ("pen/trap device") on all electronic communications being sent from or sent to the electronic mail account controlled by Lavabit, LLC ("Lavabit"); and

WHEREAS, this Court found that the information obtained by the pen/trap device would be relevant to an ongoing criminal investigation; and

WHEREAS, the Court's Order directed that Lavabit "shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device;" and

WHEREAS, Lavabit informed the Federal Bureau of Investigation that the user of the account had enabled Lavabit's encryption services and thus the pen/trap device would not collect the relevant information; and

WHEREAS, Lavabit informed the FBI that it had the technological capability to obtain the information but did not want to "defeat [its] own system;"

IT IS HEREBY ORDERED that Lavabit LLC is directed to comply forthwith with the Court's June 28, 2013 Order, and provide the Federal Bureau of Investigation with unencrypted data pursuant to the Order. To the extent any information, facilities, or technical assistance are under the control of Lavabit are needed to provide the FBI with the unencrypted data, Lavabit shall provide such information, facilities, or technical assistance forthwith.

Failure to comply with this Order shall subject Lavabit to any penalty within the power of

the Courty is electing the possibility of criminal contempt

SO ORDERED. 6 28,3

Theresa Carroll Buchanan United States Magistrate Judge Hon. Theresa C. Buchanan United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)	FILED UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	

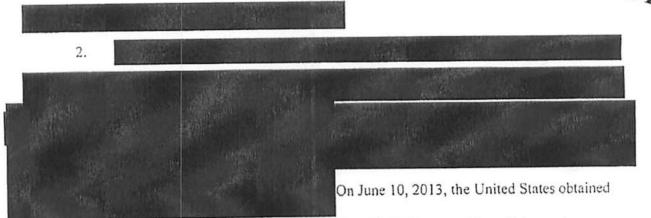


MOTION OF THE UNITED STATES FOR AN ORDER TO SHOW CAUSE

The United States, through the undersigned counsel, pursuant to Title 18, United States Code, Section 401, hereby moves for the issuance of an order directing Ladar Levison, the owner and operator of Lavabit LLC, an electronic communications service provider, to show cause why Lavabit LLC has failed to comply with the orders entered June 28, 2013, in this matter and, as a result, why this Court should not hold Mr. Levison and Lavabit LLC in contempt for its disobedience and resistence to these lawful orders. The United States further requests that the Court convene a hearing on this motion on July 16, 2013, at 10:00 a.m., and issue a summons directing Mr. Levison to appear before this Court on that date. In support of this motion, the United States represents:

1. The United States is conducting a criminal investigation of

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an order pursuant to 18 U.S.C. § 2703(d) directing Lavabit LLC to provide, within ten days, additional records and information about email account. Mr. Levison received that order on June 11, 2013. Mr. Levison responded by mail, which was not received by the government until June 27, 2013. Mr. Levison provided very little of the information sought by the June 10, 2013 order.

- 3. On June 28, 2013, the United States obtained a pen register/trap and trace order on email account, a copy of which is attached together with the application for that order.
- 4. On June 28, 2013, FBI special agents met Mr. Levison at his residence in Dallas, Texas, and discussed the prior grand jury subpoena served on Lavabit LLC and the pen register order entered that day. Mr. Levison did not have a copy of the order when he spoke with the agents, but he received a copy from the FBI within a few minutes of their conversation. Mr. Levison told the agents that he would not comply with the pen register order and wanted to speak to an attorney. It was unclear whether Mr. Levison would not comply with the order because it was technically not feasible or difficult or because it was not consistent with his business practice of providing secure, encrypted email service for his customers.

- On June 28, 2013, after this conversation with Mr. Levison, the United States
 obtained an Order Compelling Compliance Forthwith, which directed Lavabit to comply with the pen register order. Copies of that motion and order are attached.
- 6. Since June 28, 2013, the FBI has made numerous attempts, without success, to speak and meet directly with Mr. Levison to discuss the pen register order and his failure to provide "all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device" as required by that order. As of this date, Lavabit LLC has not complied with the order.
- 7. The United States requests that the Court enter the attached proposed order directing Mr. Levison to show cause why Lavabit LLC has failed to comply with the pen register order and why, therefore, he should not be held in contempt. The United States requests that this show cause hearing be scheduled for July 16, 2013, at 10:00 a.m., and that a summons be issued directing Mr. Levison to appear before this Court on that date.
- 8. The June 10, 2013 Section 2703(d) Order and the June 28, 2013 pen register order remain under seal. In addition, these orders provide that Lavabit LLC shall not disclose the existence of the government's applications and the orders to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders. The United States requests that these documents remain under seal, that the non-disclosure



provisions of the orders remain in effect, and that this motion and order and any subsequent pleadings and/or proceedings regarding this motion also be scaled.

Respectfully submitted,

Neil H. MacBride United States Attorney

United States Attorney's Office

Justin W. Williams U.S. Attorney's Building

2100 Jamieson Avenue Alexandria, Virginia 22314

Phone: 703-299-3700

PROPOSED ORDER TO SHOW CAUSE



IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)	UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	

ORDER TO SHOW CAUSE

Upon motion of the United States pursuant to Title 18, United States Code, Section 401, good cause having been shown, IT IS HEREBY ORDERED:

- Ladar Levison, the owner and operator of Lavabit LLC, an electronic
 communications service provider, shall appear before this Court on July 16, 2013, at 10:00 a.m.,
 at which time he shall show cause why Lavabit LLC has failed to comply with the orders entered
 June 28, 2013, in this matter and why this Court should not hold Mr. Levison and Lavabit LLC in
 contempt for its disobedience and resistence to these lawful orders;
- 2. The Clerk's Office shall issue a summons for the appearance of Mr. Levison on July 16, 2013, at 10:00 a.m. The Clerk's Office shall provide the Federal Bureau of Investigation with a certified copy of the summons for service on Mr. Levison and Lavabit LLC.
- The Federal Bureau of Investigation shall serve the summons on Mr. Levison together with a copy of the Motion of the United States for an Order to Show Cause and a certified copy of this Order to Show Cause.
- The sealing and non-disclosure provisions of the June 10, 2013 Section 2703(d)
 order and the June 28, 2013 pen register order shall remain in full force and effect. Mr. Levison

and Lavabit LLC shall not disclose the existence of these applications, motions, and court orders, including this Order to Show Cause, to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders.

 This Order, the Motion of the United States for an Order to Show Cause, and any subsequent pleadings and proceedings regarding this matter shall be placed under scal until further order of this Court.

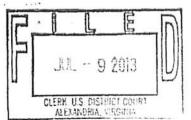
Entered in Alexandria, Virginia, this _____ day of July, 2013

Claude M. Hilton United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)	UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	



ORDER TO SHOW CAUSE

Upon motion of the United States pursuant to Title 18, United States Code, Section 401, good cause having been shown, IT IS HEREBY ORDERED:

- Ladar Levison, the owner and operator of Lavabit LLC, an electronic
 communications service provider, shall appear before this Court on July 16, 2013, at 10:00 a.m.,
 at which time he shall show cause why Lavabit LLC has failed to comply with the orders entered
 June 28, 2013, in this matter and why this Court should not hold Mr. Levison and Lavabit LLC in
 contempt for its disobedience and resistence to these lawful orders;
- 2. The Clerk's Office shall issue a summons for the appearance of Mr. Levison on July 16, 2013, at 10:00 a.m. The Clerk's Office shall provide the Federal Bureau of Investigation with a certified copy of the summons for service on Mr. Levison and Lavabit LLC.
- 3. The Federal Bureau of Investigation shall serve the summons on Mr. Levison together with a copy of the Motion of the United States for an Order to Show Cause and a certified copy of this Order to Show Cause.
- The sealing and non-disclosure provisions of the June 10, 2013 Section 2703(d)
 order and the June 28, 2013 pen register order shall remain in full force and effect. Mr. Levison

Case 1:13-ec-00297-TCB Document 25-11 Filed 02/24/16 Page 38 of 82 PageID# 558 Case 1:13-ec-00297-TCB *SEALED* Document 11-6 Filed 09/20/13 Page 3 of 3 PageID# 76

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and Lavabit LLC shall not disclose the existence of these applications, motions, and court orders, including this Order to Show Cause, to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders.

5. This Order, the Motion of the United States for an Order to Show Cause, and any subsequent pleadings and proceedings regarding this matter shall be placed under seal until further order of this Court.

Entered in Alexandria, Virginia, this _qr day of July, 2013

Claude M. Hilton
United States District Judge

A TRUE COPY, TESTE: CLERK, U.S. DISTRICT COLIRT

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DEPUTY CLERK

AO 53 (Rev. 06/09) Summons in a Criminal Case

UNITED STATÉS DISTRICT COURT REDACTED for the Eastern District of Virginia JNDER SEAL United States of America V. Case No. 1:13ec297 Ladar Levison Defendant SUMMONS IN A CRIMINAL CASE YOU ARE SUMMONED to appear before the United States district court at the time, date, and place set forth below to answer to one or more offenses or violations based on the following document filed with the court: ☐ Information ☐ Superseding Information ☐ Complaint ☐ Superseding Indictment ☐ Indictment - Probation Violation Petition ☐ Supervised Release Violation Petition ☐ Violation Notice Order of Court Courtroom No.: 800- Judge Hilton 401 Courthouse Square Place: Alexandria, VA 22314 7/16/13 @ 10:00 am Date and Time: This offense is briefly described as follows: See Attached Order 07/09/2013 Date: Issuing officer's Vignature - Deputy Clerk Printed name and title I declare under penalty of perjury that I have: Returned this summons unexecuted Executed and returned this summons A TRUE COPY, TESTE: CLERK, U.S. DISTRICT COURT Date: DEPUTY OLENK Printed name and tale



AO 110 (Rev. 01/09) Subporns to Testify Before a Grand Jury

13-1 / 130/2527 / 13 - 2451

United States District Court

Eastern District of Virginia

SUBPOENA TO TESTIFY BEFORE THE GRAND JURY

TO: Ladar Norman Levison
Dallas, TX 75204

YOU ARE COMMANDED to appear and testify before the United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place:	UNITED STATES DISTRICT COURT	Date and Time:	July 16, 2013	9:38 AM
	491 Courthouse Square			
	Alexandria, Virginia 22314			

You must also bring with you the following documents, electronically stored information, or objects (blank if not applicable):

In addition to your personal appearance, you are directed to bring to the grand jury the public and private encryption keys used by lavabit.com in any SSL (Secure Socket Layer) or TLS (Transport Security Layer) sessions, including HTTPS sessions with clients using the lavabit.com web site and encrypted SMTP communications (or Internet communications using other protocols) with mail servers;

Any other information necessary to accomplish the installation and use of the pen/trap device ordered by Judge Buchanan on June 28, 2013, unobtrusively and with minimum interference to the services that are accorded persons with respect to whom the installation and use is to take place;

If such information is electronically stored or unable to be physically transported to the grand jury, you may provide a copy of the information to the Federal Bureau of Investigation. Provision of this information to the FBI does not excuse your personal appearance.

Date:

101v 11 2013



The name, address, small, and telephone number of the United States attentey, or assistant United States atterney, who requests this subpoena, are:

Office of the United States Afterney

Justin W. Williams United States Attorney's Building 2100 Jamleson Avenue
Alexandria, Virginia 22314 (703) 299-3700

AO 110 (Rev. 01/09) Subposes to Textify Before a Grand Jury (Page 1)	
PROOF OF SERVICE	
This subpoens for (name of Individual or organization) Lader Narman Leuis was received by me on (date) July 11, 2013	<u>~</u>
92. I personally served the subpoens on the individual at (place)	; or
I left the subpoena at the individual's residence or usual place of abode with (name)	sthere, on dress, or
☐ I served the subpoens on (name of inidividual)	, who is
designated by law to accept service of process on behalf of (name of organization)	; or
C) I returned the subpoena unexecuted because	: or
C: Other (specify):	
I declare under the penalty of perjury that this information is true.	
Date: July 11, 20,3	
Server's address	

Additional information regarding attempted services, etc.

AO 93 (Rev. 12/09) Search and Seizure Warrant

UNDER SEAL

UNITED STATES DISTRICT COURT

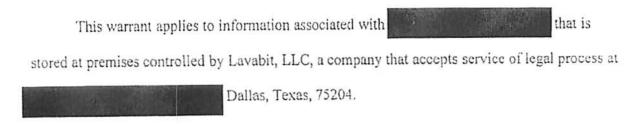
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for the Eastern District of Virginia

	In the Matter of the Search of (Briefly describe the property to be searched or identify the person by name and address) INFORMATION ASSOCIATED WITH THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT, LLC
	SEARCH AND SEIZURE WARRANT
То:	Any authorized law enforcement officer
(identify	An application by a federal law enforcement officer or an attorney for the government requests the search following person or property located in the Northem District of Texas the person or describe the property to be searched and give its location): achment A
property See Atta	The person or property to be searched, described above, is believed to conceal (identify the person or describe the to be setzed): achment B
proper	
	YOU ARE COMMANDED to execute this warrant on or before (not to exceed 14 days)
Ε.	I in the daytime 6:00 a.m. to 10 p.m. at any time in the day or night as I find reasonable cause has been established.
taken place	Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the where the property was taken.
invent	The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an tory as required by law and promptly return this warrant and inventory to United States Magistrate Judge onorable Claude M. Hilton (name)
of tria	I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay it), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be need or seized (check the appropriate box) of days (not to exceed 30). Ountil, the facts justifying, the later specific date of
	and time issued Out 16, 2013 Claude M. Hilton United States District Judge

ATTACHMENT A

Property to Be Searched



ATTACHMENT B

Particular Things to be Seized

I. Information to be disclosed by Lavabit, LLC (the "Provider")

To the extent that the information described in Attachment A is within the possession, custody, or control of the Provider, including any emails, records, files, logs, or information that has been deleted but is still available to the Provider, the Provider is required to disclose the following information to the government for each account or identifier listed in Attachment A:

- a. All information necessary to decrypt communications sent to or from the Lavabit e-mail account including encryption keys and SSL keys;
- b. All information necessary to decrypt data stored in or otherwise associated with the Lavabit account



II. Information to be seized by the government

All information described above in Section I that constitutes fruits, contraband, evidence and instrumentalities of violations of 18 U.S.C. §§ those violations involving including, for each account or identifier listed on Attachment A, information pertaining to the following matters:

- a. All information necessary to decrypt communications sent to or from the Lavabit e-mail account including encryption keys and SSL keys;
- b. All information necessary to decrypt data stored in or otherwise associated with the Lavabit account



CERTIFICATE OF AUTHENTICITY OF DOMESTIC BUSINESS RECORDS PURSUANT TO FEDERAL RULE OF EVIDENCE 902(11)

I,, attest, under penalties of perjury under the
laws of the United States of America pursuant to 28 U.S.C. § 1746, that the information
contained in this declaration is true and correct. I am employed by Lavabit, LLC, and my
official title is I am a custodian of records for Lavabit,
LLC. I state that each of the records attached hereto is the original record or a true duplicate of
the original record in the custody of Lavabit, LLC, and that I am the custodian of the attached
records consisting of (pages/CDs/kilobytes). I further state that:
a. all records attached to this certificate were made at or near the time of the occurrence of the matter set forth, by, or from information transmitted by, a person with
knowledge of those matters;
b. such records were kept in the ordinary course of a regularly conducted business
activity of Lavabit, LLC; and
c. such records were made by Lavabit, LLC as a regular practice.
I further state that this certification is intended to satisfy Rule 902(11) of the Federal
Rules of Evidence.
8
Date Signature

UNDER SEAL

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA Alexandria Division

Division	TRGINIA 1		· 6 2013	IIII
)	UNDER SEAL (Local Rule 49(No. 1:13sw522	CLE B))	RK U.S. CHSTPINT CASEST	
)			RED_{A}	CTED

IN THE MATTER OF THE SEARCH OF
INFORMATION ASSOCIATED WITH
THAT IS STORED AT PREMISES
CONTROLLED BY LAVABIT, LLC

ORDER TO SEAL

The UNITED STATES, pursuant to Local Rule 49(B) of the Local Criminal Rules for the United States District Court for the Eastern District of Virginia, having moved to seal the application for a search warrant, the search warrant, the affidavit in support of the search warrant, the Motion to Seal, and proposed Order in this matter; and

The COURT, having considered the government's submissions, including the facts presented by the government to justify sealing; having found that revealing the material sought to be sealed would jeopardize an ongoing criminal investigation; having considered the available alternatives that are less drastic than sealing, and finding none would suffice to protect the government's legitimate interest in concluding the investigation; and having found that this legitimate government interest outweighs at this time any interest in the disclosure of the material; it is hereby

ORDERED, ADJUDGED, and DECREED that, the application for search warrant, the search warrant, the affidavit in support of the search warrant, Motion to Seal, and this Order be sealed until further Order by the Court. It is further ordered that law enforcement officers may serve a copy of the warrant on the occupant of the premises as required by Rule 41 of the Fed. R. of Crim. Proc.

Date: Arty 16, 2013

Claude M. Hilton United States District Judge

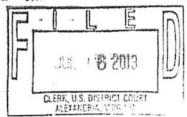
UNDER SEAL

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

IN RE: APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER PURSUANT TO 18 U.S.C. § 2705(b)

Case No. 1:13SW522 Filed Under Seal



ORDER

The United States has submitted an application pursuant to 18 U.S.C. § 2705(b), requesting that the Court issue an Order commanding Lavabit, an electronic communications service provider and/or a remote computing service, not to notify any person (including the subscribers or customers of the account(s) listed in the search warrant) of the existence of the attached search warrant until further order of the Court.

The Court determines that there is reason to believe that notification of the existence of the attached warrant will seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates. See 18 U.S.C. § 2705(b)(2), (3), (5).

IT IS THEREFORE ORDERED under 18 U.S.C. § 2705(b) that Lavabit shall not disclose the existence of the attached search warrant, or this Order of the Court, to the listed subscriber or to any other person, unless and until otherwise authorized to do so by the Court, except that Lavabit may disclose the attached search warrant to an attorney for Lavabit for the purpose of receiving legal advice.

IT IS FURTHER ORDERED that the application and this Order are sealed until otherwise ordered by the Court.

Dely 16, 2013

Claude M. Hilton
United States District Judge

IN THE UNITED STATES I	DIS	STRICT COURT FOR 1	严.	LED
EASTERN DISTI	RIC	CT OF VIRGINIA	7	JL 1 5 293
Alexand	ria	Division	" [CLERK, U.S. DISTRICT COURT
IN THE MATTER OF THE)	FILED UNDER SEAL		
APPLICATION OF THE UNITED)			D-
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297		RED_{ACTED}
AUTHORIZING THE USE OF A PEN)			ACTE
REGISTER/TRAP AND TRACE DEVICE)			ED
ON AN ELECTRONIC MAIL ACCOUNT)			

SUPPLEMENT TO THE MOTION OF THE UNITED STATES FOR AN ORDER TO SHOW CAUSE

The United States, through the undersigned counsel, submits the following additional information in support of its show cause motion filed July 9, 2013:

- 1. Following the issuance of the Court's Order to Show Cause, the government had a meeting/conference call with Mr. Levison and his then counsel. Mr. Levison was in Dallas.

 Texas, at the FBI field office, at the time, and his counsel from San Francisco, California, and prosecutors and FBI agents from the Washington, D.C. field office participated by telephone. The conference call was convened to discuss Mr. Levison's questions and concerns about the installation and operation of a pen register on the targeted email account. Mr. Levison's concerns focused primarily on how the pen register device would be installed on the Lavabit LLC system, what data would be captured by the device, what data would be viewed and preserved by the government. The parties also discussed whether Mr. Levison would be able to provide "keys" for encrypted information.
- During the conference call, the FBI explained to Mr. Levison that the pen register could be installed with minimal impact to the Lavabit LLC system, and the agents told Mr.

Levison that they would meet with him when they were ready to install the device and go over with him any of the technical details regarding the installation and use of the pen register. As for the data collected by the device, the agents assured Mr. Levison that the only data that the agents would review is that which is stated in the order and nothing more (i.e., user log-in information and the date, time, and duration of the transmissions for the target account).

- 3. Lavabit LLC provides encryption service to paid users
 on the conference call with Mr. Levison, the FBI is reasonably confident that with the encryption keys, which Mr. Levison can access, it would be able view in an un-encrypted format any encrypted information required to be produced through the use of the pen register.
- 4. Mr. Levison and his attorney did not commit to the installation and use of the pen register at the conclusion of the July 10 conference call. On July 11, 2013, counsel who participated in the conference call informed the government that she no longer represented Mr. Levison or Lavabit LLC. In addition, Mr. Levison indicated that he would not come to court unless the government paid for his travel.
- 5. On July 11, 2013, FBI agents served Mr. Levison with a grand jury subpoena directing him to appear before the grand jury in this district on July 16, 2013. As a grand jury witness, the government was responsible for making Mr. Levison's travel arrangements.
- 6. On July 11, 2013, the undersigned counsel sent Mr. Levison an email indicating that he has been served with a show cause order from this Court requiring his appearance on July 16, 2013, and a subpoena requiring his appearance on the same date before a federal grand jury. The email further advised Mr. Levison that he should contact the United States Attorney's Office as soon as possible to make his travel arrangements.



- 7. On July 13, 2013, Mr. Levison, who was no longer represented by counsel. sent government prosecutors an email indicating that he would be able to collect the data required by the pen register and provide that data to the government after 60 days (the period of the pen register order). For this service, Mr. Levison indicated that the government would have to pay him \$2000 for "developmental time and equipment" plus an additional \$1500 if the government wanted the data "more frequently" than after 60 days.
- 8. On July 13, 2013, the government responded to Mr. Levison's proposal. The prosecutors informed Mr. Levison that the pen register is a devise used to monitor ongoing email traffic on a real-time basis and providing the FBI with data after 60 days was not sufficient. Furthermore, prosecutors informed him that the statute authorizes the government to compensate a service provider for "reasonable expenses," and the amount he quoted did not appear to be reasonable. Mr. Levison responded by email stating that the pen register order, in his opinion, does not require real-time access (although this fact was discussed at length during the July 10 conference call). Moreover, he indicated that the cost of reissuing the "SSL certificate" (for encryption service) would be \$2000. It was unclear in his email if this \$2000 was an additional expense to be added to the \$3500 previously claimed. Mr. Levison indicated that he would try to contact the person responsible for making his travel arrangements at the United States Attorney's office on Sunday afternoon.
- 9. On July 15, 2013, Mr. Levison spoke with the person responsible for making his travel arrangements. He was told that he was booked on a flight from Dallas, Texas, to Reagan National Airport departing that same evening. He also had a hotel reservation. Mr. Levison indicated that

- Mr. Levison should be held in civil contempt. Civil contempt, as compared to criminal contempt under rule 42 of the Federal Rules of Criminal Procedure, is intended to coerce compliance with a court order. There are four elements to civil contempt: (1) the existence of valid order of which Lavabit LLC and Mr. Levison had actual or constructive knowledge; (2) the order was in the government's "favor"; (3) Lavabit LLC and Mr. Levison violated the terms of the order and had knowledge, or constructive knowledge, of such violation; and (4) the government suffered harm as a result. *In re Grand Jury Subpoena* (T-112), 597 F.3d 189, 202 (4th Cir. 2012).
- communication between the government and Mr. Levison, its owner and operator, has had actual knowledge of the pen register order and the subsequent June 28 order of the magistrate judge compelling compliance with that order. This Court's show cause order, which was personally served on Mr. Levison, provided further notice of the violation of those orders by Lavabit LLC. The government clearly has suffered harm in that it has lost 20 days of information as a result of non-compliance.
- 12. Lavabit LLC may comply with the pen register order by simply allowing the FBI to install the pen register devise and provide the FBI with the encryption keys. If Lavabit LLC informs the Court it will comply with the order, the government will not seek sanctions. If, however, Mr. Levison informs the Court that Lavabit LLC will not comply, the government requests that the Court impose a fine of \$1000 per day, commencing July 17, 2013, until Lavabit LLC fully complies with the pen register order.
 - 13. To the extent that Lavabit LLC takes the position that the pen register does not

authorize the production of the encryption keys, the government has asked the Court to authorize the seizure of that information pursuant to a warrant under Title 18, United States Code, Section 2703, thus rendering this argument moot.

14. The Court has sealed this proceeding. This pleading has also been filed under seal.
The United States will hand deliver a copy of this pleading to Mr. Levison at today's hearing.

By

Respectfully submitted,

Neil H. MacBride

United States Attorney's Office

Justin W. Williams U.S. Attorney's Building

2100 Jamieson Avenue Alexandria, Virginia 22314

EXHIBIT 13

REDACTED UNITED STATES DISTRICT COURT 1 EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION 2 3 IN THE MATTER OF THE 1:13 EC 297 APPLICATION OF THE UNITED STATES OF AMERICA FOR AN 5 UNDER SEAL ORDER AUTHORIZING THE INSTALLATION AND USE OF A 6) Alexandria, Virginia PEN REGISTER/TRAP AND TRACE) July 16, 2013 DEVICE ON AN ELECTRONIC) 10:41 a.m. MAIL ACCOUNT 8 9 10 TRANSCRIPT OF HEARING 11 BEFORE THE HONORABLE CLAUDE M. HILTON 12 UNITED STATES DISTRICT JUDGE 13 14 15 16 17 18 19 APPEARANCES: For the United States: James Trump, Esq. 20 Andrew Peterson, Esq. 21 Brandon Van Grack, Esq. Michael Ben'Ary, Esq. 22 Ladar Levison, Respondent For the Respondent: 23 Tracy L. Westfall, RPR, CMRS, CCR Court Reporter: 24 Proceedings reported by machine shorthand, transcript produced by computer-aided transcription. 25

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PROCEEDINGS

THE CLERK: In Re: Case No. 1:13 EC 297.

MR. TRUMP: Good morning, Judge. Jim Trump on behalf of the United States. With me is Andy Peterson, Brandon Van Grack from the United States Department of Justice, Mr. Ben'Ary behind me, and Matt Braverman, special agent for the FBI.

THE COURT: All right.

MR. LEVISON: Ladar Levison, the subject of the summons.

THE COURT: All right. Mr. Trump.

paper this morning describing the communication we've had with Lavabit, LLC, through Mr. Levison. And I think, very simply, we would like this Court to inquire of Mr. Levison whether he intends to comply with the pen register order which would require him to allow the FBI access to his server to install a device which will extract data, filter that data, and provide that data to the FBI, and to provide the FBI with the encryption keys to the extent there is encrypted information, included among within the body of information called for by the pen register order.

As the Court is aware, and as we will provide with Mr. Levison, we obtained a search warrant this morning from Your Honor for the same encryption keys. Thus, to the extent there's

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any question as to whether Mr. Levison would be required to provide these keys, it's now subject both to the pen register order and the search warrant, the seizure warrant.

That's where we stand, Your Honor. If Mr. Levison agrees to comply with the order, we would not seek any sanctions. We would ask that he be directed to forthwith make his servers available so the FBI can install that device and to extract the encryption keys.

If, however, he informs the Court he is not willing to comply with the order, we would ask the Court to impose sanctions. We suggested in our pleading a thousand dollars a day to be paid to the United States government until he complies. If he doesn't comply with that sanction, then we would be back in court seeking additional sanctions or charging additional offenses.

THE COURT: All right. Mr. Levison.

MR. LEVISON: Good morning, Your Honor. I'm not sure what order I should make these in, but I would like to request a couple of things by motion.

I'd like to move that all of the nonsensitive portions of the documents that were provided, i.e., everything except the account in question, be unsealed. I believe it's important for the industry and the people to understand what the government is requesting by demanding that I turn over these encryption keys for the entire service.

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THE COURT: All right. What do you say to that,

Mr. Trump? Deal with the motions before I -
MR. TRUMP: What Mr. Levison is trying to do, Your

Honor, is invite industry to come in and litigate as a surrogate for him the issue of whether the encryption keys are part and parcel of the pen register order. And that's one of the reasons we sought the search warrant, to make it clear, whether through the search warrant or pen register order, he is required to provide these keys.

We know he's been in contact with attorneys who also represent industry groups and others who have litigated issues like this in the WikiLeaks context and others. But we would object to unsealing this matter because it's just Mr. --

THE COURT: And they've done that in connection with the issuance of a pen register?

MR. TRUMP: They have litigated privacy-related issues in the context of process under 2703. I'm not sure -- not a pen register, but with respect to 2703.

But we discussed this issue with Mr. Levison and his counsel by conference call. We indicated that the only data that the government seeks is that which is required by the pen register order. That it's just the basic header to e-mail traffic, sender, recipient, time, duration, that sort of thing.

If Mr. Levison wants to object to providing the keys, he can certainly object to doing that and then we can proceed

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from there, but I don't think he's entitled to try to make this a public proceeding to invite others in to litigate those issues on his behalf.

THE COURT: All right. Well, I believe that to be correct. I mean, this is a criminal investigation. A pen register has been ordered and is here at issue, and any motion to unseal that will be denied.

You said you had another motion, I believe?

MR. LEVISON: Yeah. My issue is only with the SSL keys. So if that is litigated separately and that portion of the proceeding is unsealed, I'm comfortable with that.

THE COURT: I don't understand what you're saying, separate proceedings.

MR. LEVISON: Sorry. I have always agreed to the installation of the pen register device. I have only ever objected to turning over the SSL keys because that would compromise all of the secure communications in and out of my network, including my own administrative traffic.

THE COURT: Well, didn't my order already include that?

MR. LEVISON: I do not believe so, sir.

THE COURT: Did my initial order -- I don't recall at the moment. Did my initial order recall the encrypted devices with the installation of a pen register?

MR. TRUMP: The pen register, as issued, just required all assistance, technical assistance, facilities, and

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information, to facilitate the pen register.

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This morning the search warrant required --

THE COURT: Yeah, but the search warrant's a different matter now. That's not before me this morning. The only thing that's before me this morning is the pen register.

MR. TRUMP: Correct.

THE COURT: So as I understand it, my initial order ordered nothing but that the pen register be put in place.

MR. TRUMP: And all technical assistance, information, and facilities necessary to implement the pen register. And it's our position that without the encryption keys, the data from the pen register will be meaningless. So to facilitate the actual monitoring required by the pen register, the FBI also requires the encryption keys.

THE COURT: Well, that could be, but I don't know that I need -- I don't know that I need to reach that because I've issued a search warrant for that.

MR. TRUMP: Correct, Your Honor. That the -- to avoid litigating this issue, we asked the Court to enter the seizure warrant.

THE COURT: Well, what I'm saying is if he agrees that the pen register be established, and that the only thing he doesn't want to do in connection with the pen register is to give up the encryption device or code --

MR. LEVISON: I've always maintained that.

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-- so we've got no issue here. You're THE COURT: 1 2 ready to do that? MR. LEVISON: I've been ready to do that since Agent 3 Howard spoke to me the first time. 4 THE COURT: All right. So that ends our --5 MR. TRUMP: Well, then we have to inquire of 6 Mr. Levison whether he will produce the encryption keys pursuant 7 to the search warrant that Your Honor just signed. 8 THE COURT: But I can't deal with that this morning, 9 can I? 10 MR. TRUMP: Well, it's the same issue. You could ask 11 him, Your Honor. We can serve him with the warrant and ask him 12 if he's going to comply rather than --13 MR. LEVISON: Your Honor, I've also been issued a 14 subpoena demanding those same keys, which I brought with me in 15 the event that we would have to address that subpoena. 16 THE COURT: I don't know, Mr. Trump. I don't think 1 17 want to get involved in asking him. You can talk with him and 18 see whether he's going to produce them or not and let him tell 19 But I don't think I ought to go asking what he's going to 20 do and what he's not going to do because I can't take any action 21 about it anyway. 22 If he does not comply with the subpoena, there are 23 remedies for that one way or another. 24 MR. TRUMP: Well, the original pen register order was 25

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followed by a compulsion order from Judge Buchanan. The compulsion order required the encryption keys to be produced.

So, yes, part of the show cause order is to require compliance both with the pen register order and the compulsion order issued by Judge Buchanan.

And that order, which was attached to the show cause order, states, "To the extent any information, facilities, or technical assistance are under the control of Lavabit are needed to provide the FBI with the encrypted data, Lavabit shall provide such information, facilities, or technical assistance forthwith."

MR. LEVISON: I would object to that statement. I don't know if I'm wording this correctly, but what was in that order to compel was a statement that was incorrect.

Agent Howard seemed to believe that I had the ability to encrypt the e-mail content stored on our servers, which is not the case. I only have the keys that govern communications into and out of the network, and those keys are used to secure the traffic for all users, not just the user in question.

So the statement in that order compelling me to decrypt stuff and Agent Howard stating that I have the ability to do that is technically false or incorrect. There was never an explicit demand that I turn over these keys.

THE COURT: I don't know what bearing that would have, would it? I mean, I don't have a problem -- Judge Buchanan

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issued an order in addition to mine, and I'm not sure I ought to be enforcing Judge Buchanan's order.

My order, if he says that he will produce or allow the installation of the pen register, and in addition I have issued a search warrant for the codes that you want, which I did this morning, that's been entered, it seems that this issue is over as far as I'm concerned except I need to see that he allows the pen register and complies with the subpoena.

MR. TRUMP: Correct.

THE COURT: If he doesn't comply -- if he doesn't comply with the subpoena, then that has -- I have to address that.

MR. TRUMP: Right.

THE COURT: But right now there's nothing for me to address here unless he is not telling me correctly about the pen register.

MR. TRUMP: Well, we can -- Your Honor, if we can talk to Mr. Levison for five minutes, we can ask him whether he will honor the warrant that you just issued.

MR. LEVISON: Before we do that, can I --

THE COURT: Well, what can I do about it if he doesn't, if he tells you he's not going to? You've got the right to go out and search and get it.

MR. TRUMP: Well, we can't get the information without his assistance. He's the only who knows and has possession of

Tracy L. Westfall OCR-USDC/EDVA

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it. We can't take it from him involuntarily.

MR. LEVISON: If I may, sir, my other --

THE COURT: Wait just a second.

You're trying to get me ahead. You're trying to get me to deal with a contempt before there's any contempt, and I have a problem with that.

MR. TRUMP: I'm trying to avoid contempt altogether, Your Honor.

THE COURT: I know you are. And I'd love for you-all to get together and do that. I don't want to deal with it either. But I don't think we can sit around and agree that there's going to be a default and I will address it before it occurs.

MR. TRUMP: I'm just trying to figure out whether there's going to be a default. We'll take care of that, Judge.

THE COURT: You can. I think the way we've got to do this -- and I'll listen to you. I'm cutting you off, I know, but I'll listen to you in a minute.

The way we have to do this, the hearing that's before me this morning on this issue of the pen register, that's been resolved, or so he's told me. I don't know whether you want to continue this one week and see if he complies with that, which I guess would be prudent to do, or a few days for nim to comply with the pen register. Then we will wait and see what happens with the subpoena.

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Because as far as my pen register order is concerned, he says he's going to comply with it. So that issue's over and done with. The next issue will be whether or not he complies with the subpoena. And I don't know and I don't want to presume, and I don't want him to represent to me what he intends to do when he can very well go home and decide he's going to do something different.

When that warrant is served, we'll know what he's going to do. I think we've got -- I don't see another way to do it.

MR. TRUMP: That's fine, Your Honor. We will serve the warrant on him as soon as we conclude this hearing, and we'll find out whether he will provide the keys or not.

THE COURT: Okay. Now, did you want to say anything else?

MR. LEVISON: Well, I mean, I've always maintained that all the government needs to do is contact me and set up an appointment to install that pen register. So I don't know why there has never been any confusion about my willingness to install it. I've only ever objected to the providing of those keys which secure any sensitive information going back and forth.

But my motion, and I'm not sure if it's relevant or not because it deals more with the issue of the subpoena demanding the keys and for what will be the forthcoming search warrant, would be a continuance so that I can retain counsel to address

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that particular issue.

THE COURT: Well, I mean, there's nothing before me with that. I've issued the subpoena. Whatever happens with that, that's -- you're trying to get me to do what Mr. Trump wanted to do and to arrange this beforehand.

MR. LEVISON: Well, I don't know if I have to appear before that grand jury right now and give the keys over or face arrest. I'm not a lawyer so I don't understand the procedure.

THE COURT: I don't know either. You need to have -- it would be wise to have a lawyer.

MR. LEVISON: Okay.

THE COURT: I don't know what's going to happen. I don't know. They haven't served the warrant yet. I have no idea. Don't know what's going to happen with it. You'll just have to figure that out, and it be wise to have a lawyer to do it, I would think.

MR. LEVISON: I guess while I'm here in regards to the pen register, would it be possible to request some sort of external audit to ensure that your orders are followed to the letter in terms of the information collected and preserved?

THE COURT: No. The law provides for those things, and any other additional or extra monitoring you might want or think is appropriate will be denied, if that's what you're requesting.

MR. LEVISON: Okay. I mean, it requests that the government return to the Court records --

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You need to talk to a lawyer about what the THE COURT: 1 law requires for the issuance of a pen register. 2 MR. LEVISON: They can handle that separately. That's 3 fine. 4 THE COURT: The law sets out what is done in that 5 Your lawyer can fill you in if you want to know. 6 regard. MR. LEVISON: I've always been willing to accept the 7 I just have some concern about ensuring that it's used 8 properly. 9 THE COURT: Should we continue this to some specific 10 date to see that he complies with the pen register? 11 MR. TRUMP: We can, Your Honor. It's a moot issue 12 without the encryption keys. 13 Well, that is a practical matter --THE COURT: 14 That's a practical --MR. TRUMP: 15 THE COURT: -- but I don't think it is a moot issue. 16 mean, you-all have got the right to go in and put on that pen 17 register. He says that he will do it. That's all that I've 18 ordered. 19 Now, the other business about ordering that, Judge 20 Buchanan made an order that he's going to have to supply what 21 you say is the encryption codes to make the information useful. 22 I don't know. I didn't enter that order. I have trouble making 23 that connection. 24

If you're going to -- I don't know whether you want to

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1	do something in front of Judge Buchanan or not.
2	MR. LEVISON: You see, Judge, though that I've always
3	been willing. They just didn't feel the need to set up an
4	appointment.
5	THE COURT: What do you want me to do with this case?
6	You want me to continue it? You want me to say it's moot right
7	now and just end it?
8	MR. TRUMP: No. I think we can continue it. I don't
9	know Mr. Levison's schedule. It can be done within hours of his
10	return to Dallas.
11	THE COURT: Of course he can. You want to continue it
12	till a week from Friday?
13	MR. TRUMP: Or a week from today.
14	MR. LEVISON: I'm not available within hours of my
15	return, but I can meet with you on Thursday.
15	THE COURT: Let's continue it a week from Friday.
17	MR. TRUMP: A week from Friday.
18	THE COURT: What date's that? The
19	THE CLERK: 26th.
20	THE COURT: The 26th?
21	MR. LEVISON: Acceptable to me.
22	THE COURT: We'll continue it to the 26th, and that's
23	for determining whether or not that pen register has been
24	installed as you request.
25	We can make it 10 o'clock.

```
REDACTED
            MR. LEVISON: I'll remember 10:00 instead of 10:30 this
1.
2
    time.
             THE COURT: All right. Thank you.
3
             All right. Thank you-all. We'll adjourn till tomorrow
4
    morning at 9:30.
5
6
        (Proceedings concluded at 11:02 a.m.)
7
8
9
10
11
12
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23
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REDACTED

CERTIFICATION

I certify, this 17th day of September 2013, that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my ability.

Tracy Westfall, RPR, JMRS, CCR

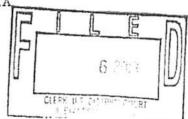
Tracy L. Westfall OCR-USDC/EDVA

EXHIBIT 14

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)
APPLICATION OF THE UNITED)
STATES AUTHORIZING THE USE OF)
A PEN REGISTER/TRAP AND TRACE)
DEVICE ON AN ELECTRONIC MAIL)
ACCOUNT)



Criminal No. 1:13EC297

ORDER

This matter comes before the Court on the Government's Motion that Ladar Levinson, the owner and operator of Lavabit, LLC show cause as to why Lavabit, LLC has failed to comply with the Court's Order of June 28, 2013 and why this Court should not hold Mr. Levinson and Lavabit, LLC in contempt, and Ladar Levinson's oral Motion To Unseal. For the reasons stated from the bench, it is hereby

ORDERED that Ladar Levinson's Motion To Unseal is DENIED and this matter is continued to Friday, July 26, 2013 at 10:00 a.m. for further proceedings.

Claude M. Hilton United States District Judge

Alexandria, Virginia July /6 , 2013

EXHIBIT 15

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT

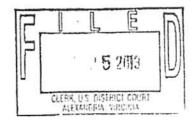
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

In re Grand Jury

FILED UNDER SEAL

No. 1:13EC297



No. 1:13SW522

No. 13-1

MOTION TO QUASH SUBPOENA AND SEARCH WARRANT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Lavabit LLC ("Lavabit") and Mr. Ladar Levinson ("Mr. Levinson") move this Court to quash the grand jury subpoena and search and seizure warrant served on them by the Federal Bureau of Investigation and the Office of the United States Attorney (collectively "Government").

BACKGROUND

Lavabit is an encrypted email service provider. As such, Lavabit's business model focuses on providing private and secure email accounts to its customers. Lavabit uses various encryption methods, including secured socket layers ("SSL"), to protect its users' privacy. Lavabit maintains an encryption

key, which may be used by authorized users decrypt data and communications from its server ("Master Key"). The Government has commanded Lavabit, by a subpoenal and a search and seizure warrant, to produce the encryption keys and SSL keys used by lavabit.com in order to access and decrypt communications and data stored in one specific email address ("Lavabit Subpoena and Warrant").

ARGUMENT

If the Government gains access to Lavabit's Master Key, it will have unlimited access to not only ("Email Account"), but all of the communications and data stored in each of Lavabit's 400,000 email accounts. None of these other users' email accounts are at issue in this matter. However, production of the Master Key will compromise the security of these users. While Lavabit is willing to cooperate with the Government regarding the Email Account, Lavabit has a duty to maintain the security for the rest of its customers' accounts. The Lavabit Subpoena and Warrant are not narrowly tailored to seek only data and communications relating to the Email Account in question. As a result, the Lavabit Subpoena and Warrant are unreasonable under the Fourth Amendment.

a. The Lavabit Subpoena and Warrant Essentially Amounts to a General Warrant.

¹ The grand jury subpoena not only commanded Mr. Levinson to appear before this Court on July 16, 2013, but also to bring Lavabit's encryption keys. Mr. Levinson's subpoena to appear before the grand jury was withdrawn, but the government continues to seek the encryption keys. Lavabit is only seeking to quash the Court's command that Mr. Levinson provide the encryption keys.

Though the Lavabit Subpoena and Warrant superficially appears to be narrowly tailored, in reality, it operates as a general warrant by giving the Government access to every Lavabit user's communications and data.

It is not what the Lavabit Subpoena and Warrant defines as the boundaries for the search, but the *method* of providing access for the search which amounts to a general warrant.

It is axiomatic that the Fourth Amendment prohibits general warrants.

Andresen v. Maryland, 427 U.S. 463, 480 (1976). Indeed "it is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." Payton v. New York, 445 U.S. 573, 583 (1980) (footnote omitted). To avoid general warrants, the Fourth Amendment requires that "the place to be searched" and "the persons or things to be seized" be described with particularity. United States v. Moore, 775 F. Supp. 2d 882, 898 (E.D. Va. 2011) (quoting United States v. Grubbs, 547 U.S. 90, 97 (2006)).

The Fourth Amendment's particularity requirement is meant to "prevent[] the scizure of one thing under a warrant describing another." Andresen, 427 U.S. at 480. This is precisely the concern with the Lavabit Subpoena and Warrant and, in this circumstance, the particularity requirement will not protect Lavabit. By turning over the Master Key, the Government will have the ability to search each and every "place," "person [and] thing" on Lavabit's network.

The Lavabit Subpoena and Warrant allows the Government to do a "general, exploratory rummaging" through any Lavabit user account. See id. (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971)) (describing the issue with general warrants "is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings"). Though the Lavabit Subpoena and Warrant is facially limited to the Email Address, the Government would be able to seize communications, data and information from any account once it is given the Master Key.

There is nothing other than the "discretion of the officer executing the warrant" to prevent an invasion of other Lavabit user's accounts and private emails. See id. at 492 (quoting Stanford v. Texas, 379 U.S. 476, 485 (1965)) (explaining that the purpose of the particularity requirement of the Fourth Amendment is to ensure, with regards to what is taken that, "nothing is left to the discretion of the officer executing the warrant.") (internal citation omitted). Lavabit has no assurance that any searches conducted utilizing the Master Key will be limited solely to the Email Account. See Groh v. Ramirez, 540 U.S. 551, 561-62 (2004) (citing Camara v. Municipal Court of City and County of San Prancisco, 387 U.S. 523, 532 (1967)) (noting that a particular warrant is to provide individuals with assurance "of the lawful authority of the executing officer, his need to search, and the limits of his power to search) (emphasis added). Lavabit has a duty to its customers to protect their accounts from the possibility of unlawful intrusions by third parties, including government entities.

As the Lavabit Subpoena and Warrant are currently framed they are invalid as they operate as a general warrant, allowing the Government to search individual users not subjection to this suit, without limit.

b. The Lavabit Subpoena and Warrant Seeks Information that Is Not Material to the Investigation.

Because of the breadth of Warrant and Subpoena, the Government will be given access to data and communications that are wholly unrelated to the suit. The Government, by commanding Lavabit's encryption keys, is acquiring access to 400,000 user's private accounts in order to gain information about one individual. 18 U.S.C. § 2703(d) states that a court order may be issued for information "relevant and material to an ongoing criminal investigation." However, the Government will be given unlimited access, through the Master Key, to several hundred thousand user's information, all of who are not "material" to the investigation. *Id.*

Additionally, the Government has no probable cause to gain access to the other users accounts. "The Fourth Amendment...requires that a warrant be no broader than the probable cause on which it is based." Moore, 775 F. Supp. 2d at 897 (quoting United States v. Hurwitz, 459 F.3d 463, 473 (4th Cir. 2006)). Probable cause here is based on the activities of the individual linked to the Email Address. Other Lavabit users would be severely impacted by the Government's access to the Master Key and have not been accused of wrongdoing or criminal activity in relation to this suit. Their privacy interests should not suffer because of the alleged misdeeds of another Lavabit user.

c. Compliance with Lavablt Subpoena and Warrant Would Cause an Undue Burden.

As a non-party and unwilling participant to this suit, Lavabit has already incurred legal fees and other costs in order to comply with the Court's orders. Further compliance, by turning over the Master Key and granting the Government access to its entire network, would be unduly burdensome. See 18 U.S.C. § 2703(d) (stating that "the service provider may [move to] quash or modify [an] order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.") (emphasis added).

The recent case of *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. 2703(d)* ("Twitter") addresses similar issues. 830 F. Supp. 2d 114 (E.D. Va. 2011). In that case, the Petitioners failed to allege "a personal injury cognizable by the Fourth Amendment." *Id.* at 138. However, Lavabit's circumstances are distinguishable. The Government, in pursuit of information date and communications related to the Email Address, has caused and will continue to cause injury to Lavabit. Not only has Lavabit expended a great deal of time and money in attempting to cooperate with the Government thus far, but, Lavabit will pay the ultimate price—the loss of its customers' trust and business—should the Court require that the Master Key be turned over. Lavabit's business, which is founded on the preservation of electronic privacy, could be destroyed if it is required to produce its Master Key.

Lavabit is also a fundamentally different entity than Twitter, the business at issue in *Twitter*. The Twitter Terms of Service specifically allowed user information to be disseminated. *Id.* at 139. Indeed, the very purpose of Twitter is for users to publically post their musings and beliefs on the Internet. In contrast, Lavabit is dedicated to keeping its user's information private and secure. Additionally, the order in *Twitter* did not seek "content information" from Twitter users, as is being sought here. *Id.* The Government's request for Lavabit's Master Key gives it access to data and communications from 400,000 email secure accounts, which is much more sensitive information that at issue in the *Twitter*.

The Government is attempting, in complete disregard of the Fourth Amendment, to penetrate a system that was founded for the sole purpose of privacy. See Katz v. United States, 389 U.S. 347, 360 (1967) (stating that "the touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy") (internal citations omitted). For Lavabit to grant the Government unlimited access to every one of its user's accounts would be to disavow its duty to its users and the principals upon which it was founded. Lavabit's service will be rendered devoid of economic value if the Government is granted access to its secure network. The Government does not have any proper basis to request that Lavabit blindly produce its Master Key and subject all of its users to invasion of privacy.

Moreover, the Master Key itself is an encryption developed and owned by Lavabit. As such it is valuable proprietary information and Lavabit has a

reasonable expectation in protecting it. Because Lavabit has a reasonable expectation of privacy for its Master Key, the Lavabit Subpoena and Warrant violate the Fourth Amendment. See Twitter, 830 F. Supp. 2d at 141 (citing United States v. Calandra, 414 U.S. 338, 346 (1974)) (noting "The grand jury is...without power to invade a legitimate privacy interest protected by the Fourth Amendment" and that "a grand jury's subpoena...will be disallowed if it is far too sweeping in its terms to be...reasonable under the Fourth Amendment.").

CONCLUSION

For the foregoing reasons, Lavabit and Mr. Levinson respectfully move this Court to quash the search and seizure warrant and grand jury subpoena. Further, Lavabit and Mr. Levinson request that this Court direct that Lavabit does not have to produce its Master Key. Alternatively, Lavabit and Mr. Levinson request that they be given an opportunity to revoke the current encryption key and reissue a new encryption key at the Government's expense. Lastly, Lavabit and Mr. Levinson request that, if they is required to produce the Master Key, that they be reimbursed for its costs which were directly incurred in producing the Master Key, pursuant to 18 U.S.C. § 2706.

LAVABIT LLC
By Counsel

Jesse R. Binnall, VSB# 79292 Bronley & Binnall, PLLC

10387 Main Street, Suite 201

Fairfax, Virginia 22030

Case 1:13-ec-00297-TCB Document 25-12 Filed 02/24/16 Page 6 of 73 PageID# 608 Case 1:13-ec-00297-TCB *SEALED* Document 11-15 Filed 09/20/13 Page 10 of 11 PageID# 126

REDACTED

(703) 229-0335 Telephone (703) 537-0780- Facsimile jbinnall@bblawonline.com Counsel for Lavabit LLC

Certificate of Service

I certify that on this 25 day of July, 2013, this Motion to Quash Subpoena and Search Warrant and Memorandum of Law in Support was hand delivered to the person at the addresses listed below:

United States Attorney's Office Eastern District of Virginia

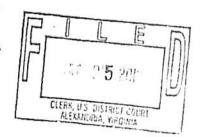
2100 Jamieson Avenue Alexandria, VA 22314

10

EXHIBIT 16

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division



IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE
OF A PEN REGISTER/TRAP
AND TRACE DEVICE ON AN
ELECTRONIC MAIL ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

In re Grand Jury

FILED UNDER SEAL

No. 1:13EC297

No. 1:13SW522

No. 13-1

MOTION FOR UNSEALING OF SEALED COURT RECORDS AND REMOVAL OF NON-DISCLOSURE ORDER AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Lavabit, LLC ("Lavabit") and Mr. Ladar Levinson ("Mr. Levinson")

(collectively "Movants") move this Court to unseal the court records concerning the United States government's attempt to obtain certain encryption keys and lift the non-disclosure order issued to Mr. Levinson. Specifically, Movants request the unsealing of all orders and documents filed in this matter before the Court's issuance of the July 16, 2013 Sealing Order ("Sealing Order"); (2) all orders and documents filed in this matter after the issuance of the Sealing Order; (3) all grand jury subpoenas and search and seizure warrants issued before or after issuance of the Sealing Order; and (4) all documents filed in

connection with such orders or requests for such orders (collectively, the "sealed documents"). The Sealing Order is attached as Exhibit A. Movants request that all of the sealed documents be unsealed and made public as quickly as possible, with only those redactions necessary to secure information that the Court deems, after review, to be properly withheld.

BACKGROUND

Lavabit was formed in 2004 as a secure and encrypted email service provider. To ensure security, Lavabit employs multiple encryption schemes using complex access keys. Today, it provides email service to roughly 400,000 users worldwide. Lavabit's corporate philosophy is user anonymity and privacy. Lavabit employs secure socket layers ("SSL") to ensure the privacy of Lavabit's subscribers through encryption. Lavabit possesses a master encryption key to facilitate the private communications of its users.

On July 16, 2013, this Court entered an Order pursuant to 18 U.S.C. 2705(b), directing Movants to disclose all information necessary to decrypt communications sent to or from and data stored or otherwise associated with the Lavabit e-mail account product product product product product product or attached as Exhibit B. The Lavabit Order precludes the Movants from notifying any person of the search and seizure warrant, or the Court's Order in issuance thereof, except that Lavabit was permitted to disclose the search warrant to an attorney for legal advice.

ARGUMENT

In criminal trials there is a common law presumption of access to judicial records, like the sealed documents in the present case. Despite the government's legitimate interests, it cannot meet its burden and overcome this presumption because it has not explored reasonable alternatives.

Furthermore, the government's notice preclusion order constitutes a content-based restriction on free speech by prohibiting public discussion of an entire topic based on its subject matter.

I. THE FIRST AMENDMENT AND NON-DISCLOSURE ORDERS

The Stored Communications Act ("SCA") authorizes notice proclusion to any person of a § 2705(b) order's existence, but only if the Court has reason to believe that notification will result in (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction or tampering with evidence; (4) intimidating of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. § 2705(b)(1)-(5). Despite this statutory authority, the § 2705(b) gag order infringes upon freedom of speech under the First Amendment, and should be subjected to constitutional case law.

The most searching form of review, "strict scrutiny", is implicated when there is a content-based restriction on free speech. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 403 (1992). Such a restriction must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. Id. The Lavabit Order's non-disclosure provision is a content-based restriction that is not narrowly tailored to achieve a compelling state interest.

a. The Lavabit Order Regulates Mr. Levinson's Free Speech

The notice preclusion order at issue here limits Mr. Levinson's speech in that he is not allowed to disclose the existence of the § 2705(b) order, or the underlying investigation to any other person including any other Lavabit subscriber. This naked prohibition against disclosure can fairly be characterized as a regulation of pure speech. *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001). A regulation that limits the time, place, or manner of speech is permissible if it serves a significant governmental interest and provides ample alternative channels for communication. *See Cox v. New Hampshire*, 312 U.S. 569, 578 (1941) (explaining that requiring a permit for parades was aimed at policing the streets rather than restraining peaceful picketing). However, a valid time, place, and manner restriction cannot be based on the content or subject matter of the speech. *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980).

The gag order in the present case is content-based because it precludes speech on an entire topic, namely the search and seizure warrant and the underlying criminal investigation. See id. at 537 ("The First Amendment's hostility to content-based regulation extends...to prohibition of public discussion of an entire topic"). While the nondisclosure provision may be viewpoint neutral on its face, it nevertheless functions as a content-based restriction because it closes off an "entire topic" from public discourse.

It is true that the government has a compelling interest in maintaining the integrity of its criminal investigation. However, Mr.

Levinson has been unjustly restrained from contacting Lavabit subscribers who could be subjected to government surveillance if Mr. Levinson were forced to comply the Lavabit Order. Lavabit's value is embodied in its complex encryption keys, which provide its subscribers with privacy and security. Mr. Levinson has been unwilling to turn over these valuable keys because they grant access to his entire network. In order to protect Lavabit, which caters to thousands of international clients, Mr. Levinson needs some ability to voice his concerns, garner support for his cause, and take precautionary steps to ensure that Lavabit remains a truly secure network.

b. The Lavabit Order Constitutes A Prior Restraint On Speech

Besides restricting content, the § 2705(b) non-disclosure order forces a prior restraint on speech. It is well settled that an ordinance, which makes the enjoyment of Constitutional guarantees contingent upon the uncontrolled will of an official, is a prior restraint of those freedoms. Shuttlesworth v.

Birmingham, 394 U.S. 147, 150-151 (1969); Staub v. City of Baxley, 355 U.S. 313, 322 (1958). By definition, a prior restraint is an immediate and irreversible sanction because it "freezes" speech. Nebraska Press Ass'n v.

Stuart, 427 U.S. 539, 559 (1976). In the present case, the Lavabit Order, enjoins Mr. Levinson from discussing these proceedings with any other person. The effect is an immediate freeze on speech.

The Supreme Court of the United States has interpreted the First

Amendment as providing greater protection from prior restraints. Alexander v.

United States, 509 U.S. 544 (1993). Prior restraints carry a heavy burden for

justification, with a presumption against constitutional validity. Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1305 (1983); Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Here, the government and the Court believe that notification of the search warrant's existence will seriously jeopardize the investigation, by giving targets an opportunity to flee or continue flight from prosecution, will destroy or tamper with evidence, change patterns of behavior, or notify confederates. See Lavabit Order. However, the government's interest in the integrity of its investigation does not automatically supersede First Amendment rights. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1978) (holding the confidentiality of judicial review insufficient to justify encroachment on the freedom of speech).

In the present case, the government has a legitimate interest in tracking the account. However, if Lavabit were forced to surrender its master encryption key, the government would have access not only to this account, but also every Lavabit account. Without the ability to disclose government access to users' encrypted data, public debate about the scope and justification for this secret investigatory tool will be stifled.

Moreover, innocent Lavabit subscribers will not know that Lavabit's security devices have been compromised. Therefore the § 2705(b) non-disclosure order should be lifted to provide Mr. Levinson the ability to ensure the value and integrity of Lavabit for his other subscribers.

II. THE LAW SUPPORTS THE RIGHT OF PUBLIC ACCESS TO THE SEALED DOCUMENTS

Despite any statutory authority, the Lavabit Order and all related documents were filed under seal. The sealing of judicial records imposes a limit on the public's right of access, which derives from two sources, the First Amendment and the common law. Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 575 (4th Cir. 2004); See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (press and public have a First Amendment right of attend a criminal trial); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 2 (1986) (right of access to preliminary hearing and transcript).

a. The Common Law Right Of Access Attaches To The Lavabit Order

For a right of access to a document to exist under either the First Amendment or the common law, the document must be a "judicial record." Baltimore Sun Co. v. Goetz, 886 F.2d 60, 63-64 (4th Cir. 1989). Although the Fourth Circuit Court of Appeals has never formally defined "judicial record", it held that § 2703(d) orders and subsequent orders issued by the court are judicial records because they are judicially created. In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d), 707 F.3d 283, 290 (4th Cir. 2013) ("Twitter"). The § 2705(b) order in the present case was issued pursuant to § 2703(d) and can properly be defined as a judicial record. Although the Fourth Circuit has held there is no First Amendment right to access § 2703(d) orders, it held that the common law presumption of access attaches to such documents. Twitter, 707 F.3d at 291.

The underlying investigation in *Twitter*, involved a § 2703(d) order, which directed Twitter to provide personal information, account information, records, financial data, direct messages to and from email addresses, and Internet Protocol addresses for eight of its subscribers. *In re:* § 2703(d) Order, 787 F. Supp. 2d 430, 435 (E.D. Va. 2011). Citing the importance of investigatory secreey and integrity, the court in that case denied the petitioners Motion to Unseal, finding no First Amendment or common law right to access. *Id.* at 443.

Unlike Twitter, whose users publish comments on a public forum, subscribers use Lavabit for its encrypted features, which ensure security and privacy. In *Twitter* there was no threat that any user would be subject to surveillance other than the eight users of interest to the government. However, a primary concern in this case is that the Lavabit Order provides the government with access to every Lavabit account.

Although the secrecy of SCA investigations is a compelling government interest, the hundreds of thousands of Lavabit subscribers that would be compromised by the Lavabit Order are not the subjects of any justified government investigation. Therefore access to these private accounts should not be treated as a simple corollary to an order requesting information on one criminal subject. The public should have access to these orders because their effect constitutes a seriously concerning expansion of grand jury subpoena power.

To overcome the common law presumption of access, a court must find that there is a "significant countervailing interest" in support of scaling that

the common law, the decision to seal or grant access to warrant papers is within the discretion of the judicial officer who issued the warrant. *Media General Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005). If a judicial officer determines that full public access is not appropriate, she must consider alternatives to sealing, which may include granting some public access or releasing a redacted version of the documents. *Id.*

In Twitter the court explained that because the magistrate judge individually considered the documents, and redacted and unsealed certain documents, he satisfied the procedural requirements for sealing. Twitter, 707 F.3d at 294. However, in the present case, there is no evidence that alternatives were considered, that documents were redacted, or that any documents were unsealed. Once the presumption or access attaches, a court cannot seal documents or records indefinitely unless the government demonstrates that some significant interest heavily outweighs the public interest in openness. Wash. Post, 386 F.3d at 575. Despite the government's concerns, there are reasonable alternatives to an absolute seal that must be explored in order to ensure the integrity of this investigation.

b. There Is No Statutory Authority To Seal The § 2705(d)

There are no provisions in the SCA that mention the sealing of orders or other documents. In contrast, the Pen/Trap Statute authorizes electronic surveillance and directs that pen/trap orders be sealed "until otherwise

and

ordered by the court". 18 U.S.C. §§ 3121-27. Similarly, the Wiretap Act, another surveillance statute, expressly directs that applications and orders granted under its provisions be sealed. 18 U.S.C. § 2518(8)(b). The SCA's failure to provide for sealing is not a congressional oversight. Rather, Congress has specifically provided for sealing provisions when it desired. Where Congress includes particular language in one section of a statute but omits it in another, it is generally assumed that Congress acts intentionally. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Therefore, there is no statutory basis for sealing an application or order under the SCA that would overcome the common law right to access.

c. Privacy Concerns Demand A Common Law Public Right Of Access To The Sealed Documents

1110
the ensuing mass surveillance scandal have sparked an intense national and
international debate about government surveillance, privacy rights and other
traditional freedoms. It is concerning that suppressing Mr. Levinson's speech
and pushing its subpoens power to the limits, the government's actions may be
viewed as accomplishing another unfounded secret infringement on personal
privacy. A major concern is that this could cause people worldwide to abandon
American service providers in favor of foreign businesses because the United
States cannot be trusted to regard privacy.1 It is in the best interests of the
Movant's and the government that the documents in this matter not be

¹ See Dan Roberts, NSA Snooping: Obama Under Pressure as Senator Denounces 'Act of Treason', 'The Guardian, June 10, 2013, http://www.guardian.co.uk/world/2013/jun/10/obama-pressured-explain-nea-surveillance.

shrouded in secrecy and used to further unjustified surveillance activities and to suppress public debate.

CONCLUSION

For the foregoing reasons, Lavabit respectfully moves this Court to unseal the court records concerning the United States government's attempt to obtain certain encryption keys and lift the non-disclosure order issued on Mr. Levinson. Alternatively, Lavabit requests that all of the scaled documents be reducted to secure only the information that the Court deems, after review, to be properly withheld.

LAVABIT LLC
By Counsel

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Counsel for Lavabit LLC

Case 1:13-ec-00297-TCB Document 25-12 Filed 02/24/16 Page 20 of 73 PageID# 622 Case 1:13-ec-00297-TCB *SEALED* Document 11-16 Filed 09/20/13 Page 13 of 13 PageID# 140

REDACTED

Certificate of Service

I certify that on this day of July, 2013, this Motion For Unsealing Of Scaled Court Records And Removal Of Non-Disclosure Order And Memorandum Of Law In Support was hand delivered to the person at the addresses listed below:

Jesse R. Binnall

United States Attorney's Office Eastern District of Virginia 2100 Jamieson Avenue Alexandria, VA 22314

12

EXHIBIT 17

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION ...

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE OF
A PEN REGISTER/TRAP AND TRACE
DEVICE ON AN ELECTRONIC MAIL
ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

IN RE GRAND JURY SUBPOENA

NO. 1:13 EC 297

NO. 1:13 SW 522

NO. 13-1

UNDER SEAL

RESPONSE OF THE UNITED STATES IN OPPOSITION TO LAVABIT'S MOTION TO QUASH SUBPOENA AND MOTION TO FOR UNSEALING OF SEALED COURT RECORDS

INTRODUCTION

This Court has ordered Lavabit, LLC to provide the government with the technical assistance necessary to implement and use a pen register and trap and trace device ("pen-trap device"). A full month after that order, and after an order to compel compliance, a grand jury subpoena, and a search warrant for that technical assistance, Lavabit has still not complied. Repeated efforts to seek that technical assistance from Lavabit's owner have failed. While the government continues to work toward a mutually acceptable solution, at present there does not appear to be a way to implement this

Court's order, as well as to comply with the subpoena and search warrant, without requiring Lavabit to disclose an encryption key to the government. This Court's orders, search warrant, and the grand jury subpoena all compel that result, and they are all lawful. Accordingly, Lavabit's motion to quash the search warrant and subpoena should be denied.

Lavabit and its owner have also moved to unseal all records in this matter and lift the order issued by the Court preventing them from disclosing a search warrant issued in this case. Because public discussion of these records would alert the target and jeopardize an active criminal investigation, the government's compelling interest in maintaining the secrecy and integrity of that investigation outweighs any public right of access to, or interest in publicly discussing, those records, and this motion should also be denied.

TECHNICAL BACKGROUND

Pen registers and trap and trace devices

To investigate Internet communications, Congress has permitted law enforcement to employ two surveillance techniques—the pen register and the trap and trace device—that permit law enforcement to learn information about an individual's communications.

See 18 U.S.C. §§ 3121-27 ("Pen-Trap Act"). These techniques, collectively known as a "pen-trap," permit law enforcement to learn facts about e-mails and other communications as they are sent—but not to obtain their content. See, e.g., United States v. Forrester. 512 F.3d 500, 509-13 (9th Cir. 2008) (upholding government's use of a pentrap that "enabled the government to learn the to/from addresses of Alba's e-mail

messages, the IP addresses of the websites that Alba visited and the total volume of information sent to or from his account").

The Pen-Trap Act "unambiguously authorize[s] the use of pen registers and trap and trace devices on e-mail accounts." In Matter of Application of U.S. For an Order Authorizing the Installation & Use of a Pen Register & a Trap & Trace Device on E-Mail Account, 416 F. Supp. 2d 13, 14 (D.D.C. 2006) (Hogan, J.) ("Hogan Order"). It authorizes both the installation of a "device," meaning, a separate computer attached to the provider's network, and also a "process," meaning, a software program run on the provider. Id. at 16; 18 U.S.C. § 3127.

Secure Socket Layer (SSL) or Transport Layer Security (TLS) Encryption

Encrypting communications sent across the Internet is a way to ensure that only the sender and receiver of a communication can read it. Among the most common methods of encrypting Web and c-mail traffic is Secure Socket Layer (SSL), which is also called Transport Layer Security (TLS) encryption. "The Secure Socket Layer ('SSL') is one method for providing some security for Internet communications. SSL provides security by establishing a secure channel for communications between a web browser and the web server; that is, SSL ensures that the messages passed between the elient web browser and the web server are encrypted." *Disney Enterprises, Inc. v. Rea,* No. 1:12-CV-687, 2013 WL 1619686 *9 (E.D. Va. Apr. 11, 2013); *see also Stambler v RSA Sec., Inc.,* 2003 WI. 22749855 *2-3 (D. Del. 2003) (describing SSL's technical operation).

As with most forms of encryption, SSL relies on the use of large numbers known as "keys." Keys are parameters used to encrypt or decrypt data. Specifically, SSL

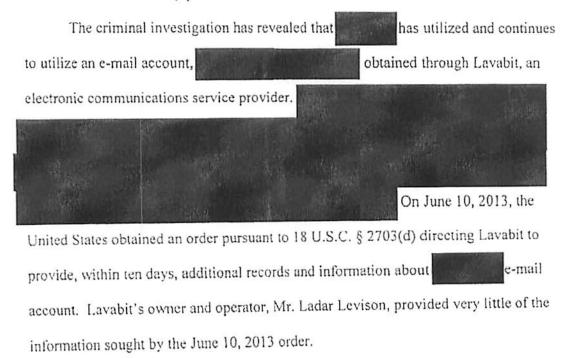
encryption employs public-key cryptography, in which both the sender and receiver each have two mathematically linked keys: a "public" key and a "private" key. "Public" keys are published, but "private" keys are not. Sending an encrypted message to someone requires knowing his or her public key; decrypting that message requires knowing his or her private key.

When Internet traffic is encrypted with SSL, capturing non-content information on e-mail communication from a pen-trap device is possible only after the traffic is decrypted. Because Internet communications closely intermingle content with non-content, pen-trap devices by necessity scan network traffic but exclude from any report to law enforcement officers all information relating to the subject line and body of the communication. See 18 U.S.C. § 3127; Hogan Order, 416 F. Supp. 2d at 17-18. A pentrap device, by definition, cannot expose to law enforcement officers the content of any communication. See id.

FACTS

The information at issue before the court is relevant to an ongoing criminal investigation of for violations of numerous federal statutes.

A. Section 2703(d) Order



B. Pen-Trap Order

On June 28, 2013, the Honorable Theresa C. Buchanan entered an Order pursuant to 18 U.S.C. § 3123 authorizing the installation and use of pen-trap device on ail electronic communications being sent from or sent to the electronic mail account ("Pen-Trap Order"). The Pen-Trap Order authorized the government to capture all (i) "non-content" dialing, routing, addressing, and signaling information sent to or from and (ii) to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data on the period of sixty days. Judge Buchanan further ordered Lavabit to furnish agents of the Federal Bureau of Investigation ("FBI"), "forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen-trap

device." Pen-Trap Order at 2. The government was also ordered to "take reasonable steps to ensure that the monitoring equipment is not used to capture any" content-related information. *Id.* Pursuant to 18 U.S.C. § 3123(d), Judge Buchanan ordered that the Pen-Trap Order and accompanying application be sealed. *Id.*

Later on June 28, 2013, two FBI Special Agents served a copy of the Pen-Trap

Order on Mr. Levison. Mr. Levison informed the FBI Special Agents that emails were
encrypted as they were transmitted to and from the Lavabit server as well as when they
were stored on the Lavabit server. In addition, decryption keys would be necessary to
access any e-mails. Mr. Levison did not provide the keys to the Agents in that meeting.
In an email to Mr. Levison on July 6, 2013, a FBI Special Agent re-affirmed the nature of
the information requested in the pen-trap order. In a response on the same day, Levison
claimed "we don't record this data".

C. Compliance Order

Mr. Levison did not comply with the Pen-Trap Order. Accordingly, in the evening of June 28, 2013, the government obtained an Order Compelling Compliance Forthwith from U.S. Magistrate Judge Theresa C. Buchanan ("Compliance Order"). The Compliance Order directed Lavabit to comply with the Pen-Trap Order and to "provide the Federal Bureau of Investigation with unencrypted data pursuant to the Order."

Lavabit was further ordered to provide "any information, facilities, or technical assistance are under the control of Lavabit [that] are needed to provide the FBI with the unencrypted data." Compliance Order at 2. The Compliance Order indicated that failing to comply would subject Lavabit to any penalty in the power of the court, "including the possibility of criminal contempt of Court." *Id.*

D. Order to Show Cause

Mr. Levison did not comply with the Compliance Order. On July 9, 2013, this Court ordered Mr. Levison to appear on July 16, 2013, to show cause why Lavabit has failed to comply with the Pen-Trap Order and Compliance Order.

The following day, on July 10, 2013, the United States Attorney's Office arranged a conference call involving the United States Attorney's Office, the FBI, Mr. Levison and Mr. Levison's attorney at the time, Marcia Hofmann. During this call, the parties discussed implementing the pen-trap device in light of the encryption in place on the target e-mail account. The FBI explained, and Mr. Levison appeared to agree, that to install the pen-trap device and to obtain the unencrypted data stream necessary for the device's operation the FBI would require (i) access to Lavabit's server and (ii) encryption keys.

E. Grand Jury Subpoena

On July 11, 2013, the United States Attorney's Office issued a grand jury subpoena for Mr. Levison to testify in front of the grand jury on July 16, 2013. The subpoena instructed Mr. Levison to bring to the grand jury his encryption keys and any other information necessary to accomplish the installation and use of the pen-trap device pursuant to the Pen-Trap Order. The FBI attempted to serve the subpoena on Mr. Levison at his residence. After knocking on his door, the FBI Special Agents witnessed Mr. Levison exit his apartment from a back door, get in his car, and drive away. Later in the evening, the FBI successfully served Mr. Levison with the subpoena.

¹ The grand jury subpoena was subsequently sealed on July 16, 2013.

On July 13, 2013, Mr. Levison sent an e-mail to Assistant United States Attorney

stating, in part:

In light of the conference call on July 10th and after subsequently reviewing the requirements of the June 28th order I now believe it would be possible to capture the required data ourselves and provide it to the FBI. Specifically the information we'd collect is the login and subsequent logout date and time, the IP address used to connect to the subject email account and the following non-content headers (if present) from any future emails sent or received using the subject account. The headers I currently plan to collect are: To, Cc, From, Date, Reply-To, Sender, Received, Return-Path, Apparently-To and Alternate-Recipient. Note that additional header fields could be captured if provided in advance of my implementation effort.

\$2,000 in compensation would be required to cover the cost of the development time and equipment necessary to implement my solution. The data would then be collected manually and provided at the conclusion of the 60 day period required by the Order. I may be able to provide the collected data intermittently during the collection period but only as my schedule allows. If the FBI would like to receive the collected information more frequently I would require an additional \$1,500 in compensation. The additional money would be needed to cover the costs associated with automating the log collection from different servers and uploading it to an an FBI server via "sep" on a daily basis. The money would also cover the cost of adding the process to our automated monitoring system so that I would notified automatically if any problems appeared.

The e-mail again confirmed that Lavabit is capable of providing the means for the FBI to install the pen-trap device and obtain the requested information in an unencrypted form.

AUSA replied to Mr. Levison's e-mail that same day, explaining that the proposal was inadequate because, among other things, it did not provide for real-time transmission of results, and it was not clear that Mr. Levison's request for money constituted the "reasonable expenses" authorized by the statute.

F. Search Warrant & 2705(b) Non-Disclosure Order

On July 16, 2013, this Court issued a search warrant to Lavabit for (i) "[a]!! information necessary to decrypt communications sent to or from the Lavabit e-mail account including encryption keys and SSL keys" and (ii)

"[a]ll information necessary to decrypt data stored in or otherwise associated with the Lavabit account "Pursuant to 18 U.S.C. § 2705(b), the Court ordered Lavabit to not disclose the existence of the search warrant upon determining that "there is reason to believe that notification of the existence of the . . . warrant will seriously jeopardize the investigation, including by giving target an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates." July 16, 2013 Order ("Non-Disclosure Order") at 1.

G. Rule 49 Sealing Order

The search warrant and accompanying materials were further sealed by the Court on July 16, 2013, pursuant to a Local Rule 49(B) ("Rule 49 Order"). In the Rule 49 Order, the Court found that "revealing the material sought to be sealed would jeopardize an ongoing criminal investigation." The sealing order was further justified by the Court's consideration of "available alternatives that are less drastic than sealing, and finding none would suffice to protect the government's legitimate interest in concluding the investigation; and having found that this legitimate government interest outweighs at this time any interest in the disclosure of the material." Rule 49 Order at 1.

H. Show Cause Hearing

At the Show Cause Hearing on July 16, 2013, Mr. Levison made an oral motion to unseal the proceedings and related filings. The government objected since unsealing the proceedings would jeopardize the ongoing criminal investigation of the Court denied Mr. Levison's motion. Mr. Levison subsequently indicated to the Court that he would permit the FBI to place a pen-trap device on his server. The government requested that the Court further order Mr. Levison to provide his SSL keys since placing

a pen-trap device on Lavabit's server would only provide encrypted information that would not yield the information required under the Pen-Trap Order. The government noted that Lavabit was also required to provide the SSL keys pursuant to the search warrant and grand jury subpoena. The Court determined that the government's request for the SSL keys was premature given that Mr. Levison had offered to place the pen-trap device on his server and the Court's order for a show cause hearing was only based on the failure to comply with the Pen-Trap Order. Accordingly, the Court scheduled a hearing for July 26, 2013, to determine whether Lavabit was in compliance with the Pen-Trap Order after a pen-trap device was installed.

I. Motion to Unseal and Lift Non-Disclosure Order

On July 25, 2013, Mr. Levison filed two motions—a Motion for Unsealing of Sealed Court Records ("Motion to Unseal") and a Motion to Quash Subpoena and Search Warrant ("Motion to Quash"). In the motions, Mr. Levison confirms that providing the SSL keys to the government would provide the data required under the Pen-Trap Order in an unencrypted form. Nevertheless, he refuses to provide the SSL keys. In order to provide the government with sufficient time to respond, the hearing was rescheduled for August 1, 2013.

On a later date, and after discussions with Mr. Levison, the FBI installed a pentrap device on Lavabit's Internet service provider, which would capture the same information as if a pen-trap device was installed on Lavabit's server. Based on the government's ongoing investigation, it is clear that due to Lavabit's encryption services the pen-trap device is failing to capture data related to all of the e-mails sent to and from the account as well as other information required under the Pen-Trap Order. During

Lavabit's over one month of noncompliance with this Court's Pen-Trap Order,



ARGUMENT

- I. THE SEARCH WARRANT AND THE GRAND JURY SUBPOENA ARE LAWUL AND REQUIRE LAVABIT TO PRODUCE THE SSL KEYS
 - A. The search warrant and grand jury subpoena are valid because they merely re-state Lavabit's pre-existing legal duty, imposed by the Pen-Trap Order, to produce information necessary to accomplish installation of the pen-trap device.

The motion of Lavabit and Mr. Levison (collectively "Lavabit") to quash both the grand jury subpoena and the search warrant should be denied because the subpoena and warrant merely re-state and clarify Lavabit's obligation under the Pen-Trap Act to provide that same information. In total, four separate legal obligations currently compel Lavabit to produce the SSL keys:

- The Pen-Trap Order pursuant to the Pen Register and Trap and Trace Device Act (18 U.S.C. §§ 3121-27);
- The Compliance Order compelling compliance forthwith with the Pen-Trap Order;
- 3. The July 16, 2013, grand jury subpoena; and
- The July 16, 2013, search warrant, issued by this Court under the Electronic Communications Privacy Act ("ECPA").

The Pen-Trap Act authorizes courts to order providers such as Lavabit to disclose "information" that is "necessary" to accomplish the implementation or use of a pen-trap. See 18 U.S.C. §§ 3123(b)(2); 3124(a); 3124(b). Judge Buchanan, acting under that authority, specifically required in the Pen-Trap Order that: "IT IS FURTHER

ORDERED, pursuant to 18 U.S.C. § 3123(b)(2), that Lavabit shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device unobtrusively and with minimum interference." Pen-Trap Order at 2.

In this case, the SSL keys are "information... necessary to accomplish the installation and use of the [pen-trap]" because all other options for installing the pen-trap have failed. In a typical case, a provider is capable of implementing a pen-trap by using its own software or device, or by using a technical solution provided by the investigating agency; when such a solution is possible, a provider need not disclose its key. *E.g., In re Application of the U.S. for an Order Authorizing the Use of a Pen Register and Trap On [XXX] Internet Serv. Account/User Name [xxxxxxxx@xxx.com], 396 F. Supp. 2d 45, 49 (D. Mass. 2005) (suggesting language in a pen-trap order "to impose upon the internet service providers the necessity of making sure that they configure their software in such a manner as to disclose only that which has been authorized"). In this case, given Lavabit's use of SSL encryption and Lavabit's lack of a software solution to implement the pen-trap on behalf the government, neither the government nor Mr. Levison have been able to identify such a solution.*

Because the search warrant and grand jury subpoena require nothing that the Pen-Trap Act does not already require, they are not unreasonably burdensome. Moreover, a court's constitutional authority to require a telecommunications provider to assist the government in implementing a pen-trap device is well-established. See United States v. New York Tel. Co., 434 U.S. 159, 168-69 (1977) (in a pre-Pen-Trap Act case, holding that district court had the authority to order a phone company to assist in the installation of a

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pen-trap, and "no claim is made that it was in any way inconsistent with the Fourth Amendment.").

- B. Lavabit's motion to quash the search warrant must be denied because there is no statutory authority for such motions, and the search warrant is lawful in any event.
 - Lavabit lacks authority to move to suppress a search warrant.

Lavabit lacks authority to ask this Court to "quash" a search warrant before it is executed. The search warrant was issued under Title II of ECPA, 18 U.S.C. §§ 2701-2712. ECPA allows providers such as Lavabit to move to quash *court orders*, but does not create an equivalent procedure to move to quash search warrants. 18 U.S.C. § 2703(d). The lack of a corresponding motion to quash or modify a search warrant means that there is no statutory authority for such motions. *See* 18 U.S.C. § 2708 ("[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter."); *cf. In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 830 F. Supp. 2d 114, 128-29 (E.D. Va. 2011) (holding that the lack of a specific provision in ECPA permitting users to move to quash court orders requires "the Court [to] infer that Congress deliberately declined to permit [such] challenges.").

The search warrant complies with the Fourth Amendment and is not general.

The Fourth Amendment requires that a search warrant "particularly describe[e] the place to be searched, and the persons or things to be seized." U.S. Const. Am. IV. This "particularity requirement is fulfilled when the warrant identifies the items to be seized by their relation to designated crimes and when the description of the items leaves

nothing to the discretion of the officer executing the warrant." *United States v. Williams*, 592 F.3d 511, 519 (4th Cir. 2010).

The July 16, 2013, search warrant's specification easily meets this standard, and therefore is not impermissibly general. It calls for only:

a. All information necessary to decrypt communications sent to or from the Lavabit e-mail account including encryption keys and SSL keys;

 All information necessary to decrypt data stored in or otherwise associated with the Lavabit account

That specification leaves nothing to discretion; it calls for encryption and SSL keys and nothing else.

Acknowledging this specificity, Lavabit nonetheless argues that the warrant "operates as a general warrant by giving the Government access to every Lavabit user's communications and data." Mot. to Quash at 3. To the contrary, the warrant does not grant the government the legal authority to access any Lavabit user's communications or data. After Lavabit produces its keys to the government, Federal statutes, such as the Wiretap Act and the Pen-Trap Act, will continue to limit sharply the government's authority to collect any data on any Lavabit user—except for the one Lavabit user whose account is currently the subject of the Pen-Trap Order. See 18 U.S.C. § 2511(1) (punishing as a felony the unauthorized interception of communications); § 3121 (criminalizing the use of pen-trap devices without a court order). It cannot be that a search warrant is "general" merely because it gives the government a tool that, if abused contrary to law, could constitute a general search. Compelling the owner of an apartment building to unlock the building's front door so that agents can search one apartment is not

a "general search" of the entire apartment building—even if the building owner imagines that undisciplined agents will illegally kick down the doors to apartments not described in the warrant.

C. Lavabit's motion to quash the subpoena must be denied because compliance would not be unreasonable or oppressive

A grand jury subpoena "may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates," but the court "may quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(1) & (2); see In re Grand Jury, John Doe No. G.J. 2005-2, 478 F.3d 581, 585 (4th Cir. 2007) (recognizing courts may quash subpoenas that are "abusive or harassing").²

Lavabit argues the subpoena should be quashed because it "grant[s] the

Government unlimited access to every one of its user's accounts." Mot. to Quash at 7.

As explained above, the subpoena does no such thing: It merely reaffirms Lavabit's existing obligation to provide information necessary to implement this Court's Pen-Trap

Order on a single Lavabit customer's e-mail account. The Pen-Trap Order further restricts the government's access by preventing the government from collecting the content of that Lavabit customer's e-mail communications.

Lavabit also argues that it will lose customers' trust and business if it they learn that Lavabit provided the SSL keys to the government. But Lavabit finds itself in the position of having to produce those keys only because, more than a month after the Pen-Trap Order, Lavabit has failed to assist the government to implement the pen-trap device.

² Lavabit cites 18 U.S.C. § 2703(d) as authority for its motion to quash, but that section by its terms only permits motions to quash court orders issued under that same section.

Any resulting loss of customer "trust" is not an "unreasonable" burden if Lavabit's customers trusted that Lavabit would refuse to comply with lawful court orders. All providers are statutorily required to assist the government in the implementation of pentraps, see 18 U.S.C. § 3124(a), (b), and requiring providers to comply with that statute is neither "unreasonable" nor "oppressive." In any event, Lavabit's privacy policy tells its customers that "Lavabit will not release any information related to an individual user unless legally compelled to do so." See http://lavabit.com/privacy_policy.html (emphasis added).

Finally, once court-ordered surveillance is complete, Lavabit will be free to change its SSL keys. Vendors sell new SSL certificates for approximately \$100. See, e.g., GoDaddy LLC, SSL Certificates, https://www.godaddy.com/ssl/ssl-certificates.aspx. Moreover, Lavabit is entitled to compensation "for such reasonable expenses incurred in providing" assistance in implementing a pen-trap device. 18 U.S.C. § 3124(c).

11. THE NON-DISCLOSURE ORDER IS CONSISTENT WITH THE FIRST AMENDMENT BECAUSE IT IS NARROWLY TAILORED TO SERVE WHAT ALL PARTIES AGREE IS A COMPELLING GOVERNMENT INTEREST

Lavabit has asked the Court to unseal all of the records sealed by this Court's

Order to Seal, and to lift the Court's Order dated July 16, 2013, directing Lavabit not to

disclose the existence of the search warrant the Court signed that day ("Non-Disclosure

Order"). Motion for Unsealing of Sealed Court Records and Removal of Non
Disclosure Order ("Mot. to Unseal") at 1-2. Lavabit, however, has not identified (and

cannot) any compelling reason sufficient to overcome what even Lavabit concedes is the

government's compelling interest in maintaining the secrecy and integrity of its active

investigation Moreover, the restrictions are narrowly tailored to restrict

Lavabit from discussing only a limited set of information disclosed to them as part of this investigation. Because there is no reason to jeopardize the criminal investigation, this motion must be denied.

A The Non-Disclosure Order survives even strict scrutiny review by imposing necessary but limited secrecy obligations on Lavabit

The United States does not concede that strict scrutiny must be applied in reviewing the Non-Disclosure Order. There is no need to decide this issue, however, because the Non-Disclosure Order is narrowly tailored to advance a compelling government interest, and therefore easily satisfies strict scrutiny.

The Government has a compelling interest in protecting the integrity of on-going criminal investigations. *Virginia Dep't of State Police v. Wash. Post*, 386 F.3d 567, 579 (4th Cir. 2004) ("We note initially our complete agreement with the general principle that a compelling governmental interest exists in protecting the integrity of an ongoing law enforcement investigation"); *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) ("requirements ... that a State's interest must be 'compelling' ...are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen"). Indeed, it is "obvious and unarguable that no government interest is more compelling than the security of the Nation." *Halg v. Agee*, 453 U.S. 280, 307 (1981) (internal quotation marks omitted); *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business"). Likewise, here, the United States clearly has a compelling interest in ensuring that the target of lawful surveillance is not aware that he is being monitored.

United States v. Aguilar, 515 U.S. 593, 606 (1995) (holding that a statute prohibiting disclosure of a wiretap was permissible under the First Amendment, in part because "[w]e think the Government's interest is quite sufficient to justify the construction of the statute as written, without any artificial narrowing because of First Amendment concerns"). As the Non-Disclosure Order makes clear, publicizing "the existence of the [search] warrant will seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates."

Lavabit acknowledges that "the government has a compelling interest in maintaining the integrity of its criminal investigation of ". Mot. to Unseal at 4; id. at 6 ("the government has a legitimate interest in tracking" account); id. at 8 ("the secrecy of [Stored Communications Act] investigations is a compelling government interest"). In spite of this recognition, Lavabit states it intends to disclose the search warrant and order should the Court grant the Motion to Unseal. Id. at 5 ("Mr. Levinson needs some ability to voice his concerns [and] garner support for his cause"); id. at 6. Disclosure of electronic surveillance process before the electronic surveillance has finished, would be unprecedented and defeat the very purpose of the surveillance. Such disclosure would ensure that the legitimate monitoring of e-mail account and take action to frustrate the legitimate monitoring of that account.

The Non-Disclosure Order is narrowly tailored to serve the government's compelling interest of protecting the integrity of its investigation. The scope of information that Lavabit may not disclose could hardly be more narrowly drawn: "the

existence of the attached search warrant" and the Non-Disclosure Order itself. Restrictions on a party's disclosure of information obtained through participation in confidential proceedings stand on a different and firmer constitutional footing from restrictions on the disclosure of information obtained by independent means. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (order prohibiting disclosure of information learned through judicial proceeding "is not the kind of classic prior restraint that requires exacting First Amendment scrutiny"); Butterworth v. Smith, 494 U.S. 624, 632 (1990) (distinguishing between a witness' "right to divulge information of which he was in possession before he testified before the grand jury" with "information which he may have obtained as a result of his participation in the proceedings of the grand jury"); see also Hoffman-Pugh v. Keenan, 338 F.3d 1136, 1140 (10th Cir. 2003) (finding prohibition on disclosing information learned through grand jury process, as opposed to information person already knew, does not violate First Amendment). In Rhinehart, the Court found that "control over [disclosure of] the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." 467 U.S. at 32.

Further, the Non-Disclosure Order is temporary. The nondisclosure obligation will last only so long as necessary to protect the government's ongoing investigation.

B. The Order neither forecloses discussion of an "entire topic" nor constitutes an unconstitutional prior restraint on speech

The limitation imposed here does not close off from discussion an "entire topic," as articulated in *Consolidated Edison*. Mot. to Unseal at 4. At issue in that case was the constitutionality of a state commission's order prohibiting a regulated utility from including inserts in monthly bills that discussed *any* controversial issue of public policy,

such as nuclear power. Consolidated Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 532 (1980). The Non-Disclosure Order, by contrast, precludes a single individual, Mr. Levison, from discussing a narrow set of information he did not know before this proceeding commenced, in order to protect the integrity of an ongoing criminal investigation. Cf. Doe v. Mukasey, 549 F.3d 861, 876 (2d Cir. 2009) ("although the nondisclosure requirement is triggered by the content of a category of information, that category, consisting of the fact of receipt of [a National Security Letter] and some related details, is far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions."). Mr. Levison may still discuss everything he could discuss before the Non-Disclosure Order was issued.

Lavabit's argument that the Non-Disclosure Order, and by extension all § 2705(b) orders, are unconstitutional prior restraints is likewise unavailing. Mot. To Unseal at 5-6. As argued above, the Non-Disclosure Order is narrowly tailored to serve compelling government interests, and satisfies strict scrutiny. See supra, Part II.A. Regardless, the Non-Disclosure Order does not fit within the two general categories of prior restraint that ean run afoul of the First Amendment: licensing regimes in which an individual's right to speak is conditioned upon prior approval from the government, see City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988), and injunctions restraining certain speech and related activities, such as publishing defamatory or scandalous articles, showing obscene movies, and distributing leaflets, see Alexander v. United States, 509 U.S. 544, 550 (1993). A prior restraint denies a person the ability to express viewpoints or ideas they could have possessed without any government involvement. Section 2705(b) orders, by contrast, restrict a recipient's ability to disclose limited

information that the recipient only learned from the government's need to effectuate a legitimate, judicially sanctioned form of monitoring. Such a narrow limitation on information acquired only by virtue of an official investigation does not raise the same concerns as other injunctions on speech. *Cf. Rhinehart*, 467 U.S. at 32, *Doe v. Mukasey*, 549 F.3d at 877 ("[t]he non-disclosure requirement" imposed by the national security letter statute "is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny").

III. NO VALID BASIS EXISTS TO UNSEAL DOCUMENTS THAT, IF MADE PUBLIC PRE-MATURELY, WOULD JEOPARDIZE AN ON-GOING CRIMINAL INVESTIGATION

A. Any common law right of access is outweighed by the need to protect the integrity of the investigation.

Lavabit asserts that the common law right of access necessitates reversing this

Court's decision to seal the search warrant and supporting documents. Mot. to Unseal at
7-10. The presumption of public access to judicial records, however, is "qualified," Balt.

Sum Co. v. Goetz, 886 F.2d 60, 65 (4th Cir. 1989), and rebuttable upon a showing that the
"public's right of access is outweighed by competing interests," In re Application of the

U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d), 707 F.3d 283, 290 (4th Cir.

2013) ("Twitter"). In addition to considering substantive interests, a judge must also
consider procedural alternatives to sealing judicial records. Twitter, 707 F.3d at 294.

"Adherence to this procedure serves to ensure that the decision to seal materials will not
be made lightly and that it will be subject to meaningful appellate review." Va. Dep't of
State Police v. Wash. Post, 386 F.3d 567, 576 (4th Cir. 2004). This standard is met easily
here.

"[The common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment," Twitter, 707 F.3d at 290 (internal quotation marks omitted). With respect to the substantive equities at stake. the United States' interest in maintaining the secrecy of a criminal investigation to prevent the target of the surveillance from being alerted and altering behavior to thwart the surveillance clearly outweighs any public interest in learning about specific acts of surveillance. Id. at 294 (rejecting common law right of access because, inter alia, the sealed documents "set forth sensitive non-public facts, including the identity of targets and witnesses in an ongoing criminal investigation"). "Because secrecy is necessary for the proper functioning of the criminal investigation" prior to indictment, "openness will frustrate the government's operations." Id. at 292. Lavabit concedes that ensuring "the secrecy of [Stored Communications Act] investigations," like this, "is a compelling government interest." Mot. to Unseal at 8 (emphasis added). Lavabit does not, however, identify any compelling interests to the contrary. Far from presenting "a seriously concerning expansion of grand jury subpoena power," as Lavabit's contents, id., a judge issued the Pen-Trap Order, which did not authorize monitoring of any Lavabit e-mail account other than

In addition, the Court satisfied the procedural prong. It "considered the available alternatives that are less drastic than sealing, and [found] none would suffice to protect the government's legitimate interest in concluding the investigation." Rule 49 Order.

The Fourth Circuit's decision in *Twitter* is instructive. That case arose from the Wikileaks investigation of Army Pfc. Bradley Manning. Specifically, the government obtained an order pursuant to 18 U.S.C. § 2703(d) directing Twitter to disclose electronic

communications and account and usage information pertaining to three subscribers. When apprised of this, the subscribers asserted that a common law right of access required unsealing records related to the § 2703(d) order. The Fourth Circuit rejected this claim, finding that the public's interest in the Wikileaks investigation and the government's electronic surveillance of internet activities did not outweigh "the Government's interests in maintaining the secrecy of its investigation, preventing potential suspects from being tipped off, or altering behavior to thwart the Government's ongoing investigation." 707 F.3d at 293. "The mere fact that a case is high profile in nature," the Fourth Circuit observed, "does not necessarily justify public access." Id. at 294. Though Twitter involved a § 2703(d) order, rather than a § 2705(b) order, the Court indicated this is a distinction without a difference. Id. at 294 (acknowledging that the concerns about unsealing records "accord" with § 2705(b)). Given the similarities between Twitter and the instant case-most notably the compelling need to protect otherwise confidential information from public disclosure and the national attention to the matter-there is no compelling rationale currently before the Court necessitating finding that a common law right of access exists here.

B. Courts have inherent authority to seal ECPA process

Lavabit asserts that this Court must unseal the Non-Disclosure Order because 18 U.S.C. § 2705(b) does not explicitly reference the sealing of non-disclosure orders issued pursuant to that section. Mot. to Unseal at 9-10. As an initial matter, the Court has inherent authority to seal documents before it. *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984) ("[t]he trial court has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing

interests"); see also Media General Operations, Inc. v. Buchanan, 417 F3d. 424, 430 (4th Cir. 2005); United States v. U.S. Dist. Court, 407 U.S. 297, 321 (1972) ("a warrant application involves no public or adversary proceedings: it is an ex parte request before a magistrate or judge."). In addition, the Court here exercised its authority to seal pursuant to Local Rule 49(B), the validity of which Lavabit does not contest.

Even if the Court did not have this authority, Lavabit's reading of § 2705(b) must be rejected, because it would gut the essential function of non-disclosure orders and thereby disregard Congress' clear intent in passing § 2705. The Section allows courts to delay notification pursuant to § 2705(a) or issue a non-disclosure order pursuant to § 2705(b) upon finding that disclosure would risk enumerated harms, namely danger to a person's life or safety, flight from prosecution, destruction of evidence, intimidation of witnesses, or seriously jeopardizing an investigation. 18 U.S.C. §§ 2705(a)(2)(A)-(E), (b)(1)-(5). It would make no sense for Congress to purposefully authorize courts to limit disclosure of sensitive information while simultaneously intending to allow the same information to be publicly accessible in an unsealed court document.

Finally, the implications Lavabit attempts to draw from the mandatory sealing requirements of 18 U.S.C. §§ 2518(8)(b) and 3123(a)(3)(B) are mistaken. While Lavabit characterizes those statutes as granting courts the authority to seal Wiretap Act and pentrap orders, courts already had that authority. Those statutes have another effect: they removed discretion from courts by requiring that courts seal Wiretap Act orders and pentrap orders. See 18 U.S.C. § 2518(8)(b) ("Applications made and orders granted under this chapter shall be sealed by the judge") (emphasis added); Id. § 3123(a)(3)(B) ("The record maintained under subparagraph (A) shall be provided ex parte and under seal to

the court") (emphasis added). Congress' decision to leave that discretion in place in other situations does not mean that Congress believed that only Wiretap Act and pen-trap orders may be sealed.

C. Supposed privacy concerns do not compel a common law right of access to the sealed documents.

Lavabit's brief ends with an argument that privacy interests require a common law right of access. Mot. to Unseal at 10-11. Lavabit, however, offers no legal basis for this Court to adopt such a novel argument, nor do the putative policy considerations. Lavabit references outweigh the government's compelling interest in preserving the secrecy of its ongoing criminal investigation. Indeed, the most compelling interest currently before the Court is ensuring that the Court's orders requiring that Mr. Levison and Lavabit comply with legitimate monitoring be implemented forthwith and without additional delay, evasion, or resistance by Mr. Levison and Lavabit.



CONCLUSION

For the foregoing reasons, Lavabit's motions should be denied. Furthermore, the Court should enforce the Pen-Trap Order, Compliance Order, search warrant, and grand jury subpoena by imposing sanctions until Lavabit complies.

Respectfully Submitted,

NEIL H. MACBRIDE
United States Attorney

By:

Assistant United States Attorney United States Attorney's Office 2100 Jamieson Ave.

Alexandria, VA 22314

703-299-3700



CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2013, I e-mailed a copy of the foregoing

document to Lavabit's Counsel of Record:

Jesse R. Binnall Bronley & Binnall, PLLC 10387 Main Street, Suite 201 Fairfax, VA 22030



Assistant United States Attorney United States Attorney's Office 2100 Jamieson Ave. Alexandria, VA 22314

703-299-3700

EXHIBIT 18

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1			
2	UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA		
3	ALEXANDRIA DIVISION		
4) IN THE MATTER OF THE)	NO. 1:13 EC 297	
5	APPLICATION OF THE UNITED) STATES AUTHORIZING THE USE)	10. 1.10 10 27	
6	OF A PEN REGISTER/TRAP AND) TRACE DEVICE ON AN)	COPY	
7	ELECTRONIC MAIL ACCOUNT)		
8	IN THE MATTER OF THE SEARCH) AND SEIZURE OF INFORMATION)	NO. 1:13 SW 522	
9	ASSOCIATED WITH THAT		
10	IS STORED AND CONTROLLED AT) PREMISES CONTROLLED BY)		
11	LAVABIT, LLC		
12	IN RE GRAND JURY SUBPOENA)	NO. 13-1	
13		UNDER SEAL	
14)	Alexandria, Virginia August 1, 2013	
15)	10:00 a.m.	
16			
17	TRANSCRIPT OF HEARING		
18	BEFORE THE HONORABLE CLAUDE M. HILTON		
19	UNITED STATES DISTRICT JUDGE		
20	APPEARANCES:		
21	For the United States: James T		
22	Michael Ben'Ary, Esq. Josh Goldfoot, Esq.		
23	For the Respondent: Jesse R	. Binnall, Esq.	
24	Court Reporter: Tracy L. Westfall, RPR, CMRS, CCR Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.		
25			
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PROCEEDINGS

THE CLERK: In re: Case Nos. 1:13 EC 297, 1:13 SW 522, and Grand Jury No. 13-1.

MR. TRUMP: Good morning. Jim Trump on behalf of the United States.

THE COURT: Good morning.

MR. BINNALL: Good morning, Your Honor. Jesse Binnall on behalf of Lavabit and Mr. Levison.

THE COURT: All right.

MR. BINNALL: May it please the Court. We're before the Court today on two separate motions, a motion to quash the requirement of Lavabit to produce its encryption keys and the motion to unseal and lift the nondisclosure requirements of Mr. Levison.

Your Honor, the motion to quash in this arises because the privacy of users is at -- of Lavabit's users are at stake. We're not simply speaking of the target of this investigation. We're talking about over 400,000 individuals and entities that are users of Lavabit who use this service because they believe their communications are secure.

By handing over the keys, the encryption keys in this case, they necessarily become less secure. In this case it is true that the face of the warrant itself does limit the documents or -- and communications to be viewed and the specific metadata to be viewed to the target of the case,

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However, there is a lack of any sort of check or balance in order to ensure that the -- that the encrypted data of other Lavabit users remain secure. The encryption in this case doesn't protect only content. It protects login data and the other -- some of the other metadata involved in this case.

We believe that this is not the least restrictive means in order to provide the government the data that they are looking for. Specifically --

THE COURT: You have two different encryption codes, one for the logins and the messages that are transmitted. You have another code that encrypts the content of the messages, right?

MR. BINNALL: Your Honor, I believe that that is true.

From my understanding of the way that this works is that there is one SSL key. That SSL key is what is issue in this case, and that SSL key specifically protects the communication, the over -- the breadth of the communication itself from the user's actual computer to the server to make sure that the user is communicating with exactly who the user intends to be communicating with, the server.

And that's one of the things that SSL does. It ensures that you're talking to the right person via e-mail and there's not a so-called man in the middle who's there to take that message away.

THE COURT: Does that key also contain the code of the

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message and interpret the message as well?

MR. BINNALL: My understanding is that it does, Your Honor, but because that's not my technical expertise, I'm not going to represent to the Court anything on that one way or another. But my understanding is there is one general key here that is at issue.

THE COURT: Well, why would you set up such? I mean, a telephone, you've got telephone numbers and --

MR. BINNALL: Correct.

THE COURT: -- those can be traced very easily without any look at the content of the message that's there. You-all could have set up something the same way.

MR. BINNALL: We could have, Your Honor. Actually, if you're to --

THE COURT: So if anybody's -- you're blaming the government for something that's overbroad, but it seems to me that your client is the one that set up the system that's designed not to protect that information, because you know that there needs to be access to calls that go back and forth to one person or another. And to say you can't do that just because you've set up a system that everybody has to -- has to be unencrypted, if there's such a word, that doesn't seem to me to be a very persuasive argument.

MR. BINNALL: I understand the Court's point, and this is the way that I understand why it's done that way.

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There's different security aspects involved for people who want to protect their privacy, and there certainly is the actual content of the message themselves. That's certainly what I would concede is the highest security interest.

But there's also the security interest to make sure that they're communicating with who you want to be communicating with. That is equally of a concern for privacy issues because that is, at the end of the day, one of the things that secures the content of the message.

In this case it is true that most Internet service providers do log, is what they call it, a lot of the metadata that the government wants in this case without that necessarily being encrypted, things such as who something is going to, who it's going from, the time it's being sent, the IP address from which it is being sent.

Lavabit code is not something that you buy off the shelf. It is code that was custom made. It was custom made in order to secure privacy to the largest extent possible and to be the most secure way possible for multiple people to communicate, and so it has chosen specifically not to log that information.

Now, that is actually information that my client has offered to start logging with the particular user in this case. It is, however, something that is quite burdensome on him. It is something that would be custom code that would take between 20 to 40 hours for him to be able to produce. We believe that

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is a better alternative than turning over the encryption key which can be used to get the data for all Lavabit users.

Thope that addresses the Court's concern kind of with regard to the metadata and why it is not more -- why Lavabit hasn't created an encryption system that may honestly be more within the mainstream, but this is a provider that specifically was started in order to have to protect privacy interests more than the average Internet service provider.

THE COURT: I can understand why the system was set up, but I think the government is -- government's clearly entitled to the information that they're seeking, and just because you-all have set up a system that makes that difficult, that doesn't in any way lessen the government's right to receive that information just as they would from any telephone company or any other e-mail source that could provide it easily. Whether it's -- in other words, the difficulty or the ease in obtaining the information doesn't have anything to do with whether or not the government's lawfully entitled to the information.

MR. BINNALL: It is -- and we don't disagree that the government is entitled to the information. We actually --

THE COURT: Well, how are we going to get it? I'm going to have to deny your motion to quash. It's just not overbroad. The government's asking for a very narrow, specific bit of information, and it's information that they're entitled to.

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these than I have.

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Now, how are we going to work out that they get it? MR. BINNALL: Your Honor, what I would still say is the best method for them to get it is, first of all, there be some way for there to be some sort of accountability other than just relying on the government to say we're not going to go outside the scope of the warrant. This is nothing that is, of course, personal against the government and the, you know, very professional law enforcement officers involved in this case. But quite simply, the way the Constitution is set up, it's set up in a way to ensure that there's some sort of checks and balances and accountability. THE COURT: What checks and balances need to be set up? MR. BINNALL: Well --THE COURT: Suggest something to me. MR. BINNALL: I think that the least restrictive means possible here is that the government essentially pay the reasonable expenses, meaning in this case my client's extensive labor costs to be capped at a reasonable amount. THE COURT: Has the government ever done that in one of these pen register cases? Not that I've found, Your Honor. MR. BINNALL: THE COURT: I don't think so. I've never known of one. MR. BINNALL: And Your Honor's certainly seen more of

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So would it be reasonable to start now with THE COURT: 1 2 your client? MR. BINNALL: I think everyone would agree that this is 3 an unusual case. And that this case, in order to protect the 4 privacy of 400,000-plus other users, some sort of relatively 5 small manner in which to create a log system for this one user 6 to give the government the metadata that they're looking for is 7 the least restrictive mean here, and we can do that in a way 8 that doesn't compromise the security keys. 9 This is actually a way that my client --10 THE COURT: You want to do it in a way that the 11 government has to trust you --1.2 MR. BINNALL: Yes, Your Honor. 13 THE COURT: -- to come up with the right data. 14 MR. BINNALL: That's correct, Your Honor. 15 THE COURT: And you won't trust the government. So why 16 would the government trust you? 17 MR. BINNALL: Your Honor, because that's what the basis 18 of Fourth Amendment law says is more acceptable, is that the 19 government is the entity that you really need the checks and 20 balances on. 21 Now, my --22 I don't know that the Fourth Amendment says 23 This is a criminal investigation. 24

MR. BINNALL: That is absolutely correct.

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THE COURT: A criminal investigation, and I don't know that the Fourth Amendment says that the person being investigated here is entitled to more leeway and more rights than the government is. I don't know.

MR. BINNALL: There certainly is a balance of power there. I, of course, am not here to represent the interest of

I'm here specifically looking over my client who has sensitive data --

THE COURT: I understand. I'm trying to think of working out something. I'm not sure you're suggesting anything to me other than either you do it and the government has to trust you to give them whatever you want to give them or you have to trust the government that they're not going to go into your other files.

Is there some other route?

MR. BINNALL: I would suggest that the government -
I'm sorry -- that the Court can craft an order to say that we

can -- that we should work in concert with each other in order

to come up with this coding system that gives the government all

of the metadata that we can give them through this logging

procedure that we can install in the code, and then using that

as a least restrictive means to see if that can get the

government the information that they're looking for on the

specific account.

THE COURT: How long does it take to install that?

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REDACTED I mean, 20, 40 hours. So I would suggest MR. BINNALL: that would probably be a week to a week and a half, Your Honor, although I would be willing to talk to my client to see if we can get that expedited. THE COURT: To install it? MR. BINNALL: Well, to write the code. THE COURT: You don't have a code right at the moment. You would have to write something? MR. BINNALL: That's correct. And the portion of the government's brief that talks about the money that he was

looking for is that reasonable expense for him basically to do nothing for that period of time but write code to install in and put it in a way that order to take the data from the government will see the logged metadata involved.

THE COURT: All right. I think I understand your I don't think you need to argue this motion to unseal. This is a grand jury matter and part of an ongoing criminal investigation, and any motion to unseal will be denied.

MR. BINNALL: If I could have the Court's attention just on one issue of the nondisclosure provision of this. And I understand the Court's position on this, but there is other privileged communications if the Court would be so generous as to allow me very briefly to address that issue?

There's other First Amendment considerations at issue with not necessarily just the sealing of this, but what

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Mr. Levison can disclose and to whom he may disclose it.

The First Amendment, of course, doesn't just cover speech and assembly, but the right to petition for a redress of grievances. We're talking about a statute here, and, honestly,

a statute that is very much in the public eye and involving

issues that are currently pending before Congress.

I think the way that the order currently is written, besides being --

THE COURT: You're talking about the sealing order?

MR. BINNALL: I'm talking about the sealing order and the order that prohibits Mr. Levison from disclosing any information.

Now, we don't want to disclose -- we have no intention of disclosing the target, but we would like to be able to, for instance, talk to members of the legislature and their staffs about rewriting this in a way that's --

THE COURT: No. This is an ongoing criminal investigation, and there's no leeway to disclose any information about it.

MR. BINNALL: And so at that point it will remain with only Mr. Levison and his lawyers, and we'll keep it at that.

THE COURT: Let me hear from Mr. Trump.

Is there some way we can work this out or something that I can do with an order that will help this or what?

MR. TRUMP: I don't believe so, Your Honor, because

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you've already articulated the reason why is that anything done by Mr. Levison in terms of writing code or whatever, we have to trust Mr. Levison that we have gotten the information that we were entitled to get since June 28th. He's had every opportunity to propose solutions to come up with ways to address his concerns and he simply hasn't.

We can assure the Court that the way that this would operate, while the metadata stream would be captured by a device, the device does not download, does not store, no one looks at it. It filters everything, and at the back end of the filter, we get what we're required to get under the order.

So there's no agents looking through the 400,000 other bits of information, customers, whatever. No one looks at that, no one stores it, no one has access to it. All we're going to look at and all we're going to keep is what is called for under the pen register order, and that's all we're asking this Court to do.

THE COURT: All right. Well, I think that's reasonable. So what is this before me for this morning other than this motion to quash and unseal which I've ruled on?

MR. TRUMP: The only thing is to order the production of the encryption keys, which just --

THE COURT: Hasn't that already been done? There's a subpoena for that.

MR. TRUMP: There's a search warrant for it, the motion

REDACTED to quash. THE COURT: Search warrant. 2 MR. TRUMP: Excuse me? 3 THE COURT: I said subpoena, but I meant search 4 5 warrant. MR. TRUMP: We issued both, Your Honor, but Your Honor 6 authorized the seizure of that information. And we would ask 7 the Court to enforce that by directing Mr. Levison to turn over 8 the encryption keys. 9 If counsel represents that that will occur, we can not 10 waste any more of the Court's time. If he represents that 11 Mr. Levison will not turn over the encryption keys, then we have 12 to discuss what remedial action this Court can take to require 13 compliance with that order. 14 THE COURT: Well, I will order the production of 15 those -- of those keys. 16 Is that simply Mr. Levison or is that the corporation 17 as well? 18 MR. TRUMP: That's one and the same, Your Honor. 19 Just so the record is clear. We understand from 20 Mr. Levison that the encryption keys were purchased 27 commercially. They're not somehow custom crafted by 22 Mr. Levison. He buys them from a vendor and then they're 23 installed. 24 THE COURT: Well, I will order that. If you will 25

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present an order to me, I'll enter it later on. 1 2 MR. TRUMP: Thank you. 3 MR. BINNALL: Thank you, Your Honor. As far as time frame goes, my client did ask me if the 4 Court did order this if the Court could give him approximately 5 five days in order to actually physically get the encryption 6 7 keys here. And so it will be -- or just some sort of reasonable time frame to get the encryption keys here and in the 8 government's hands. He did ask me to ask exactly the manner G that those are to be turned over. 10 MR. TRUMP: Your Honor, we understand that this can be 11 done almost instantaneously, as soon as Mr. Levison makes 12 contact with an agent in Dallas, and we would ask that he be 13 given 24 hours or less to comply. This has been going on for a 14 15 month. THE COURT: Yeah, I don't think 24 -- 24 hours would be 16 reasonable. Doesn't have to do it in the next few minutes, but 17 I would think something like this, it's not anything he has to 18 amass or get together. It's just a matter of sending something. 19 So I think 24 hours would be reasonable. 20 MR. BINNALL: Yes. Thank you, Your Honor. 21 THE COURT: All right. And you'll present me an order? 22 We will, Your Honor. Thank you. 23 MR. TRUMP: THE COURT: All right. Thank you-all, and we'll 24

adjourn until -- or stand in recess till 3 o'clock. Well,

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1	recess till 9 o'clock tomorrow morning.
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3	(Proceedings concluded at 10:25 a.m.)
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9	CERTIFICATION
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11	I certify, this 19th day of August 2013, that the
12	foregoing is a correct transcript from the record of proceedings
13	in the above-entitled matter to the best of my ability.
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16	Tracy Westfall RPR CMRS, CCR
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EXHIBIT 19

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT) UNDER SEAL)) No. 1:13EC297)	AUG 2013
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT LLC))) No. 1:13SW522))	
In re Grand Jury) No. 13-1	

ORDER DENYING MOTIONS

This matter comes before the Court on the motions of Lavabit LLC and Ladar Levinson, its owner and operator, to (1) quash the grand jury subpoena and search and seizure warrant compelling Lavabit LLC to provide the government with encryption keys to facilitate the installation and use of a pen register and trap and trace device, and (2) unseal court records and remove a non-disclosure order relating to these proceedings. For the reasons stated from the bench, and as set forth in the government's response to the motions, it is hereby

ORDERED that the motion to quash and motion to unseal are DENIED;

It is further ORDERED that, by 5 p.m. CDT on August 2, 2013, Lavabit LLC and Ladar Levison shall provide the government with the encryption keys and any other "information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap

Case 1:13-ec-00297-TCB Document 25-12 Filed 02/24/16 Page 67 of 73 PageID# 669 Case 1:13-ec-00297-TCB *SEALED* Document 11-19 Filed 09/20/13 Page 3 of 3 PageID# 187

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device" as required by the July 16, 2013 seizure warrant and the June 28, 2013 pen register order.

It is further ORDERED that this Order shall remain under seal until further order of this

Court

/s/
Claude M. Hilton
United States District Judge

Alexandria, Virginia August _/_ , 2013

EXHIBIT 20

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED)	UNDER SEAL
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	
)	
IN THE MATTER OF THE SEARCH AND)	
SEIZURE OF INFORMATION)	
ASSOCIATED WITH)	No. 1:13SW522
THAT IS)	
STORED AT PREMISES CONTROLLED)	
BY LAVABIT LLC)	
)	
In re Grand Jury)	No. 13-1



MOTION FOR SANCTIONS

The United States, through the undersigned counsel, pursuant to Title 18, United States Code, Section 401, hereby moves for the issuance of an order imposing sanctions on Lavabit LLC and Ladar Levison, its owner and operator, for Lavabit's failure to comply with this Court's order entered August 1, 2013. In support of this motion, the United States represents:

- 1. At the hearing on August 1, 2013, this Court directed Lavabit to provide the government with the encryption keys necessary for the operation of a pen register/trap and trace order entered June 28, 2013. Lavabit was ordered to provide those keys by 5 p.m. on August 2, 2013. See Order Denying Motions entered August 2, 2013.
- At approximately 1:30 p.m. CDT on August 2, 2013, Mr. Levison gave the FBI a
 printout of what he represented to be the encryption keys needed to operate the pen register. This

printout, in what appears to be 4-point type, consists of 11 pages of largely illegible characters.

See Attachment A. (The attachment was created by scanning the document provided by Mr.

Levison; the original document was described by the Dallas FBI agents as slightly clearer than the scanned copy but nevertheless illegible.) Moreover, each of the five encryption keys contains 512 individual characters – or a total of 2560 characters. To make use of these keys, the FBI would have to manually input all 2560 characters, and one incorrect keystroke in this laborious process would render the FBI collection system incapable of collecting decrypted data.

- 3. At approximately 3:30 p.m. EDT (2:30 p.m. CDT), the undersigned AUSA contacted counsel for Lavabit LLC and Mr. Levison and informed him that the hard copy format for receipt of the encryption keys was unworkable and that the government would need the keys produced in electronic format. Counsel responded by email at 6:50 p.m. EDT stating that Mr. Levison "thinks" he can have an electronic version of the keys produced by Monday, August 5, 2013.
- 4. On August 4, 2013, the undersigned AUSA sent an e-mail to counsel for Lavabit LLC and Mr. Levison stating that we expect to receive an electronic version of the encryption keys by 10:00 a.m. CDT on Monday, August 5, 2013. The e-mail indicated that we expect the keys to be produced in PEM format, an industry standard file format for digitally representing SSL keys. See Attachment B. The e-mail further stated that the preferred medium for receipt of these keys would be a CD hand-delivered to the Dallas office of the FBI (with which Mr. Levison is familiar). The undersigned AUSA informed counsel for Lavabit LLC and Mr. Levison that the government would seek an order imposing sanctions if we did not receive the encryption keys in electronic format by Monday morning.

- 5. The government did not receive the electronic keys as requested. The undersigned AUSA spoke with counsel for Lavabit and Mr. Levison at approximately 10:00 a.m. this morning, and he stated that Mr. Levison might be able to produce the keys in electronic format by 5 p.m. on August 5, 2013. The undersigned AUSA told counsel that was not acceptable given that it should take Mr. Levison 5 to 10 minutes to put the keys onto a CD in PEM format. The undersigned AUSA told counsel that if there was some reason why it cannot be accomplished sooner, to let him know by 11:00 a.m. this morning. The government has not received an answer from counsel.
- 6. The government therefore moves the Court to impose sanctions on Lavabit LLC and Mr. Levison in the amount of \$5000 per day beginning at noon (EDT) on August 5, 2013, and continuing each day in the same amount until Lavabit LLC and Mr. Levison comply with this Court's orders.
- 7. As noted, Attachment A to this motion is a copy of the printout provided by Mr.

 Levison on August 2, 2013. Attachment B is a more detailed explanation of how these encryption keys can be given to the FBI in an electronic format. Attachment C to this motion is a proposed order.

 A copy of this motion, filed under seal, was delivered by email to counsel for Lavabit LLC on August 5, 2013.

Respectfully submitted,

Neil H. MacBride United States Attorney

Phone: 703-299-3700

Ву:

United States Attorney's Office
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314

Attachment A

Case 1:13-ec-00297-TCB *SEALED* Document 11-20 Filed 09/20/13 Page 7 of 13 PageID# 194



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Case 1:13-ec-00297-TCB *SEALED* Document 11-20 Filed 09/20/13 Page 8 of 13 PageID#

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Case 1:13-ec-00297-TCB *SEALED* Document 11-20 Filed 09/20/13 Page 13 of 13 PageID# 200

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ATTACHMENT B

Lavabit uses 2048-bit Secure Socket Layer (SSL) certificates purchased from GoDaddy to encrypt communication between users and its server. SSL encryption employs public-key cryptography, in which both the sender and receiver each have two mathematically linked keys: a "publie" key and a "private" key. "Public" keys are published, but "private" keys are not. In this circumstance, a Lavabit customer uses Lavabit's published public key to initiate an encrypted email session with Lavabit over the internet. Lavabit's servers then decrypt this traffic using their private key. The only way to decrypt this traffic is through the usage of this private key. A SSL certificate is another name for a published public key.

To obtain a SSL certificate from GoDaddy, a user needs to first generate a 2048-bit private key on his/her computer. Depending on the operating system and web server used, there are multiple ways to generate a private key. One of the more popular methods is to use a freely available command-line tool called OpenSSL. This generation also creates a certificate signing request file. The user sends this file to the SSL generation authority (e.g. GoDaddy) and GoDaddy then sends back the SSL certificate. The private key is not sent to GoDaddy and should be retained by the user. This private key is stored on the user's web server to permit decryption of internet traffic, as described above. The FBI's collection system that will be installed to implement the PR/TT also requires the private key to be stored to decrypt Lavabit email and internet traffic. This decrypted traffic will then be filtered for the target email address specified in the PR/TT order.

Depending on how exactly the private key was first generated by the user, it itself may be encrypted and protected by a password supplied by the user. This additional level of security is useful if, for example, a backup copy of the private key is stored on a CD. If that CD was lost or stolen, the private key would not be compromised because a password would be required to access it. However, the user that generated the private key would have supplied it at generation time and would thus have knowledge of it. The OpenSSL tool described above is capable of decrypting encrypted private keys and converting the keys to a non-encrypted format with a simple, well-documented command. The FBI's collection system and most web servers requires the key to be stored in a non-encrypted format.

A 2048-bit key is composed of 512 characters. The standard practice of exchanging private SSL keys between entities is to use some electronic medium (e.g., CD or secure internet exchange). SSL keys are rarely, if ever, exchanged verbally or through print medium due to their long length and possibility of human error. Mr. Levison has previously stated that Lavabit actually uses five separate public/private key pairs, one for each type of mail protocol used by Lavabit.

PEM format is an industry-standard file format for digitally representing SSL keys. PEM tiles can easily be created using the OpenSSL tool described above. The preferred medium for receiving these keys would be on a CD.

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EXHIBIT 21

Case 1:13-ec-00297-TCB *SEALED* Document 11-21 Filed 09/20/13 Page 2 of 3 PageID# 202

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNDER SEAL IN THE MATTER OF THE APPLICATION OF THE UNITED No. 1:13EC297 STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION No. 1:13SW522 ASSOCIATED WITH THATIS STORED AT PREMISES CONTROLLED BY LAVABIT LLC No. 13-1 In re Grand Jury



ORDER

This matter comes before the Court on the motion of the government for sanctions for failure to comply with this Court's order entered August 2, 2013. For the reasons stated in the government's motion, and pursuant to Title 18, United States Code, Section 401, it is hereby ORDERED that the motion for sanctions is granted;

It is further ORDERED that, if the encryption keys necessary to implement the pen register and trap and trace device are not provided to the FBI in PEM or equivalent electronic format by noon (CDT) on August 5, 2013, a fine of five thousand dollars (\$5,000.00) shall be imposed on Lavabit LLC and Mr. Levison:

It is further ORDERED that, if the encryption keys necessary to implement the pen register and trap and trace device are not provided to the FBI in PEM or equivalent electronic

Case 1:13-ec-00297-TCB *SEALED* Document 11-21 Filed 09/20/13 Page 3 of 3 PageID# 203

REDACTED

format by noon (CDT) each day thereafter beginning August 6, 2013, a fine of five thousand dollars (\$5,000.00) shall be imposed on Lavabit LLC and Mr. Levison for each day of non-compliance; and

It is further ORDERED that the government's motion for sanctions and this Order shall remain under seal until further order of this Court.

Claude M. Hilton
United States District Judge

Alexandria, Virginia August 5_, 2013 Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 1 of 5 PageID# 204

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Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 2 of 5 PageID# 205

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE
OF A PEN REGISTER/TRAP
AND TRACE DEVICE ON AN
ELECTRONIC MAIL ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

FILED UNDER SEAL

No. 1:13EC297

No. 1:13SW522

NOTICE OF APPEAL

Notice is hereby given that Lavabit LLC ("Lavabit") and Mr. Ladar Levison ("Mr. Levison") in the above named case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Orders of this Court entered on August 1, 2013 and August 5, 2013.

LAVABIT LLC LADAR LEVISON By Counsel

Jesse R. Binnall, VSB# 79292 Byonley & Binnall, PLLC

10387 Main Street, Suite 201

Fairfax, Virginia 22030

(703) 229-0335 - Telephone

(703) 537-0780 - Facsimile jbinnall@bblawonlinc.com

Counsel for Lavabit LLC

Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 3 of 5 PageID# 206

REDACTED

Jesse R. Binnall

Certificate of Service

I certify that on this 15th day of August, 2013, this Notice of Appeal was emailed and mailed to the person at the addresses listed below:

United States Attorney's Office Eastern District of Virginia 2100 Jamieson Avenue Alexandria, VA 22314

2

Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 4 of 5 PageID# 207

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

FILED UNDER SEAL

In re Grand Jury

No. 13-1

NOTICE OF APPEAL

Notice is hereby given that Lavabit LLC ("Lavabit") and Mr. Ladar Levison ("Mr. Levison") in the above named case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Orders of this Court entered on August 1, 2013 and August 5, 2013.

> LAVABIT LLC LADAR LEVISON By Counsel

Jesse R. Birnall, VSB# 79292 Bronley & Binnall, PLLC 10387 Main Street, Suite 201 Fairfax, Virginia 22030 (703) 229-0335 - Telephone

(703) 537-0780 - Facsimile jbinnall@bblawonline.com

Counsel for Lavabit LLC

Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 5 of 5 PageID# 208

REDACTED

Certificate of Service

I certify that on this 15th day of August, 2013, this Notice of Appeal was emailed and mailed to the person at the addresses listed below:

United States Attorney's Office Eastern District of Virginia 2100 Jamieson Avenue Alexandria, VA 22314

Jesse R. Binnall

Case 1:13-ec-00297-TCB *SEALED* Document 11-23 Filed 09/20/13 Page 1 of 3 PageID# 209

REDACTED

Case 1:13-ec-00297-TCB *SEALED* Document 11-23 Filed 09/20/13 Page 2 of 3 PageID# 210



IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE
OF A PEN REGISTER/TRAP
AND TRACE DEVICE ON AN
ELECTRONIC MAIL ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

FILED UNDER SEAL

No. 1:13SW522

NOTICE OF APPEAL

Notice is hereby given that Lavabit LLC ("Lavabit") and Mr. Ladar Levison ("Mr. Levison") in the above named case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Orders of this Court entered on August 1, 2013 and August 5, 2013.

Jesse R. Binnall VSB# 79292

Bronley & Binnall, PLLC

1/0387 Main Street, Suite 201

Fairfax, Virginia 22030

(703) 229-0335 - Telephone (703) 537-0780 - Facsimile

(703) 537-0780 - Facsinine jbinnall@bblawonline.com

Counsel for Lavabit LLC

LAVABIT LLC LADAR LEVISON By Counsel

Case 1:13-ec-00297-TCB *SEALED* Document 11-23 Filed 09/20/13 Page 3 of 3 PageID# 211

REDACTED

Certificate of Service

I certify that on this 16th day of August, 2013, this Notice of Appeal was emailed and mailed to the person at the addresses listed below:

United States Attorney's Office Eastern District of Virginia 2100 Jamieson Avenue Alexandria, VA 22314

Jesse R. Binnall

Case 1:13-ec-00297-TCB *SEALED* Document 11-24 Filed 09/20/13 Page 1 of 4 PageID# 212

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Case 1:13-ec-00297-TCB *SEALED* Document 11-24 Filed 09/20/13 Page 2 of 4 PageID# 213

	Lavabit Online Media Links	REDACTED
Democracy Now Interview:		
Democracy Now Interview Tr	ranscript:	
Huff Post Interview:		
RT Interview:		
Ron Paul Interview:		
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Case 1:13-ec-00297-TCB *SEALED* Document 11-24 Filed 09/20/13 Page 3 of 4 PageID# 214

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A CONTRACTOR STORY

Case 1:13-ec-00297-TCB *SEALED* Document 11-24 Filed 09/20/13 Page 4 of 4 PageID# 215

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Case 1:13-ec-00297-TCB *SEALED* Document 11-25 Filed 09/20/13 Page 1 of 3 PageID# 216

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Case 1:13-ec-00297-TCB *SEALED* Document 11-25 Filed 09/20/13 Page 2 of 3 PageID# 217

REDACTED

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE OF
A PEN REGISTER/TRAP AND TRACE
DEVICE ON AN ELECTRONIC MAIL
ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

IN RE GRAND JURY SUBPOENA

NO. 1:13 EC 297

NO. 1:13 SW 522

NO. 13-1

UNDER SEAL

PROPOSED ORDER

The United States has proposed partially unsealing records in this matter due to public disclosures made by Ladar Levison and Lavabit, LLC and for the purpose of creating a public record for Mr. Levison's appeal. The Court has considered the original sealing orders, the motions in support of the original sealing orders, the government's <u>ex parte</u> motion to unseal certain documents, and the prior pleadings of Mr. Levison, and hereby finds that:

- (1) the government has a compelling interest in keeping certain information in the documents sealed, and the government has proposed reducted versions of the documents that minimizes the information under seal;
- (2) the government's interest in keeping the redacted material sealed outweighs any public interest in disclosure; and

Case 1:13-ec-00297-TCB Document 25-13 Filed 02/24/16 Page 25 of 28 PageID# 700

Case 1:13-ec-00297-TCB *SEALED* Document 11-25 Filed 09/20/13 Page 3 of 3 PageID# 218

REDACTED

(3) having considered alternatives to the proposed redactions none will adequately protect that interest; it is hereby

ORDERED that the redacted versions of certain records filed in the above captioned matter are partially unsealed. The unsealed records are attached to this Order. To the extent any such record is covered by a non-disclosure Order issued pursuant to 18 U.S.C. § 2705(b), the non-disclosure obligation does not apply to the unsealed, redacted version of the document. The Clerk of the Court may publicly release the redacted version of any of the records attached to this Order. Any record not attached to this Order, as well as the unredacted copies of any record filed in the above-captioned matter, including the government's *ex parte*, sealed Motion to Unseal and Statement of Reasons will remain sealed until further Order of the Court.

	The Honorable Claude M. Hilton United States District Judge
Date: Alexandria, VA	

Case 1:13-ec-00297-TCB *SEALED* Document 11-26 Filed 09/20/13 Page 1 of 3 PageID# 219

REDACTED

Case 1:13-ec-00297-TCB *SEALED* Document 11-26 Filed 09/20/13 Page 2 of 3 PageID# 220

REDACTED

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE OF
A PEN REGISTER/TRAP AND TRACE
DEVICE ON AN ELECTRONIC MAIL
ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

IN RE GRAND JURY SUBPOENA

NO. 1:13 EC 297

NO. 1:13 SW 522

NO. 13-1

UNDER SEAL

PROPOSED ORDER

The United States has proposed partially unsealing records in this matter due to public disclosures made by Ladar Levison and Lavabit, LLC and for the purpose of creating a public record for Mr. Levison's appeal. The Court has considered the original sealing orders, the motions in support of the original sealing orders, the government's <u>ex parte</u> motion to unseal certain documents, and the prior pleadings of Mr. Levison, and hereby finds that:

- (1) the government has a compelling interest in keeping certain information in the documents sealed, and the government has proposed redacted versions of the documents that minimizes the information under seal;
- (2) the government's interest in keeping the redacted material sealed outweighs any public interest in disclosure; and

Case 1:13-ec-00297-TCB *SEALED* Document 11-26 Filed 09/20/13 Page 3 of 3 PageID# 221

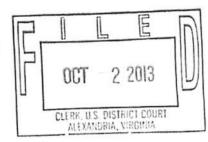
REDACTED

(3) having considered alternatives to the proposed redactions none will adequately protect that interest; it is hereby

ORDERED that the redacted versions of certain records filed in the above captioned matter are partially unsealed. The unsealed records are attached to this Order. To the extent any such record is covered by a non-disclosure Order issued pursuant to 18 U.S.C. § 2705(b), the non-disclosure obligation does not apply to the unsealed, redacted version of the document. The Clerk of the Court may publicly release the redacted version of any of the records attached to this Order. Any record not attached to this Order, as well as the unredacted copies of any record filed in the above-captioned matter, including the government's *ex parte*, sealed Motion to Unseal and Statement of Reasons will remain sealed until further Order of the Court.

	The Honorable Claude M. Hilton United States District Judge
Date: Alexandria, VA	

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION



IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE OF
A PEN REGISTER/TRAP AND TRACE
DEVICE ON AN ELECTRONIC MAIL
ACCOUNT

NO. 1:13 EC 297

REDACTED

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

IN RE GRAND JURY SUBPOENA

NO. 1:13 SW 522

NO. 13-1

UNDER SEAL

ORDER

The United States has proposed partially unsealing records in this matter due to public disclosures made by Ladar Levison and Lavabit, LLC and for the purpose of creating a public record for Mr. Levison's appeal. The Court has considered the original sealing orders, the motions in support of the original sealing orders, the government's <u>ex parte</u> motion to unseal certain documents, and the prior pleadings of Mr. Levison, and hereby finds that:

- (1) the government has a compelling interest in keeping certain information in the documents sealed, and the government has proposed redacted versions of the documents that minimizes the information under seal;
- (2) the government's interest in keeping the redacted material sealed outweighs any public interest in disclosure; and

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 2 of 83 PageID# 705

(3) having considered alternatives to the proposed redactions none will adequately protect

that interest; it is hereby

ORDERED that the redacted versions of certain records filed in the above captioned

matter are partially unsealed. The unsealed records are attached to this Order. To the extent any

such record is covered by a non-disclosure Order issued pursuant to 18 U.S.C. § 2705(b), the

non-disclosure obligation does not apply to the unsealed, redacted version of the document. The

Clerk of the Court may publicly release the redacted version of any of the records attached to this

Order. Any record not attached to this Order, as well as the unredacted copies of any record filed

in the above-captioned matter, including the government's ex parte, sealed Motion to Unseal and

Statement of Reasons will remain sealed until further Order of the Court.

United States District Judge

Date: 2 2013

2

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA



IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER PURSUANT TO 18 U.S.C. § 2703(d)

MISC. NO. 1:13 EC 254

REDACTED

Filed Under Seal

ORDER

The United States has submitted an application pursuant to 18 U.S.C. § 2703(d), requesting that the Court issue an Order requiring Lavabit LLC, an electronic communications service provider and/or a remote computing service located in Dallas, TX, to disclose the records and other information described in Attachment A to this Order.

The Court finds that the United States has offered specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation.

The Court determines that there is reason to believe that notification of the existence of this Order will seriously jeopardize the ongoing investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates. See 18 U.S.C. § 2705(b)(2), (3), (5).

IT IS THEREFORE ORDERED, pursuant to 18 U.S.C. § 2703(d), that Lavabit LLC shall, within ten days of the date of this Order, disclose to the United States the records and other information described in Attachment A to this Order.

IT IS FURTHER ORDERED that Lavabit LLC shall not disclose the existence of the application of the United States, or the existence of this Order of the Court, to the subscribers of the account(s) listed in Attachment A, or to any other person, unless and until otherwise

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 5 of 83 PageID# 708 Case 1:13-ec-00297-TCB *SEALED* Document 11-1 Filed 09/20/13 Page 3 of 5 PageID# 52

REDACTED

authorized to do so by the Court, except that Lavabit LLC may disclose this Order to an attorney for Lavabit LLC for the purpose of receiving legal advice.

IT IS FURTHER ORDERED that the application and this Order are sealed until otherwise ordered by the Court.

John F. Anderson United States Magistrate Judge

JUNY 10, 2013

A TRUE COPY, TESTE:
CLERK, U.S. DISTRICT COURT

DEFO/Y CLERK

ATTACHMENT A

REDACTED

I. The Account(s)

The Order applies to certain records and information associated with the following email account(s):

II. Records and Other Information to Be Disclosed

Lavabit LLC is required to disclose the following records and other information, if available, to the United States for each account or identifier listed in Part I of this Attachment ("Account"), for the time period from inception to the present:

- A. The following information about the customers or subscribers of the Account:
 - Names (including subscriber names, user names, and screen names);
 - Addresses (including mailing addresses, residential addresses, business addresses, and e-mail addresses);
 - Local and long distance telephone connection records;
 - Records of session times and durations, and the temporarily assigned network addresses (such as Internet Protocol ("IP") addresses) associated with those sessions;
 - Length of service (including start date) and types of service utilized;
 - Telephone or instrument numbers (including MAC addresses);
 - Other subscriber numbers or identities (including the registration Internet Protocol ("IP") address); and
 - Means and source of payment for such service (including any credit card or bank account number) and billing records.
- B. All records and other information (not including the contents of communications) relating to the Account, including:
 - Records of user activity for each connection made to or from the Account, including log files; messaging logs; the date, time, length, and method of connections; data transfer volume; user names; and source and destination Internet Protocol addresses;
 - Information about each communication sent or received by the Account, including the date and time of the communication, the method of communication, and the source and destination of the communication (such as source and destination email addresses, IP addresses, and telephone numbers).

CERTIFICATE OF AUTHENTICITY OF DOMESTIC BUSINESS RECORDS PURSUANT TO FEDERAL RULE OF EVIDENCE 902(11)

Ι,	attest, under penalties of perjury under the
	ited States of America pursuant to 28 U.S.C. § 1746, that the information
contained in th	is declaration is true and correct. I am employed by Lavabit LLC, and my official
title is	. I am a custodian of records for Lavabit LLC. I state
that each of th	e records attached hereto is the original record or a true duplicate of the original
	custody of Lavabit LLC, and that I am the custodian of the attached records
	(pages/CDs/kilobytes). I further state that:
a.	all records attached to this certificate were made at or near the time of the
occurrence of	the matter set forth, by, or from information transmitted by, a person with
	those matters;
b.	such records were kept in the ordinary course of a regularly conducted business
activity of La	evabit LLC; and
c.	such records were made by Lavabit LLC as a regular practice.
1 furt	her state that this certification is intended to satisfy Rule 902(11) of the Federal
Rules of Evi	dence.
Date	Signature

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INSTALLATION AND USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	(<u>Under Seal</u>))))) 1:13 EC 297
ODDEL	

ORDER

This matter having come before the Court pursuant to an Application under 18 U.S.C. § 3122, by Assistant United States Attorney, an attorney for the Government as defined by Fed. R. Crim. P. 1(b)(1), requesting an Order under 18 U.S.C. § 3123, authorizing the installation and use of a pen register and the use of a trap and trace device or process ("pen/trap device") on all electronic communications being sent from or sent to the account associated with that is registered to subscriber at Lavabit, LLC (hereinafter referred to as the "SUBJECT ELECTRONIC MAIL ACCOUNT").

The Court finds that the applicant has certified that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation into possible violation(s) of 18 U.S.C. §§ 641, 793(d)-(e), and 798(a)(3) by

IT APPEARING that the information likely to be obtained by the pen/trap device is relevant to an ongoing criminal investigation of the specified offense;

IT IS ORDERED, pursuant to 18 U.S.C. § 3123, that a pen/trap device may be installed and used by Lavabit and the Federal Bureau of Investigation to capture all non-content dialing, routing, addressing, and signaling information (as described and limited in the Application), sent from or sent to the SUBJECT ELECTRONIC MAIL ACCOUNT, to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data (date, time, duration, and Internet Protocol address of all log-ins) on the

SUBJECT ELECTRONIC MAIL ACCOUNT, all for a period of sixty (60) days from the date of such Order or the date the monitoring equipment becomes operational, whichever occurs later;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(b)(2), that Lavabit shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device unobtrusively and with minimum interference to the services that are accorded persons with respect to whom the installation and use is to take place;

IT IS FURTHER ORDERED that the United States take reasonable steps to ensure that the monitoring equipment is not used to capture any "Subject:" portion of an electronic mail message, which could possibly contain content;

IT IS FURTHER ORDERED that Lavabit shall be compensated by the Federal Bureau of Investigation for reasonable expenses incurred in providing technical assistance;

agency seeks to install and use its own pen/trap device on a packet-switched data network of a public provider, the United States shall ensure that a record is maintained which will identify: (a) any officer(s) who installed the device and any officer(s) who accessed the device to obtain information from the network; (b) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (c) the configuration of the device at the time of its installation and any subsequent modification thereof; and (d) any information which has been collected by the device. To the extent that the pen/trap device can be set to automatically record this information electronically, the record shall be maintained electronically throughout the installation and use of the pen/trap device. Pursuant to 18 U.S.C. § 3123(a)(3)(B), as amended, such record(s) shall be provided ex parte and under seal to this Court within 30 days of the termination of this Order, including any extensions thereof;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(d), that this Order and the Application be scaled until otherwise ordered by the Court, and that copies of such Order may be

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 11 of 83 PageID# 714 Case 1:13-ec-00297-TCB *SEALED* Document 11-2 Filed 09/20/13 Page 4 of 4 PageID# 58

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furnished to the Federal Bureau of Investigation, the United States Attorney's Office, and Lavabit;

IT IS FURTHER ORDERED that Lavabit shall not disclose the existence of the pen/trap device, or the existence of the investigation to any person, except as necessary to effectuate this Order, unless or until otherwise ordered by the Court.

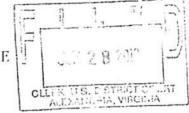
SO ORDERED:

Theresa Carroll Buchanan United States Magistrate Judge

Hon. Theresa C. Buchanan United States Magistrate Judge

Date: 6/28/13

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA



Alexandria Division

IN THE MATTER OF THE APPLICATION	J		REDACTED
OF THE UNITED STATES OF AMERICA)		LED
FOR AN ORDER AUTHORIZING THE)	(Under Scal)	
INSTALLATION AND USE OF A PEN	.)		
REGISTER/TRAP AND TRACE DEVICE)	1:13 EC 297	*
ON AN ELECTRONIC MAIL ACCOUNT)		

MOTION FOR ENTRY OF AN ORDER TO COMPEL

The United States, by and through its undersigned counsel, hereby requests the Court enter an Order directing Lavabit, LLC, to comply with the Court's June 28, 2013 Pen Register/Trap and Trace Order. In support of the motion the United States declares as follows:

- 1. On June 28, 2013, at approximately 4 p.m., this Court entered an Order pursuant to 18 U.S.C. § 3123 authorizing the installation and use of a pen register and the use of a trap and trace device ("pen/trap device") on all electronic communications being sent from or sent to the electronic mail account.

 That e-mail account is controlled by Lavabit, LLC.
- 2. In its Order, the Court found that the information to be collected by the pen/trap device would be relevant to an ongoing criminal investigation. In addition, the Court ordered Lavabit "shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device."
- 3. The Federal Bureau of Investigation served a copy of the Order on Lavabit that same afternoon. A representative of Lavabit stated that it could not provide the requested information because the user of the account had enabled Lavabit's encryption services, and thus

Lavabit would not provide the requested information. The representative of Lavabit indicated that Lavabit had the technical capability to decrypt the information but that Lavabit did not want to "defeat [its] own system."

- the representative of Lavabit did not comply with the Order, and indicated he first wanted to seek legal advice.
- 5. The Pen Register and Trap and Trace Act gives this Court the authority to order a provider to assist the government in the execution of a lawful pen register or trap and trace order, including by providing information. Section 3122 of Title 18, United States Code, provides in part: "An order issued under this section-- ... shall direct, upon the request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device under section 3124 of this title." Section 3124(a) provides, "Upon the request of an attorney for the Government or an officer of a law enforcement agency authorized to install and use a pen register under this chapter, a provider of wire or electronic communication service... shall furnish such investigative or law enforcement officer forthwith all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference... if such

assistance is directed by a court order as provided in section 3123(b)(2) of this title." Section 3124(b) contains a similar provision governing trap and trace orders.

Wherefore, the United States requests an Order directing Lavabit to comply forthwith with the Court's June 28, 2013 Order.

Respectfully submitted, NEIL H. MACBRIDE United States Attorney

Ву:

Assistant United States Attorney

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IN THE UNITED STATES D		THE CLERK, U.S. DITTIPLE ALEXANDO
Alexandri		REDACTED
STATES OF AMERICA)	\sim_D

Alexandria Division

IN THE MATTER OF THE ADDITION	1		
IN THE MATTER OF THE APPLICATION	,		
OF THE UNITED STATES OF AMERICA)		
FOR AN ORDER AUTHORIZING THE)	(Under Seal)	
INSTALLATION AND USE OF A PEN)		
REGISTER/TRAP AND TRACE DEVICE)	1:13 EC 297	
ON AN ELECTRONIC MAIL ACCOUNT)		

ORDER COMPELLING COMPLIANCE FORTHWITH

WHEREAS, on June 28, 2013, at approximately 4:00 p.m., this Court entered an Order pursuant to 18 U.S.C. § 3123 authorizing the installation and use of a pen register and the use of a trap and trace device ("pen/trap device") on all electronic communications being sent from or which is an e-mail account sent to the electronic mail account controlled by Lavabit, LLC ("Lavabit"); and

WHEREAS, this Court found that the information obtained by the pen/trap device would be relevant to an ongoing criminal investigation; and

WHEREAS, the Court's Order directed that Lavabit "shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device;" and

WHEREAS, Lavabit informed the Federal Bureau of Investigation that the user of the account had enabled Lavabit's encryption services and thus the pen/trap device would not collect the relevant information; and

WHEREAS, Lavabit informed the FBI that it had the technological capability to obtain the information but did not want to "defeat [its] own system;"

IT IS HEREBY ORDERED that Lavabit LLC is directed to comply forthwith with the Court's June 28, 2013 Order, and provide the Federal Bureau of Investigation with unencrypted data pursuant to the Order. To the extent any information, facilities, or technical assistance are under the control of Lavabit are needed to provide the FBI with the unencrypted data, Lavabit shall provide such information, facilities, or technical assistance forthwith.

Failure to comply with this Order shall subject Lavabit to any penalty within the power of the Court, it cluding the partibility of criminal contempt of Court. Tells

SO ORDERED. 6/28/13

Theresa Carroll Buchanan
United States Maglatrate Judge
Hon. Theresa C. Buchanan
United States Magistrate Judge

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 19 of 83 PageID# 722 Case 1:13-ec-00297-TCB *SEALED* Document 11-5 Filed 09/20/13 Page 1 of 8 PageID# 66



IN THE UNITED STATES DISTRICT COURT FOR THE

Alexandria Division

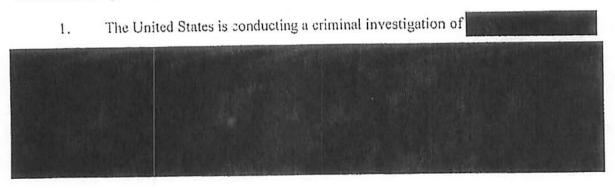
EASTERN DISTRICT OF VIRGINIA

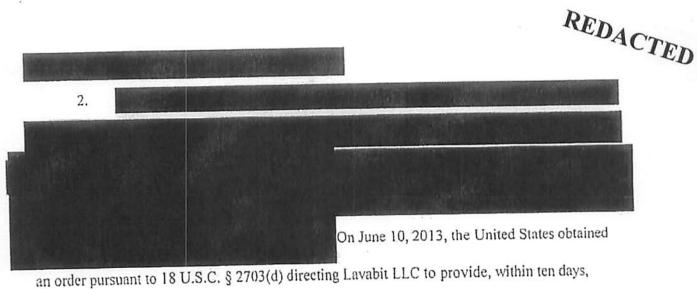
IN THE MATTER OF THE)	FILED UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	



MOTION OF THE UNITED STATES FOR AN ORDER TO SHOW CAUSE

The United States, through the undersigned counsel, pursuant to Title 18, United States Code, Section 401, hereby moves for the issuance of an order directing Ladar Levison, the owner and operator of Lavabit LLC, an electronic communications service provider, to show cause why Lavabit LLC has failed to comply with the orders entered June 28, 2013, in this matter and, as a result, why this Court should not hold Mr. Levison and Lavabit LLC in contempt for its disobedience and resistence to these lawful orders. The United States further requests that the Court convene a hearing on this motion on July 16, 2013, at 10:00 a.m., and issue a summons directing Mr. Levison to appear before this Court on that date. In support of this motion, the United States represents:





an order pursuant to 18 U.S.C. § 2703(d) directing Lavabit ELC to provide, within tentary, additional records and information about email account. Mr. Levison received that order on June 11, 2013. Mr. Levison responded by mail, which was not received by the government until June 27, 2013. Mr. Levison provided very little of the information sought by the June 10, 2013 order.

- 3. On June 28, 2013, the United States obtained a pen register/trap and trace order on email account, a copy of which is attached together with the application for that order.
- 4. On June 28, 2013, FBI special agents met Mr. Levison at his residence in Dallas, Texas, and discussed the prior grand jury subpoena served on Lavabit LLC and the pen register order entered that day. Mr. Levison did not have a copy of the order when he spoke with the agents, but he received a copy from the FBI within a few minutes of their conversation. Mr. Levison told the agents that he would not comply with the pen register order and wanted to speak to an attorney. It was unclear whether Mr. Levison would not comply with the order because it was technically not feasible or difficult or because it was not consistent with his business practice of providing secure, encrypted email service for his customers.

- 5. On June 28, 2013, after this conversation with Mr. Levison, the United States obtained an Order Compelling Compliance Forthwith, which directed Lavabit to comply with the pen register order. Copies of that motion and order are attached.
- 6. Since June 28, 2013, the FBI has made numerous attempts, without success, to speak and meet directly with Mr. Levison to discuss the pen register order and his failure to provide "all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device" as required by that order. As of this date, Lavabit LLC has not complied with the order.
- 7. The United States requests that the Court enter the attached proposed order directing Mr. Levison to show cause why Lavabit LLC has failed to comply with the pen register order and why, therefore, he should not be held in contempt. The United States requests that this show cause hearing be scheduled for July 16, 2013, at 10:00 a.m., and that a summons be issued directing Mr. Levison to appear before this Court on that date.
- 8. The June 10, 2013 Section 2703(d) Order and the June 28, 2013 pen register order remain under seal. In addition, these orders provide that Lavabit LLC shall not disclose the existence of the government's applications and the orders to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders. The United States requests that these documents remain under seal, that the non-disclosure

provisions of the orders remain in effect, and that this motion and order and any subsequent pleadings and/or proceedings regarding this motion also be sealed.

Respectfully submitted,

Neil H. MacBride United States Attorney

United States Attorney's Office

Justin W. Williams U.S. Attorney's Building

2100 Jamieson Avenue Alexandria, Virginia 22314

Phone: 703-299-3700

PROPOSED ORDER TO SHOW CAUSE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)	UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT)	

ORDER TO SHOW CAUSE

Upon motion of the United States pursuant to Title 18, United States Code, Section 401, good cause having been shown, IT IS HEREBY ORDERED:

- 1. Ladar Levison, the owner and operator of Lavabit LLC, an electronic communications service provider, shall appear before this Court on July 16, 2013, at 10:00 a.m., at which time he shall show cause why Lavabit LLC has failed to comply with the orders entered June 28, 2013, in this matter and why this Court should not hold Mr. Levison and Lavabit LLC in contempt for its disobedience and resistence to these lawful orders;
- The Clerk's Office shall issue a summons for the appearance of Mr. Levison on July 16, 2013, at 10:00 a.m. The Clerk's Office shall provide the Federal Bureau of Investigation with a certified copy of the summons for service on Mr. Levison and Lavabit LLC.
- The Federal Bureau of Investigation shall serve the summons on Mr. Levison together with a copy of the Motion of the United States for an Order to Show Cause and a certified copy of this Order to Show Cause.
- The sealing and non-disclosure provisions of the June 10, 2013 Section 2703(d)
 order and the June 28, 2013 pen register order shall remain in full force and effect. Mr. Levison

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 26 of 83 PageID# 729 Case 1:13-ec-00297-TCB *SEALED* Document 11-5 Filed 09/20/13 Page 8 of 8 PageID# 73

REDACTED

and Lavabit LLC shall not disclose the existence of these applications, motions, and court orders, including this Order to Show Cause, to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders.

 This Order, the Motion of the United States for an Order to Show Cause, and any subsequent pleadings and proceedings regarding this matter shall be placed under seal until further order of this Court.

Entered in Alexandria, Virginia, this _____ day of July, 2013

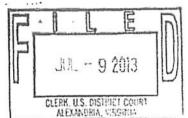
Claude M. Hilton United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

N THE MATTER OF THE)	UNDER SEAL
APPLICATION OF THE UNITED)	
STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297
AUTHORIZING THE USE OF A PEN)	
REGISTER/TRAP AND TRACE DEVICE)	
ON AN ELECTRONIC MAIL ACCOUNT	1	



ORDER TO SHOW CAUSE

Upon motion of the United States pursuant to Title 18, United States Code, Section 401, good cause having been shown, IT IS HEREBY ORDERED:

- Ladar Levison, the owner and operator of Lavabit LLC, an electronic communications service provider, shall appear before this Court on July 16, 2013, at 10:00 a.m., at which time he shall show cause why Lavabit LLC has failed to comply with the orders entered June 28, 2013, in this matter and why this Court should not hold Mr. Levison and Lavabit LLC in contempt for its disobedience and resistence to these lawful orders;
- 2. The Clerk's Office shall issue a summons for the appearance of Mr. Levison on July 16, 2013, at 10:00 a.m. The Clerk's Office shall provide the Federal Bureau of Investigation with a certified copy of the summons for service on Mr. Levison and Lavabit LLC.
- 3. The Federal Bureau of Investigation shall serve the summons on Mr. Levison together with a copy of the Motion of the United States for an Order to Show Cause and a certified copy of this Order to Show Cause.
- The sealing and non-disclosure provisions of the June 10, 2013 Section 2703(d)
 order and the June 28, 2013 pen register order shall remain in full force and effect. Mr. Levison

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 29 of 83 PageID# 732 Case 1:13-ec-00297-TCB *SEALED* Document 11-6 Filed 09/20/13 Page 3 of 3 PageID# 76

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and Lavabit LLC shall not disclose the existence of these applications, motions, and court orders, including this Order to Show Cause, to the subscriber or to any other persons unless otherwise authorized to do so by court order, except that Lavabit LLC may disclose the orders to an attorney for the purpose of obtaining legal advice regarding these orders.

5. This Order, the Motion of the United States for an Order to Show Cause, and any subsequent pleadings and proceedings regarding this matter shall be placed under seal until further order of this Court.

Entered in Alexandria, Virginia, this _41 day of July, 2013

Claude M. Hilton
United States District Judge

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 31 of 83 PageID# 734 Case 1:13-ec-00297-TCB *SEALED* Document 11-7 Filed 09/20/13 Page 2 of 2 PageID# 78

AO 83 (Rev. 06/09) Summons in a Criminal Case

United Staté	S DISTRIC	t Court	REDACTE	ZD
United States of America v.	istrict of Virginia))		ER SEA	action 1
Ladar Levison Defendant) Case No	. 1:13ec297		
	A CRIMINAL	CASE		
YOU ARE SUMMONED to appear before the Ubelow to answer to one or more offenses or violations bas	Inited States districted on the following	ict court at the time, ng document filed w Superseding Inform	ation Complaint	
☐ Probation Violation Petition ☐ Supervised Release	Violation Petition	ı □ Violation Not	ice 🖾 Order of Court	-
Place: 401 Courthouse Square		Courtroom No.:	800- Judge Hilton	×
Alexandria, VA 22314		Date and Time:	7/16/13 @ 10:00 am	
This offense is briefly described as follows: See Attached Order				
Date: 07/09/2013		Issuing officer's Printed name	- Deputy Clerk	
I declare under penalty of perjury that I have: Executed and returned this summons Date:	☐ Returned th	CLERK,	DEPUTY CLERK	e T
		Printed name		

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 32 of 83 PageID# 735 Case 1:13-ec-00297-TCB *SEALED* Document 11-8 Filed 09/20/13 Page 1 of 3 PageID# 79

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AO 110 (Rev. 01/09) Subporns to Testify Before a Grand Jury

13-1 / 130/2527 / 13 - 2451

United States District Court

Eastern District of Virginia

SUBPOENA TO TESTIFY BEFORE THE GRAND JURY

TO:

Ladar Norman Levison

Dallas, TX 75204

YOU ARE COMMANDED to appear and testify before the United States district court at the time, date, and place shown below to tesify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

UNITED STATES DISTRICT COURT Place: 401 Courthouse Square Alexandria, Virginia 22314

Date and Time:

July 16, 2013

9:30 AM

You must also bring with you the following documents, electronically stored information, or objects (biank if not applicable):

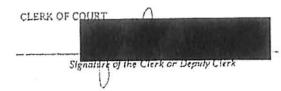
In addition to your personal appearance, you are directed to bring to the grand jury the public and private encryption keys used by lavabit.com in any SSL (Secure Socket Layer) or TLS (Transport Security Layer) sessions, including HTTPS sessions with ellents using the lavabit.com web site and encrypted SMTP communications (or Internet communications using other protocols) with mail servers;

Any other information necessary to accomplish the installation and use of the pen/trap device ordered by Judge Buchanan on June 28, 2013, unobtrusively and with minimum interference to the services that are necorded persons with respect to whom the installation and use is to take place;

If such information is electronically stored or unable to be physically transported to the grand jury, you may provide a copy of the information to the Federal Bureau of Investigation. Provision of this information to the FBI does not excuse your personal appearance.

Date:

July 11, 2013



The name, address, small, and telephone number of the United States attentey, or assistant United States atterney, who requests this subpoena, are:

> Office of the United States Attorney Justin W. Williams United States Attorney's Building 2100 Jamleson Avenue Alexandria, Virginia 22314 (703) 299-3700

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 34 of 83 PageID# 737 Case 1:13-ec-00297-TCB *SEALED* Document 11-8 Filed 09/20/13 Page 3 of 3 PageID# 81

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	PROOF OF SERVICE	
nis subpoena for (name of Individua as received by me on (date) <u>J</u> W	al or organization) Lader Narman Leuren	
Lipersonally served the subpoena	on the individual at (place)cn (date); or; or	
	ial's residence or usual place of abode with (name) _, a person of suitable age and discretion who resides there, or _, and mailed a copy to the individual's last known address; or	n -
I served the subpoens on (name designated by law to accept serv	of Inidividual), who i vice of process on behalf of (name of organization) on (date); or	s
I returned the subpoena unexect		٥ſ
Other (specify):		
I declare under the penalty of p	erjury that this information is true.	
		# 5 7 5
Date: July 11, 20,3		
	Server's address	

Additional information regarding attempted services, etc.

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 35 of 83 PageID# 738 Case 1:13-ec-00297-TCB *SEALED* Document 11-9 Filed 09/20/13 Page 1 of 6 PageID# 82

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Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 36 of 83 PageID# 739 Case 1:13-ec-00297-TCB *SEALED* Document 11-9 Filed 09/20/13 Page 2 of 6 PageID# 83

AQ 93 (F	Rev. 12/09)	Search and	Scizure	Warrant
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UNDER SEAL

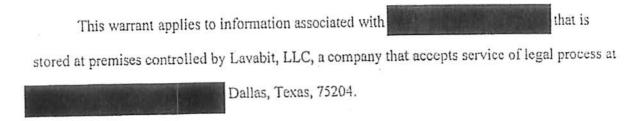
UNITED STATES DISTRICT COURT

REDACTED

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PALAPA BETTY AND THE AND	Eastern District of Virginia	
	Edstern District of Triginia	
In the Matter of the Search of (Briefly describe the property to be search or identify the person by name and addre. INFORMATION ASSOCIATED W THAT IS STORED AT PREMISE CONTROLLED BY LAVABIT, LI	TTH) Case	No. 1:13SW522
SEAL	RCH AND SEIZURE V	VARRANT
To: Any authorized law enforcement of	fficer	(20)
An application by a federal law en of the following person or property located (identify the person or describe the property to be si See Attachment A	forcement officer or an attorn	ney for the government requests the search District of Texas
property to be seized): See Attachment B		eved to conceal (identify the person or describe the
I find that the affidavit(s), or any property.	recorded testimony, establish	n probable cause to search and seize the person or
YOU ARE COMMANDED to	execute this warrant on or be	fore(not to exceed 14 days)
in the daytime 6:00 a.m. to 10 p.		day or night as I find reasonable cause has been
taken to the person from whom, or from	whose premises, the property	opy of the warrant and a receipt for the property was taken, or leave the copy and receipt at the
inventory as required by law and prompt The Honorable Claude M. Hilton (name)	lly return this warrant and in-	ng the execution of the warrant, must prepare an ventory to United States Magistrate Judge
☐ I find that immediate notification of trial), and authorize the officer execuses arched or seized (check the appropriate be	ting this warrant to delay not a) \Box for \Box days (not in the days)	t listed in 18 U.S.C. § 2705 (except for delay ice to the person who, or whose property, will be to exceed 30). Ing., the later specific date of
City and state: Alexandria, Virginia	2013	Claude M. Hilton United States District Judge

ATTACHMENT A

Property to Be Searched



ATTACHMENT B

Particular Things to be Seized

I. Information to be disclosed by Lavabit, LLC (the "Provider")

To the extent that the information described in Attachment A is within the possession, custody, or control of the Provider, including any emails, records, files, logs, or information that has been deleted but is still available to the Provider, the Provider is required to disclose the following information to the government for each account or identifier listed in Attachment A:

- a. All information necessary to decrypt communications sent to or from the Lavabit e-mail account including encryption keys and SSL keys;
- b. All information necessary to decrypt data stored in or otherwise associated with the Lavabit account

II. Information to be seized by the government

All information described above in Section I that constitutes fruits, contraband, evidence and instrumentalities of violations of 18 U.S.C. §§

violations involving including, for each account or identifier listed on Attachment A, information pertaining to the following matters:

- a. All information necessary to decrypt communications sent to or from the Lavabit e-mail account including encryption keys and SSL keys;
- b. All information necessary to decrypt data stored in or otherwise associated with the Lavabit account

CERTIFICATE OF AUTHENTICITY OF DOMESTIC BUSINESS RECORDS PURSUANT TO FEDERAL RULE OF EVIDENCE 902(11)

Ι,	, attest, under penalties of perjury under the
laws of the Unite	d States of America pursuant to 28 U.S.C. § 1746, that the information
contained in this	declaration is true and correct. I am employed by Lavabit, LLC, and my
official title is	. I am a custodian of records for Lavabit,
	each of the records attached hereto is the original record or a true duplicate of
the original recor	rd in the custody of Lavabit, LLC, and that I am the custodian of the attached
records consisting	ng of (pages/CDs/kilobytes). I further state that:
	ll records attached to this certificate were made at or near the time of the e matter set forth, by, or from information transmitted by, a person with
knowledge of th	
b. s	such records were kept in the ordinary course of a regularly conducted business
activity of Lava	abit, LLC; and
c. :	such records were made by Lavabit, LLC as a regular practice.
I furthe	r state that this certification is intended to satisfy Rule 902(11) of the Federal
Rules of Evide	nce.
Date	Signature
Duite	

UNDER SEAL

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA Alexandria Division

Alexandr	ia Divisio	n	μ,	' 16 2010 [U]
IN THE MATTER OF THE SEARCH OF)	UNDER SEAL (Local Rule 49(E	-	ALEXANDRAL I SOURT
INFORMATION ASSOCIATED WITH)	No. 1:13sw522	•	
THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT, LLC))			REDACTED

ORDER TO SEAL

The UNITED STATES, pursuant to Local Rule 49(B) of the Local Criminal Rules for the United States District Court for the Eastern District of Virginia, having moved to seal the application for a search warrant, the search warrant, the affidavit in support of the search warrant, the Motion to Seal, and proposed Order in this matter; and

The COURT, having considered the government's submissions, including the facts presented by the government to justify sealing; having found that revealing the material sought to be sealed would jeopardize an ongoing criminal investigation; having considered the available alternatives that are less drastic than sealing, and finding none would suffice to protect the government's legitimate interest in concluding the investigation; and having found that this legitimate government interest outweighs at this time any interest in the disclosure of the material; it is hereby

ORDERED, ADJUDGED, and DECREED that, the application for search warrant, the search warrant, the affidavit in support of the search warrant, Motion to Seal, and this Order be sealed until further Order by the Court. It is further ordered that law enforcement officers may serve a copy of the warrant on the occupant of the premises as required by Rule 41 of the Fed. R. of Crim. Proc.

Date: Arexandria, Virginia

Claude M. Hilton United States District Judge Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 43 of 83 PageID# 746

Case 1:13-ec-00297-TCB *SEALED* Document 11-11 Filed 09/20/13 Page 1 of 2 PageID# 90

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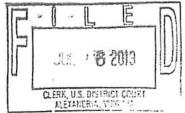
UNDER SEAL

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

IN RE: APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER PURSUANT TO 18 U.S.C. § 2705(b)

Case No. 1:13SW522 Filed Under Seal



ORDER

The United States has submitted an application pursuant to 18 U.S.C. § 2705(b), requesting that the Court issue an Order commanding Lavabit, an electronic communications service provider and/or a remote computing service, not to notify any person (including the subscribers or customers of the account(s) listed in the search warrant) of the existence of the attached search warrant until further order of the Court.

The Court determines that there is reason to believe that notification of the existence of the attached warrant will seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates. See 18 U.S.C. § 2705(b)(2), (3), (5).

IT IS THEREFORE ORDERED under 18 U.S.C. § 2705(b) that Lavabit shall not disclose the existence of the attached search warrant, or this Order of the Court, to the listed subscriber or to any other person, unless and until otherwise authorized to do so by the Court, except that Lavabit may disclose the attached search warrant to an attorney for Lavabit for the purpose of receiving legal advice.

IT IS FURTHER ORDERED that the application and this Order are sealed until otherwise ordered by the Court.

July 16, 2013

Claude M. Hilton United States District Judge Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 45 of 83 PageID# 748
Case 1:13-ec-00297-TCB *SEALED* Document 11-12 Filed 09/20/13 Page 1 of 6 PageID# 92

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Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 46 of 83 PageID# 749
Case 1:13-ec-00297-TCB *SEALED* Document 11-12 Filed 09/20/13 Page 2 of 6 PageID# 93

IN THE UNITED STATES	DIS	STRICT COURT FOR	T	LED
		CT OF VIRGINIA		JUL # 2083 U
Alexand	dria	Division	u	CLERK, U.S. DISTRICT COURT
IN THE MATTER OF THE)	FILED UNDER SEA	L	*
APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER)	No. 1:13EC297		REDA
AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE)			REDACTED
ON AN ELECTRONIC MAIL ACCOUNT)			20

SUPPLEMENT TO THE MOTION OF THE UNITED STATES FOR AN ORDER TO SHOW CAUSE

The United States, through the undersigned counsel, submits the following additional information in support of its show cause motion filed July 9, 2013:

- meeting/conference call with Mr. Levison and his then counsel. Mr. Levison was in Dallas.

 Texas, at the FBI field office, at the time, and his counsel from San Francisco, California, and prosecutors and FBI agents from the Washington, D.C. field office participated by telephone. The conference call was convened to discuss Mr. Levison's questions and concerns about the installation and operation of a pen register on the targeted email account. Mr. Levison's concerns focused primarily on how the pen register device would be installed on the Lavabit LLC system, what data would be captured by the device, what data would be viewed and preserved by the government. The parties also discussed whether Mr. Levison would be able to provide "keys" for encrypted information.
- During the conference call, the FBI explained to Mr. Levison that the pen register could be installed with minimal impact to the Lavabit LLC system, and the agents told Mr.



Levison that they would meet with him when they were ready to install the device and go over with him any of the technical details regarding the installation and use of the pen register. As for the data collected by the device, the agents assured Mr. Levison that the only data that the agents would review is that which is stated in the order and nothing more (i.e., user log-in information and the date, time, and duration of the transmissions for the target account).

- 3. Lavabit LLC provides encryption service to paid users
 on the conference call with Mr. Levison, the FBI is reasonably confident that with the encryption keys, which Mr. Levison can access, it would be able view in an un-encrypted format any encrypted information required to be produced through the use of the pen register.
- 4. Mr. Levison and his attorney did not commit to the installation and use of the pen register at the conclusion of the July 10 conference call. On July 11, 2013, counsel who participated in the conference call informed the government that she no longer represented Mr. Levison or Lavabit LLC. In addition, Mr. Levison indicated that he would not come to court unless the government paid for his travel.
- 5. On July 11, 2013, FBI agents served Mr. Levison with a grand jury subpoena directing him to appear before the grand jury in this district on July 16, 2013. As a grand jury witness, the government was responsible for making Mr. Levison's travel arrangements.
- 6. On July 11, 2013, the undersigned counsel sent Mr. Levison an email indicating that he has been served with a show cause order from this Court requiring his appearance on July 16, 2013, and a subpoena requiring his appearance on the same date before a federal grand jury. The email further advised Mr. Levison that he should contact the United States Attorney's Office as soon as possible to make his travel arrangements.

- 7. On July 13, 2013, Mr. Levison, who was no longer represented by counsel, sent government prosecutors an email indicating that he would be able to collect the data required by the pen register and provide that data to the government after 60 days (the period of the pen register order). For this service, Mr. Levison indicated that the government would have to pay him \$2000 for "developmental time and equipment" plus an additional \$1500 if the government wanted the data "more frequently" than after 60 days.
- 8. On July 13, 2013, the government responded to Mr. Levison's proposal. The prosecutors informed Mr. Levison that the pen register is a devise used to monitor ongoing email traffic on a real-time basis and providing the FBI with data after 60 days was not sufficient.

 Furthermore, prosecutors informed him that the statute authorizes the government to compensate a service provider for "reasonable expenses," and the amount he quoted did not appear to be reasonable. Mr. Levison responded by email stating that the pen register order, in his opinion, does not require real-time access (although this fact was discussed at length during the July 10 conference call). Moreover, he indicated that the cost of reissuing the "SSL certificate" (for encryption service) would be \$2000. It was unclear in his email if this \$2000 was an additional expense to be added to the \$3500 previously claimed. Mr. Levison indicated that he would try to contact the person responsible for making his travel arrangements at the United States Attorney's office on Sunday afternoon.
 - 9. On July 15, 2013, Mr. Levison spoke with the person responsible for making his travel arrangements. He was told that he was booked on a flight from Dallas, Texas, to Reagan National Airport departing that same evening. He also had a hotel reservation. Mr. Levison indicated that

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- Mr. Levison should be held in civil contempt. Civil contempt, as compared to criminal contempt under rule 42 of the Federal Rules of Criminal Procedure, is intended to coerce compliance with a court order. There are four elements to civil contempt: (1) the existence of valid order of which Lavabit LLC and Mr. Levison had actual or constructive knowledge; (2) the order was in the government's "favor"; (3) Lavabit LLC and Mr. Levison violated the terms of the order and had knowledge, or constructive knowledge, of such violation; and (4) the government suffered harm as a result. *In re Grand Jury Subpoena* (T-112), 597 F.3d 189, 202 (4th Cir. 2012).
 - 11. Here, each of these elements has been met. Lavabit LLC, through direct communication between the government and Mr. Levison, its owner and operator, has had actual knowledge of the pen register order and the subsequent June 28 order of the magistrate judge compelling compliance with that order. This Court's show cause order, which was personally served on Mr. Levison, provided further notice of the violation of those orders by Lavabit LLC. The government clearly has suffered harm in that it has lost 20 days of information as a result of non-compliance.
 - 12. Lavabit LLC may comply with the pen register order by simply allowing the FBI to install the pen register devise and provide the FBI with the encryption keys. If Lavabit LLC informs the Court it will comply with the order, the government will not seek sanctions. If, however, Mr. Levison informs the Court that Lavabit LLC will not comply, the government requests that the Court impose a fine of \$1000 per day, commencing July 17, 2013, until Lavabit LLC fully complies with the pen register order.
 - 13. To the extent that Lavabit LLC takes the position that the pen register does not

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authorize the production of the encryption keys, the government has asked the Court to authorize the seizure of that information pursuant to a warrant under Title 18, United States Code, Section 2703, thus rendering this argument moot.

14. The Court has sealed this proceeding. This pleading has also been filed under seal.
The United States will hand deliver a copy of this pleading to Mr. Levison at today's hearing.

By

Respectfully submitted,

Neil H. MacBride

United States Attorney's Office

Justin W. Williams U.S. Attorney's Building 2100 Jamieson Avenue

Alexandria, Virginia 22314 Phone: 703-299-3700 Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 51 of 83 PageID# 754 Case 1:13-ec-00297-TCB *SEALED* Document 11-13 Filed 09/20/13 Page 1 of 17 PageID# 98

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11	REDACTED
1	UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA
2	ALEXANDRIA DIVISION
3	}
4	IN THE MATTER OF THE APPLICATION OF THE UNITED 1:13 EC 297
5	STATES OF AMERICA FOR AN) ORDER AUTHORIZING THE) UNDER SEAL
6	INSTALLATION AND USE OF A) PEN REGISTER/TRAP AND TRACE) Alexandria, Virginia
7	DEVICE ON AN ELECTRONIC) July 16, 2013 MAIL ACCOUNT) 10:41 a.m.
8	
9	
10	TRANSCRIPT OF HEARING
11	BEFORE THE HONORABLE CLAUDE M. HILTON
12	UNITED STATES DISTRICT JUDGE
13	*
14	
15	
16	
17	
18	
19	APPEARANCES:
20	For the United States: James Trump, Esq. Andrew Peterson, Esq.
21	Brandon Van Grack, Esq. Michael Ben'Ary, Esq.
22	For the Respondent: Ladar Levison, Respondent
23	Court Reporter: Tracy L. Westfall, RPR, CMRS, CCR
24 25	Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

UNDER SEAL

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?

PROCEEDINGS

THE CLERK: In Re: Case No. 1:13 EC 297.

MR. TRUMP: Good morning, Judge. Jim Trump on behalf of the United States. With me is Andy Peterson, Brandon Van Grack from the United States Department of Justice, Mr. Ben'Ary behind me, and Matt Braverman, special agent for the FBI.

THE COURT: All right.

MR. LEVISON: Ladar Levison, the subject of the summons.

THE COURT: All right. Mr. Trump.

paper this morning describing the communication we've had with Lavabit, LLC, through Mr. Levison. And I think, very simply, we would like this Court to inquire of Mr. Levison whether he intends to comply with the pen register order which would require him to allow the FBI access to his server to install a device which will extract data, filter that data, and provide that data to the FBI, and to provide the FBI with the encryption keys to the extent there is encrypted information, included among within the body of information called for by the pen register order.

As the Court is aware, and as we will provide with Mr. Levison, we obtained a search warrant this morning from Your Honor for the same encryption keys. Thus, to the extent there's

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any question as to whether Mr. Levison would be required to provide these keys, it's now subject both to the pen register order and the search warrant, the seizure warrant.

That's where we stand, Your Honor. If Mr. Levison agrees to comply with the order, we would not seek any sanctions. We would ask that he be directed to forthwith make his servers available so the FBI can install that device and to extract the encryption keys.

If, however, he informs the Court he is not willing to comply with the order, we would ask the Court to impose sanctions. We suggested in our pleading a thousand dollars a day to be paid to the United States government until he complies. If he doesn't comply with that sanction, then we would be back in court seeking additional sanctions or charging additional offenses.

THE COURT: All right. Mr. Levison.

MR. LEVISON: Good morning, Your Honor. I'm not sure what order I should make these in, but I would like to request a couple of things by motion.

I'd like to move that all of the nonsensitive portions of the documents that were provided, i.e., everything except the account in question, be unsealed. I believe it's important for the industry and the people to understand what the government is requesting by demanding that I turn over these encryption keys for the entire service.

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THE COURT: All right. What do you say to that, 1 Mr. Trump? Deal with the motions before I --2 MR. TRUMP: What Mr. Levison is trying to do, Your 3 Honor, is invite industry to come in and litigate as a surrogate 4 for him the issue of whether the encryption keys are part and 5 parcel of the pen register order. And that's one of the reasons 6 we sought the search warrant, to make it clear, whether through 7 the search warrant or pen register order, he is required to 8 provide these keys. 9 We know he's been in contact with attorneys who also 10 represent industry groups and others who have litigated issues 11 like this in the WikiLeaks context and others. But we would 12 object to unsealing this matter because it's just Mr. --13 THE COURT: And they've done that in connection with 14 the issuance of a pen register? 15 MR. TRUMP: They have litigated privacy-related issues 16 in the context of process under 2703. I'm not sure -- not a pen 17 register, but with respect to 2703. 18 But we discussed this issue with Mr. Levison and his 19 counsel by conference call. We indicated that the only data 20 that the government seeks is that which is required by the pen 21 register order. That it's just the basic header to e-mail 22 traffic, sender, recipient, time, duration, that sort of thing.

If Mr. Levison wants to object to providing the keys, he can certainly object to doing that and then we can proceed

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	from there, but I don't think he's entitled to try to make this
	a public proceeding to invite others in to litigate those issues
3	on his behalf.
4	THE COURT: All right. Well, I believe that to be
5	correct. I mean, this is a criminal investigation. A pen
6	register has been ordered and is here at issue, and any motion
7	to unseal that will be denied.
8	You said you had another motion, I believe?
9	MR. LEVISON: Yeah. My issue is only with the SSL
.0	keys. So if that is litigated separately and that portion of
11	the proceeding is unsealed, I'm comfortable with that.
1.2	THE COURT: I don't understand what you're saying,
13	separate proceedings.
14	MR. LEVISON: Sorry. I have always agreed to the
15	installation of the pen register device. I have only ever
16	objected to turning over the SSL keys because that would
17	and out of my
18	administrative traffic.
19	accomm Well didn't my order already include that
20	MR. LEVISON: I do not believe so, sir.
2:	THE COURT: Did my initial order I don't recall at
23	the moment. Did my initial order recall the encrypted devices
2	with the installation of a pen register?
2	MR. TRUMP: The pen register, as issued, just required
2	all assistance, technical assistance, facilities, and

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information, to facilitate the pen register.

This morning the search warrant required --

THE COURT: Yeah, but the search warrant's a different matter now. That's not before me this morning. The only thing that's before me this morning is the pen register.

MR. TRUMP: Correct.

THE COURT: So as I understand it, my initial order ordered nothing but that the pen register be put in place.

MR. TRUMP: And all technical assistance, information, and facilities necessary to implement the pen register. And it's our position that without the encryption keys, the data from the pen register will be meaningless. So to facilitate the actual monitoring required by the pen register, the FBI also requires the encryption keys.

THE COURT: Well, that could be, but I don't know that I need -- I don't know that I need to reach that because I've issued a search warrant for that.

MR. TRUMP: Correct, Your Honor. That the -- to avoid litigating this issue, we asked the Court to enter the seizure warrant.

THE COURT: Well, what I'm saying is if he agrees that the pen register be established, and that the only thing he doesn't want to do in connection with the pen register is to give up the encryption device or code --

MR. LEVISON: I've always maintained that.

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1	THE COURT: so we've got no issue here. You're
2	ready to do that?
3	MR. LEVISON: I've been ready to do that since Agent
4	Howard spoke to me the first time.
5	THE COURT: All right. So that ends our
6	MR. TRUMP: Well, then we have to inquire of
7	Mr. Levison whether he will produce the encryption keys pursuant
8	to the search warrant that Your Honor just signed.
9	THE COURT: But I can't deal with that this morning,
10	can I?
11	MR. TRUMP: Well, it's the same issue. You could ask
12	him, Your Honor. We can serve him with the warrant and ask him
13	if he's going to comply rather than
14	MR. LEVISON: Your Honor, I've also been issued a
15	subpoena demanding those same keys, which I brought with me in
16	the event that we would have to address that subpoena.
17	THE COURT: I don't know, Mr. Trump. I don't think I
18	
19	5 September 1997 - 1997
20) I 15.
21	do and what he's not going to do because I can't take any action
22	487 1864
23	
24	remedies for that one way or another.

MR. TRUMP: Well, the original pen register order was

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followed by a compulsion order from Judge Buchanan. The compulsion order required the encryption keys to be produced.

So, yes, part of the show cause order is to require compliance both with the pen register order and the compulsion order issued by Judge Buchanan.

And that order, which was attached to the show cause order, states, "To the extent any information, facilities, or technical assistance are under the control of Lavabit are needed to provide the FBI with the encrypted data, Lavabit shall provide such information, facilities, or technical assistance forthwith."

MR. LEVISON: I would object to that statement. I don't know if I'm wording this correctly, but what was in that order to compel was a statement that was incorrect.

Agent Howard seemed to believe that I had the ability to encrypt the e-mail content stored on our servers, which is not the case. I only have the keys that govern communications into and out of the network, and those keys are used to secure the traffic for all users, not just the user in question.

So the statement in that order compelling me to decrypt stuff and Agent Howard stating that I have the ability to do that is technically false or incorrect. There was never an explicit demand that I turn over these keys.

THE COURT: I don't know what bearing that would have, would it? I mean, I don't have a problem -- Judge Buchanan

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issued an order in addition to mine, and I'm not sure I ought to 1 be enforcing Judge Buchanan's order. 2 My order, if he says that he will produce or allow the 3 installation of the pen register, and in addition I have issued 4 a search warrant for the codes that you want, which I did this 5 morning, that's been entered, it seems that this issue is over 6 as far as I'm concerned except I need to see that he allows the 7 pen register and complies with the subpoena. 8 MR. TRUMP: Correct. 9 THE COURT: If he doesn't comply -- if he doesn't 10 comply with the subpoena, then that has -- I have to address 11 that. 12 MR. TRUMP: Right. 13 THE COURT: But right now there's nothing for me to 14 address here unless he is not telling me correctly about the pen 15 register. 16 MR. TRUMP: Well, we can -- Your Honor, if we can talk 17 to Mr. Levison for five minutes, we can ask him whether he will 18 honor the warrant that you just issued. 19 MR. LEVISON: Before we do that, can I --20 THE COURT: Well, what can I do about it if he doesn't, 21 if he tells you he's not going to? You've got the right to go 22

MR. TRUMP: Well, we can't get the information without

He's the only who knows and has possession of

out and search and get it.

his assistance.

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it. We can't take it from him involuntarily.

MR. LEVISON: If I may, sir, my other --

THE COURT: Wait just a second.

You're trying to get me ahead. You're trying to get me to deal with a contempt before there's any contempt, and I have a problem with that.

MR. TRUMP: I'm trying to avoid contempt altogether, Your Honor.

THE COURT: I know you are. And I'd love for you-all to get together and do that. I don't want to deal with it either. But I don't think we can sit around and agree that there's going to be a default and I will address it before it occurs.

MR. TRUMP: I'm just trying to figure out whether there's going to be a default. We'll take care of that, Judge.

THE COURT: You can. I think the way we've got to do this -- and I'll listen to you. I'm cutting you off, I know, but I'll listen to you in a minute.

The way we have to do this, the hearing that's before me this morning on this issue of the pen register, that's been resolved, or so he's told me. I don't know whether you want to continue this one week and see if he complies with that, which I guess would be prudent to do, or a few days for him to comply with the pen register. Then we will wait and see what happens with the subpoena.

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Because as far as my pen register order is concerned, he says he's going to comply with it. So that issue's over and done with. The next issue will be whether or not he complies with the subpoena. And I don't know and I don't want to presume, and I don't want him to represent to me what he intends to do when he can very well go home and decide he's going to do something different.

When that warrant is served, we'll know what he's going to do. I think we've got -- I don't see another way to do it.

MR. TRUMP: That's fine, Your Honor. We will serve the warrant on him as soon as we conclude this hearing, and we'll find out whether he will provide the keys or not.

THE COURT: Okay. Now, did you want to say anything else?

MR. LEVISON: Well, I mean, I've always maintained that all the government needs to do is contact me and set up an appointment to install that pen register. So I don't know why there has never been any confusion about my willingness to install it. I've only ever objected to the providing of those keys which secure any sensitive information going back and forth.

But my motion, and I'm not sure if it's relevant or not because it deals more with the issue of the subpoena demanding the keys and for what will be the forthcoming search warrant, would be a continuance so that I can retain counsel to address

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that particular issue.

THE COURT: Well, I mean, there's nothing before me with that. I've issued the subpoena. Whatever happens with that, that's -- you're trying to get me to do what Mr. Trump wanted to do and to arrange this beforehand.

MR. LEVISON: Well, I don't know if I have to appear before that grand jury right now and give the keys over or face arrest. I'm not a lawyer so I don't understand the procedure.

THE COURT: I don't know either. You need to have -- it would be wise to have a lawyer.

MR. LEVISON: Okay.

THE COURT: I don't know what's going to happen. I don't know. They haven't served the warrant yet. I have no idea. Don't know what's going to happen with it. You'll just have to figure that out, and it be wise to have a lawyer to do it, I would think.

MR. LEVISON: I guess while I'm here in regards to the pen register, would it be possible to request some sort of external audit to ensure that your orders are followed to the letter in terms of the information collected and preserved?

THE COURT: No. The law provides for those things, and any other additional or extra monitoring you might want or think is appropriate will be denied, if that's what you're requesting.

MR. LEVISON: Okay. I mean, it requests that the government return to the Court records --

Tracy L. Westfall OCR-USDC/EDVA

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1	THE COURT: You need to talk to a lawyer about what the	
2	law requires for the issuance of a pen register.	
3	MR. LEVISON: They can handle that separately. That's	
4	fine.	
5	THE COURT: The law sets out what is done in that	
6	regard. Your lawyer can fill you in if you want to know.	
7	MR. LEVISON: I've always been willing to accept the	
8	device. I just have some concern about ensuring that it's used	
9	properly.	
10	THE COURT: Should we continue this to some specific	
11	date to see that he complies with the pen register?	
12	MR. TRUMP: We can, Your Honor. It's a moot issue	
13	without the encryption keys.	
14	THE COURT: Well, that is a practical matter	
15		
16	THE COURT: but I don't think it is a moot issue. I	
17	mean, you-all have got the right to go in and put on that pen	
18	register. He says that he will do it. That's all that I've	
19	ordered.	
20	Now, the other business about ordering that, Judge	
2	Buchanan made an order that he's going to have to supply what	
23	you say is the encryption codes to make the information useful.	
2	I don't know. I didn't enter that order. I have trouble making	3
2	The manufacture of the second	
2	If you're going to I don't know whether you want to	
	III	

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do something in front of Judge Buchanan or not. 1 MR. LEVISON: You see, Judge, though that I've always 2 been willing. They just didn't feel the need to set up an 3 appointment. 4 THE COURT: What do you want me to do with this case? 5 You want me to continue it? You want me to say it's moot right 6 now and just end it? 7 MR. TRUMP: No. I think we can continue it. 8 know Mr. Levison's schedule. It can be done within hours of his 9 return to Dallas. 10 THE COURT: Of course he can. You want to continue it 11 till a week from Friday? 12 MR. TRUMP: Or a week from today. 13 MR. LEVISON: I'm not available within hours of my 14 return, but I can meet with you on Thursday. 15 THE COURT: Let's continue it a week from Friday. 16 MR. TRUMP: A week from Friday. 17 THE COURT: What date's that? The --18 THE CLERK: 26th. 19 THE COURT: The 26th? 20 MR. LEVISON: Acceptable to me. 21 THE COURT: We'll continue it to the 26th, and that's 22 for determining whether or not that pen register has been 23

We can make it 10 o'clock.

installed as you request.

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            MR. LEVISON: I'll remember 10:00 instead of 10:30 this
1
2
   time.
            THE COURT: All right. Thank you.
3
            All right. Thank you-all. We'll adjourn till tomorrow
4
   morning at 9:30.
5
6
        (Proceedings concluded at 11:02 a.m.)
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REDACTED

CERTIFICATION

I certify, this 17th day of September 2013, that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my ability.

Tracy Westfall, RPR, MRS, CCR

Case 1:13-ec-00297-TCB *SEALED* Document 11-14 Filed 09/20/13 Page 1 of 2 PageID# 115

REDACTED

EXHIBIT 14

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 69 of 83 PageID# 772 Case 1:13-ec-00297-TCB *SEALED* Document 11-14 Filed 09/20/13 Page 2 of 2 PageID# 116

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE)
APPLICATION OF THE UNITED)
STATES AUTHORIZING THE USE OF)
A PEN REGISTER/TRAP AND TRACE)
DEVICE ON AN ELECTRONIC MAIL)
ACCOUNT)



Criminal No. 1:13EC297

ORDER

This matter comes before the Court on the Government's Motion that Ladar Levinson, the owner and operator of Lavabit, LLC show cause as to why Lavabit, LLC has failed to comply with the Court's Order of June 28, 2013 and why this Court should not hold Mr. Levinson and Lavabit, LLC in contempt, and Ladar Levinson's oral Motion To Unseal. For the reasons stated from the bench, it is hereby

ORDERED that Ladar Levinson's Motion To Unseal is DENIED and this matter is continued to Friday, July 26, 2013 at 10:00 a.m. for further proceedings.

Claude M. Hilton
United States District Judge

Alexandria, Virginia July /6 , 2013 Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 70 of 83 PageID# 773
Case 1:13-ec-00297-TCB *SEALED* Document 11-15 Filed 09/20/13 Page 1 of 11 PageID#

REDACTED

EXHIBIT 15

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 71 of 83 PageID# 774 Case 1:13-ec-00297-TCB *SEALED* Document 11-15 Filed 09/20/13 Page 2 of 11 PageID# 118



IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT

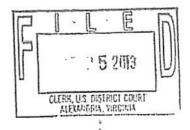
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

In re Grand Jury

FILED UNDER SEAL

No. 1:13EC297



No. 1:13SW522

No. 13-1

MOTION TO QUASH SUBPOENA AND SEARCH WARRANT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Lavabit LLC ("Lavabit") and Mr. Ladar Levinson ("Mr. Levinson") move this Court to quash the grand jury subpoena and search and seizure warrant served on them by the Federal Bureau of Investigation and the Office of the United States Attorney (collectively "Government").

BACKGROUND

Lavabit is an encrypted email service provider. As such, Lavabit's business model focuses on providing private and secure email accounts to its customers. Lavabit uses various encryption methods, including secured socket layers ("SSL"), to protect its users' privacy. Lavabit maintains an encryption

key, which may be used by authorized users decrypt data and communications from its server ("Master Key"). The Government has commanded Lavabit, by a subpoenal and a search and seizure warrant, to produce the encryption keys and SSL keys used by lavabit.com in order to access and decrypt communications and data stored in one specific email address

("Lavabit Subpoena and Warrant").

ARGUMENT

If the Government gains access to Lavabit's Master Key, it will have unlimited access to not only ("Email Account"), but all of the communications and data stored in each of Lavabit's 400,000 email accounts. None of these other users' email accounts are at issue in this matter. However, production of the Master Key will compromise the security of these users. While Lavabit is willing to cooperate with the Government regarding the Email Account, Lavabit has a duty to maintain the security for the rest of its customers' accounts. The Lavabit Subpoena and Warrant are not narrowly tailored to seek only data and communications relating to the Email Account in question. As a result, the Lavabit Subpoena and Warrant are unreasonable under the Fourth Amendment.

a. The Lavabit Subpoena and Warrant Essentially Amounts to a General Warrant.

The grand jury subpoend not only commanded Mr. Levinson to appear before this Court on July 16, 2013, but also to bring Lavabit's encryption keys. Mr. Levinson's subpoend to appear before the grand jury was withdrawn, but the government continues to seek the encryption keys. Lavabit is only seeking to quash the Court's command that Mr. Levinson provide the encryption keys.

Though the Lavabit Subpoena and Warrant superficially appears to be narrowly tailored, in reality, it operates as a general warrant by giving the Government access to every Lavabit user's communications and data.

It is not what the Lavabit Subpoena and Warrant defines as the boundaries for the search, but the *method* of providing access for the search which amounts to a general warrant.

It is exiomatic that the Fourth Amendment prohibits general warrants.

Andresen v. Maryland, 427 U.S. 463, 480 (1976). Indeed "it is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." Payton v. New York, 445 U.S. 573, 583 (1980) (footnote omitted). To avoid general warrants, the Fourth Amendment requires that "the place to be searched" and "the persons or things to be seized" be described with particularity. United States v. Moore, 775 F. Supp. 2d 882, 898 (E.D. Va. 2011) (quoting United States v. Grubbs, 547 U.S. 90, 97 (2006)).

The Fourth Amendment's particularity requirement is meant to "prevent[] the scizure of one thing under a warrant describing another." Andresen, 427

U.S. at 480. This is precisely the concern with the Lavabit Subpoena and

Warrant and, in this circumstance, the particularity requirement will not protect Lavabit. By turning over the Master Key, the Government will have the ability to search each and every "place," "person [and] thing" on Lavabit's network.

"general, exploratory rummaging" through any Lavabit user account. See id.

(quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971)) (describing the issue with general warrants "is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings"). Though the Lavabit

Subpoena and Warrant is facially limited to the Email Address, the

Government would be able to seize communications, data and information from any account once it is given the Master Key.

There is nothing other than the "discretion of the officer executing the warrant" to prevent an invasion of other Lavabit user's accounts and private emails. See id. at 492 (quoting Stanford v. Texas, 379 U.S. 476, 485 (1965)) (explaining that the purpose of the particularity requirement of the Fourth Amendment is to ensure, with regards to what is taken that, "nothing is left to the discretion of the officer executing the warrant.") (internal citation omitted). Lavabit has no assurance that any searches conducted utilizing the Master Key will be limited solely to the Email Account. See Groh v. Ramirez, 540 U.S. 551, 561-62 (2004) (citing Camara v. Municipal Court of City and County of San Prancisco, 387 U.S. 523, 532 (1967)) (noting that a particular warrant is to provide individuals with assurance "of the lawful authority of the executing officer, his need to search, and the limits of his power to search) (emphasis added). Lavabit has a duty to its customers to protect their accounts from the possibility of unlawful intrusions by third parties, including government entities.

As the Lavabit Subpoena and Warrant are currently framed they are invalid as they operate as a general warrant, allowing the Government to search individual users not subjection to this suit, without limit.

b. The Lavabit Subpoena and Warrant Seeks Information that Is Not Material to the Investigation.

Because of the breadth of Warrant and Subpoena, the Government will be given access to data and communications that are wholly unrelated to the suit. The Government, by commanding Lavabit's encryption keys, is acquiring access to 400,000 user's private accounts in order to gain information about one individual. 18 U.S.C: § 2703(d) states that a court order may be issued for information "relevant and material to an ongoing criminal investigation." However, the Government will be given unlimited access, through the Master Key, to several hundred thousand user's information, all of who are not "material" to the investigation. *Id.*

Additionally, the Government has no probable cause to gain access to the other users accounts. "The Fourth Amendment...requires that a warrant be no broader than the probable cause on which it is based." Moore, 775 F. Supp. 2d at 897 (quoting United States v. Hurwitz, 459 F.3d 463, 473 (4th Cir. 2006)). Probable cause here is based on the activities of the individual linked to the Email Address. Other Lavabit users would be severely impacted by the Government's access to the Master Key and have not been accused of wrongdoing or criminal activity in relation to this suit. Their privacy interests should not suffer because of the alleged misdeeds of another Lavabit user.

c. Compliance with Lavablt Subpoena and Warrant Would Cause an Undue Burden,

As a non-party and unwilling participant to this suit, Lavabit has already incurred legal fees and other costs in order to comply with the Court's orders. Further compliance, by turning over the Master Key and granting the Government access to its entire network, would be unduly burdensome. See 18 U.S.C. § 2703(d) (stating that "the service provider may [move to] quash or modify [an] order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.") (emphasis added).

The recent case of *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. 2703(d)* ("Twitter") addresses similar issues. 830 F. Supp. 2d 114 (E.D. Va. 2011). In that case, the Petitioners failed to allege "a personal injury cognizable by the Fourth Amendment." *Id.* at 138. However, Lavabit's circumstances are distinguishable. The Government, in pursuit of information date and communications related to the Email Address, has caused and will continue to cause injury to Lavabit. Not only has Lavabit expended a great deal of time and money in attempting to cooperate with the Government thus far, but, Lavabit will pay the ultimate price—the loss of its customers' trust and business—should the Court require that the Master Key be turned over.

Lavabit's business, which is founded on the preservation of electronic privacy, could be destroyed if it is required to produce its Master Key.

Lavabit is also a fundamentally different entity than Twitter, the business at issue in Twitter. The Twitter Terms of Service specifically allowed user information to be disseminated. Id. at 139. Indeed, the very purpose of Twitter is for users to publically post their musings and beliefs on the Internet. In contrast, Lavabit is dedicated to keeping its user's information private and secure. Additionally, the order in Twitter did not seek "content information" from Twitter users, as is being sought here. Id. The Government's request for Lavabit's Master Key gives it access to data and communications from 400,000 email secure accounts, which is much more sensitive information that at issue in the Twitter.

The Government is attempting, in complete disregard of the Fourth Amendment, to penetrate a system that was founded for the sole purpose of privacy. See Katz v. United States, 389 U.S. 347, 360 (1967) (stating that "the touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy") (internal citations omitted). For Lavabit to grant the Government unlimited access to every one of its user's accounts would be to disavow its duty to its users and the principals upon which it was founded. Lavabit's service will be rendered devoid of economic value if the Government is granted access to its secure network. The Government does not have any proper basis to request that Lavabit blindly produce its Master Key and subject all of its users to invasion of privacy.

Moreover, the Master Key itself is an encryption developed and owned by Lavabit. As such it is valuable proprietary information and Lavabit has a

reasonable expectation in protecting it. Because Lavabit has a reasonable expectation of privacy for its Master Key, the Lavabit Subpoena and Warrant violate the Fourth Amendment. See Twitter, 830 F. Supp. 2d at 141 (citing United States v. Calandra, 414 U.S. 338, 346 (1974)) (noting "The grand jury is...without power to invade a legitimate privacy interest protected by the Fourth Amendment" and that "a grand jury's subpoena...will be disallowed if it is far too sweeping in its terms to be...reasonable under the Fourth Amendment.").

CONCLUSION

For the foregoing reasons, Lavabit and Mr. Levinson respectfully move this Court to quash the search and seizure warrant and grand jury subpocna. Further, Lavabit and Mr. Levinson request that this Court direct that Lavabit does not have to produce its Master Key. Alternatively, Lavabit and Mr. Levinson request that they be given an opportunity to revoke the current encryption key and reissue a new encryption key at the Government's expense. Lastly, Lavabit and Mr. Levinson request that, if they is required to produce the Master Key, that they be reimbursed for its costs which were directly incurred in producing the Master Key, pursuant to 18 U.S.C. § 2706.

LAVABIT LLC By Counsel

Jesse R. Binnall, VSB# 79292

Bronley & Binnall, PLLC 10387 Main Street, Suite 201

Fairfax, Virginia 22030

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REDACTED

(703) 229-0335 Telephone (703) 537-0780- Facsimile jbinnall@bblawonline.com Counsel for Lavabit LLC Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 80 of 83 PageID# 783
Case 1:13-ec-00297-TCB *SEALED* Document 11-15 Filed 09/20/13 Page 11 of 11 PageID# 127

REDACTED

Certificate of Service

I certify that on this 25 day of July, 2013, this Motion to Quash Subpoena and Search Warrant and Memorandum of Law in Support was hand delivered to the person at the addresses listed below:

United States Attorney's Office Eastern District of Virginia 2100 Jamicson Avenue Alexandria, VA 22314

Jesse R. Binnal

Case 1:13-ec-00297-TCB Document 25-14 Filed 02/24/16 Page 81 of 83 PageID# 784 Case 1:13-ec-00297-TCB *SEALED* Document 11-16 Filed 09/20/13 Page 1 of 13 PageID# 128

REDACTED

EXHIBIT 16

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division



IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE
OF A PEN REGISTER/TRAP
AND TRACE DEVICE ON AN
ELECTRONIC MAIL ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

In re Grand Jury

FILED UNDER SEAL

No. 1:13EC297

No. 1:13SW522

No. 13-1

MOTION FOR UNSEALING OF SEALED COURT RECORDS AND REMOVAL OF NON-DISCLOSURE ORDER AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Lavabit, LLC ("Lavabit") and Mr. Ladar Levinson ("Mr. Levinson")

(collectively "Movants") move this Court to unseal the court records concerning the United States government's attempt to obtain certain encryption keys and lift the non-disclosure order issued to Mr. Levinson. Specifically, Movants request the unsealing of all orders and documents filed in this matter before the Court's issuance of the July 16, 2013 Sealing Order ("Sealing Order"); (2) all orders and documents filed in this matter after the issuance of the Sealing Order; (3) all grand jury subpoenas and search and seizure warrants issued before or after issuance of the Sealing Order; and (4) all documents filed in

connection with such orders or requests for such orders (collectively, the "sealed documents"). The Sealing Order is attached as Exhibit A. Movants request that all of the sealed documents be unsealed and made public as quickly as possible, with only those redactions necessary to secure information that the Court deems, after review, to be properly withheld.

BACKGROUND

Lavabit was formed in 2004 as a secure and encrypted email service provider. To ensure security, Lavabit employs multiple encryption schemes using complex access keys. Today, it provides email service to roughly 400,000 users worldwide. Lavabit's corporate philosophy is user anonymity and privacy. Lavabit employs secure socket layers ("SSL") to ensure the privacy of Lavabit's subscribers through encryption. Lavabit possesses a master encryption key to facilitate the private communications of its users.

On July 16, 2013, this Court entered an Order pursuant to 18 U.S.C. 2705(b), directing Movants to disclose all information necessary to decrypt communications sent to or from and data stored or otherwise associated with the Lavabit e-mail account production, including SSL keys (the "Lavabit Order"). The Lavabit Order is attached as Exhibit B. The Lavabit Order precludes the Movants from notifying any person of the search and seizure warrant, or the Court's Order in issuance thereof, except that Lavabit was permitted to disclose the search warrant to an attorney for legal advice.

ARGUMENT

In criminal trials there is a common law presumption of access to judicial records; like the sealed documents in the present case. Despite the government's legitimate interests, it cannot meet its burden and overcome this presumption because it has not explored reasonable alternatives.

Furthermore, the government's notice preclusion order constitutes a content-based restriction on free speech by prohibiting public discussion of an entire topic based on its subject matter.

I. THE FIRST AMENDMENT AND NON-DISCLOSURE ORDERS

The Stored Communications Act ("SCA") authorizes notice preclusion to any person of a § 2705(b) order's existence, but only if the Court has reason to believe that notification will result in (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction or tampering with evidence; (4) intimidating of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. § 2705(b)(1)-(5). Despite this statutory authority, the § 2705(b) gag order infringes upon freedom of speech under the First Amendment, and should be subjected to constitutional case law.

The most searching form of review, "strict scrutiny", is implicated when there is a content-based restriction on free speech. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 403 (1992). Such a restriction must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. Id. The Lavabit Order's non-disclosure provision is a content-based restriction that is not narrowly tailored to achieve a compelling state interest.



a. The Lavabit Order Regulates Mr. Levinson's Free Speech

The notice preclusion order at issue here limits Mr. Levinson's speech in that he is not allowed to disclose the existence of the § 2705(b) order, or the underlying investigation to any other person including any other Lavabit subscriber. This naked prohibition against disclosure can fairly be characterized as a regulation of pure speech. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001). A regulation that limits the time, place, or manner of speech is permissible if it serves a significant governmental interest and provides ample alternative channels for communication. See Cox v. New Hampshire, 312 U.S. 569, 578 (1941) (explaining that requiring a permit for parades was aimed at policing the streets rather than restraining peaceful picketing). However, a valid time, place, and manner restriction cannot be based on the content or subject matter of the speech. Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 536 (1980).

The gag order in the present case is content-based because it precludes speech on an entire topic, namely the search and seizure warrant and the underlying criminal investigation. See id. at 537 ("The First Amendment's hostility to content-based regulation extends... to prohibition of public discussion of an entire topic"). While the nondisclosure provision may be viewpoint neutral on its face, it nevertheless functions as a content-based restriction because it closes off an "entire topic" from public discourse.

It is true that the government has a compelling interest in maintaining the integrity of its criminal investigation. However, Mr.

Levinson has been unjustly restrained from contacting Lavabit subscribers who could be subjected to government surveillance if Mr. Levinson were forced to comply the Lavabit Order. Lavabit's value is embodied in its complex encryption keys, which provide its subscribers with privacy and security. Mr. Levinson has been unwilling to turn over these valuable keys because they grant access to his entire network. In order to protect Lavabit, which caters to thousands of international clients, Mr. Levinson needs some ability to voice his concerns, garner support for his cause, and take precautionary steps to ensure that Lavabit remains a truly secure network.

b. The Lavabit Order Constitutes A Prior Restraint On Speech

Besides restricting content, the § 2705(b) non-disclosure order forces a prior restraint on speech. It is well settled that an ordinance, which makes the enjoyment of Constitutional guarantees contingent upon the uncontrolled will of an official, is a prior restraint of those freedoms. Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969); Staub v. City of Baxley, 355 U.S. 313, 322 (1958). By definition, a prior restraint is an immediate and irreversible sanction because it "freezes" speech. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). In the present case, the Lavabit Order, enjoins Mr. Levinson from discussing these proceedings with any other person. The effect is an immediate freeze on speech.

The Supreme Court of the United States has interpreted the First

Amendment as providing greater protection from prior restraints. Alexander v.

United States, 509 U.S. 544 (1993). Prior restraints carry a heavy burden for

Justification, with a presumption against constitutional validity. Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1305 (1983); Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Here, the government and the Court believe that notification of the search warrant's existence will seriously jeopardize the investigation, by giving targets an opportunity to flee or continue flight from prosecution, will destroy or tamper with evidence, change patterns of behavior, or notify confederates. See Lavabit Order. However, the government's interest in the integrity of its investigation does not automatically supersede First Amendment rights. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1978) (holding the confidentiality of judicial review insufficient to justify encroachment on the freedom of speech).

In the present case, the government has a legitimate interest in tracking the account. However, if Lavabit were forced to surrender its master encryption key, the government would have access not only to this account, but also every Lavabit account. Without the ability to disclose government access to users' encrypted data, public debate about the scope and justification for this secret investigatory tool will be stifled.

Moreover, innocent Lavabit subscribers will not know that Lavabit's security devices have been compromised. Therefore the § 2705(b) non-disclosure order should be lifted to provide Mr. Levinson the ability to ensure the value and integrity of Lavabit for his other subscribers.

II. THE LAW SUPPORTS THE RIGHT OF PUBLIC ACCESS TO THE SEALED DOCUMENTS

Despite any statutory authority, the Lavabit Order and all related documents were filed under seal. The sealing of judicial records imposes a limit on the public's right of access, which derives from two sources, the First Amendment and the common law. Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 575 (4th Cir. 2004); See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (press and public have a First Amendment right of attend a criminal trial); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 2 (1986) (right of access to preliminary hearing and transcript).

a. The Common Law Right Of Access Attaches To The Lavabit Order

For a right of access to a document to exist under either the First Amendment or the common law, the document must be a "judicial record." Baltimore Sun Co. v. Goetz, 886 F.2d 60, 63–64 (4th Cir. 1989). Although the Fourth Circuit Court of Appeals has never formally defined "judicial record", it held that § 2703(d) orders and subsequent orders issued by the court are judicial records because they are judicially created. In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d), 707 F.3d 283, 290 (4th Cir. 2013) ("Twitter"). The § 2705(b) order in the present case was issued pursuant to § 2703(d) and can properly be defined as a judicial record. Although the Fourth Circuit has held there is no First Amendment right to access § 2703(d) orders, it held that the common law presumption of access attaches to such documents. Twitter, 707 F.3d at 291.

The underlying investigation in *Twitter*, involved a § 2703(d) order, which directed Twitter to provide personal information, account information, records, financial data, direct messages to and from email addresses, and Internet Protocol addresses for eight of its subscribers. *In re: § 2703(d) Order*, 787 F.

Supp. 2d 430, 435 (E.D. Va. 2011). Citing the importance of investigatory secreey and integrity, the court in that case denied the petitioners Motion to Unseal, finding no First Amendment or common law right to access. *Id.* at 443.

Unlike Twitter, whose users publish comments on a public forum, subscribers use Lavabit for its encrypted features, which ensure security and privacy. In Twitter there was no threat that any user would be subject to surveillance other than the eight users of interest to the government. However, a primary concern in this case is that the Lavabit Order provides the government with access to every Lavabit account.

Although the secrecy of SCA investigations is a compelling government interest, the hundreds of thousands of Lavabit subscribers that would be compromised by the Lavabit Order are not the subjects of any justified government investigation. Therefore access to these private accounts should not be treated as a simple corollary to an order requesting information on one criminal subject. The public should have access to these orders because their effect constitutes a seriously concerning expansion of grand jury subpoena power.

To overcome the common law presumption of access, a court must find that there is a "significant countervailing interest" in support of scaling that

outweighs the public's interest in openness. Twitter, 707 F.3d at 293. Under the common law, the decision to seal or grant access to warrant papers is within the discretion of the judicial officer who issued the warrant. Media General Operations, Inc. v. Buchanan, 417 F.3d 424, 429 (4th Cir. 2005). If a judicial officer determines that full public access is not appropriate, she must consider alternatives to sealing, which may include granting some public access or releasing a redacted version of the documents. Id.

In Twitter the court explained that because the magistrate judge individually considered the documents, and redacted and unsealed certain documents, he satisfied the procedural requirements for sealing. Twitter, 707 F.3d at 294. However, in the present case, there is no evidence that alternatives were considered, that documents were redacted, or that any documents were unsealed. Once the presumption or access attaches, a court cannot seal documents or records indefinitely unless the government demonstrates that some significant interest heavily outweighs the public interest in openness. Wash. Post, 386 F.3d at 575. Despite the government's concerns, there are reasonable alternatives to an absolute seal that must be explored in order to ensure the integrity of this investigation.

b. There Is No Statutory Authority To Scal The § 2705(d) Documents

There are no provisions in the SCA that mention the sealing of orders or other documents. In contrast, the Pen/Trap Statute authorizes electronic surveillance and directs that pen/trap orders be sealed "until otherwise

and

ordered by the court". 18 U.S.C. §§ 3121-27. Similarly, the Wiretap Act, another surveillance statute, expressly directs that applications and orders granted under its provisions be sealed. 18 U.S.C. § 2518(8)(b). The SCA's failure to provide for sealing is not a congressional oversight. Rather, Congress has specifically provided for sealing provisions when it desired. Where Congress includes particular language in one section of a statute but omits it in another, it is generally assumed that Congress acts intentionally. Keene *Corp. v. United States, 508 U.S. 200, 208 (1993). Therefore, there is no statutory basis for sealing an application or order under the SCA that would overcome the common law right to access.

c. Frivacy Concerns Demand A Common Law Public Right Of Access To The Sealed Documents

the ensuing mass surveillance scandal have sparked an intense national and international debate about government surveillance, privacy rights and other traditional freedoms. It is concerning that suppressing Mr. Levinson's speech and pushing its subpoena power to the limits, the government's actions may be viewed as accomplishing another unfounded secret infringement on personal privacy. A major concern is that this could cause people worldwide to abandon American service providers in favor of foreign businesses because the United States cannot be trusted to regard privacy. It is in the best interests of the Movant's and the government that the documents in this matter not be

¹ See Dan Roberts, NSA Snooping: Obama Under Pressure as Senator Denounces 'Act of Treason', The Guardian, June 10, 2013, http://www.guardian.co.uk/world/2013/jun/10/obama-pressured-explain-nea-surveillance.

shrouded in secrecy and used to further unjustified surveillance activities and to suppress public debate.

CONCLUSION

For the foregoing reasons, Lavabit respectfully moves this Court to unseal the court records concerning the United States government's attempt to obtain certain encryption keys and lift the non-disclosure order issued on Mr. · Levinson. Alternatively, Lavabit requests that all of the scaled documents be redacted to secure only the information that the Court deems, after review, to be properly withheld.

> LAVABIT LLC By Counsel

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REDACTED

Certificate of Service

I certify that on this Zday of July, 2013, this Motion For Unsealing Of Sealed Court Records And Removal Of Non-Disclosure Order And Memorandum Of Law In Support was hand delivered to the person at the addresses listed below:

Jesse R. Birinall

United States Attorney's Office Eastern District of Virginia 2100 Jamieson Avenue Alexandria, VA 22314

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EXHIBIT 17

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IN THE UNITED STATES DISTRICT COURT

REDACTED

EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE OF
A PEN REGISTER/TRAP AND TRACE
DEVICE ON AN ELECTRONIC MAIL
ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

IN RE GRAND JURY SUBPOENA

NO. 1:13 EC 297

EII EU

NO. 1:13 SW 522

NO. 13-1

UNDER SEAL

RESPONSE OF THE UNITED STATES IN OPPOSITION TO LAVABIT'S MOTION TO QUASH SUBPOENA AND MOTION TO FOR UNSEALING OF SEALED COURT RECORDS

INTRODUCTION

This Court has ordered Lavabit, LLC to provide the government with the technical assistance necessary to implement and use a pen register and trap and trace device ("pen-trap device"). A full month after that order, and after an order to compel compliance, a grand jury subpoena, and a search warrant for that technical assistance, Lavabit has still not complied. Repeated efforts to seek that technical assistance from Lavabit's owner have failed. While the government continues to work toward a mutually acceptable solution, at present there does not appear to be a way to implement this

Court's order, as well as to comply with the subpoena and search warrant, without requiring Lavabit to disclose an encryption key to the government. This Court's orders, search warrant, and the grand jury subpoena all compel that result, and they are all lawful. Accordingly, Lavabit's motion to quash the search warrant and subpoena should be denied.

Lavabit and its owner have also moved to unseal all records in this matter and lift the order issued by the Court preventing them from disclosing a search warrant issued in this case. Because public discussion of these records would alert the target and jeopardize an active criminal investigation, the government's compelling interest in maintaining the secrecy and integrity of that investigation outweighs any public right of access to, or interest in publicly discussing, those records, and this motion should also be denied.

TECHNICAL BACKGROUND

Pen registers and trap and trace devices

To investigate Internet communications, Congress has permitted law enforcement to employ two surveillance techniques—the pen register and the trap and trace device—that permit law enforcement to learn information about an individual's communications.

See 18 U.S.C. §§ 3121-27 ("Pen-Trap Act"). These techniques, collectively known as a "pen-trap," permit law enforcement to learn facts about e-mails and other communications as they are sent—but not to obtain their content. See, e.g., United States v. Forrester, 512 F.3d 500, 509-13 (9th Cir. 2008) (upholding government's use of a pentrap that "enabled the government to learn the to/from addresses of Alba's e-mail

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messages, the IP addresses of the websites that Alba visited and the total volume of information sent to or from his account").

The Pen-Trap Act "unambiguously authorize[s] the use of pen registers and trap and trace devices on e-mail accounts." In Matter of Application of U.S. For an Order Authorizing the Installation & Use of a Pen Register & a Trap & Trace Device on E-Mail Account, 416 F. Supp. 2d 13, 14 (D.D.C. 2006) (Hogan, J.) ("Hogan Order"). It authorizes both the installation of a "device," meaning, a separate computer attached to the provider's network, and also a "process," meaning, a software program run on the provider. Id. at 16; 18 U.S.C. § 3127.

Secure Socket Layer (SSL) or Transport Layer Security (TLS) Encryption

Encrypting communications sent across the Internet is a way to ensure that only the sender and receiver of a communication can read it. Among the most common methods of encrypting Web and e-mail traffic is Secure Socket Layer (SSL), which is also called Transport Layer Security (TLS) encryption. "The Secure Socket Layer ('SSL') is one method for providing some security for Internet communications. SSL provides security by establishing a secure channel for communications between a web browser and the web server; that is, SSL ensures that the messages passed between the client web browser and the web server are encrypted." *Disney Enterprises, Inc. v. Rea,* No. 1:12-CV-687, 2013 WL 1619686 *9 (E.D. Va. Apr. 11, 2013); *see also Stambler v. RSA Sec., Inc.,* 2003 WL 22749855 *2-3 (D. Del. 2003) (describing SSL's technical operation).

As with most forms of encryption, SSL relies on the use of large numbers known as "keys." Keys are parameters used to encrypt or decrypt data. Specifically, SSL

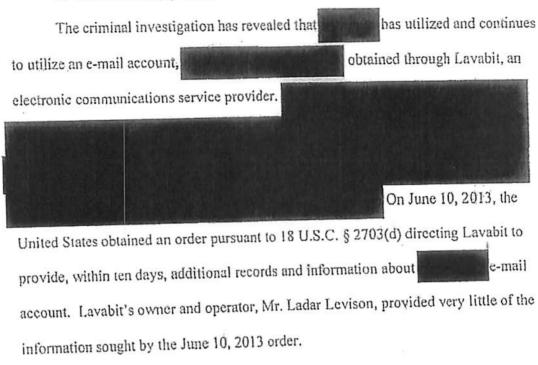
encryption employs public-key cryptography, in which both the sender and receiver each have two mathematically linked keys: a "public" key and a "private" key. "Public" keys are published, but "private" keys are not. Sending an encrypted message to someone requires knowing his or her public key; decrypting that message requires knowing his or her private key.

When Internet traffic is encrypted with SSL, capturing non-content information on e-mail communication from a pen-trap device is possible only after the traffic is decrypted. Because Internet communications closely intermingle content with non-content, pen-trap devices by necessity scan network traffic but exclude from any report to law enforcement officers all information relating to the subject line and body of the communication. See 18 U.S.C. § 3127; Hogan Order, 416 F. Supp. 2d at 17-18. A pentrap device, by definition, cannot expose to law enforcement officers the content of any communication. See id.

FACTS

The information at issue before the court is relevant to an ongoing criminal investigation of

A. Section 2703(d) Order



B. Pen-Trap Order

On June 28, 2013, the Honorable Theresa C. Buchanan entered an Order pursuant to 18 U.S.C. § 3123 authorizing the installation and use of pen-trap device on all electronic communications being sent from or sent to the electronic mail account ("Pen-Trap Order"). The Pen-Trap Order authorized the government to capture all (i) "non-content" dialing, routing, addressing, and signaling information sent to or from and (ii) to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data on the all for a period of sixty days. Judge Buchanan further ordered Lavabit to furnish agents of the Federal Bureau of Investigation ("FBI"), "forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen-trap

device." Pen-Trap Order at 2. The government was also ordered to "take reasonable steps to ensure that the monitoring equipment is not used to capture any" content-related information. *Id.* Pursuant to 18 U.S.C. § 3123(d), Judge Buchanan ordered that the Pen-Trap Order and accompanying application be sealed. *Id.*

Later on June 28, 2013, two FBI Special Agents served a copy of the Pen-Trap

Order on Mr. Levison. Mr. Levison informed the FBI Special Agents that emails were
encrypted as they were transmitted to and from the Lavabit server as well as when they
were stored on the Lavabit server. In addition, decryption keys would be necessary to
access any e-mails. Mr. Levison did not provide the keys to the Agents in that meeting.
In an email to Mr. Levison on July 6, 2013, a FBI Special Agent re-affirmed the nature of
the information requested in the pen-trap order. In a response on the same day, Levison
claimed "we don't record this data".

C. Compliance Order

Mr. Levison did not comply with the Pen-Trap Order. Accordingly, in the evening of June 28, 2013, the government obtained an Order Compelling Compliance Forthwith from U.S. Magistrate Judge Theresa C. Buchanan ("Compliance Order"). The Compliance Order directed Lavabit to comply with the Pen-Trap Order and to "provide the Federal Bureau of Investigation with unencrypted data pursuant to the Order." Lavabit was further ordered to provide "any information, facilities, or technical assistance are under the control of Lavabit [that] are needed to provide the FBI with the unencrypted data." Compliance Order at 2. The Compliance Order indicated that failing to comply would subject Lavabit to any penalty in the power of the court, "including the possibility of criminal contempt of Court." *Id.*

D. Order to Show Cause

Mr. Levison did not comply with the Compliance Order. On July 9, 2013, this Court ordered Mr. Levison to appear on July 16, 2013, to show cause why Lavabit has failed to comply with the Pen-Trap Order and Compliance Order.

The following day, on July 10, 2013, the United States Attorney's Office arranged a conference call involving the United States Attorney's Office, the FBI, Mr. Levison and Mr. Levison's attorney at the time, Marcia Hofmann. During this call, the parties discussed implementing the pen-trap device in light of the encryption in place on the target e-mail account. The FBI explained, and Mr. Levison appeared to agree, that to install the pen-trap device and to obtain the unencrypted data stream necessary for the device's operation the FBI would require (i) access to Lavabit's server and (ii) encryption keys.

E. Grand Jury Subpoena

On July 11, 2013, the United States Attorney's Office issued a grand jury subpoena for Mr. Levison to testify in front of the grand jury on July 16, 2013. The subpoena instructed Mr. Levison to bring to the grand jury his encryption keys and any other information necessary to accomplish the installation and use of the pen-trap device pursuant to the Pen-Trap Order. The FBI attempted to serve the subpoena on Mr. Levison at his residence. After knocking on his door, the FBI Special Agents witnessed Mr. Levison exit his apartment from a back door, get in his car, and drive away. Later in the evening, the FBI successfully served Mr. Levison with the subpoena.

¹ The grand jury subpoena was subsequently sealed on July 16, 2013.

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On July 13, 2013, Mr. Levison sent an e-mail to Assistant United States Attorney

stating, in part:

In light of the conference call on July 10th and after subsequently reviewing the requirements of the June 28th order I now believe it would be possible to capture the required data ourselves and provide it to the FBI. Specifically the information we'd collect is the login and subsequent logout date and time, the IP address used to connect to the subject email account and the following non-content headers (if present) from any future emails sent or received using the subject account. The headers I currently plan to collect are: To, Ce, From, Date, Reply-To, Sender, Received, Return-Path, Apparently-To and Alternate-Recipient. Note that additional header fields could be captured if provided in advance of my implementation effort.

52,000 in compensation would be required to cover the cost of the development time and equipment necessary to implement my solution. The data would then be collected manually and provided at the conclusion of the 60 day period required by the Order. I may be able to provide the collected data intermittently during the collection period but only as my schedule allows. If the FBI would like to receive the collected information more frequently I would require an additional \$1,500 in compensation. The additional money would be needed to cover the costs associated with automating the log collection from different servers and uploading it to an an FBI server via "sep" on a daily basis. The money would also cover the cost of adding the process to our automated monitoring system so that I would notified automatically if any problems appeared.

The c-mail again confirmed that Lavabit is capable of providing the means for the FBI to install the pen-trap device and obtain the requested information in an unencrypted form.

AUSA replied to Mr. Levison's e-mail that same day, explaining that the proposal was inadequate because, among other things, it did not provide for real-time transmission of results, and it was not clear that Mr. Levison's request for money constituted the "reasonable expenses" authorized by the statute.

F. Search Warrant & 2705(b) Non-Disclosure Order

On July 16, 2013, this Court issued a search warrant to Lavabit for (i) "[a]ll information necessary to decrypt communications sent to or from the Lavabit e-mail account including encryption keys and SSL keys" and (ii)

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"[a]II information necessary to decrypt data stored in or otherwise associated with the Lavabit account "Pursuant to 18 U.S.C. § 2705(b), the Court ordered Lavabit to not disclose the existence of the search warrant upon determining that "there is reason to believe that notification of the existence of the . . . warrant will seriously jeopardize the investigation, including by giving target an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates." July 16, 2013 Order ("Non-Disclosure Order") at 1.

G. Rule 49 Sealing Order

The search warrant and accompanying materials were further sealed by the Court on July 16, 2013, pursuant to a Local Rule 49(B) ("Rule 49 Order"). In the Rule 49 Order, the Court found that "revealing the material sought to be sealed would jeopardize an ongoing criminal investigation." The sealing order was further justified by the Court's consideration of "available alternatives that are less drastic than sealing, and finding none would suffice to protect the government's legitimate interest in concluding the investigation; and having found that this legitimate government interest outweighs at this time any interest in the disclosure of the material." Rule 49 Order at 1.

H. Show Cause Hearing

At the Show Cause Hearing on July 16, 2013, Mr. Levison made an oral motion to unseal the proceedings and related filings. The government objected since unsealing the proceedings would jeopardize the ongoing criminal investigation of the Court denied Mr. Levison's motion. Mr. Levison subsequently indicated to the Court that he would permit the FBI to place a pen-trap device on his server. The government requested that the Court further order Mr. Levison to provide his SSL keys since placing

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a pen-trap device on Lavabit's server would only provide encrypted information that would not yield the information required under the Pen-Trap Order. The government noted that Lavabit was also required to provide the SSL keys pursuant to the search warrant and grand jury subpoena. The Court determined that the government's request for the SSL keys was premature given that Mr. Levison had offered to place the pen-trap device on his server and the Court's order for a show cause hearing was only based on the failure to comply with the Pen-Trap Order. Accordingly, the Court scheduled a hearing for July 26, 2013, to determine whether Lavabit was in compliance with the Pen-Trap Order after a pen-trap device was installed.

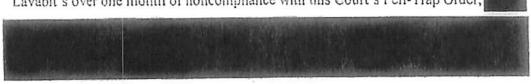
I, Motion to Unscal and Lift Non-Disclosure Order

On July 25, 2013, Mr. Levison filed two motions—a Motion for Unsealing of Sealed Court Records ("Motion to Unseal") and a Motion to Quash Subpoena and Search Warrant ("Motion to Quash"). In the motions, Mr. Levison confirms that providing the SSL keys to the government would provide the data required under the Pen-Trap Order in an unencrypted form. Nevertheless, he refuses to provide the SSL keys. In order to provide the government with sufficient time to respond, the hearing was rescheduled for August 1, 2013.

On a later date, and after discussions with Mr. Levison, the FBI installed a pentrap device on Lavabit's Internet service provider, which would capture the same information as if a pen-trap device was installed on Lavabit's server. Based on the government's ongoing investigation, it is clear that due to Lavabit's encryption services the pen-trap device is failing to capture data related to all of the e-mails sent to and from the account as well as other information required under the Pen-Trap Order. During

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Lavabit's over one month of noncompliance with this Court's Pen-Trap Order,



ARGUMENT

- THE SEARCH WARRANT AND THE GRAND JURY SUBPOENA ARE Ĩ. LAWUL AND REQUIRE LAVABIT TO PRODUCE THE SSL KEYS
 - The search warrant and grand jury subpoena are valid because they A. merely re-state Lavabit's pre-existing legal duty, imposed by the Pen-Trap Order, to produce information necessary to accomplish installation of the pen-trap device.

The motion of Lavabit and Mr. Levison (collectively "Lavabit") to quash both the grand jury subpoena and the search warrant should be denied because the subpoena and warrant merely re-state and clarify Lavabit's obligation under the Pen-Trap Act to provide that same information. In total, four separate legal obligations currently compel Lavabit to produce the SSL keys:

- 1. The Pen-Trap Order pursuant to the Pen Register and Trap and Trace Device Act (18 U.S.C. §§ 3121-27);
- The Compliance Order compelling compliance forthwith with the Pen-Trap Order;
- The July 16, 2013, grand jury subpoena; and
- 4. The July 16, 2013, search warrant, issued by this Court under the Electronic Communications Privacy Act ("ECPA").

The Pen-Trap Act authorizes courts to order providers such as Lavabit to disclose "information" that is "necessary" to accomplish the implementation or use of a pen-trap. See 18 U.S.C. §§ 3123(b)(2); 3124(a); 3124(b). Judge Buchanan, acting under that authority, specifically required in the Pen-Trap Order that: "IT IS FURTHER

ORDERED, pursuant to 18 U.S.C. § 3123(b)(2), that Lavabit shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device unobtrusively and with minimum interference." Pen-Trap Order at 2.

In this case, the SSL keys are "information... necessary to accomplish the installation and use of the [pen-trap]" because all other options for installing the pen-trap have failed. In a typical case, a provider is capable of implementing a pen-trap by using its own software or device, or by using a technical solution provided by the investigating agency; when such a solution is possible, a provider need not disclose its key. E.g., In re Application of the U.S. for an Order Authorizing the Use of a Pen Register and Trap On [XXX] Internet Serv. Account/User Name [xxxxxxxx@xxx.com], 396 F. Supp. 2d 45, 49

(D. Mass. 2005) (suggesting language in a pen-trap order "to impose upon the internet service providers the necessity of making sure that they configure their software in such a manner as to disclose only that which has been authorized"). In this case, given Lavabit's use of SSL encryption and Lavabit's lack of a software solution to implement the pen-trap on behalf the government, neither the government nor Mr. Levison have been able to identify such a solution.

Because the search warrant and grand jury subpoena require nothing that the Pen-Trap Act does not already require, they are not unreasonably burdensome. Moreover, a court's constitutional authority to require a telecommunications provider to assist the government in implementing a pen-trap device is well-established. See United States v. New York Tel. Co., 434 U.S. 159, 168-69 (1977) (in a pre-Pen-Trap Act case, holding that district court had the authority to order a phone company to assist in the installation of a

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pen-trap, and "no claim is made that it was in any way inconsistent with the Fourth Amendment.").

- B. Lavabit's motion to quash the search warrant must be denied because there is no statutory authority for such motions, and the search warrant is lawful in any event.
 - Lavabit lacks authority to move to suppress a search warrant.

Lavabit lacks authority to ask this Court to "quash" a search warrant before it is executed. The search warrant was issued under Title II of ECPA, 18 U.S.C. §§ 2701-2712. ECPA allows providers such as Lavabit to move to quash *court orders*, but does not create an equivalent procedure to move to quash search warrants. 18 U.S.C. § 2703(d). The lack of a corresponding motion to quash or modify a search warrant means that there is no statutory authority for such motions. *See* 18 U.S.C. § 2708 ("[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter."); *cf. In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 830 F. Supp. 2d 114, 128-29 (E.D. Va. 2011) (holding that the lack of a specific provision in ECPA permitting users to move to quash court orders requires "the Court [to] infer that Congress deliberately declined to permit [such] challenges.").

The search warrant complies with the Fourth Amendment and is not general.

The Fourth Amendment requires that a search warrant "particularly describe[e] the place to be searched, and the persons or things to be seized." U.S. Const. Am. IV.

This "particularity requirement is fulfilled when the warrant identifies the items to be seized by their relation to designated crimes and when the description of the items leaves

nothing to the discretion of the officer executing the warrant." United States v. Williams, 592 F.3d 511, 519 (4th Cir. 2010).

The July 16, 2013, search warrant's specification easily meets this standard, and therefore is not impermissibly general. It calls for only:

a. All information necessary to decrypt communications sent to or from the Lavabit e-mail account including encryption keys and SSL keys;

 All information necessary to decrypt data stored in or otherwise associated with the Lavabit account

That specification leaves nothing to discretion; it calls for encryption and SSL keys and nothing else.

Acknowledging this specificity, Lavabit nonetheless argues that the warrant "operates as a general warrant by giving the Government access to every Lavabit user's communications and data." Mot. to Quash at 3. To the contrary, the warrant does not grant the government the legal authority to access any Lavabit user's communications or data. After Lavabit produces its keys to the government, Federal statutes, such as the Wiretap Act and the Pen-Trap Act, will continue to limit sharply the government's authority to collect any data on any Lavabit user—except for the one Lavabit user whose account is currently the subject of the Pen-Trap Order. See 18 U.S.C. § 2511(1) (punishing as a felony the unauthorized interception of communications); § 3121 (criminalizing the use of pen-trap devices without a court order). It cannot be that a search warrant is "general" merely because it gives the government a tool that, if abused contrary to law, could constitute a general search. Compelling the owner of an apartment building to unlock the building's front door so that agents can search one apartment is not

a "general search" of the entire apartment building—even if the building owner imagines that undisciplined agents will illegally kick down the doors to apartments not described in the warrant.

C. Layabit's motion to quash the subpoena must be denied because compliance would not be unreasonable or oppressive

A grand jury subpoena "may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates," but the court "may quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(1) & (2); see In re Grand Jury, John Doe No. G.J.2005-2, 478 F.3d 581, 585 (4th Cir. 2007) (recognizing courts may quash subpoenas that are "abusive or harassing").²

Lavabit argues the subpoena should be quashed because it "grant[s] the Government unlimited access to every one of its user's accounts." Mot. to Quash at 7. As explained above, the subpoena does no such thing: It merely reaffirms Lavabit's existing obligation to provide information necessary to implement this Court's Pen-Trap Order on a single Lavabit customer's e-mail account. The Pen-Trap Order further restricts the government's access by preventing the government from collecting the content of that Lavabit customer's e-mail communications.

Lavabit also argues that it will lose customers' trust and business if it they learn that Lavabit provided the SSL keys to the government. But Lavabit finds itself in the position of having to produce those keys only because, more than a month after the Pen-Trap Order, Lavabit has failed to assist the government to implement the pen-trap device.

Layabit cites 18 U.S.C. § 2703(d) as authority for its motion to quash, but that section by its terms only permits motions to quash court orders issued under that same section.

Any resulting loss of customer "trust" is not an "unreasonable" burden if Lavabit's customers trusted that Lavabit would refuse to comply with lawful court orders. All providers are statutorily required to assist the government in the implementation of pentraps, see 18 U.S.C. § 3124(a), (b), and requiring providers to comply with that statute is neither "unreasonable" nor "oppressive." In any event, Lavabit's privacy policy tells its customers that "Lavabit will not release any information related to an individual user unless legally compelled to do so." See http://lavabit.com/privacy_policy.html (emphasis added).

Finally, once court-ordered surveillance is complete, Lavabit will be free to change its SSL keys. Vendors sell new SSL certificates for approximately \$100. See, e.g., GoDaddy LLC, SSL Certificates, https://www.godaddy.com/ssl/ssl-certificates.aspx. Moreover, Lavabit is entitled to compensation "for such reasonable expenses incurred in providing" assistance in implementing a pen-trap device. 18 U.S.C. § 3124(c).

II. THE NON-DISCLOSURE ORDER IS CONSISTENT WITH THE FIRST AMENDMENT BECAUSE IT IS NARROWLY TAILORED TO SERVE WHAT ALL PARTIES AGREE IS A COMPELLING GOVERNMENT INTEREST

Lavabit has asked the Court to unseal all of the records sealed by this Court's

Order to Seal, and to lift the Court's Order dated July 16, 2013, directing Lavabit not to

disclose the existence of the search warrant the Court signed that day ("Non-Disclosure

Order"). Motion for Unsealing of Sealed Court Records and Removal of Non
Disclosure Order ("Mot. to Unseal") at 1-2. Lavabit, however, has not identified (and

cannot) any compelling reason sufficient to overcome what even Lavabit concedes is the

government's compelling interest in maintaining the secrecy and integrity of its active

investigation. Moreover, the restrictions are narrowly tailored to restrict

Lavabit from discussing only a limited set of information disclosed to them as part of this investigation. Because there is no reason to jeopardize the criminal investigation, this motion must be denied.

A. The Non-Disclosure Order survives even strict scrutiny review by imposing necessary but limited secrecy obligations on Lavabit

The United States does not concede that strict scrutiny must be applied in reviewing the Non-Disclosure Order. There is no need to decide this issue, however, because the Non-Disclosure Order is narrowly tailored to advance a compelling government interest, and therefore easily satisfies strict scrutiny.

The Government has a compelling interest in protecting the integrity of on-going criminal investigations. Virginia Dep't of State Police v. Wash. Post, 386 F.3d 567, 579 (4th Cir. 2004) ("We note initially our complete agreement with the general principle that a compelling governmental interest exists in protecting the integrity of an ongoing law enforcement investigation"); Branzburg v. Hayes, 408 U.S. 665, 700 (1972) ("requirements ... that a State's interest must be 'compelling' ...are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen"). Indeed, it is "obvious and unarguable that no government interest is more compelling than the security of the Nation." Halg v. Agee, 453 U.S. 280, 307 (1981) (internal quotation marks omitted); see also Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business"). Likewise, here, the United States clearly has a compelling interest in ensuring that the target of lawful surveillance is not aware that he is being monitored.

United States v. Aguilar, 515 U.S. 593, 606 (1995) (holding that a statute prohibiting disclosure of a wiretap was permissible under the First Amendment, in part because "[w]e think the Government's interest is quite sufficient to justify the construction of the statute as written, without any artificial narrowing because of First Amendment concerns"). As the Non-Disclosure Order makes clear, publicizing "the existence of the [search] warrant will seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates."

Lavabit acknowledges that "the government has a compelling interest in maintaining the integrity of its criminal investigation of ". Mot. to Unseal at 4; id. at 6 ("the government has a legitimate interest in tracking" account); id. at 8 ("the secreey of [Stored Communications Act] investigations is a compelling government interest"). In spite of this recognition, Lavabit states it intends to disclose the search warrant and order should the Court grant the Motion to Unseal. Id. at 5 ("Mr. Levinson needs some ability to voice his concerns [and] garner support for his cause"); id. at 6. Disclosure of electronic surveillance process before the electronic surveillance has finished, would be unprecedented and defeat the very purpose of the surveillance. Such disclosure would ensure that would learn of the monitoring of e-mail account and take action to frustrate the legitimate monitoring of that account.

The Non-Disclosure Order is narrowly tailored to serve the government's compelling interest of protecting the integrity of its investigation. The scope of information that Lavabit may not disclose could hardly be more narrowly drawn: "the

existence of the attached search warrant" and the Non-Disclosure Order itself. Restrictions on a party's disclosure of information obtained through participation in confidential proceedings stand on a different and firmer constitutional footing from restrictions on the disclosure of information obtained by independent means. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (order prohibiting disclosure of information learned through judicial proceeding "is not the kind of classic prior restraint that requires exacting First Amendment scrutiny"); Butterworth v. Smith, 494 U.S. 624, 632 (1990) (distinguishing between a witness' "right to divulge information of which he was in possession before he testified before the grand jury" with "information which he may have obtained as a result of his participation in the proceedings of the grand jury"); see also Hoffman-Pugh v. Keenan, 338 F.3d 1136, 1140 (10th Cir. 2003) (finding prohibition on disclosing information learned through grand jury process, as opposed to information person already knew, does not violate First Amendment). In Rhinehart, the Court found that "control over [disclosure of] the discovered information does not raise the same specter of government censorship that such control might suggest in other situations," 467 U.S. at 32.

Further, the Non-Disclosure Order is temporary. The nondisclosure obligation will last only so long as necessary to protect the government's ongoing investigation.

B. The Order neither forecloses discussion of an "entire topic" nor constitutes an unconstitutional prior restraint on speech

The limitation imposed here does not close off from discussion an "entire topic," as articulated in *Consolidated Edison*. Mot. to Unseal at 4. At issue in that case was the constitutionality of a state commission's order prohibiting a regulated utility from including inserts in monthly bills that discussed *any* controversial issue of public policy,

such as nuclear power. Consolidated Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 532 (1980). The Non-Disclosure Order, by contrast, precludes a single individual, Mr. Levison, from discussing a narrow set of information he did not know before this proceeding commenced, in order to protect the integrity of an ongoing criminal investigation. Cf. Doe v. Mukasey, 549 F.3d 861, 876 (2d Cir. 2009) ("although the nondisclosure requirement is triggered by the content of a category of information, that category, consisting of the fact of receipt of [a National Security Letter] and some related details, is far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions."). Mr. Levison may still discuss everything he could discuss before the Non-Disclosure Order was issued.

Lavabit's argument that the Non-Disclosure Order, and by extension all § 2705(b) orders, are unconstitutional prior restraints is likewise unavailing. Mot. To Unseal at 5-6. As argued above, the Non-Disclosure Order is narrowly tailored to serve compelling government interests, and satisfies strict scrutiny. See supra, Part II.A. Regardless, the Non-Disclosure Order does not fit within the two general categories of prior restraint that can run afoul of the First Amendment: licensing regimes in which an individual's right to speak is conditioned upon prior approval from the government, see City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988), and injunctions restraining certain speech and related activities, such as publishing defamatory or scandalous articles, showing obscene movies, and distributing leaflets, see Alexander v. United States, 509 U.S. 544, 550 (1993). A prior restraint denies a person the ability to express viewpoints or ideas they could have possessed without any government involvement. Section 2705(b) orders, by contrast, restrict a recipient's ability to disclose limited

information that the recipient only learned from the government's need to effectuate a legitimate, judicially sanctioned form of monitoring. Such a narrow limitation on information acquired only by virtue of an official investigation does not raise the same concerns as other injunctions on speech. *Cf. Rhinehart*, 467 U.S. at 32, *Doe v. Mukasey*, 549 F.3d at 877 ("[t]he non-disclosure requirement" imposed by the national security letter statute "is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny").

- III. NO VALID BASIS EXISTS TO UNSEAL DOCUMENTS THAT, IF MADE PUBLIC PRE-MATURELY, WOULD JEOPARDIZE AN ON-GOING CRIMINAL INVESTIGATION
 - A. Any common law right of access is outweighed by the need to protect the integrity of the investigation.

Lavabit asserts that the common law right of access necessitates reversing this

Court's decision to seal the search warrant and supporting documents. Mot. to Unseal at

7-10. The presumption of public access to judicial records, however, is "qualified," Balt.

Sun Co. v. Goetz, 886 F.2d 60, 65 (4th Cir. 1989), and rebuttable upon a showing that the

"public's right of access is outweighed by competing interests," In re Application of the

U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d), 707 F.3d 283, 290 (4th Cir.

2013) ("Twitter"). In addition to considering substantive interests, a judge must also

consider procedural alternatives to sealing judicial records. Twitter, 707 F.3d at 294.

"Adherence to this procedure serves to ensure that the decision to seal materials will not
be made lightly and that it will be subject to meaningful appellate review." Va. Dep't of

State Police v. Wash. Post, 386 F.3d 567, 576 (4th Cir. 2004). This standard is met easily
here.

"[T]he common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment." Twitter, 707 F.3d at 290 (internal quotation marks omitted). With respect to the substantive equities at stake, the United States' interest in maintaining the secrecy of a criminal investigation to prevent the target of the surveillance from being alerted and altering behavior to thwart the surveillance clearly outweighs any public interest in learning about specific acts of surveillance. Id. at 294 (rejecting common law right of access because, inter alia, the sealed documents "set forth sensitive non-public facts, including the identity of targets and witnesses in an ongoing criminal investigation"). "Because secreey is necessary for the proper functioning of the criminal investigation" prior to indictment, "openness will frustrate the government's operations." Id. at 292. Lavabit concedes that ensuring "the secrecy of [Stored Communications Act] investigations," like this, "is a compelling government interest." Mot. to Unseal at 8 (emphasis added). Lavabit does not, however, identify any compelling interests to the contrary. Far from presenting "a seriously concerning expansion of grand jury subpoena power," as Lavabit's contents, id., a judge issued the Pen-Trap Order, which did not authorize monitoring of any Lavabit e-mail account other than

In addition, the Court satisfied the procedural prong. It "considered the available alternatives that are less drastic than sealing, and [found] none would suffice to protect the government's legitimate interest in concluding the investigation." Rule 49 Order.

The Fourth Circuit's decision in *Twitter* is instructive. That case arose from the Wikileaks investigation of Army Pfc. Bradley Manning. Specifically, the government obtained an order pursuant to 18 U.S.C. § 2703(d) directing Twitter to disclose electronic

communications and account and usage information pertaining to three subscribers. When apprised of this, the subscribers asserted that a common law right of access required unscaling records related to the § 2703(d) order. The Fourth Circuit rejected this claim, finding that the public's interest in the Wikileaks investigation and the government's electronic surveillance of internet activities did not outweigh "the Government's interests in maintaining the secrecy of its investigation, preventing potential suspects from being tipped off, or altering behavior to thwart the Government's ongoing investigation." 707 F.3d at 293. "The mere fact that a case is high profile in nature," the Fourth Circuit observed, "does not necessarily justify public access." Id. at 294. Though Twitter involved a § 2703(d) order, rather than a § 2705(b) order, the Court indicated this is a distinction without a difference. Id. at 294 (acknowledging that the concerns about unsealing records "accord" with § 2705(b)). Given the similarities between Twitter and the instant case—most notably the compelling need to protect otherwise confidential information from public disclosure and the national attention to the matter-there is no compelling rationale currently before the Court necessitating finding that a common law right of access exists here.

B. Courts have inherent authority to seal ECPA process

Lavabit asserts that this Court must unseal the Non-Disclosure Order because 18 U.S.C. § 2705(b) does not explicitly reference the sealing of non-disclosure orders issued pursuant to that section. Mot. to Unseal at 9-10. As an initial matter, the Court has inherent authority to seal documents before it. In re Knight Pub. Co., 743 F.2d 231, 235 (4th Cir. 1984) ("[t]he trial court has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing

interests"); see also Media General Operations, Inc. v. Buchanan, 417 F3d, 424, 430 (4th Cir. 2005); United States v. U.S. Dist. Court, 407 U.S. 297, 321 (1972) ("a warrant application involves no public or adversary proceedings: it is an exparte request before a magistrate or judge."). In addition, the Court here exercised its authority to seal pursuant to Local Rule 49(B), the validity of which Lavabit does not contest.

Even if the Court did not have this authority, Lavabit's reading of § 2705(b) must be rejected, because it would gut the essential function of non-disclosure orders and thereby disregard Congress' clear intent in passing § 2705. The Section allows courts to delay notification pursuant to § 2705(a) or issue a non-disclosure order pursuant to § 2705(b) upon finding that disclosure would risk enumerated harms, namely danger to a person's life or safety, flight from prosecution, destruction of evidence, intimidation of witnesses, or seriously jeopardizing an investigation. 18 U.S.C. §§ 2705(a)(2)(A)-(E), (b)(1)-(5). It would make no sense for Congress to purposefully authorize courts to limit disclosure of sensitive information while simultaneously intending to allow the same information to be publicly accessible in an unsealed court document.

Finally, the implications Lavabit attempts to draw from the mandatory sealing requirements of 18 U.S.C. §§ 2518(8)(b) and 3123(a)(3)(B) are mistaken. While Lavabit characterizes those statutes as granting courts the authority to seal Wiretap Act and pentrap orders, courts already had that authority. Those statutes have another effect: they removed discretion from courts by requiring that courts seal Wiretap Act orders and pentrap orders. See 18 U.S.C. § 2518(8)(b) ("Applications made and orders granted under this chapter shall be sealed by the judge") (emphasis added); Id. § 3123(a)(3)(B) ("The record maintained under subparagraph (A) shall be provided ex parte and under seal to

the court") (emphasis added). Congress' decision to leave that discretion in place in other situations does not mean that Congress believed that only Wiretap Act and pen-trap orders may be sealed.

C. Supposed privacy concerns do not compel a common law right of access to the sealed documents.

Lavabit's brief ends with an argument that privacy interests require a common law right of access. Mot. to Unseal at 10-11. Lavabit, however, offers no legal basis for this Court to adopt such a novel argument, nor do the putative policy considerations. Lavabit references outweigh the government's compelling interest in preserving the secrecy of its ongoing criminal investigation. Indeed, the most compelling interest currently before the Court is ensuring that the Court's orders requiring that Mr. Levison and Lavabit comply with legitimate monitoring be implemented forthwith and without additional delay, evasion, or resistance by Mr. Levison and Lavabit.

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CONCLUSION

For the foregoing reasons, Lavabit's motions should be denied. Furthermore, the Court should enforce the Pen-Trap Order, Compliance Order, search warrant, and grand jury subpoena by imposing sanctions until Lavabit complies.

Respectfully Submitted,

NEIL H. MACBRIDE

By:

Assistant United States Attorney United States Attorney's Office 2100 Jamieson Ave.

Alexandria, VA 22314

703-299-3700

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2013, I e-mailed a copy of the foregoing document to Lavabit's Counsel of Record:

Jesse R. Binnall Bronley & Binnall, PLLC 10387 Main Street, Suite 201 Fairfax, VA 22030



Assistant United States Attorney United States Attorney's Office 2100 Jamieson Ave. Alexandria, VA 22314

703-299-3700

EXHIBIT 18

REDACTED 1 UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA 2 ALEXANDRIA DIVISION 3 4 NO. 1:13 EC 297 IN THE MATTER OF THE APPLICATION OF THE UNITED 5 STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND 6 TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT 7 NO. 1:13 SW 522 IN THE MATTER OF THE SEARCH 8 AND SEIZURE OF INFORMATION ASSOCIATED MITH 9 IS STORED AND CONTROLLED AT 10 PREMISES CONTROLLED BY LAVABIT, LLC 11 NO. 13-1 IN RE GRAND JURY SUBPOENA 12 UNDER SEAL 13 Alexandria, Virginia 14 August 1, 2013 10:00 a.m. 15 16 TRANSCRIPT OF HEARING 17 BEFORE THE HONORABLE CLAUDE M. HILTON 18 UNITED STATES DISTRICT JUDGE 19 20 APPEARANCES: 21 James Trump, Esq. For the United States: Michael Ben'Ary, Esq. 22 Josh Goldfoot, Esq. 23 Jesse R. Binnall, Esq. For the Respondent: 24 Tracy L. Westfall, RPR, CMRS, CCR Court Reporter: Proceedings reported by machine shorthand, transcript produced 25 by computer-aided transcription.

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PROCEEDINGS

THE CLERK: In re: Case Nos. 1:13 EC 297, 1:13 SW 522, and Grand Jury No. 13-1.

MR. TRUMP: Good morning. Jim Trump on behalf of the United States.

THE COURT: Good morning.

MR. BINNALL: Good morning, Your Honor. Jesse Binnall on behalf of Lavabit and Mr. Levison.

THE COURT: All right.

MR. BINNALL: May it please the Court. We're before the Court today on two separate motions, a motion to quash the requirement of Lavabit to produce its encryption keys and the motion to unseal and lift the nondisclosure requirements of Mr. Levison.

Your Honor, the motion to quash in this arises because the privacy of users is at -- of Lavabit's users are at stake. We're not simply speaking of the target of this investigation. We're talking about over 400,000 individuals and entities that are users of Lavabit who use this service because they believe their communications are secure.

By handing over the keys, the encryption keys in this case, they necessarily become less secure. In this case it is true that the face of the warrant itself does limit the documents or -- and communications to be viewed and the specific metadata to be viewed to the target of the case,

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However, there is a lack of any sort of check or balance in order to ensure that the -- that the encrypted data of other Lavabit users remain secure. The encryption in this case doesn't protect only content. It protects lcgin data and the other -- some of the other metadata involved in this case.

We believe that this is not the least restrictive means in order to provide the government the data that they are looking for. Specifically --

THE COURT: You have two different encryption codes, one for the logins and the messages that are transmitted. You have another code that encrypts the content of the messages, right?

MR. BINNALL: Your Honor, I believe that that is true.

From my understanding of the way that this works is that there is one SSL key. That SSL key is what is issue in this case, and that SSL key specifically protects the communication, the over -- the breadth of the communication itself from the user's actual computer to the server to make sure that the user is communicating with exactly who the user intends to be communicating with, the server.

And that's one of the things that SSL does. It ensures that you're talking to the right person via e-mail and there's not a so-called man in the middle who's there to take that message away.

THE COURT: Does that key also contain the code of the

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message and interpret the message as well?

MR. BINNALL: My understanding is that it does, Your Honor, but because that's not my technical expertise, I'm not going to represent to the Court anything on that one way or another. But my understanding is there is one general key here that is at issue.

THE COURT: Well, why would you set up such? I mean, a telephone, you've got telephone numbers and --

MR. BINNALL: Correct.

THE COURT: -- those can be traced very easily without any look at the content of the message that's there. You-all could have set up something the same way.

MR. BINNALL: We could have, Your Honor. Actually, if you're to --

THE COURT: So if anybody's -- you're blaming the government for something that's overbroad, but it seems to me that your client is the one that set up the system that's designed not to protect that information, because you know that there needs to be access to calls that go back and forth to one person or another. And to say you can't do that just because you've set up a system that everybody has to -- has to be unencrypted, if there's such a word, that doesn't seem to me to be a very persuasive argument.

MR. BINNALL: I understand the Court's point, and this is the way that I understand why it's done that way.

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There's different security aspects involved for people who want to protect their privacy, and there certainly is the actual content of the message themselves. That's certainly what I would concede is the highest security interest.

But there's also the security interest to make sure that they're communicating with who you want to be communicating That is equally of a concern for privacy issues because that is, at the end of the day, one of the things that secures the content of the message.

In this case it is true that most Internet service providers do log, is what they call it, a lot of the metadata that the government wants in this case without that necessarily being encrypted, things such as who something is going to, who it's going from, the time it's being sent, the IP address from which it is being sent.

Lavabit code is not something that you buy off the It is code that was custom made. It was custom made in order to secure privacy to the largest extent possible and to be the most secure way possible for multiple people to communicate, and so it has chosen specifically not to log that information.

Now, that is actually information that my client has offered to start logging with the particular user in this case. It is, however, something that is quite burdensome on him. is something that would be custom code that would take between 20 to 40 hours for him to be able to produce. We believe that

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is a better alternative than turning over the encryption key which can be used to get the data for all Lavabit users.

I hope that addresses the Court's concern kind of with regard to the metadata and why it is not more -- why Lavabit hasn't created an encryption system that may honestly be more within the mainstream, but this is a provider that specifically was started in order to have to protect privacy interests more than the average Internet service provider.

but I think the government is -- government's clearly entitled to the information that they're seeking, and just because you-all have set up a system that makes that difficult, that doesn't in any way lessen the government's right to receive that information just as they would from any telephone company or any other e-mail source that could provide it easily. Whether it's -- in other words, the difficulty or the ease in obtaining the information doesn't have anything to do with whether or not the government's lawfully entitled to the information.

MR. BINNALL: It is -- and we don't disagree that the government is entitled to the information. We actually --

THE COURT: Well, how are we going to get it? I'm going to have to deny your motion to quash. It's just not overbroad. The government's asking for a very narrow, specific bit of information, and it's information that they're entitled to.

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Now, how are we going to work out that they get it?

MR. BINNALL: Your Honor, what I would still say is the best method for them to get it is, first of all, there be some way for there to be some sort of accountability other than just relying on the government to say we're not going to go outside the scope of the warrant.

This is nothing that is, of course, personal against the government and the, you know, very professional law enforcement officers involved in this case. But quite simply, the way the Constitution is set up, it's set up in a way to ensure that there's some sort of checks and balances and accountability.

THE COURT: What checks and balances need to be set up?

MR. BINNALL: Well --

THE COURT: Suggest something to me.

MR. BINNALL: I think that the least restrictive means possible here is that the government essentially pay the reasonable expenses, meaning in this case my client's extensive labor costs to be capped at a reasonable amount.

THE COURT: Has the government ever done that in one of these pen register cases?

MR. BINNALL: Not that I've found, Your Honor.

THE COURT: I don't think so. I've never known of one.

MR. BINNALL: And Your Honor's certainly seen more of these than I have.

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1	THE COURT: So would it be reasonable to start now with				
2	your client?				
3	MR. BINNALL: I think everyone would agree that this is				
4	an unusual case. And that this case, in order to protect the				
5	privacy of 400,000-plus other users, some sort of relatively				
6	small manner in which to create a log system for this one user				
7	to give the government the metadata that they're looking for is				
8	the least restrictive mean here, and we can do that in a way				
9	that doesn't compromise the security keys.				
10	This is actually a way that my client				
11	THE COURT: You want to do it in a way that the				
1.2	government has to trust you				
13	MR. BINNALL: Yes, Your Honor.				
14	THE COURT: to come up with the right data.				
15	MR. BINNALL: That's correct, Your Honor.				
16	THE COURT: And you won't trust the government. So why				
17	would the government trust you?				
18	MR. BINNALL: Your Honor, because that's what the basis				
19	of Fourth Amendment law says is more acceptable, is that the				
20	government is the entity that you really need the checks and				
21	balances on.				

Now, my --

THE COURT: I don't know that the Fourth Amendment says that. This is a criminal investigation.

MR. BINNALL: That is absolutely correct.

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THE COURT: A criminal investigation, and I don't know that the Fourth Amendment says that the person being investigated here is entitled to more leeway and more rights than the government is. I don't know.

MR. BINNALL: There certainly is a balance of power there. I, of course, am not here to represent the interest of I'm here specifically looking over my client who has sensitive data --

THE COURT: I understand. I'm trying to think of working out something. I'm not sure you're suggesting anything to me other than either you do it and the government has to trust you to give them whatever you want to give them or you have to trust the government that they're not going to go into your other files.

Is there some other route?

MR. BINNALL: I would suggest that the government -
I'm sorry -- that the Court can craft an order to say that we

can -- that we should work in concert with each other in order

to come up with this coding system that gives the government all

of the metadata that we can give them through this logging

procedure that we can install in the code, and then using that

as a least restrictive means to see if that can get the

government the information that they're looking for on the

specific account.

THE COURT: How long does it take to install that?

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MR. BINNALL: I mean, 20, 40 hours. So I would suggest that would probably be a week to a week and a half, Your Honor, although I would be willing to talk to my client to see if we can get that expedited.

THE COURT: To install it?

MR. BINNALL: Well, to write the code.

THE COURT: You don't have a code right at the moment. You would have to write something?

MR. BINNALL: That's correct. And the portion of the government's brief that talks about the money that he was looking for is that reasonable expense for him basically to do nothing for that period of time but write code to install in order to take the data from and put it in a way that the government will see the logged metadata involved.

THE COURT: All right. I think I understand your position. I don't think you need to argue this motion to unseal. This is a grand jury matter and part of an ongoing criminal investigation, and any motion to unseal will be denied.

MR. BINNALL: If I could have the Court's attention just on one issue of the nondisclosure provision of this. And I understand the Court's position on this, but there is other privileged communications if the Court would be so generous as to allow me very briefly to address that issue?

There's other First Amendment considerations at issue with not necessarily just the sealing of this, but what

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Mr. Levison can disclose and to whom he may disclose it.

The First Amendment, of course, doesn't just cover speech and assembly, but the right to petition for a redress of grievances. We're talking about a statute here, and, honestly, a statute that is very much in the public eye and involving issues that are currently pending before Congress.

I think the way that the order currently is written, besides being --

THE COURT: You're talking about the sealing order?

MR. BINNALL: I'm talking about the sealing order and the order that prohibits Mr. Levison from disclosing any information.

Now, we don't want to disclose -- we have no intention of disclosing the target, but we would like to be able to, for instance, talk to members of the legislature and their staffs about rewriting this in a way that's --

THE COURT: No. This is an ongoing criminal investigation, and there's no leeway to disclose any information about it.

MR. BINNALL: And so at that point it will remain with only Mr. Levison and his lawyers, and we'll keep it at that.

THE COURT: Let me hear from Mr. Trump.

Is there some way we can work this out or something that I can do with an order that will help this or what?

MR. TRUMP: I don't believe so, Your Honor, because

Tracy L. Westfall CCR-USDC/EDVA

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you've already articulated the reason why is that anything done by Mr. Levison in terms of writing code or whatever, we have to trust Mr. Levison that we have gotten the information that we were entitled to get since June 28th. He's had every opportunity to propose solutions to come up with ways to address his concerns and he simply hasn't.

We can assure the Court that the way that this would operate, while the metadata stream would be captured by a device, the device does not download, does not store, no one looks at it. It filters everything, and at the back end of the filter, we get what we're required to get under the order.

So there's no agents looking through the 400,000 other bits of information, customers, whatever. No one looks at that, no one stores it, no one has access to it. All we're going to look at and all we're going to keep is what is called for under the pen register order, and that's all we're asking this Court to do.

THE COURT: All right. Well, I think that's reasonable. So what is this before me for this morning other than this motion to quash and unseal which I've ruled on?

MR. TRUMP: The only thing is to order the production of the encryption keys, which just --

THE COURT: Hasn't that already been done? There's a subpoena for that.

MR. TRUMP: There's a search warrant for it, the motion

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REDACTED to quash. 1 Search warrant. THE COURT: 2 Excuse me? MR. TRUMP: 3 THE COURT: I said subpoena, but I meant search 4 5 warrant. MR. TRUMP: We issued both, Your Honor, but Your Honor 6 authorized the seizure of that information. And we would ask 7 the Court to enforce that by directing Mr. Levison to turn over 8 the encryption keys. 9 If counsel represents that that will occur, we can not 10 waste any more of the Court's time. If he represents that 11 Mr. Levison will not turn over the encryption keys, then we have 12 to discuss what remedial action this Court can take to require 13 compliance with that order. 14 THE COURT: Well, I will order the production of 15 those -- of those keys. 16 Is that simply Mr. Levison or is that the corporation 17 as well? 18 MR. TRUMP: That's one and the same, Your Honor. 19 Just so the record is clear. We understand from 20 Mr. Levison that the encryption keys were purchased 21 commercially. They're not somehow custom crafted by 22 Mr. Levison. He buys them from a vendor and then they're 23 installed. 24 THE COURT: Well, I will order that. If you will 25

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present an order to me, I'll enter it later on.

MR. TRUMP: Thank you.

MR. BINNALL: Thank you, Your Honor.

As far as time frame goes, my client did ask me if the Court did order this if the Court could give him approximately five days in order to actually physically get the encryption keys here. And so it will be -- or just some sort of reasonable time frame to get the encryption keys here and in the government's hands. He did ask me to ask exactly the manner that those are to be turned over.

MR. TRUMP: Your Honor, we understand that this can be done almost instantaneously, as soon as Mr. Levison makes contact with an agent in Dallas, and we would ask that he be given 24 hours or less to comply. This has been going on for a month.

THE COURT: Yeah, I don't think 24 -- 24 hours would be reasonable. Doesn't have to do it in the next few minutes, but I would think something like this, it's not anything he has to amass or get together. It's just a matter of sending something.

So I think 24 hours would be reasonable.

MR. BINNALL: Yes. Thank you, Your Honor.

THE COURT: All right. And you'll present me an order?

MR. TRUMP: We will, Your Honor. Thank you.

THE COURT: All right. Thank you-all, and we'll

adjourn until -- or stand in recess till 3 o'clock. Well,

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1	recess till 9 o'clock tomorrow morning.
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3	(Proceedings concluded at 10:25 a.m.)
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9	CERTIFICATION
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11	I certify, this 19th day of August 2013, that the
12	foregoing is a correct transcript from the record of proceedings
13	in the above-entitled matter to the best of my ability.
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16	Tracy Westfall RPR CMRS, CCR
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EXHIBIT 19

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division UNDER SEAL IN THE MATTER OF THE APPLICATION OF THE UNITED ALIG 2013 No. 1:13EC297 STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN CLERK, U.S. DISTRICT COURT ALEXANDRIA, VIRGINIA REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION No. 1:13SW522 ASSOCIATED WITH THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT LLC No. 13-1 In re Grand Jury

ORDER DENYING MOTIONS

This matter comes before the Court on the motions of Lavabit LLC and Ladar Levinson, its owner and operator, to (1) quash the grand jury subpoena and search and seizure warrant compelling Lavabit LLC to provide the government with encryption keys to facilitate the installation and use of a pen register and trap and trace device, and (2) unseal court records and remove a non-disclosure order relating to these proceedings. For the reasons stated from the bench, and as set forth in the government's response to the motions, it is hereby

ORDERED that the motion to quash and motion to unseal are DENIED;

It is further ORDERED that, by 5 p.m. CDT on August 2, 2013, Lavabit LLC and Ladar Levison shall provide the government with the encryption keys and any other "information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap

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device" as required by the July 16, 2013 seizure warrant and the June 28, 2013 pen register order.

It is further ORDERED that this Order shall remain under seal until further order of this

Court.

Claude M. Hilton
United States District Judge

Alexandria, Virginia August _/_, 2013 Case 1:13-ec-00297-TCB Document 25-15 Filed 02/24/16 Page 58 of 65 PageID# 844 Case 1:13-ec-00297-TCB *SEALED* Document 11-20 Filed 09/20/13 Page 1 of 13 PageID# 188

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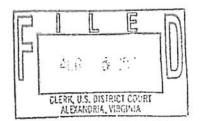
EXHIBIT 20

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

N THE MATTER OF THE)	UNDER SEAL
APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT)	No. 1:13EC297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH)	No. 1:13SW522
STORED AT PREMISES CONTROLLED BY LAVABIT LLC)	
In re Grand Jury)	No. 13-1



MOTION FOR SANCTIONS

The United States, through the undersigned counsel, pursuant to Title 18, United States

Code, Section 401, hereby moves for the issuance of an order imposing sanctions on Lavabit

LLC and Ladar Levison, its owner and operator, for Lavabit's failure to comply with this Court's

order entered August 1, 2013. In support of this motion, the United States represents:

- 1. At the hearing on August 1, 2013, this Court directed Lavabit to provide the government with the encryption keys necessary for the operation of a pen register/trap and trace order entered June 28, 2013. Lavabit was ordered to provide those keys by 5 p.m. on August 2, 2013. See Order Denying Motions entered August 2, 2013.
- At approximately 1:30 p.m. CDT on August 2, 2013, Mr. Levison gave the FBI a
 printout of what he represented to be the encryption keys needed to operate the pen register. This

printout, in what appears to be 4-point type, consists of 11 pages of largely illegible characters.

See Attachment A. (The attachment was created by scanning the document provided by Mr.

Levison; the original document was described by the Dallas FBI agents as slightly clearer than the scanned copy but nevertheless illegible.) Moreover, each of the five encryption keys contains 512 individual characters — or a total of 2560 characters. To make use of these keys, the FBI would have to manually input all 2560 characters, and one incorrect keystroke in this laborious process would render the FBI collection system incapable of collecting decrypted data.

- 3. At approximately 3:30 p.m. EDT (2:30 p.m. CDT), the undersigned AUSA contacted counsel for Lavabit LLC and Mr. Levison and informed him that the hard copy format for receipt of the encryption keys was unworkable and that the government would need the keys produced in electronic format. Counsel responded by email at 6:50 p.m. EDT stating that Mr. Levison "thinks" he can have an electronic version of the keys produced by Monday, August 5, 2013.
- 4. On August 4, 2013, the undersigned AUSA sent an e-mail to counsel for Lavabit LLC and Mr. Levison stating that we expect to receive an electronic version of the encryption keys by 10:00 a.m. CDT on Monday, August 5, 2013. The e-mail indicated that we expect the keys to be produced in PEM format, an industry standard file format for digitally representing SSL keys. See Attachment B. The e-mail further stated that the preferred medium for receipt of these keys would be a CD hand-delivered to the Dallas office of the FBI (with which Mr. Levison is familiar). The undersigned AUSA informed counsel for Lavabit LLC and Mr. Levison that the government would seek an order imposing sanctions if we did not receive the encryption keys in electronic format by Monday morning.

- 5. The government did not receive the electronic keys as requested. The undersigned AUSA spoke with counsel for Lavabit and Mr. Levison at approximately 10:00 a.m. this morning, and he stated that Mr. Levison might be able to produce the keys in electronic format by 5 p.m. on August 5, 2013. The undersigned AUSA told counsel that was not acceptable given that it should take Mr. Levison 5 to 10 minutes to put the keys onto a CD in PEM format. The undersigned AUSA told counsel that if there was some reason why it cannot be accomplished sooner, to let him know by 11:00 a.m. this morning. The government has not received an answer from counsel.
 - 6. The government therefore moves the Court to impose sanctions on Lavabit LLC and Mr. Levison in the amount of \$5000 per day beginning at noon (EDT) on August 5, 2013, and continuing each day in the same amount until Lavabit LLC and Mr. Levison comply with this Court's orders.
 - 7. As noted, Attachment A to this motion is a copy of the printout provided by Mr.

 Levison on August 2, 2013. Attachment B is a more detailed explanation of how these encryption keys can be given to the FBI in an electronic format. Attachment C to this motion is a proposed order.

Case 1:13-ec-00297-TCB Document 25-15 Filed 02/24/16 Page 62 of 65 PageID# 848 Case 1:13-ec-00297-TCB *SEALED* Document 11-20 Filed 09/20/13 Page 5 of 13 PageID# 192

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 A copy of this motion, filed under seal, was delivered by email to counsel for Lavabit LLC on August 5, 2013.

Respectfully submitted,

Neil H. MacBride United States Attorney

Ву:

United States Attorney' Office
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314

Phone: 703-299-3700

Case 1:13-ec-00297-TCB Document 25-15 Filed 02/24/16 Page 63 of 65 PageID# 849
Case 1:13-ec-00297-TCB *SEALED* Document 11-20 Filed 09/20/13 Page 6 of 13 PageID# 193

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Attachment A

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Case 1:13-ec-00297-TCB Document 25-16 Filed 02/24/16 Page 5 of 16 PageID# 856

Case 1:13-ec-00297-TCB *SEALED* Document 11-20 Filed 09/20/13 Page 13 of 13 PageID# 200



ATTACHMENT B

Lavabit uses 2048-bit Secure Socket Layer (SSL) certificates purchased from GoDaddy to encrypt communication between users and its server. SSL encryption employs public-key cryptography, in which both the sender and receiver each have two mathematically linked keys: a "publie" key and a "private" key. "Public" keys are published, but "private" keys are not. In this circumstance, a Lavabit customer uses Lavabit's published public key to initiate an encrypted email session with Lavabit over the internet. Lavabit's servers then decrypt this traffic using their private key. The only way to decrypt this traffic is through the usage of this private key. A SSL certificate is another name for a published public key.

To obtain a SSL certificate from GoDaddy, a user needs to first generate a 2048-bit private key on his/her computer. Depending on the operating system and web server used, there are multiple ways to generate a private key. One of the more popular methods is to use a freely available command-line tool called OpenSSL. This generation also creates a certificate signing request file. The user sends this file to the SSL generation authority (e.g., GoDaddy) and GoDaddy then sends back the SSL certificate. The private key is not sent to GoDaddy and should be retained by the user. This private key is stored on the user's web server to permit decryption of internet traffic, as described above. The FBI's collection system that will be installed to implement the PR/TT also requires the private key to be stored to decrypt Lavabit email and internet traffic. This decrypted traffic will then be filtered for the target email address specified in the PR/TT order.

Depending on how exactly the private key was first generated by the user, it itself may be encrypted and protected by a password supplied by the user. This additional level of security is useful if, for example, a backup copy of the private key is stored on a CD. If that CD was lost or stolen, the private key would not be compromised because a password would be required to access it. However, the user that generated the private key would have supplied it at generation time and would thus have knowledge of it. The OpenSSL tool described above is capable of decrypting encrypted private keys and converting the keys to a non-encrypted format with a simple, well-documented command. The FBI's collection system and most web servers requires the key to be stored in a non-encrypted format.

A 2048-bit key is composed of 512 characters. The standard practice of exchanging private SSL keys between entities is to use some electronic medium (e.g., CD or secure internet exchange). SSL keys are rarely, if ever, exchanged verbally or through print medium due to their long length and possibility of human error. Mr. Levison has previously stated that Lavabit actually uses five separate public/private key pairs, one for each type of mail protocol used by Lavabit.

PEM format is an industry-standard file format for digitally representing SSL keys. PEM files can easily be created using the OpenSSL tool described above. The preferred medium for receiving these keys would be on a CD.

Case 1:13-ec-00297-TCB Document 25-16 Filed 02/24/16 Page 6 of 16 PageID# 857
Case 1:13-ec-00297-TCB *SEALED* Document 11-21 Filed 09/20/13 Page 1 of 3 PageID# 201

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EXHIBIT 21

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Case 1:13-ec-00297-TCB *SEALED* Document 11-21 Filed 09/20/13 Page 2 of 3 PageID# 202

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNDER SEAL IN THE MATTER OF THE APPLICATION OF THE UNITED No. 1:13EC297 STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION No. 1:13SW522 ASSOCIATED WITH THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT LLC No. 13-1 In re Grand Jury



ORDER

This matter comes before the Court on the motion of the government for sanctions for failure to comply with this Court's order entered August 2, 2013. For the reasons stated in the government's motion, and pursuant to Title 18, United States Code, Section 401, it is hereby

ORDERED that the motion for sanctions is granted;

It is further ORDERED that, if the encryption keys necessary to implement the pen register and trap and trace device are not provided to the FBI in PEM or equivalent electronic format by noon (CDT) on August 5, 2013, a fine of five thousand dollars (\$5,000.00) shall be imposed on Lavabit LLC and Mr. Levison;

It is further ORDERED that, if the encryption keys necessary to implement the pen register and trap and trace device are not provided to the FBI in PEM or equivalent electronic Case 1:13-ec-00297-TCB Document 25-16 Filed 02/24/16 Page 8 of 16 PageID# 859
Case 1:13-ec-00297-TCB *SEALED* Document 11-21 Filed 09/20/13 Page 3 of 3 PageID# 203

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format by noon (CDT) each day thereafter beginning August 6, 2013, a fine of five thousand dollars (\$5,000.00) shall be imposed on Lavabit LLC and Mr. Levison for each day of non-compliance; and

It is further ORDERED that the government's motion for sanctions and this Order shall remain under seal until further order of this Court.

Claude M. Hilton
United States District Judge

Alexandria, Virginia August <u>5</u>, 2013 Case 1:13-ec-00297-TCB Document 25-16 Filed 02/24/16 Page 9 of 16 PageID# 860 Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 1 of 5 PageID# 204

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EXHIBIT 22

Case 1:13-ec-00297-TCB Document 25-16 Filed 02/24/16 Page 10 of 16 PageID# 861

Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 2 of 5 PageID#

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE
OF A PEN REGISTER/TRAP
AND TRACE DEVICE ON AN
ELECTRONIC MAIL ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC FILED UNDER SEAL

No. 1:13EC297

No. 1:13SW522

NOTICE OF APPEAL

Notice is hereby given that Lavabit LLC ("Lavabit") and Mr. Ladar Levison ("Mr. Levison") in the above named case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Orders of this Court entered on August 1, 2013 and August 5, 2013.

Jesse R. Binnall, VSB# 79292

Bronley & Binnall, PLLC

10387 Main Street, Suite 201

Fairfax, Virginia 22030

(703) 229-0335 - Telephone

(703) 537-0780 - Facsimile

jbinnall@bblawonline.com Counsel for Lavabit LLC LAVABIT LLC LADAR LEVISON By Counsel Case 1:13-ec-00297-TCB Document 25-16 Filed 02/24/16 Page 11 of 16 PageID# 862

Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 3 of 5 PageID# 206

REDACTED

Certificate of Service

I certify that on this 15th day of August, 2013, this Notice of Appeal was emailed and mailed to the person at the addresses listed below:

United States Attorney's Office Eastern District of Virginia 2100 Jamieson Avenue Alexandria, VA 22314

Jesse R. Binnal

Case 1:13-ec-00297-TCB Document 25-16 Filed 02/24/16 Page 12 of 16 PageID# 863

Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 4 of 5 PageID# 207

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

FILED UNDER SEAL

LAVABIT LLC LADAR LEVISON By Counsel

In re Grand Jury

No. 13-1

NOTICE OF APPEAL

Notice is hereby given that Lavabit LLC ("Lavabit") and Mr. Ladar Levison ("Mr. Levison") in the above named case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Orders of this Court entered on August 1, 2013 and August 5, 2013.

Jesse R. Binnall, VSB# 79292

Bronley & Binnall, PLLC

10387 Main Street, Suite 201

Fairfax, Virginia 22030

(703) 229-0335 - Telephone

(703) 537-0780 - Facsimile

jbinnall@bblawonline.com

Counsel for Lavabit LLC

Case 1:13-ec-00297-TCB *SEALED* Document 11-22 Filed 09/20/13 Page 5 of 5 PageID#

REDACTED

Certificate of Service

I certify that on this 15th day of August, 2013, this Notice of Appeal was emailed and mailed to the person at the addresses listed below:

United States Attorney's Office Eastern District of Virginia 2100 Jamieson Avenue Alexandria, VA 22314

Jesse R. Binnall

Case 1:13-ec-00297-TCB *SEALED* Document 11-23 Filed 09/20/13 Page 1 of 3 PageID#

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EXHIBIT 23

Case 1:13-ec-00297-TCB *SEALED* Document 11-23 Filed 09/20/13 Page 2 of 3 PageID# 210

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE
OF A PEN REGISTER/TRAP
AND TRACE DEVICE ON AN
ELECTRONIC MAIL ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

FILED UNDER SEAL

No. 1:13SW522

NOTICE OF APPEAL

Notice is hereby given that Lavabit LLC ("Lavabit") and Mr. Ladar Levison ("Mr. Levison") in the above named case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Orders of this Court entered on August 1, 2013 and August 5, 2013.

Jesse R. Binnall, VSB# 79292

Bronley & Binnall, PLLC

10387 Main Street, Suite 201

Fairfax, Virginia 22030

(703) 229-0335 - Telephone (703) 537-0780 - Facsimile

jbinnall@bblawonline.com

Counsel for Lavabit LLC

LAVABIT LLC LADAR LEVISON By Counsel Case 1:13-ec-00297-TCB *SEALED* Document 11-23 Filed 09/20/13 Page 3 of 3 PageID# 211

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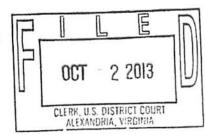
Certificate of Service

I certify that on this 16th day of August, 2013, this Notice of Appeal was emailed and mailed to the person at the addresses listed below:

United States Attorney's Office Eastern District of Virginia 2100 Jamieson Avenue Alexandria, VA 22314

Jesse R. Binnall

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION



IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE OF
A PEN REGISTER/TRAP AND TRACE
DEVICE ON AN ELECTRONIC MAIL
ACCOUNT

NO. 1:13 EC 297



IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

IN RE GRAND JURY SUBPOENA

NO. 1:13 SW 522

NO. 13-1

UNDER SEAL

ORDER

The United States has proposed partially unsealing records in this matter due to public disclosures made by Ladar Levison and Lavabit, LLC and for the purpose of creating a public record for Mr. Levison's appeal. The Court has considered the original sealing orders, the motions in support of the original sealing orders, the government's <u>ex parte</u> motion to unseal certain documents, and the prior pleadings of Mr. Levison, and hereby finds that:

- (1) the government has a compelling interest in keeping certain information in the documents sealed, and the government has proposed redacted versions of the documents that minimizes the information under seal;
- (2) the government's interest in keeping the redacted material scaled outweighs any public interest in disclosure; and

REDACTED

(3) having considered alternatives to the proposed redactions none will adequately protect

that interest; it is hereby

ORDERED that the redacted versions of certain records filed in the above captioned

matter are partially unsealed. The unsealed records are attached to this Order. To the extent any

such record is covered by a non-disclosure Order issued pursuant to 18 U.S.C. § 2705(b), the

non-disclosure obligation does not apply to the unsealed, redacted version of the document. The

Clerk of the Court may publicly release the redacted version of any of the records attached to this

Order. Any record not attached to this Order, as well as the unredacted copies of any record filed

in the above-captioned matter, including the government's ex parte, sealed Motion to Unseal and

Statement of Reasons will remain sealed until further Order of the Court.

United States District Judge

Date: 2 2013
Alexandria VA

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division 7015 DEC 11 P 3: 30

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE
OF A PEN REGISTER/TRAP
AND TRACE DEVICE ON AN
ELECTRONIC MAIL ACCOUNT

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

In re Grand Jury

FILED UNDER SEALALEXANDRIA, VIRGINIA

No. 1:13EC297

No. 1:13SW522

No. 13-1

MOTION TO UNSEAL RECORDS AND VACATED NON-DISCLOSURE ORDERS AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Lavabit, LLC ("Lavabit") and Mr. Ladar Levison ("Mr. Levison")

(collectively "Movants") move this Court to fully unseal records and vacate non-disclosure orders that are over two years old. While these records have been partially unsealed, Mr. Levison is still prevented from disclosing the target of the subpoenas, specifically the named individual and the email address(es) searched, and the non-disclosure orders are still in effect. The account holder at issue is

The Facts

Mr. Levison, a resident of Texas, formed Lavabit in 2004 as a secure and encrypted email service provider. At its peak, Lavabit provided email service to approximately 410,000 users worldwide.

In the spring of 2013, the United States launched a criminal investigation into the activities of As part of this investigation, the federal government (1) subpoenaed Lavabit for billing and subscriber email account with Lavabit, (2) obtained an information related to order requiring Lavabit to install a pen-trap device to intercept all electronic communications involving account, and (3) issued a search warrant to Lavabit for all information necessary to access their encrypted data, Exhibit A through C. The latter involved a request for Lavabit's private encryption keys1 which would allow the government to access the plain-text for all the traffic traversing the Lavabit network, including emails and customer passwords. After exhausting its options in court, and subsequently finding itself the subject of a contempt charge, Lavabit surrendered its private encryption key. Concurrently Mr. Levison chose to suspend the operation of Lavabit's email service.

¹ Lavabit employed an industry standard to provide transport layer security ("TLS"), sometimes called a secure socket layer ("SSL"), to ensure the privacy and security of communications between Lavabit and its users. TLS makes use of two "keys", one public, and the other private, which work together to verify the identity of Lavabit's servers and setup an encrypted network connection. This encryption protects the data sent between the server and a user's email client, or web browser.

the subject of the investigation, which led to the government demanding unfettered access to the private communications for all of Lavabit's customers, foreseeable future. the United States filed a criminal complaint against On in the District Court for the Eastern District of Virginia, charging him with Act. Though initially filed under seal, the United States unsealed the complaint

Lavabit and Mr. Levison challenged the validity and constitutionality of the search warrant and orders. This Court denied Lavabit's request to quash the search warrant and grand jury subpoena, and twice denied the movants' motion to unseal court records. Lavabit appealed the decision to the Fourth Circuit Court of Appeals, and while the appeal was pending, this Court partially unsealed portions of the record, Exhibit D. The Court continued to redact the target's name and email addresses.

Two years later, a lifetime, in today's media cycle, the search warrant, grand jury subpoena, and other pleadings and orders remain partially sealed, and Mr. Levison is still subject to the non-disclosure orders of June 10, 28 and July 16, 2013 ("the non-disclosure orders"). As such, he may *never* disclose email accounts are what spawned the government's request and led to the subsequent legal proceedings.

I. THE NON-DISCLOSURE ORDERS ARE INVALID BECAUSE THEY VIOLATE MR. LEVISON'S FIRST AMENDMENT RIGHT TO FREE SPEECH

All three non-disclosure orders were issued by the Court pursuant to the Stored Communications Act ("SCA") at 18 U.S.C. § 2705(b). These orders constitute notice preclusion authorized by the SCA. Such an order is "a type of gag order." In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876, 879-80 (S.D. Tex. 2008). A restriction on speech survives judicial scrutiny only "if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 394 (4th Cir. 1993) (Murnaghan, J., concurring) (quoting Simon & Schuster, Inc. v. New York Crime Victims Board, 502 U.S. 105, 118 (1991)).

By requesting a gag order, the government's purpose is to preclude Mr.

Levison from speaking about an entire topic, namely, the object of the search and seizure warrants to Lavabit and the underlying criminal investigation of See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (opining

that "the government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral..."). In fact, the non-disclosure orders prohibit Mr. Levison from disclosing the link between the federal government's, now public, investigation of and his email accounts with Lavabit. Such restrictions qualify as content-based regulation of speech. See Bartnicki v. Vopper, 532 U.S. 514, 526 (2001). The Supreme Court has held that content-based regulation of speech is "presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 381-82 (1992) (noting that the "First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.").

Within First Amendment jurisprudence, government action in the form of an administrative or judicial order forbidding certain speech has been described as a "prior restraint." Alexander v. United States, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984)) ("The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."). "Temporary restraining

² Although the government action at issue in this case does not involve a law in the ordinary sense, the Supreme Court has held that a government investigation is nonetheless subject to First Amendment scrutiny. Watkins v. United States, 354 U.S. 178, 197 (1957) ("While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law-making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking").

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orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." Nimmer, at 4-16. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (striking down injunctions barring the New York Times and Washington Post from publishing excerpts from the "Pentagon Papers"). The gag order issued in this case is also a speech restrictive injunction and, thus, an example of prior restraint that is "constitutionally disfavored in this nation nearly to the point of extinction." In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876, 882 (S.D. Tex. 2008) (quoting United States v. Brown, 250 F.3d 907, 915 (5th Cir. 2001)).

Moreover, "[a]ny prior restraint on expression [arrives in court] with a 'heavy presumption' against its constitutional validity," with the government having the burden of proving that such a restriction is justified. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558-59 (1976) (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-20 (1971). In Nebraska Press, the Supreme Court noted that a prior restraint is an immediate and irreversible sanction because it "freezes" speech, which is "the most serious and the least tolerable infringement on First Amendment rights." Id. at 559. Applying this reasoning, other courts have held that the Stored Communications Act and federal pen/trap statute do not permit gag orders of indefinite duration. See, e.g. In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876, 895 (S.D. Tex. 2008) (holding that a 180-day period is "most reasonable as a default setting for sealing and non-disclosure" orders); Matter

of Grand Jury Subpoena for: [Redacted]@yahoo.com, No. 5:15-CR-90096-PSG, 2015 WL 604267, at *1 (N.D. Cal. Feb. 5, 2015) (denying government's motion to gag Yahoo!, pursuant to 18 U.S.C. 2705(b), "until further order of the court")).

In this case, the federal government has prohibited Mr. Levison from disclosing the target in the Lavabit proceedings, and freely discussing the underlying investigation concerning. This specific prohibition of an entire topic is a content-based restriction of Mr. Levison's speech under the First Amendment. For such a gag order to be constitutional, it must be narrowly tailored to serve a compelling government interest. *IOTA XI*, 993 F.2d at 394. In addition, the gag order in this case applies to Mr. Levison "until otherwise authorized" by the Court. Indeed, even in the very serious context of national security, the Supreme Court has found that a prior restraint is permissible only if the speech will "surely result in direct, immediate, and irreparable harm to our Nation or its people." *New York Times v. United States* (*Pentagon Papers*), 403 U.S. 713, 730 (1971) (per curium) (Stewart & White, JJ., concurring).³

³ The Stewart-White concurrence is the holding of the case because, of the six Justices who concurred in the judgment, Justices Stewart and White concurred on the narrowest grounds. See Marks v. United States, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds") (internal quotation omitted); accord, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 764 n. 9 (1988). In New York Times v. United States, Justices Black and Douglas would clearly have refused to enjoin publication even if the Government had

18 U.S.C. § 2705(b) authorizes notice preclusion, but only if the court has reason to believe that notification will result in:

- (1) endangering the life or physical safety of an individual;
- (2) flight from prosecution;
- (3) destruction or tampering with evidence;
- (4) intimidating of potential witnesses; or
- (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. § 2705(b)(1)-(5).

First, there is no evidence or insinuation in the government's filings to suggest that a disclosure by Mr. Levison or Lavabit of the sealed information would somehow endanger somebody's life or safety. Second, there is no risk that will flee from prosecution, as a result of such disclosure, because he has already fled from prosecution. Third, there is no risk that will tamper with his Lavabit accounts or otherwise alter his behavior if Mr. Levison were to disclose the information under seal because Lavabit is no

met Stewart's test. See, e.g., New York Times, 403 U.S. at 730 (Black, J., concurring) (Black & Douglas, JJ., concurring) (no evidence that disclosure would cause "direct, immediate, and irreparable damage...") Justice Brennan also would likely have held more broadly. "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. . . [O]nly governmental . . . proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary." Id. at 725-27 (Brennan, J., concurring).

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longer operating its email service. This makes it impossible for access, let alone tamper with his accounts. The investigation is already two years old, so any compelling interest the government may have had, as defined in 18 U.S.C. § 2705(b), has long since expired. Without a compelling government interest, the continued suppression of Mr. Levison's speech cannot pass constitutional muster. See United States v. O'Brien, 391 U.S. 367, 376-77 (1968).4

"[The Government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citations omitted). The government cannot meet this burden here because it cannot demonstrate that any actual harm will occur as a result of fully unsealing these documents. Indeed, its recited harms are now two years old, and any urgency to their claims, if it existed, has vanished with the passage of time. Even if the government had a compelling interest when the gag order was issued, the passage of time has tipped the scales and now favors the movant's First Amendment right to free speech. The Southern District of Texas recognized as much when it held that a 180-day period is "reasonable as a default setting for sealing and non-

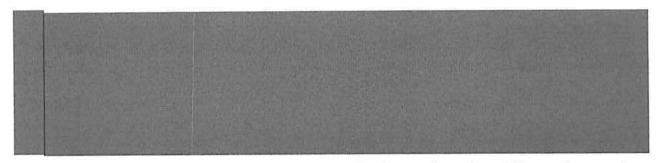
⁴ In *United States v. O'Brien*, the Supreme Court held that the government may regulate speech if: (1) the regulation is within the government's constitutional power; (2) the regulation furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

disclosure" orders. In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876, 895 (S.D. Tex. 2008). The gag order in this case, which prohibits Mr. Levison from speaking freely, has already eclipsed this "reasonable" period, as cited in In re Sealing & Non-Disclosure, by a factor of five.

Fourth, the gag order does not relate to other witnesses; it simply prohibits Mr. Levison from confirming that the investigation led to the Lavabit proceedings, and discussing the investigation in its proper context.

Despite was the target, Mr. Levison has been required to tread carefully, and discuss them separately; an act of verbal contortion. He is perpetually in fear that a misstep will result in this Court holding him in contempt for violating its gag orders.

Fifth, there is no risk that a disclosure would jeopardize the investigation because the government's investigation of that the government actually sought to search Lavabit for evidence related to The government's prohibitions on speech do not protect the secrecy of, or otherwise imperil a government investigation, but rather prevent Mr. Levison from fully engaging in the public discourse involving and the subsequent government investigation. See In re A 18 U.S.C. § 2703 Order Issued to Google on June 10, 2011, 2012 U.S. Dist. LEXIS 25770, at *2 (E.D. Va. 2012) (Jones, Jr., J.) (stating that the government's concern of confidentiality is moot, because the use of the government's tools in this matter have been widely publicized). See,



The gag orders preventing the release of information that this motion seeks to unseal are not narrowly tailored or designed to achieve a specific and important purpose. Instead, they are a prior restraint on Mr. Levison's speech, of unlimited duration, which have greatly affected Mr. Levison and Lavabit, while doing nothing to further the government investigation. As such, the gag orders represent a violation of the movants First Amendment's right to free speech.

II. THE LAW SUPPORTS THE RIGHT OF PUBLIC ACCESS TO THE SEALED DOCUMENTS

Despite the lack of statutory authority, the 2703(d) search warrant and other related documents, along with the 2705(b) Order, remain partially under seal and the subject of non-disclosure, or "gag" orders. The sealing of judicial records imposes a limit on the public's right of access, which derives from two sources, the First Amendment and the common law. Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 575 (4th Cir. 2004) (citing Stone v. University of Md. Med. Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988)); see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (the press and public have a First Amendment right to attend a criminal trial); Press-Enterprise Co. v. Superior

not Mr. Levison.

⁵ The title of this article was chosen by

Court, 478 U.S. 1, 2 (1986) (the public has a First Amendment right of access to preliminary hearing and transcript).

a. The Common Law Right Of Access Attaches To The Search Warrant

"For a right of access to exist under the First Amendment or common law, the document must be a 'judicial record." United States v. Applebaum, 707 F.3d 283, 290 (4th Cir. 2013) (citing Baltimore Sun Co. v. Goetz, 886 F.2d 60, 63–64 (4th Cir. 1989)). In Applebaum, the Fourth Circuit held that § 2703(d) orders and subsequent orders issued by the court are judicial records because they are judicially created. Id. at 290. The Court also held that the common law presumption of access attaches to such documents. Id. at 291. In this case, the 2705(b) Order was issued pursuant to 18 U.S.C. § 2703(d), therefore it is a judicial record and a presumption of access attaches to it.

To overcome the common law presumption of access, a court must find that there is a "significant countervailing interest" in support of sealing that outweighs the public's interest in openness. *Id.* at 293. Under the common law, the decision to seal or grant access to warrant papers lies within the discretion of the judicial officer who issued the warrant. *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005). If a judicial officer determines that full public access is not appropriate, he or she "must consider alternatives to sealing the documents," including granting some public access or releasing a redacted version of the documents. *Id.* (quoting *Baltimore Sun*, 886 F.2d at 66). In the present case, now, two years later, there is no longer a need for such

partial redactions because the government's investigation of is well known and widely publicized.

b. There Is No Statutory Authority To Seal The § 2705(d) Documents

There are no provisions in the SCA to seal orders or other documents. By contrast, the Pen/Trap Statute authorizes electronic surveillance and directs that pen/trap orders be sealed "until otherwise ordered by the court". 18 U.S.C. §§ 3123. Similarly, the Wiretap Act, another surveillance statute, expressly directs that applications and orders granted under its provisions be sealed. 18 U.S.C. § 2518(8)(b). Thus, Congress has specifically provided for sealing provisions when it has so desired. Additionally, where Congress includes particular language in one section of a statute but omits it in another, it is assumed that Congress acted intentionally. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Therefore, Congress has provided no statutory basis for sealing an application or order under the SCA that would overcome the common law right to access.

c. The First Amendment Right To Petition The Government For Redress Of Grievances Demands Public Access

The Petition Clause of the First Amendment protects the public's right to petition the government for redress of grievances. Borough of Duryea, Pa. v. Guarnieri, 131 S.Ct. 2488, 2494 (2011). "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights... to petition for redress of grievances." Id. at 2495 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). Free speech allows the

public to state its grievances and the right to petition ensures that it can communicate those grievances to the government. *Id.* The non-disclosure orders in this case deny Mr. Levison these fundamental rights and forbid him from discussing portions of his experience with the world freely and without fear.

The non-disclosure orders prohibit Mr. Levison from disclosing any information regarding the target of the underlying investigation. A representative democracy depends upon the people being afforded the opportunity to air their grievances to their representatives. Mr. Levison has been and continues to be denied the ability to petition the government for redress. These orders are the hallmark of an extremely unsettling expansion of government power that jeopardizes the privacy of thousands to aid the investigation of an individual. Even a partial concealment of these proceedings undermines Mr. Levison right to voice his political opinions and threatens the free formation of opinions on a matter of public import.

Conclusion

For the foregoing reasons, Lavabit and Ladar Levison respectfully move this Court to lift fully the non-disclosure orders issued to Mr. Levison.

LAVABIT LLC
By Counsel

Jesse R. Binnall VSB# 79292

onise T. Gitcheva, VSB# 86200

Harvey & Rinnall, PLLC

717 King Street, Suite 300

Alexandria, Virginia 22314 (703) 888-1943 Telephone (703) 888-1930- Facsimile jbinnall@harveybinnall.com lgitcheva@harveybinnall.com Counsel for Lavabit LLC

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Certificate of Service

I certify that on this 11th day of December, 2015, this Motion to Unseal Records and Vacate Non-Disclosure Orders and Memorandum of Law in Support of Motion was hand delivered to the person at the addresses listed below:

James L. Trump
Senior Litigation Counsel
United States Attorney's Office
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, VA 22314
jim.trump@usdoj.gov

Jesse R. Binnall

REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE FILED UNDER SEAL APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER No. 1:13EC297 AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH No. 1:13SW522 THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT LLC In re Grand Jury No. 13-1

SEALING ORDER

Upon the motion of the United States, good cause having been shown, it is hereby ORDERED that:

The grand jury subpoena issued to Ladar Norman Levison for an appearance on July 16, 2013, shall be placed under seal until further order of this Court;

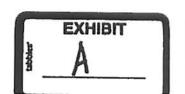
It is further ORDERED that the government shall serve Mr. Levison with a copy of this Order along with a copy of its motion to seal; and

It is further ORDERED that the government's motion to seal the grand jury subpoena and this Order shall be placed under seal.

Alexandria, Virginia July /6, 2013

Claude M. Hilton

United States District Judge



IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

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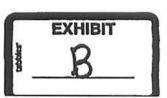
IN THE MATTER OF THE APPLICATION)	
OF THE UNITED STATES OF AMERICA)	
FOR AN ORDER AUTHORIZING THE)	(Under Seal)
INSTALLATION AND USE OF A PEN)	005
REGISTER/TRAP AND TRACE DEVICE)	1:13 EC 29"
ON AN ELECTRONIC MAIL ACCOUNT)	

ORDER

This matter having come before the Court pursuant to an Application under 18 U.S.C. § 3122, by Andrew Peterson, Assistant United States Attorney, an attorney for the Government as defined by Fed. R. Crim. P. 1(b)(1), requesting an Order under 18 U.S.C. § 3123, authorizing the installation and use of a pen register and the use of a trap and trace device or process ("pen/trap device") on all electronic communications being sent from or sent to the account associated with that is registered to subscriber at Lavabit, LLC (hereinafter referred to as the "SUBJECT ELECTRONIC MAIL ACCOUNT"). The Court finds that the applicant has certified that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation into possible violation(s) of 18 U.S.C. §§

IT APPEARING that the information likely to be obtained by the pen/trap device is relevant to an ongoing criminal investigation of the specified offense;

IT IS ORDERED, pursuant to 18 U.S.C. § 3123, that a pen/trap device may be installed and used by Lavabit and the Federal Bureau of Investigation to capture all non-content dialing, routing, addressing, and signaling information (as described and limited in the Application), sent from or sent to the SUBJECT ELECTRONIC MAIL ACCOUNT, to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data (date, time, duration, and Internet Protocol address of all log-ins) on the



SUBJECT ELECTRONIC MAIL ACCOUNT, all for a period of sixty (60) days from the date of such Order or the date the monitoring equipment becomes operational, whichever occurs later;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(b)(2), that Lavabit shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device unobtrusively and with minimum interference to the services that are accorded persons with respect to whom the installation and use is to take place;

IT IS FURTHER ORDERED that the United States take reasonable steps to ensure that the monitoring equipment is not used to capture any "Subject:" portion of an electronic mail message, which could possibly contain content;

IT IS FURTHER ORDERED that Lavabit shall be compensated by the Federal Bureau of Investigation for reasonable expenses incurred in providing technical assistance;

agency seeks to install and use its own pen/trap device on a packet-switched data network of a public provider, the United States shall ensure that a record is maintained which will identify: (a) any officer(s) who installed the device and any officer(s) who accessed the device to obtain information from the network; (b) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (c) the configuration of the device at the time of its installation and any subsequent modification thereof; and (d) any information which has been collected by the device. To the extent that the pen/trap device can be set to automatically record this information electronically, the record shall be maintained electronically throughout the installation and use of the pen/trap device. Pursuant to 18 U.S.C. § 3123(a)(3)(B), as amended, such record(s) shall be provided ex parte and under seal to this Court within 30 days of the termination of this Order, including any extensions thereof;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(d), that this Order and the Application be sealed until otherwise ordered by the Court, and that copies of such Order may be

Case 1:13-ec-00297-TCB Document 25-18 Filed 02/24/16 Page 20 of 26 PageID# 889

furnished to the Federal Bureau of Investigation, the United States Attorney's Office, and Lavabit;

IT IS FURTHER ORDERED that Lavabit shall not disclose the existence of the pen/trap device, or the existence of the investigation to any person, except as necessary to effectuate this Order, unless or until otherwise ordered by the Court.

SO ORDERED:

Theresa Carroll Buchanan United States Magistrate Judge

Hon. Theresa C. Buchanan United States Magistrate Judge

Date:

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA



IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER PURSUANT TO 18 U.S.C. § 2703(d)

MISC. NO. 1:13 EC 354

REDACTED

Filed Under Seal

ORDER

The United States has submitted an application pursuant to 18 U.S.C. § 2703(d), requesting that the Court issue an Order requiring Lavabit LLC, an electronic communications service provider and/or a remote computing service located in Dallas, TX, to disclose the records and other information described in Attachment A to this Order.

The Court finds that the United States has offered specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation.

The Court determines that there is reason to believe that notification of the existence of this Order will seriously jeopardize the ongoing investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates. See 18 U.S.C. § 2705(b)(2), (3), (5).

IT IS THEREFORE ORDERED, pursuant to 18 U.S.C. § 2703(d), that Lavabit LLC shall, within ten days of the date of this Order, disclose to the United States the records and other information described in Attachment A to this Order.

IT IS FURTHER ORDERED that Lavabit LLC shall not disclose the existence of the application of the United States, or the existence of this Order of the Court, to the subscribers of the account(s) listed in Attachment A, or to any other person, unless and until otherwise ______

EXHIBIT

REDACTED

authorized to do so by the Court, except that Lavabit LLC may disclose this Order to an attorney for Lavabit LLC for the purpose of receiving legal advice.

IT IS FURTHER ORDERED that the application and this Order are sealed until otherwise ordered by the Court.

United States Magistrate Judge

June 10, 2013

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ATTACHMENT A

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I. The Account(s)

The Order applies to c	ertain records and	information as	ssociated with	the following email
account(s):				

II. Records and Other Information to Be Disclosed

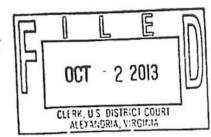
Lavabit LLC is required to disclose the following records and other information, if available, to the United States for each account or identifier listed in Part I of this Attachment ("Account"), for the time period from inception to the present:

- A. The following information about the customers or subscribers of the Account:
 - 1. Names (including subscriber names, user names, and screen names);
 - 2. Addresses (including mailing addresses, residential addresses, business addresses, and e-mail addresses);
 - Local and long distance telephone connection records;
 - Records of session times and durations, and the temporarily assigned network addresses (such as Internet Protocol ("IP") addresses) associated with those sessions;
 - Length of service (including start date) and types of service utilized;
 - Telephone or instrument numbers (including MAC addresses);
 - Other subscriber numbers or identities (including the registration Internet Protocol ("IP") address); and
 - Means and source of payment for such service (including any credit card or bank account number) and billing records.
- B. All records and other information (not including the contents of communications) relating to the Account, including:
 - Records of user activity for each connection made to or from the Account, including log files; messaging logs; the date, time, length, and method of connections; data transfer volume; user names; and source and destination Internet Protocol addresses;
 - Information about each communication sent or received by the Account, including the date and time of the communication, the method of communication, and the source and destination of the communication (such as source and destination email addresses, IP addresses, and telephone numbers).

CERTIFICATE OF AUTHENTICITY OF DOMESTIC BUSINESS RECORDS PURSUANT TO FEDERAL RULE OF EVIDENCE 902(11)

I,, attest, under penalties of perjury under the
laws of the United States of America pursuant to 28 U.S.C. § 1746, that the information
contained in this declaration is true and correct. I am employed by Lavabit LLC, and my official
title is I am a custodian of records for Lavabit LLC. I state
that each of the records attached hereto is the original record or a true duplicate of the original
record in the custody of Lavabit LLC, and that I am the custodian of the attached records
consisting of (pages/CDs/kilobytes). I further state that:
a. all records attached to this certificate were made at or near the time of the
occurrence of the matter set forth, by, or from information transmitted by, a person with
knowledge of those matters;
b. such records were kept in the ordinary course of a regularly conducted business
activity of Lavabit LLC; and
 such records were made by Lavabit LLC as a regular practice.
I further state that this certification is intended to satisfy Rule 902(11) of the Federal
Rules of Evidence.
Date Signature

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION



IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE OF
A PEN REGISTER/TRAP AND TRACE
DEVICE ON AN ELECTRONIC MAIL
ACCOUNT

NO. 1:13 EC 297

REDACTED

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC

IN RE GRAND JURY SUBPOENA

NO. 1:13 SW 522

NO. 13-1

UNDER SEAL

ORDER

The United States has proposed partially unsealing records in this matter due to public disclosures made by Ladar Levison and Lavabit, LLC and for the purpose of creating a public record for Mr. Levison's appeal. The Court has considered the original sealing orders, the motions in support of the original sealing orders, the government's ex parte motion to unseal certain documents, and the prior pleadings of Mr. Levison, and hereby finds that:

- (1) the government has a compelling interest in keeping certain information in the documents sealed, and the government has proposed redacted versions of the documents that minimizes the information under seal:
- (2) the government's interest in keeping the redacted material sealed outweighs any public interest in disclosure; and



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(3) having considered alternatives to the proposed redactions none will adequately protect

that interest; it is hereby

ORDERED that the redacted versions of certain records filed in the above captioned

matter are partially unsealed. The unsealed records are attached to this Order. To the extent any

such record is covered by a non-disclosure Order issued pursuant to 18 U.S.C. § 2705(b), the

non-disclosure obligation does not apply to the unsealed, redacted version of the document. The

Clerk of the Court may publicly release the redacted version of any of the records attached to this

Order. Any record not attached to this Order, as well as the unredacted copies of any record filed

in the above-captioned matter, including the government's ex parte, sealed Motion to Unseal and

Statement of Reasons will remain sealed until further Order of the Court.

The Honorable Claude M. Hilton

United States District Judge

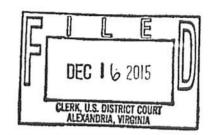
Date:

Alexandria, VA

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division



IN THE MATTER OF THE)
APPLICATION OF THE UNITED)
STATES AUTHORIZING THE USE OF)
A PEN REGISTER/TRAP AND TRACE)
DEVICE ON AN ELECTRONIC MAIL)
ACCOUNT)

IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH

IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT, LLC.

IN RE: GRAND JURY

UNDER SEAL

Criminal No. 1:13EC297

Criminal No. 1:13SW522

Criminal No. 1:13-1

ORDER

This matter comes before the Court on Lavabit, LLC and Mr. Ladar Levinson's ("Movants") Motion to Unseal Records and Vacate Non-Disclosure Orders. It is hereby

ORDERED that the Government shall have until January 6, 2016 to file a response to the Movants' Motion.

CLAUDE M. HILTON

UNITED STATES DISTRCT JUDGE

Alexandria, Virginia December /6 , 2015 Case 1:13-ec-00297-TCB Document 25-20 Filed 02/24/16 Page 1 of 6 Page D# 897

IN THE UNITED STATES DISTRICT COURT FOR THE

FILED

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EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT)	No. 1:13EC297	CLERK US DISTRICT COURT ALEXANDRIA, VIRGINIA
IN THE MATTER OF THE SEARCH AND)	No. 1:13SW522	

SEIZURE OF INFORMATION

In re Grand Jury

ASSOCIATED WITH [REDACTED]
THAT IS STORED AT PREMISES
CONTROLLED BY LAVABIT LLC

RESPONSE OF THE UNITED STATES TO MOTION TO UNSEAL RECORDS AND VACATE NON-DISCLOSURE ORDERS

No. 13-1

Lavabit LLC and Ladar Levison have moved this Court for an order authorizing the public disclosure of all information currently under seal in the referenced dockets. The United States opposes Lavabit's motion and asks that the Court instead enter the attached Protective Order.

The history of these proceedings is well-documented. See In re Under Seal, 749 F.3d 276, 279 (4th Cir. 2014). And while this Court's sealing and non-disclosure orders remain in effect, the only information not publicly disclosed is the identity of the target of the investigation and that person's email address. See In re Under Seal, Fourth Circuit Appeal 13-4625, Joint Appendix Volume I, Docket Entry 27, filed October 10, 10, 2013. The government opposes the

public disclosure of the identity of the target of the investigation and the target's email address, as such disclosure would reveal a matter occurring before the grand jury, which is prohibited under Rule 6(e)(2) of the Federal Rules of Criminal Procedure. Lavabit, on the other hand, seeks an order requiring the government to reveal that information so that Ladar Levison can "freely discuss the underlying investigation" involving this one subscriber.

The question before this Court is whether the information at issue, the identity of a target of a grand jury investigation, which is contained in pleadings and orders under both the Pen/Trap Statute, 18 U.S.C. §§ 3123–27, and the Stored Communications Act, 18 U.S.C. §§ 2701–12, is subject to a public right of access under the First Amendment and/or common law. The First Amendment analysis is frequently called the "experience and logic" test. Courts ask (1) whether the place and process have historically been open to the press and general public, and (2) whether public access plays a significant positive role in the functioning of the particular process in question. See Baltimore Sun v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989), quoting Press Enterprises Co. v. Superior Court, 478 U.S. 1, 8-1-)1988). The common law right of access, on the other hand, involves a balancing of interests whereby a court must consider whether the public's right to access is outweighed by a significant countervailing interest in continued sealing. See Under Seal v. Under Seal, 326 F.3d 479, 486 (4th Cir. 2003).

The information Lavabit wants to unseal (Lavabit's subscriber and the subscriber's email address) is revealed in the un-redacted pleadings and orders that are a part of the pre-indictment investigation of the case. See Application of the United States of America for an Order Pursuant to 18 U.S.C. Section 2703(d), 707 F.3d 283, 292 and 295 (4th Cir. 2013) (finding that §2703(d) orders, pen registers, and wiretaps are pre-indictment investigative matters akin to grand jury

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(2) of the Federal Rules

investigations). As noted above, the government is barred by Rule 6(e)(2) of the Federal Rules of Criminal Procedure from disclosing publicly the identity of a target of a grand jury investigation, an investigation that is not closed but ongoing.

In this context, the Fourth Circuit has said that public access does not play a significant role in the functioning of investigations involving §2703(d) orders, and there is, accordingly, no First Amendment right to access them. *Id.* at 292, quoting *In re Sealed Case*, 199 F.3d 522, 526 (D.C.Cir. 2000). The Fourth Circuit reasoned:

Section 2703(d) proceedings can be likened to grand jury proceedings. In fact, they are a step removed from grand jury proceedings, and are perhaps even more sacrosanct. Proceedings for the issuance of § 2703(d) orders are also like proceedings for the issuance of search warrants, which we have noted are not open. See Goetz, 886 F.2d at 64 (observing that the Supreme Court has twice "recognized that proceedings for the issuance of search warrants are not open"). Because secrecy is necessary for the proper functioning of the criminal investigations at this § 2703(d) phase, openness will frustrate the government's operations. Because § 2703(d) orders and proceedings fail the logic prong, we hold that there is no First Amendment right to access them.

707 F.3d at 292 (footnote omitted).

As to whether there is a common law right of access to the identity of Lavabit's subscriber, Lavabit explains very little about the public's interest in this matter other than to say that Lavabit has been precluded from "freely discussing the underlying investigation." To the contrary, Lavabit can – and has – discussed the underlying investigation publicly in the context of its appeal to Fourth Circuit, resulting in a lengthy published opinion. In addition, a cursory internet search reveals that Ladar Levison has spoken out publicly on numerous other occasions about the case, his appeal, and internet privacy and encrypted email topics generally. Whether the government should be able to compel Lavabit – or any other service provider – to turn over unencrypted email account information for users of encrypted email service is certainly an issue

that can be debated and discussed in public forums without identifying a specific subscriber. Indeed, if Ladar Levison is to be believed (based on what he has said in a number of articles and videotaped interviews), he fought the government's demands on principle for all of his encrypted email customers. Revealing the name of the particular subscriber at issue in this case does not change the nature of the dialogue in which Levison plans to engage. Moreover, whether or not this is a high-profile investigation does not justify public access to the target's identity and should play no role in the Court's analysis. *Id.* at 293-94.

The government concedes that Lavabit should be able to notify its subscriber of the existence of the proposed orders and underlying pleadings in this case. The subscriber, of course, much like the grand jury witness, is under no obligation of secrecy with regard to any of the underlying sealed information.

The United States proposes that the Court enter the attached Protective Order. The protective order would allow Lavabit to notify its subscriber and would give the public access to all of the pleadings and orders in these several dockets with only the identity of the target and the target's email account information redacted from the public record. The proposed order would

Case 1:13-ec-00297-TCB Document 25-20 Filed 02/24/16 Page 5 of 6 PageID# 901

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also require the government to move to unseal the protected information promptly once the grand jury investigation is completed.

Respectfully submitted,

Dana J. Boente United States Attorney

By: /s

James L. Trump Assistant United States Attorney 2100 Jamieson Avenue Alexandria, Virginia 22314 Phone: 703-299-3700

Email: jim.trump@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2016, I electronically filed the foregoing Response of the United States to Motion to Unseal Records and Vacate Non-Disclosure Orders with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Jesse R. Binnall Harvey & Binnall, PLLC 717 King street, suite 300 Alexandria, Virginia 22314 jbinnall@harveybinnall.com

By: ______

James L. Trump Assistant United States Attorney 2100 Jamieson Avenue Alexandria, Virginia 22314 (703) 299-3726 jim.trump@usdoj.gov

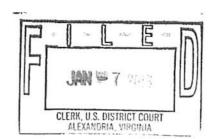
IN THE UNITED STATES DISTRICT COURT FOR THE



EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT)	No. 1:13EC297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH [REDACTED] THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT LLC)	No. 1:13SW522
In re Grand Jury)	No. 13-1



PROTECTIVE ORDER

Lavabit LLC and Ladar Levison have moved this Court for an order directing the unsealing of all information in these proceedings. The United States opposes this motion.

Based on the reasons set forth in the government's response, good cause having been shown,

It is hereby ORDERED that the Motion to Unseal Records and Vacate Non-Disclosure Orders is denied;

It is further ORDERED that Lavabit LLC or Ladar Levison may disclose to its subscriber the nature of these proceedings and the underlying un-redacted pleadings and orders;

It is further ORDERED that the United States shall file on the public docket copies of all of the previously filed pleadings, transcripts, and orders with reductions for only the identity of the subscriber and the subscriber's email address; and

It is further ORDERED that the United States shall, upon completion of the grand jury investigation, promptly move to unseal any information remaining under seal in these matters.

Entered in Alexandria, Virginia, this Zaday of January, 2016.

Claude M. Hilton

Senior United States District Judge

Case 1:13-ec-00297-TCB Document 25-22 Filed 02/24/16 Page 1 of 3 PageID# 905

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U.S. District Court Eastern District of Virginia - (Alexandria) CRIMINAL DOCKET FOR CASE #: 1:13-ec-00297-TCB-1 *SEALED* Internal Use Only

Case title: USA v. In Re: Pen Register

Date Filed: 07/09/2013

Date Terminated: 07/09/2013

Assigned to: Magistrate Judge Theresa

Carroll Buchanan

Defendant (1)

In Re: Pen Register

TERMINATED: 07/09/2013

Pending Counts

Disposition

None

Highest Offense Level (Opening)

None

Terminated Counts

Disposition

None

Highest Offense Level (Terminated)

None

Complaints

Disposition

None

Plaintiff

USA

represented by James L. Trump

United States Attorney's Office 2100 Jamieson Ave

Alexandria, VA 22314 (703)299-3700

Email: jim.trump@usdoj.gov

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

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Date Filed	#	Docket Text
07/09/2013	1	MOTION for Order to Show Cause by USA as to In Re: Pen Register. (krob,) (Entered: 07/09/2013)
07/09/2013	2	ORDER granting 1 Motion for Order to Show Cause and that the Clerk's Office shall issue a summons for the appearance of Mr. Levison on July 16,2013, at 10:00 a.m. The Clerk's Office shall provide the Federal Bureau of Investigation with a certified copy of the summons for service on Mr. Levison and Lavabit LLC as to In Re: Pen Register (1). Signed by District Judge Claude M. Hilton on 7/9/13. (krob) (Entered: 07/09/2013)
07/09/2013	<u>3</u>	Summons Issued in case as to In Re: Pen Register (Ladar Levison). (krob) (Entered: 07/09/2013)
07/09/2013		Set Hearings as to In Re: Pen Register: Show Cause Hearing set for 7/16/2013 10:00 AM in Alexandria Courtroom 800 before District Judge Claude M. Hilton. (krob) (Entered: 07/09/2013)
07/09/2013		(Court only) ***Terminated defendant In Re: Pen Register, pending deadlines, and motions. (rban,) (Entered: 02/18/2014)
07/16/2013	4	Supplement re 1 MOTION for Order to Show Cause by USA as to In Re: Pen Register. (krob) (Entered: 07/16/2013)
07/16/2013	<u>5</u>	Minute Entry for proceedings held before District Judge Claude M. Hilton: Docket Call In Re: Pen Register held on 7/16/2013. Appearance of counsel for Govt. and respondent, Ladar Levison. Respondent's motion to unseal Denied. Matter re: pen register resolved at this time; UNDER SEAL HEARING set for 7/26/2013 at 10:00 AM in Alexandria Courtroom 800 before District Judge Claude M. Hilton. (Court Reporter: Westfall)(tarm) (Entered: 07/16/2013)
07/16/2013	<u>6</u>	ORDER that Ladar Levinson's Motion to Unseal is DENIED and this matter is continued to Friday, July 26, 2013 at 10:00 a.m. for further proceedings. Signed by District Judge Claude M. Hilton on 7/16/13. (tarm) (Entered: 07/16/2013)
07/16/2013	7	MOTION to Seal the grand jury subpoena served onLadar Levison, the owner and operator ofLavabit LLC by USA as to In Re: Pen Register. (krob,) (Entered: 07/17/2013)
07/16/2013	8	ORDER granting 7 Motion to Seal the grand jury subpoena served onLadar Levison as to In Re: Pen Register (1). Signed by District Judge Claude M. Hilton on 7/16/13. (krob,) (Entered: 07/17/2013)
07/26/2013		Reset Deadlines re Motion or Report and Recommendation in case as to In Re: Pen Register Motion Hearing set for 8/1/2013 at 10:00 AM in Alexandria Courtroom 800 before District Judge Claude M. Hilton. (clar,) (Entered: 07/26/2013)
08/01/2013	9	Minute Entry for proceedings held before District Judge Claude M. Hilton: Docket Call In Re: Pen Register held on 8/1/2013. Lavabit's

CMCase 1:135-ec-00297-TCB Document 25-22 Filed 02/24/16 Page 3 of 3 PageID# 907 REDACTED

			and the state of t
			Motion to Quash - Denied, Mr. Levison Ordered to turn over the encryption keys. Respondent's request for 5 days to do so Denied, Respondant given 24 hours.Lavabit's Motion to Unseal - Denied. (Court Reporter: Westfall)(tarm) (Entered: 08/02/2013)
09/18/2013		<u>10</u>	Sealed Transcript of Proceedings on 7/16/2013 before District Judge Claude M. Hilton. (rban,) (Entered: 09/18/2013)
09/20/2013		<u>11</u>	UNDER SEAL EX PARTE MOTION by USA as to In Re: Pen Register. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26)(rban,) (Entered: 10/02/2013)
10/02/2013		12	Sealed Order re 11 UNDER SEAL EX PARTE MOTION by USA as to In Re: Pen Register. Signed by District Judge Claude M. Hilton on 10/2/2013. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23) (rban,) (Entered: 10/02/2013)
10/02/2013		<u>13</u>	Redacted version of 12 Sealed Order.(rban,) (Entered: 10/02/2013)
10/02/2013			(Court only) ***Motions terminated as to In Re: Pen Register: 11 MOTION filed by USA. (rban,) (Entered: 10/02/2013)
09/16/2014			(Court only) ***Staff notes: Exhibits to the 12 Order dated 10/02/2013 are the redacted public versions that can be provided to the public. (jlan) (Entered: 09/16/2014)
12/14/2015	₩.	14	MOTION to Unseal Case by Lavabit, LLC and Mr Ladar Levinson In Re: Pen Register. (krob,) (Entered: 12/15/2015)
12/16/2015	31	<u>15</u>	ORDER to Respond re 14 MOTION to Unseal Case filed by In Re: Pen Register. ORDERED that the Government shall have until January 6, 2016to file a response to the Movants' Motion as to In Re: Pen Register. Signed by District Judge Claude M. Hilton on 12/16/2015. (lbru,) (Entered: 12/17/2015)
01/07/2016		<u>16</u>	RESPONSE to Motion by USA as to In Re: Pen Register re 14 MOTION to Unseal Case (krob,) (Entered: 01/07/2016)
01/07/2016		<u>17</u>	Protective Order as to In Re: Pen Register. Signed by District Judge Claude M. Hilton on 1/7/16. (c/s) (krob,) (Entered: 01/07/2016)