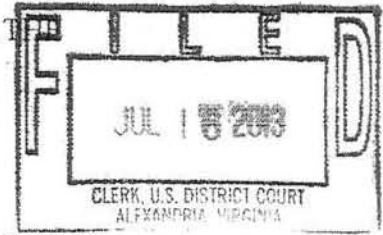


IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division



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

2. 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 [REDACTED]. Based 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 device 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 [REDACTED]

10. The proceeding before the Court today is to determine whether Lavabit LLC and 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 device 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.

Respectfully submitted,

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By



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