

IN THE UNITED STATES DISTRICT COURT FOR THE

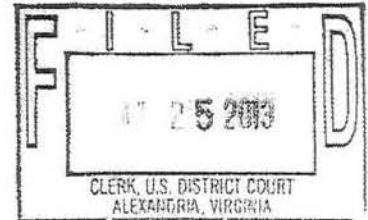
EASTERN DISTRICT OF VIRGINIA

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

FILED UNDER SEAL

No. 1:13EC297



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

No. 1:13SW522

[REDACTED] THAT IS
STORED AND CONTROLLED AT
PREMISES CONTROLLED BY
LAVABIT LLC

In re Grand Jury

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 subpoena¹ 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 [REDACTED] ("Lavabit Subpoena and Warrant").

ARGUMENT

If the Government gains access to Lavabit's Master Key, it will have unlimited access to not only [REDACTED] ("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 seizure 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 Francisco*, 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 subjected 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 Lavabit 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 than 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**



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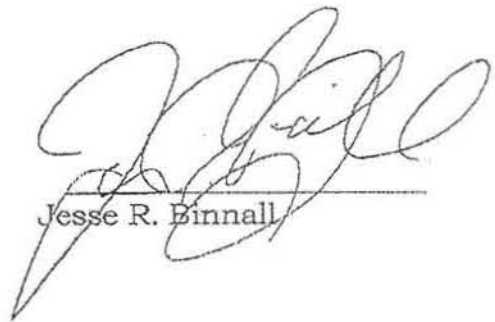
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Certificate of Service

I certify that on this 25th 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:



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Jesse R. Binnall