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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

United States of America,)
)
)
 Plaintiff,) Case No. 3:17-cr-0095 SLG-DMS
)
 vs.)
)
 Matthew Schwier,)
)
 Defendant.)
)
)
 _____)

**SUPPLEMENTAL DECLARATION OF JEFFREY M. FISCHBACH
SUPPLEMENTING DOC. 296**

I, Jeffrey M. Fischbach, declare as follows:

1. This declaration is written to supplement my declaration at Dkt. 296-1 responding to the government’s Dkt 288, “Notice Regarding Proposed Testing Environment”, and 288-1, “Test Environment Regarding Torrential Downpour”.
2. It should be noted that the government’s entire concern over TD, as well as TD’s secret feature being released into the “wild” has been rendered entirely without merit and perhaps disingenuous by its own repeated missteps. As noted previously, the government already

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accidentally exposed its secret feature to me during its demonstration on October 17 and 18, 2019. Without prompting or obligation, *I* alerted *both* the government and the court that this occurred, and volunteered to bound by a verbal nondisclosure agreement, sworn before the court. Had I not volunteered this information, the government would have had no idea that this secret, which the government has described as being critical to its ability to work undercover, without detection, had been exposed to me. I have been trusted since then to observe the oath I *volunteered* to the court. The government has now, once again, accidentally provided me something it claims I cannot be trusted to keep safe. Before settling on a protective order, the government has unintentionally provided me with two working copies of TD, to which I have had unmonitored access for more than two weeks.

3. On December 6, 2019 I traveled to the Orange County RCFL for the purposes of initiating several searches in preparation for trial, and to examine the thumb drive sent by the government containing copies of the Virtual Machines (VM) preserving Mr. Erdely's TD validation, performed in my and Atty. Herz's presence, in Anchorage on November 4, 2019. Shortly after arriving at the OCRCFL, my liaison, Joseph Monroe provided to me the aforementioned thumb drive for use on the government-supplied Mac that I have been using to conduct my Anchorage and Orange County examinations. Upon receiving the thumb drive I informed Mr. Monroe that I would like to copy its contents to the aforementioned government computer, so that I can return the thumb drive to his custody, as not to leave it exposed in a shared civilian exam room. As well, VM's typically do not run well, if at all, on external media. Mr. Monroe agreed, so long as it stayed on that computer, as stipulated.

4. Some time later that afternoon, Mr. Monroe re-entered the defense examination room, and informed me that he had received communication from AUSA Jonas Walker, asking him to remind me that I was not to remove anything from that thumb drive from the OCRCFL. I agreed, and reminded him that I had copied its contents to the government's computer, which he acknowledged. AUSA Walker also memorialized this notice in an email on that date at 2:37PM.

5. A short time later, Mr. Monroe again entered the defense examination room and asked if I

had already begun working with the data from the thumb drive. I let him know that I had, but that I also had been having some trouble with errors attributed to an older model computer. Mr. Monroe then informed me that Mr. Walker believed that there may be copies of TD on the thumb drive he supplied, and reminded me that I was not to copy it. I again reminded him that I had already copied the contents of the thumb drive to the government's computer, to remain in RCFL control and custody. He acknowledged that.

6. I left the OCRCFL two different times that day, since having been provided copies of TD. Each time, I left without any search of my property, as is expected when exiting an RCFL facility. (Upon my final exit for the day, Mr. Monroe simply waved from behind glass, and asked if I had anything still running on the computer.) As usual, I had in my possession a laptop, a tablet, a smartphone, and several pieces of removable media which I typically carry in my computer bag. Any one of which could have been used to remove TD from the OCRCFL. Even if I did not already have those storage devices with me, there is a BestBuy directly across the street from the OCRCFL, where I could purchase one. I left the OCRCFL for a lunch break, lasting at least an hour. Plenty of time to purchase removable media.

7. *If* I had nefarious intentions, TD would have *already* been “in the wild” for the past two weeks. I am unsure when Mr. Walker realized that he accidentally sent me two copies of TD, but I presume it was sometime between at least November 19, and December 6, 2019 -- and not likely coincidental with my arrival at the OCRCFL. However, upon realizing that TD was already in my possession, Mr. Walker simply admonished me, via Mr. Monroe, that I was not to remove it from the RCFL, and then trusted me not to. At the October 17-18 and November 26th hearings in Anchorage, it was conveyed to the court that putting TD in my possession is considered to be “in the wild”. However, even after realizing that TD had already been released to “the wild”, Mr. Walker allowed me unmonitored access to it. At any time, had Mr. Monroe told me that I would not be able to continue my examination due to the accidental release of TD, I would have complied. Instead, I was allowed by the USA to continue my work until standard OCRCFL closing hours, and leave the facility twice -- all the while trusting that I would not remove a copy of TD, or possibly trusting that I was aware of potential consequences

of doing so. Which I am.

8. Simply put, *if* I cannot be trusted with Torrential Downpour, or its secret feature, then both have *already* been irrevocably compromised and released to the wild. And, *nothing* in the government's latest, or even prior proposals will ever get it back. Having earned the respect, not only of defense attorneys, prosecutors, judges, and the media, as well as my entire income for the last quarter century, it is counter intuitive that someone in my position would simply compromise my status for the purposes of aiding criminal behavior. If anything, at least as much as the AUSA and any member of law enforcement, I earn my living *because* individuals are arrested, not because they are empowered to get away with crime. I have every reason, and even several additional legal reasons to keep this software from being compromised. While Mr. Erdely can accidentally reveal a secret TD feature, and Mr. Walker can accidentally release two copies of the software, I would likely be held in contempt of court, at the least, and possibly risk much more. For this reason alone, the government's clear, and demonstrated attempts to thoroughly monitor and collect evidence on me and my examination for the purposes of exposing the breach of a Protective Order, give me pause to consider whether assisting in the defense of one individual may not be worth risking my own career and freedom. I would suspect, given the impositions the government has proposed, very few if any individuals in my position would accept the case.

9. Despite the government's failure to secure its own software and secrets, I have gone to great lengths, both to voluntarily alert the government and the court about information which they accidentally provided to me, as well as to attempt to use equipment owned by the government, at facilities run by the government, and to utilize very expensive specialized hardware and software at my disposal to further reduce the risk of accidental dissemination. To wit, I suggested the use of the LA SCIF, when it was demonstrated to me that the OCRCFL does not physically guarantee the security of equipment and data left in its shared defense exam room.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct, and that I execute this Declaration in Los Angeles, California, on January 6, 2020.



Jeffrey M. Fischbach