UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR PRTT ORDER FOR ONE WHATSAPP ACCOUNT FOR INVESTIGATION OF VIOLATION OF 21 U.S.C. § 841	Case No. 18-pr-00017 Chief Judge Beryl A. Howell **UNDER SEAL**

MEMORANDUM OPINION

In February 2018, the government sought an order, pursuant to 18 U.S.C. §§ 3122 and 3123, authorizing the installation and use of pen register and trap and trace devices ("PR/TT devices") on a specific WhatsApp, Inc. ("WhatsApp") account. *See* First Application ("App.") at 1, ECF No. 1. Although the application contained the WhatsApp account number for the account in question, the application was denied by a Magistrate Judge on the ground that the application lacked "the cellular telephone number associated with the designated WhatsApp account" and "the provider of such cellular telephone service." *See* Order, dated Feb. 2, 2018 ("Consolidated Order") at 2, *In re Application of USA for PRTT Order*, No. 17-mc-[redacted], ECF No. 6; Order, dated Feb. 5, 2018 ("Order"), ECF No. 2 (denying the application at issue in this matter for the reasons stated in the Consolidated Order). Now pending before the Court is the government's *Ex Parte* Objection to the Magistrate Judge's Denial of Application of the United States for PRTT Order for One WhatsApp Account ("Obj."), ECF No. 3. For the reasons stated herein, a WhatsApp account number is sufficient information to install and use a PR/TT device on a WhatsApp account. Accordingly, the government's objection is sustained, the Magistrate Judge's order is reversed, and the government's application is granted.

I. BACKGROUND

The procedural history of this matter is summarized briefly below, followed by a description of WhatsApp's electronic communication services as relevant to the application at issue.

A. Procedural History

On January 25, 2018, the government filed an application, pursuant to 18 U.S.C. §§ 3122 and 3123, for an order "authorizing the installation and use of pen register and trap and trace devices ('pen-trap devices') to record, decode, and/or capture dialing, routing, addressing, and signaling information associated with each access to, and each communication to or from," a specific WhatsApp account number in use by one of several subjects of an ongoing criminal investigation. App. at 1. In support of this application, the government asserted that "[e]ach WhatsApp account has a unique account identifier in the form of the telephone number of the mobile phone upon which the user has installed the WhatsApp Messenger application," and that "[t]hese telephone numbers, which also function as WhatsApp account identifiers, can be recorded by pen-trap devices and can be used to identify parties to a communication without revealing the communication's content." *Id.* ¶ 17.

That application was denied by a Magistrate Judge in an order dated February 5, 2018, "[f]or the reasons set forth" in a consolidated order, issued three days earlier by the same Magistrate Judge, denying six similar applications for the use of PR/TT devices on WhatsApp accounts. Order at 1.[1] Those six applications were filed between January 25, 2018, and January 29, 2018, and, like the application at issue in this matter, requested orders "authorizing the

[1] Initially, the government did not have access to the Consolidated Order and therefore was unable to determine the reasons for the denial. *See* Obj. at 1 n.1. Recognizing this problem, on February 9, 2018, a different Magistrate Judge issued an order in this matter "explain[ing] the rationale underlying" the prior orders. Order, dated Feb. 9, 2018 at 1, ECF No. 4.

installation and use of pen register and trap and trace devices" on specific WhatsApp accounts. Second Application at 1, *In re Application of USA for PRTT Order*, No. 17-mc-[redacted] ECF No. 5; *see also* Second Application at 1, *In re Application of USA for PRTT Order*, No. 17-mc-[redacted] ECF No. 3; Second Application at 1, *In re Application of USA for PRTT Order*, No. 17-mc-[redacted] ECF No. 3; First Application at 1, *In re Application of USA for PRTT Order*, No. 18-pr-[redacted] ECF No. 1; Application at 1, *In re Application of USA for PRTT Order*, No. 18-pr-[redacted] ECF No. 1; Application at 1, *In re Application of USA for PRTT Order*, No. 18-pr[redacted] ECF No. 1.[2]

The Magistrate Judge denied those six applications on February 2, 2018, noting that the government "d[id] not provide the cellular telephone number associated with the designated WhatsApp account; nor d[id] the United States identify the provider of such cellular telephone service, seemingly utilizing 'WhatsApp' and 'Service Provider' interchangeably." Consolidated Order at 2. The government was directed to "supplement each application (1) to provide the cellular telephone number, and corresponding cellular telephone service provider, onto which the WhatsApp smartphone application has been installed, or (2) to provide the authority on which the United States relies for the proposition that an order pursuant to 18 U.S.C. §§ 3122, 3123 is appropriately entered absent such information." *Id.* The government submitted supplemental material in each of those six cases between February 13, 2018, and February 15, 2018, asserting, *inter alia*, that a user's "WhatsApp account number [ ] is the same as the inputted phone number," that "WhatsApp itself will be the relevant service provider receiving and implementing the requested order," and that "WhatsApp is the applicable service provider for a pen-trap device

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[2] In three of those cases, applications for PR/TT devices on the given WhatsApp accounts previously had been granted. *See, e.g.*, Order, dated Nov. 29, 2017, *In re Application of USA for PRTT Order*, No. 17-mc-[redacted] ECF No. 2 (granting first application in Misc. No. 17-[redacted]; Order, dated Dec. 11, 2017, *In re Application of USA for PRTT Order*, No. 17-mc[redacted] ECF No. 4 (granting renewed first application in Misc. No. 17-[redacted]; Order, dated Dec. 1, 2017, *In re Application of USA for PRTT Order*, No. 17-mc-[redacted] ECF No. 2 (granting first application in Misc. No. 17[redacted]; Order, dated Dec. 1, 2017, *In re Application of USA for PRTT Order*, No. 17-mc-[redacted] ECF No. 2 (granting first application in Misc. No. 17[redacted].

directed to a WhatsApp account number." Supplement to Applications ¶¶ 2–4, *In re Application of USA for PRTT Order*, No. 17-mc-[redacted], ECF No. 7. As of February 28, 2018, the date on which the objection at issue was filed, no further order had been issued taking the supplemental material into account. Although the government had planned to await resolution of those six supplemental applications before objecting to the order in this matter, "because of the need for the order as part of an ongoing investigation, the government file[d] this objection seeking immediate relief." Obj. at 2–3.

B. Background Concerning WhatsApp

WhatsApp is a United States-based company that "provides messaging, Internet calling, and other services to users around the world" through WhatsApp Messenger, a cross-platform smartphone application. *Information for Law Enforcement Authorities*, WHATSAPP, https://faq.whatsapp.com/en/general/26000050/?category=5245250 (last visited March 2, 2018); *About WhatsApp*, WHATSAPP, https://www.whatsapp.com/about (last visited March 2, 2018). Messages and calls sent through WhatsApp Messenger are transmitted over the Internet by WhatsApp servers located in the United States. *See* Obj. at 3; *Features*, WHATSAPP, https://www.whatsapp.com/features (last visited March 2, 2018). Users may utilize either their cellular provider's data network or another data connection, such as their home wireless router or a public wireless hotspot, to connect to the application and exchange messages and calls on the application. *Features*, *supra* ("WhatsApp uses your phone's Internet connection to send messages so you can avoid SMS [short message service] fees.").

Upon registration, each WhatsApp account is given a unique account identifier. According to computer scientists in the Drug Enforcement Administration's Office of Investigative Technology, "after WhatsApp is downloaded to a smart phone capable of running mobile applications, a user must then input a phone number, which will be used by WhatsApp to

confirm the creation of the account." Obj. at 3; *see also Verifying Your Number*, WHATSAPP, https://faq.whatsapp.com/en/iphone/20902747/?category=5245245 (last visited March 2, 2018) ("WhatsApp requires an active phone number to create an account."). WhatsApp accounts "can only be verified with one number on one device," and "[t]here is no option to have a WhatsApp account with two phone numbers." *Using One WhatsApp Account on Multiple Phones, or with Multiple Phone Numbers*, WHATSAPP, https://faq.whatsapp.com/en/general/21009863/?category=5245245 (last visited March 2, 2018). A user's WhatsApp account number is therefore "the same as the inputted phone number." Obj. at 3; *see also id.* at 4 ("[A] WhatsApp account number is numerically the same as the inputted phone number used to confirm the creation of the account."). Users then utilize those account numbers to identify the intended recipients of messages they are sending and to identify the senders of messages they receive. *Id.* at 4.

Importantly, a WhatsApp user need not have downloaded the application onto the device associated with his or her registered phone number. For example, a user may use his or her WhatsApp account on a different smartphone by logging into the application with his or her registered phone number. *See Changing Phone Numbers and/or Phones*, WHATSAPP, https://faq.whatsapp.com/en/general/28030001/?category=5245246 (last visited March 2, 2018) ("If you are moving from one type of phone to another, such as from an iPhone to an Android, *and* preserving your number, you will keep your account info. This information is tied to the phone number. Simply download WhatsApp on the new phone and verify your number.") (emphasis in original). A user may also run a web-based version of the application by visiting a website, opening the smartphone application on his or her phone, and using the phone to scan the code displayed on the website to sync the two platforms. *How Do I Use WhatsApp on My Computer?*, WHATSAPP, https://faq.whatsapp.com/en/web/26000012/?category=5245235 (last

visited March 2, 2018); *Pairing Your Phone with the WhatsApp on Desktop*, WHATSAPP, https://faq.whatsapp.com/en/web/28080003/?category=5245235 (last visited March 2, 2018). The messages sent and received through the web-based platform are then "fully synced between your phone and your computer, and you can see all messages on both devices. Any action you take on the phone will apply to WhatsApp on your computer and vice versa." *How Do I Use WhatsApp on My Computer?*, *supra*.

II. STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(3), "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." As this matter was not "referred" to a magistrate judge by a district court judge within the meaning of § 636(b)(1)(A) or (B), the order denying the government's application is an exercise of the Magistrate Judge's "additional duties," pursuant to § 636(b)(3), in conjunction with this Court's Local Criminal Rules 57.17(a) and 59.3, under which magistrate judges are granted the "duty" and the "power" to "[i]ssue search warrants," as well as to "[i]ssue subpoenas . . . or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings." LCrR 57.17(a)(3), (10). Pursuant to Local Rule 59.3(b), a "magistrate judge's warrant or order for which review is requested . . . may be accepted, modified, set aside, or recommitted to the magistrate judge with instructions, after de novo review by the Chief Judge." LCrR 59.3(b); *see also In re Search of Information Associated with [redacted]@gmail.com That Is Stored at Premises Controlled by Google, Inc.* ("*Google*"), No. 16-mj-757, 2017 WL 3445634, at *5 (D.D.C. July 31, 2017) ("Accordingly, because this case arises out of the Magistrate Judge's 'additional duties' jurisdiction pursuant to § 636(b)(3), the Magistrate Judge's order is subject to *de novo* review by the district court."); *In re U.S. for an Order*

Pursuant to 18 U.S.C. § 2705(b) ("*Airbnb*"), No. 17-mc-2490, 2018 WL 692923, at *3 (D.D.C. Jan. 30, 2018) ("Magistrate judge orders issued under the SCA in unassigned criminal matters are subject to *de novo* review.").

III. DISCUSSION

To address whether a PR/TT device may be installed and used on a WhatsApp account when only the WhatsApp account number is specified in the application, the applicable statutory framework is first reviewed, followed by analysis showing, consistent with the government's explanation for its objection, that a WhatsApp account number is sufficient information to authorize the installation and use of a PR/TT device on a specific WhatsApp account.

A. Statutory Framework

The Electronic Communications Privacy Act of 1986 ("ECPA"), Pub. L. No. 99-508, 100 Stat. 1848, expands to electronic communications certain protections that are afforded to wire and oral communications by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211. In particular, Title III of ECPA, codified in chapter 206 of Title 18, at 18 U.S.C. §§ 3121–27, "addresses pen register and trap and trace devices," requiring government entities to obtain a court order authorizing their installation. S. REP. NO. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557; *see also* 18 U.S.C. § 3121(a) ("[N]o person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of this title or under the Foreign Intelligence Surveillance Act of 1978.").

To obtain an order authorizing the use or installation of a PR/TT device, an "attorney for the Government" must submit an application, "in writing under oath or equivalent affirmation, to a court of competent jurisdiction." 18 U.S.C. § 3122(a)(1). That application must include (1) "the identity of the attorney for the Government or the State law enforcement or investigative officer making the application," (2) "the identity of the law enforcement agency conducting the

investigation," and (3) "a certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." *Id.* § 3122(b).[3] Upon receipt of a satisfactory application, "the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device anywhere within the United States," which order "shall apply to any person or entity providing wire or electronic communication service in the United States whose assistance may facilitate the execution of the order." *Id.* § 3123(a)(1).[4]

PR/TT devices were initially "given narrow definitions limited to the capture of telephone numbers." *In re U.S. for Orders Authorizing Installation & Use of Pen Registers*, 416 F. Supp. 2d 390, 394 (D. Md. 2006); *see also* S. REP. NO. 99-541 at 10, *reprinted in* 1986 U.S.C.C.A.N. at 3564 ("Pen registers are devices that record the telephone numbers to which calls have been placed from a particular telephone. . . . [T]rap and trace devices [ ] record the numbers of telephones from which calls have been placed to a particular telephone."). Those statutory definitions were "significantly broadened" by the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, and now encompass newer types of communications as well. *In re Application of U.S. for an Order for Prospective Cell Site Location Information on a Certain Cellular Telephone*, 460 F. Supp. 2d 448, 455 (S.D.N.Y. 2006); *see also id.* at 456 ("[T]he

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3 The government's application satisfies these basic requirements. *See* App. ¶¶ 3–5.

4 Orders authorizing PR/TT devices must specify (1) "the identify, if known, of the person to whom is leased or in whose name is listed the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied"; (2) "the identity, if known, of the person who is the subject of the criminal investigation"; (3) "the attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied, and, in the case of an order authorizing installation and use of a trap and trace device under subsection (a)(2), the geographic limits of the order"; and (4) "a statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates." 18 U.S.C. § 3123(b)(1). The government's proposed order satisfies these requirements. *See generally* Obj., Ex. 1, Proposed Order, ECF No. 3-1. Although "the subscriber of [the subject account] is unknown," *id.* at 1, the government learned, from a cooperating witness "of proven reliability," that the subject account was used by an [redacted] App. ¶ 18.

House Report on the Patriot Act indicates that Congress did intend the new definitions of pen registers and trap and trace devices to apply to all communications media, not just email.").

Under the current definitions, a "pen register" is defined as "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," but which does not include the contents of any communication. 18 U.S.C. § 3127(3). A "trap and trace device" is defined as "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," again not including the contents of any communication. *Id.* § 3127(4). "Electronic communication" is, in turn, defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." *Id.* § 2510(12).

Relying on these definitions, courts have recognized that PR/TT devices can be used to collect information from many different types of "instrument[s] or facilit[ies]" for electronic communications. *See, e.g.*, *United States v. Forrester*, 512 F.3d 500, 504 (9th Cir. 2008) (concluding that "computer surveillance that enabled the government to learn the to/from addresses of [the defendant's] e-mail messages, the Internet protocol ('IP') addresses of the websites that he visited and the total volume of information transmitted to or from his account" was "analogous to the use of a pen register"); *Meisler v. Chrzanowski*, 2013 WL 5375524, at *14 (D. Nev. Sept. 24, 2013) (noting that "Title III of the ECPA . . . regulates the collection of addressing and other non-content information," including "phone numbers dialed from or to a

particular telephone . . . and its counterpart in internet communications"); *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* ("*In re E-Mail Account*"), 416 F. Supp. 2d 13, 16–17 (D.D.C. 2006) (authorizing installation and use of PR/TT devices on an e-mail account); *In re Application of U.S. for an Order Authorizing the Use of a Pen Register & Trap on [xxx] Internet Service Account/User Name [xxxxxxx@xxx.com]*, 396 F. Supp. 2d 45, 49–50 (D. Mass. 2005) (authorizing the use of PR/TT devices on internet service accounts).

B. PR/TT Devices May Be Used on WhatsApp Accounts Designated by Only Their WhatsApp Account Numbers

With this framework in mind, the government's objection to the Magistrate Judge's order must be sustained. As a threshold matter, PR/TT devices may be installed and used on WhatsApp accounts. The government correctly notes that, "[s]imilar to the way BlackBerry Messenger users use BlackBerry PINs, or E-mail users utilize E-mail addresses, WhatsApp users utilize WhatsApp account numbers to identify the intended recipient of the messages that they send as well as the sender of messages that they receive." Obj. at 4 (citing *In re E-Mail Account*, 416 F. Supp. 2d at 16). The messages sent between WhatsApp users are undoubtedly electronic communications, as they are "transfer[s] of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). Thus, pen registers, which by definition "record[ ] outgoing signals from an instrument or facility that transmits 'electronic communication,'" and trap and trace devices, which by definition "capture incoming electronic impulses to identify the source of an 'electronic communication,'" *In re E-Mail Account*, 416 F. Supp. 2d at 15–16 (quoting 18 U.S.C. § 3127(3)–(4)), can be installed and used on WhatsApp accounts in the same way they are

installed and used on any other "instrument or facility from which a wire or electronic communication is transmitted," 18 U.S.C. § 3127(3), such as an e-mail account.

The reasoning of this Court in *In re E-Mail Account*, 416 F. Supp. 2d 13 (D.D.C. 2006), is instructive. In that case, the Court explained that the pen register statute applies to e-mail communications because the statutory definitions of "pen register" and "trap and trace device" "make clear that both a pen register and a trap and trace device may be a 'process' used to gather information relating to 'electronic communication.'" *Id.* at 16 (quoting 18 U.S.C. § 3127(4)) (footnote omitted). Thus, the Court concluded, "[g]iven that the statute defines an electronic communication to be any 'transfer of signals' of 'any nature' by means of virtually any type of transmission system (*e.g.*, wire, electromagnetic, etc.), there can be no doubt it is broad enough to encompass e-mail communications and other similar signals transmitted over the Internet." *Id.* PR/TT devices therefore can "be processes used to gather information about e-mail communications." *Id.*

In denying the government's application, the Magistrate Judge highlighted the fact that the application "does not provide the cellular telephone number associated with the designated WhatsApp account" and does not "identify the provider of such cellular telephone service, seemingly utilizing 'WhatsApp' and 'Service Provider' interchangeably." Consolidated Order at 2. Neither reason warrants denial of the application. Importantly, the government is seeking only WhatsApp information—that is, "information related to communications occurring over WhatsApp servers located in the United States," Obj. at 4—rather than information regarding the cellular telephone number and cellular service provider for the user in question. As already discussed, a WhatsApp account number is the same as the phone number used to create the WhatsApp account. Thus, by providing the WhatsApp account number, the government has

"provide[d] the cellular telephone number associated with the designated WhatsApp account," Consolidated Order at 2, thereby alleviating the Magistrate Judge's concerns. Indeed, in stating its policy regarding law-enforcement requests for records, WhatsApp itself notes that "[a]ll requests must identify requested records with particularity and include," *inter alia*, "[t]he *WhatsApp account number* (including any applicable country codes . . .)" for the account in question. *Information for Law Enforcement Authorities*, *supra* (emphasis added). That number, which is also the cellular telephone number for the user at issue, properly was provided in the government's application. *See* App. at 1; *id.* ¶ 17.

The Magistrate Judge also stated that the government did not "identify the provider of [ ] cellular telephone service" for the device associated with the designated WhatsApp account. Consolidated Order at 2. Given the information the government seeks, however, WhatsApp is the relevant service provider. Under the pen register statute, an order authorizing a PR/TT device "shall apply to any person or entity providing wire or electronic communication service in the United States." 18 U.S.C. § 3123(a)(1). By "provid[ing] users with the ability to send and receive electronic communications to each other," *Airbnb*, 2018 WL 692923, at *5, through the WhatsApp Messenger application, WhatsApp is providing an electronic communications service.[5] Thus, because the government seeks only "information associated with each access to,

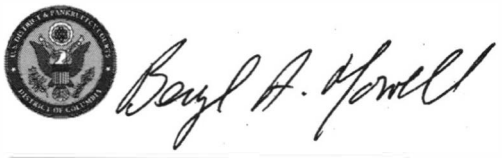
[5] WhatsApp also holds itself out to customers as a provider of electronic communications services. *See Information for Law Enforcement Authorities*, *supra*. The company states that "[a] valid subpoena issued in connection with an official criminal investigation is required to compel the disclosure of basic subscriber records (defined in 18 U.S.C. Section 2703(c)(2))"; "[a] court order issued under 18 U.S.C. Section 2703(d) is required to compel the disclosure of certain records or other information pertaining to the account, not including contents of communications"; and "[a] search warrant issued under the procedures described in the Federal Rules of Criminal Procedure or equivalent state warrant procedures upon a showing of probable cause is required to compel the disclosure of the stored contents of any account." *Id.*

and each communication to or from," a specific WhatsApp account, App. at 1, WhatsApp is the appropriate entity to provide the requested information.[6]

IV. CONCLUSION

For the reasons stated above, the government's objection is sustained, the Magistrate Judge's Order dated February 5, 2018, is reversed, and the government's application, pursuant to 18 U.S.C. §§ 3122 and 3123, for an order authorizing a PR/TT device is granted. The government is directed, by March 12, 2018, to review this Memorandum Opinion and the entire record in this matter and advise the Court of which docket entries may be unsealed in whole or in part, with proposed redactions as necessary to protect any ongoing criminal investigations. An appropriate Order, which is filed under seal, accompanies this Memorandum Opinion.

Date: March 2, 2018



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[6] In support of its argument, the government notes that "the Chief Judge of this Court has recently reviewed and approved the use of various templates, including templates for pen register and trap and trace applications and orders in different contexts, such as e-mail and social media." Obj. at 5–6. The government seemingly understands this approval as "underscoring the conclusion that the statute does not require the government to submit a telephone number and its service provider to obtain an order for web-based communications." *Id.* at 6. Those templates are not intended to serve as shibboleths, requiring the grant of an application merely because the template was used. Rather, as specific legal issues arise, those templates may require modification and do not purport to pre-judge the resolution of particular issues that may arise in specific cases.