UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	CASE NO. 3:17CR83 (RNC)
	:	
	:	
PETER YURYEVICH LEVASHOV, aka "Petr Levashov," "Peter Severa," "Petr Severa," and "Sergey Astakhov"	:	February 6, 2018
	:	
	:	

MOTION OF THE UNITED STATES FOR *CURCIO* HEARING AND FOR STAY OF STANDING ORDER ON DISCOVERY

In this complex cyber prosecution, the government respectfully requests the Court conduct a hearing pursuant to *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), to address a potential conflict of interest of retained defense counsel. Both the government and the defendant request that the Court conduct such a hearing as soon as practicable to address and resolve the conflict.[1]

Consistent with the relief sought, the government seeks an immediate stay of the Court's standing order on criminal discovery to disclose certain materials to defense counsel within 14 days after a defendant's first appearance in Court. As discussed further below, this case involves an unusually large amount of discovery, including a significant amount of information and evidence belonging to the defendant. Thus, it would not be prudent to disclose such voluminous and sensitive material to an attorney who may ultimately be conflicted out of representing the defendant.

[1] The parties consent to having a magistrate judge hear and decide the conflicts issue depending on the Court's availability.

FACTUAL BACKGROUND

From at least February 22, 2016, until his arrest on April 7, 2017, the defendant Peter Levashov, a Russian citizen who lived in St. Petersburg, knowingly and intentionally operated, controlled, and profited from a botnet called Kelihos.

A botnet is a network of computers infected with malicious software and controlled without the computer owners' authorization. In this case, the Kelihos botnet used tens of thousands of infected computers to accomplish a myriad of criminal activities. Specifically, using the Kelihos botnet, Levashov: (i) harvested credentials, including e-mail addresses, usernames, and passwords from infected computers; (ii) sent e-mail spam to promote various fraudulent schemes; and (iii) distributed ransomware, which is malware that encrypts a computer's files and demands payment to unlock the computer.

Levashov profited from Kelihos by advertising these services in online forums and collecting payment for such services. The amount of payment depended on the type of service and the volume of spam. Some of the services Levashov marketed included spamming for pharmaceutical products, employment scams, and phishing, a form of social engineering that uses e-mail or malicious websites to solicit personal information or money by posing as a trustworthy source to the intended victim. Like many cyber criminals, Levashov took numerous steps to anonymize his identity. For example, he marketed his botnet under an online nickname or alias: Peter Severa. Levashov also accessed his infrastructure through a Virtual Private Network ("VPN"), which further masked his true Internet Protocol address.

PROCEDURAL HISTORY

Pursuant to a criminal complaint and arrest warrant arising from this criminal activity,

Levashov was arrested in Spain on or about April 7, 2017. He was ordered detained by Spanish authorities pending extradition proceedings. A grand jury sitting in Bridgeport subsequently returned an eight-count Indictment against Levashov that charged him with various computer, fraud, and identity theft crimes. At the conclusion of the extradition proceedings in Spain, Levashov was ordered extradited to the United States. He arrived in the District of Connecticut from Spain on February 2, 2018, and was presented and arraigned in open court before the Honorable Holly B. Fitzsimmons later that evening. Levashov entered not guilty pleas on all of the charges and was ordered detained without prejudice.

In advance of Levashov's initial appearance and arraignment, the government notified Levashov's retained counsel of record, Igor Litvak, as well as Judge Fitzsimmons, of the existence of the conflict described further below. Judge Fitzsimmons then asked conflict-free standby counsel, Assistant Federal Defender Kelly Barrett, to be present at Levashov's initial appearance and arraignment. At the hearing, Attorney Barrett confirmed on the record that she spoke to Levashov before the hearing, advised him of the charges and maximum penalties in the Indictment, and confirmed that Levashov consented to pretrial detention without prejudice. Separately, Attorney Litvak advised the Court the same at the hearing. Judge Fitzsimmons advised Levashov that a conflict issue existed and that it would addressed at another hearing. Levashov himself asked the court that such a hearing be conducted as quickly as possible.

DISCUSSION

I. Controlling Law

There is a well-established "presumption in favor of [a defendant's] counsel of choice." *Wheat v. United States*, 486 U.S. 153, 164 (1988). "But the right to choose one's own counsel

is not absolute." *United States v. Jones*, 381 F.3d 114, 119 (2d Cir. 2004). Because a "defendant's Sixth Amendment right to effective assistance of counsel includes the right to representation by conflict-free counsel," *United States v. Schwarz*, 283 F.3d 76, 90 (2d Cir. 2002) (quotation omitted), a court must consider not only "the accused's right to counsel, but also the interests of the judiciary in preserving the integrity of its processes, and the government's interest in ensuring a fair trial and a just verdict." *Jones*, 381 F.3d at 119; *see also Wheat*, 486 U.S. at 160. Thus, "[a] criminal defendant may waive his Sixth Amendment right to a representative free from conflicts of interest in order to retain a particular attorney, but—since a waiver will not necessarily cure every conflict—the Sixth Amendment's presumption in favor of counsel of choice may not be interpreted to mean that the right to waive conflicts is absolute." *Jones*, 381 F.3d at 119.

The Connecticut Rules of Professional Conduct address an attorney's conflicts of interest in representing clients.[2] Rule 1.7, which addresses conflicts of interest for current clients, provides that a lawyer ordinarily "shall not represent a client if the representation involves a concurrent conflict of interest." A "concurrent conflict" is defined as one in which "the representation of one client will be directly adverse to another client" or if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Conn. R. Prof. Conduct 1.7(a).

An exception to this general bar to concurrent conflicts if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent

[2] Because the case is pending in this Court, which has adopted the Connecticut Rules of Professional Conduct, *see* L.R. 82(2)(a)(1)(2), those rules apply here.

> and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

Conn. R. Prof. Conduct 1.7(b).

Even if an attorney is no longer representing a client, the attorney still has ethical obligations to a former client. Rule 1.9, for example, bars a lawyer from "represent[ing] another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Conn. R. Prof. Conduct 1.9(a). Matters are "substantially related" if, for example, "there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." *Id.* commentary. Moreover, the attorney still owes a duty of confidentiality to former clients and may not reveal information relating to the client's representation unless there is informed consent. Conn. R. Prof. Conduct 1.6.

As discussed above, however, even if each of the attorney's clients knowingly waives the conflict, this Court has wide latitude to reject the waiver. *See Wheat*, 486 U.S. at 163 ("[T]he district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses."); *Jones*, 381 F.3d at 120 ("The district court retains the discretion to reject that waiver if the attorney's conflict jeopardizes the integrity of the judicial

proceedings."). "Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly." *Wheat*, 486 U.S. at 162.

The Second Circuit has articulated the importance of *Curcio* hearings where a conflict of interest may exist and that conflict can be waived by the defendant. *See United States v. Curcio*, 680 F.2d 881, 888-90 (2d Cir. 1982). At such hearings, "the trial court (1) advises the defendant of his right to representation by an attorney who has no conflict of interest, (2) instructs the defendant as to the dangers arising from particular conflicts, (3) permits the defendant to confer with his chosen counsel, (4) encourages the defendant to seek advice from independent counsel, (5) allows a reasonable time for the defendant to make a decision, and (6) determines, preferably by means of questions that are likely to be answered in narrative form, whether the defendant understands the risk of representation by his present counsel and freely chooses to run them." *United States v. Perez*, 325 F.3d 115, 119 (2d Cir. 2003).

II. The Conflict of Defense Counsel

On January 5, 2018, Attorney Igor Litvak filed a notice of appearance in this case. *See* Docket No. 15. Despite indications from Attorney Litvak that another attorney may also file a notice of appearance in this case as co-counsel, Attorney Litvak is, thus far, the only defense counsel of record.[3] The government recently learned that Attorney Litvak represented another

[3] The other counsel identified by Attorney Litvak, Attorney 2, has a conflict as well. Attorney 2's identity, and the nature of the conflict, is discussed in Sealed Exhibit 1. *See* Sealed Exhibit 1 ¶ 4. The government requests that, as part of any *Curcio* hearing with respect to Attorney Litvak, the Court inquire as to whether Attorney 2 is currently providing, or in the past provided, legal or consulting services to the defendant. *See* Sealed Exhibit 1 ¶ 5. More

defendant in a pending federal criminal case in another district. The circumstances of that concurrent representation are described in Exhibit 1, which is being filed under seal to describe the sensitive information therein. Given Attorney Litvak's concurrent representations, a *Curcio* hearing is necessary to: (1) advise Levashov of the nature and risks of such a conflict, (2) assess whether any exception to the rules of professional conduct applies; (3) determine whether Levashov wishes to waive such a conflict, and, (4) even if Levashov and Litvak's other client were to waive such a conflict, whether this Court will permit Litvak to continue in his representation of Levashov in this case.

III. Good Cause Exists to Issue an Immediate Stay of the Court's Standing Order on Discovery.

During the pendency of the *Curcio* hearing and the Court's resolution of the conflicts issue, the government requests a stay of the deadlines set in the Court's standing order on criminal discovery. Under Section (A)(1) of that order, the government is required to provide or notice to defense counsel enumerated categories of materials "[w]ithin 14 days after arraignment." The court, however, may modify or defer the standing order "upon a showing of good cause." Standing Order § (E).

Here, the government has set forth good cause for an immediate stay of the deadlines in the standing discovery order until the Court resolves the conflict issue. This case involves an unusually voluminous amount of discovery, including materials from investigative files spanning multiple jurisdictions and years, the personal identifying information—including e-mail

---

generally, the Court may wish to advise the defendant about the risks presented from seeking or obtaining legal advice or consulting services from *any* attorney who may have a conflict of interest, regardless of whether that attorney has filed an appearance in this case.

addresses, user names, and passwords—of thousands of individuals, and over 80 terrabytes of electronic data from multiple servers and devices, much of which belong to or were controlled by the defendant himself. Under these circumstances, it would not be prudent to disclose such sensitive and voluminous discovery to counsel who may be conflicted.

Accordingly, the Court should stay the court's standing order on criminal discovery. More specifically, the government requests that it have up to 14 days after the Court's decision concerning the conflict to disclose to defense counsel (whether Attorney Litvak or some other counsel) the required discovery.

The government has conferred with Attorney Litvak, who does not oppose the requested stay of discovery.

WHEREFORE, the government respectfully requests that this Court schedule a *Curcio* hearing at its earliest convenience. Moreover, the Court should stay the deadlines in the standing order on criminal discovery pending resolution of the conflict issue.

Respectfully submitted,

JOHN H. DURHAM
UNITED STATES ATTORNEY

_____/s/_____

VANESSA RICHARDS
ASSISTANT U.S. ATTORNEY
Federal Bar No. phv05095
1000 Lafayette Blvd., 10th Floor
Bridgeport, CT 06604
Tel.: (203) 696-3000

DAVID T. HUANG
ASSISTANT U.S. ATTORNEY
Federal Bar No. ct30434
157 Church Street, 25th Floor
New Haven, CT 06510
Tel: (203) 821-3700

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2018, a copy of the foregoing MOTION OF THE UNITED STATES FOR *CURCIO* HEARING AND FOR STAY OF STANDING ORDER ON DISCOVERY was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/
DAVID T. HUANG
ASSISTANT U.S. ATTORNEY