

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION – FELONY BRANCH

In the Matter of the Search of)
www.disruptj20.org that Is Stored at) Special Proceeding No. 17 CSW 3438
Premises Owned, Maintained, Controlled, or) Judge Morin
Operated by DreamHost)
_____) /

DREAMHOST, LLC'S PROPOSED ORDER

Pursuant to the hearing before Judge Morin on August 24, 2017, and based on the Court's ruling at that hearing, DreamHost LLC hereby submits its proposed order. The proposed order is attached as Exhibit A. Also attached as Exhibit B is a comparison of the proposed order submitted by the government to that submitted by DreamHost.

The proposed order submitted by DreamHost has four primary differences from the proposed order submitted by the government. The Court should accept each of DreamHost's proposed changes to the order.

I. As Held by the Court, the Order Should Include Language Staying the Order Pending an Appeal.

Primary among DreamHost's changes is that it has included a provision issuing a stay of the order pending appeal, as held by the Court at the conclusion of the hearing. The government does not wish to have this part of the Court's ruling reflected in the language of the proposed order. Under DreamHost's proposed language, DreamHost shall provide all of the requested data and information to the government, but the government may not review the data until an appeal of this order is resolved. This language is appropriate for two reasons.

First, at the hearing, DreamHost requested the Court stay its order pending DreamHost's determination of whether it will appeal the order. (8/24/2017 Hr'g Tr. at 54.) The Court, in turn, instructed DreamHost to provide the information to the government, but that "[t]he government won't review it until [DreamHost] make[s] a decision about whether [it is] going to appeal the order." (8/24/2017 Hr'g Tr. at 54-55.) Precluding the government from review of the records while DreamHost determined whether it would exercise its right to appeal the order could not have been limited to DreamHost exercising that right. It would hardly follow that the government could not review the records while DreamHost determined whether to appeal the order, but that it was allowed to review the records once DreamHost files a notice of appeal. DreamHost intends to appeal, although it is still examining the issues. Therefore, pursuant to the Court's rational at the hearing that the government should not review the information if DreamHost intends to appeal, the government should not review the information while an appeal is pending.

Second, the legal standard for issuing a stay pending appeal is satisfied. In order to prevail on a motion to stay pending appeal, a movant must show that it (1) is likely to succeed on the merits, (2) that irreparable harm will result if a stay is denied, (3) that the opposing party will not be harmed by a stay, and (4) that the public interest favors the granting of a stay. *Barry v. Washington Post Co.*, 529 A.2d 319, 320–21 (D.C. 1987). With respect to the likelihood of success on the merits, a party "need not show a mathematical probability of success on the merits." *Akassy v. William Penn Apartments Ltd. P'ship.*, 891 A.2d 291, 310 (D.C. 2006). Further, "[a] stay may be granted with either a high probability of success and some injury, or *vice versa*." *Id.* (emphasis in original). "Thus, if irreparable harm is clearly shown, the movant may prevail by demonstrating that he or she has a substantial case on the merits."

Here, the four factors favor a stay. As DreamHost explained at the hearing and in its papers submitted to the Court, there are significant jurisdictional and First and Fourth Amendment concerns regarding the government's Search Warrant. Indeed, these concerns are the reason this Court has ordered the government to comply with very strict rules regarding what information the government is permitted to access and keep. While the Court ultimately ordered DreamHost to provide the records to the government, there is a significant chance that an appellate court might rule that disclosure of such records violates the First and Fourth Amendments. Further, despite binding precedent from the United States Supreme Court, this Court has ordered DreamHost to disclose what is tantamount to names and a membership list of a political advocacy group and has also authorized the government to obtain content from various different email accounts with one search warrant without any specificity or identification as to each of the email accounts at issue. DreamHost believes it has a high probability of success on the merits, at least on these issues, if not others.

With respect to an irreparable harm, the United States Supreme Court has held that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Considering the considerable First Amendment implications involved in the data and information the government seeks, this factor is readily satisfied.

The last two factors also favor a stay. Because DreamHost is willing to proceed and provide all responsive data and information to the government now (so long as the government is barred from reviewing the data and information as the Court has held), there is no risk that the government will lose the ability to review the data and information once DreamHost's appeal has concluded. And the public interest unquestionably favors ensuring that each citizen's First Amendment rights are fully protected.

Therefore, the language in the proposed order should accurately reflect the Court's holding that the government may not review the records until DreamHost has either determined that it will not appeal the order or has otherwise exhausted its right under appeal.

II. As Held by the Court, the Order Should Include Language that DreamHost Does Not Have to Disclose Information that Qualifies Either as Work Product or Documentary Material Under the PPA.

In its proposed order, with respect to data and information that is covered by the Privacy Protection Act ("PPA"), the government has included a phrase that states that "DreamHost shall not disclose the content of any other material or data that is protected by the Privacy Protection Act ('PPA')." (Ex. A at 2.) DreamHost proposes adding another phrase to this sentence, so that it reads, in full: "DreamHost shall not disclose the content of any other material or data that is protected by the Privacy Protection Act ('PPA') that would qualify as either 'work product' or 'documentary material' as such terms are defined pursuant to the PPA." The Court should include this phrase because it adds specificity to the order to ensure that information that is fully protected by the PPA is not disclosed.

Indeed, as this Court recognized in its August 24, 2017 email to the parties, the government "represent[ed] that it does not request information that is otherwise protected under the PPA, [and therefore] any information protected under the PPA should not be turned over to the government[.]" If the government is not seeking information protected by the PPA, then it should be bound by the specific language proposed by DreamHost that will define what is, and what is not, information that DreamHost is required to disclose.

Furthermore, as DreamHost had to clarify at the hearing, the government's statement that it is not seeking materials under the PPA includes that it is not seeking "work product or documentary material." (8/24/2017 Hr'g Tr. at 30.) Because this was an area of concern to DreamHost, and because there was confusion regarding this point, the Court should address this

issue specifically in its order to ensure the parties are fully aware of what is, and is not, required in DreamHost's production.

III. As Held by the Court, the Order Should Include Language that the Government Shall Not Review the Information and Data Provided Until This Court Approves the Governments' Report.

DreamHost includes a provision in its proposed order that states "that the government shall not begin its review of the data and information until such time as this Court approves all aspects of the report submitted by the government." (Ex. A at 4.) According to the government in its submission, the Court should not include this language because it would require a further order from the Court. But at the hearing, the Court appeared to acknowledge that it would issue a further order regarding this report and whether it was sufficient. (8/24/2017 Hr'g Tr. at 48-49.) Failure to include this language is thus inconsistent with this Court's ruling.

Furthermore, allowing the government to review the information and data prior to this Court approving the process contained in the government's report would essentially make the need for a report superfluous. The reason for requiring the government to submit a report is for the Court to ensure that the government's review will adequately protect the constitutionally protected data and information. If the government can review the data and information prior to this Court approving the report, then there is no real supervision of their review. As the Court acknowledged in its ruling, it is "going to be supervising their search." (8/24/2017 Hr'g Tr. at 53.) This supervision only has merit if the Court first has to approve of the process the government is going to use to review the data and information prior to this review.

IV. The Court Should Order the Government to Permanently Delete Any Data that Does Not Fall Within the Scope of Seizure and File a Report Explaining How the Deletion Will Occur.

The parties have agreed to include language in the order that the government is required to "delete from its servers or any other storage medium any data or information that does not

fall within the authorized Scope of Seizure.” However, given how readily one can restore deleted data, and the various means available by which one can delete data, DreamHost proposes language that the Court order the government to “*permanently* delete” this data and information, a change the government rejects. There is, however, no justification for agreeing to delete the data and yet not agreeing to delete it in a manner where it can be restored. The only possible justification is that the government may intend to later restore and preserve this information on its own computers and servers, wherein the possession would violate this Court’s order.

Further, DreamHost proposes language that, after reviewing the data and information, the government file “a report identifying how such data is permanently deleted and cannot be restored or recovered.” As explained in the emails attached as Exhibit C to the government’s submission, the government objected to this language because it cannot know how it will delete the information until after it has done its general review. But under DreamHost’s proposed language, the government is not required to file this report until *after* it has conducted its review of the information. There is thus no reason why the government does not have the ability to file this report.

The Court should thus require the government to *permanently* delete the unresponsive data and put in place a process by which DreamHost would know that such data has in fact been deleted and cannot be restored, and require the government to specify how it has done so.

DATED this 5th day of September, 2017.

By: /s/ Raymond O. Aghaian
Raymond O. Aghaian
D.C. Bar #478838
Kilpatrick Townsend & Stockton LLP
9720 Wilshire Blvd PH
Beverly Hills, CA 90212-2018
raghaian@kilpatricktownsend.com
(310) 310-7010 office
(310) 388-1198 facsimile
Attorney for DreamHost, LLC

Chris Ghazarian, Esq. (*Pro Hac Vice application submitted*)
DreamHost, LLC
707 Wilshire Blvd., Suite 5050
Los Angeles, CA 90017
chris@dreamhost.com
(213) 787-4401 office
Attorney for DreamHost, LLC

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was sent via e-mail and first-class mail this 5th day of September, 2017, to:

AUSA John W. Borchert
U.S. Attorney's Office
555 Fourth Street, N.W.
Washington, D.C. 20530
john.borchert@usdoj.gov

Paul Alan Levy
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-7725
plevy@citizen.org

/s/ Raymond O. Aghaian _____
Raymond O. Aghaian

EXHIBIT A

DreamHost's Proposed Order

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH
OF WWW.DISRUPTJ20.ORG THAT
IS STORED AT PREMISES OWNED,
MAINTAINED, CONTROLLED, OR
OPERATED BY DREAMHOST

Special Proceedings No. 17 CSW 3438

ORDER

This matter having come before the Court pursuant to the motion to show cause filed by the government seeking to compel DreamHost, LLC. (“DreamHost”) to comply with a search warrant issued by the Court on July 12, 2017, No. 17 CSW 3438 (hereinafter, the “Warrant”), and upon consideration of the representations and arguments made by the parties in their filed pleadings and during a hearing in this matter on August 24, 2017, it is hereby,

ORDERED that, pursuant to that Warrant, DreamHost shall disclose to the government all information that is within the possession, custody, or control of DreamHost for the account **www.disruptj20.org** (hereinafter, the “Account”), including any messages, records, files, logs, or information that have been deleted but are still available to DreamHost, or have been preserved pursuant to a request made under 18 U.S.C. § 2703(f), and meets the following criteria:

1. **For the time period from October 1, 2016, through and including all of January 20, 2017 (Eastern Time)**, all records or other information, pertaining to the Account, including all files, databases, and database records stored by DreamHost in relation to that Account;¹ AND
2. All information in the possession of DreamHost that might identify the DreamHost subscribers related to the Account, including names, addresses, telephone numbers and other identifiers, e-mail addresses, business information, the length of service (including start date), means and source of payment for services (including any credit card or bank account number), and information about any domain name registration; AND
3. All records pertaining to the types of service utilized by the user; AND

¹ The information to be provided by DreamHost for the Account shall include the contents of all email accounts with the domain “@disruptj20.org,” all “blog” posts, and all electronic mailing lists.

4. All records pertaining to communications between DreamHost and any person regarding the account or identifier, including contacts with support services and records of actions taken; EXCEPT
5. DreamHost shall not disclose records that constitute HTTP request and error logs; AND EXCEPT
6. DreamHost shall not disclose the content of any unpublished draft publications (e.g., draft blog posts or emails), including images and metadata that were associated with draft publications; AND EXCEPT
7. Dream Host shall not disclose the content of any other material or data that is protected by the Privacy Protection Act (“PPA”) that would qualify as either “work product” or “documentary material” as such terms are defined pursuant to the PPA; AND

IT IS FURTHER ORDERED that, to the extent there is material or data that DreamHost believes is protected by the PPA and not subject to disclosure to the government, DreamHost shall prepare a log identifying the type of data (i.e., draft blog post, recording) that DreamHost excludes from the production of material, and shall provide that log to the government without identifying the content of such records;² AND

IT IS FURTHER ORDERED that, the government may seize all information provided by DreamHost pursuant to this Order that constitutes evidence of a violation of D.C. Code § 22-1322, as described in the Affidavit in support of the Warrant, including: (a) evidence concerning the nature, scope, planning, organization, coordination, and carrying out of the above-described offense; (b) communications relating to the planning, organization, coordination, and carrying out of the above-described offense; (c) evidence, including Internet Protocol (“IP”) addresses, email addresses, and any other evidence that will help identify individuals who participated in the above-described offense, planned for the above-described offense, organized the above-described offense, or incited the

² If the government disputes the application of the PPA to any type of data that DreamHost excludes from its production, the government may seek review with this Court on the issue of whether the type of data falls within the protection of the PPA. The government and Dream Host will file any copies of this log or filings containing information from this log under seal absent further order from the Court.

above-described offense; and (d) evidence about the state of mind of individuals who participated (or, knowing about planned violence, refused to participate) in the above-described offense, planned for the above-described offense, organized the above-described offense, or incited the above-described offense (collectively, the “Scope of Seizure”); AND

IT IS FURTHER ORDERED that, so long as it falls within the Scope of Seizure as defined above, the government may seize all information relating to the development, publishing, advertisement, access, use, administration or maintenance of the Account, including:

1. Files, databases, and database records stored by DreamHost on behalf of the subscriber or user operating the Account, including:
 - a. HTML, CSS, JavaScript, image files, or other files;
 - b. SSH, FTP, or Telnet logs showing connections related to the website, and any other transactional information, including records of session times and durations, log files, dates and times of connecting, methods of connecting, and ports;
 - c. MySQL, PostgreSQL, or other databases related to the website;
 - d. The contents of all e-mail accounts that are within the @disn.iptj20.org domain (including info@disruptj20.org).
 2. DreamHost subscriber information for the Account, to include:
 - a. Names, physical addresses, telephone numbers and other identifiers, email addresses, and business information;
 - b. Length of service (including start date), types of service utilized, means and source of payment for services (including any credit card or back account number), and billing and payment information;
 - c. The date that the domain name disruptj20.org was registered, the registrant information, administrative contact information, the technical contact information and billing contact used to register the domain and the method of payment tendered to secure and register the Internet domain name;
- AND

IT IS FURTHER ORDERED that, prior to a review of the data and information provided by DreamHost to the government (except that the government may conduct a general review of the data and information to determine the procedures it will use for the detailed review, so long as the general review is limited to determining the type of data and information that is included and not a review of individual pieces of data and information), the government shall file a report with the Court, and provide DreamHost a copy of the same report, identifying the following: (a) the individuals who will be involved in or are authorized to participate in the review of the data and information, including all individuals who conducted the general review described above; (b) the process the government will use to review the data and information; (c) to the extent not already addressed by that process, the procedures the government will implement to minimize the review of data and information that does not fall within the Scope of Seizure; and (d) to the extent it can be determined based on the general review, the government's plan for deleting from its files and servers all data and information that does not fall within the Scope of Seizure following the search and seizure of evidence; AND

IT IS FURTHER ORDERED that the government shall not begin its review of the data and information until such time as this Court approves all aspects of the report submitted by the government;

IT IS FURTHER ORDERED that, upon completion of the government's review of the data and information provided by DreamHost to the government, and having identified the data and information that is within the Scope of Seizure from that which is outside of the Scope of Seizure, the government shall: (a) permanently delete from its servers or any other storage medium any data or information that does not fall within the authorized Scope of Seizure; and (b) file with the Court, *ex parte* and under seal, a copy of all data and information that is outside of the Scope of Seizure and separately file under seal, but not *ex parte*, a report identifying how such data is permanently deleted and cannot be restored or recovered; AND

IT IS FURTHER ORDERED that, after filing a copy with the Court of the data or information that does not fall within the authorized Scope of Seizure, the government shall not have any access to this data or information without a further Court order; AND

IT IS FURTHER ORDERED that the government shall not distribute, publicize, or otherwise make known to any other person or entity, to include any other law enforcement or government entity, the data and information that does not fall within the authorized Scope of Seizure; AND

IT IS FURTHER ORDERED that all data and information that falls within the Scope of Seizure may be copied and retained by the government; AND

IT IS FURTHER ORDERED that, upon completion of the government's review of the data and information provided by DreamHost to the government, the government shall file, *ex parte* and under seal, an itemized list of the data and information that the government has copied and retained as falling within the Scope of Seizure and the specific reason(s) the government believes that each individual items of data and information falls within the Scope of Seizure; AND

IT IS FURTHER ORDERED that, along with its itemized list of the data and information that the government has copied and retained as falling within the Scope of Seizure, the government shall file with the Court *ex parte* and under seal a copy of the information contained on this itemized list; AND

IT IS FURTHER ORDERED that, to the extent the government needs a full digital copy of all material provided by DreamHost for purposes of authentication at trial, the government may seek leave of the Court to obtain from the Court the full scope of material disclosed by DreamHost that the government is providing to the Court consistent with the procedures set forth in this Order and that the Court will maintain under seal in this case; AND

IT IS FURTHER ORDERED that this Order is stayed pending the resolution of any appeal of this Order, except that DreamHost is still required to provide the government with a copy of all data and information that it is otherwise required to produce under this Order, and that the government is hereby forbidden from reviewing, processing, or otherwise accessing the data and information in any manner during the pendency of the appeal.

SO ORDERED.

Chief Judge Robert E. Morin

Superior Court for the District of Columbia

Date: _____

Copies to:

Jennifer A. Kerkhoff
John W. Borchert
Assistant United States Attorneys

Raymond O. Aghaian
Counsel for DreamHost, Inc.

EXHIBIT B

DreamHost's Proposed Order

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH
OF WWW.DISRUPTJ20.ORG THAT
IS STORED AT PREMISES OWNED,
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2. All information in the possession of DreamHost that might identify the DreamHost subscribers related to the Account, including names, addresses, telephone numbers and other identifiers, e-mail addresses, business information, the length of service (including start date), means and source of payment for services (including any credit card or bank account number), and information about any domain name registration; AND
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7. Dream Host shall not disclose the content of any other material or data that is protected by the Privacy Protection Act (“PPA”) that would qualify as either “work product” or “documentary material” as such terms are defined pursuant to the PPA; AND

IT IS FURTHER ORDERED that, to the extent there is material or data that DreamHost believes is protected by the PPA and not subject to disclosure to the government, DreamHost shall prepare a log identifying the type of data (i.e., draft blog post, recording) that DreamHost excludes from the production of material, and shall provide that log to the government without identifying the content of such records;² AND

IT IS FURTHER ORDERED that, the government may seize all information provided by DreamHost pursuant to this Order that constitutes evidence of a violation of D.C. Code § 22-1322, as described in the Affidavit in support of the Warrant, including: (a) evidence concerning the nature, scope, planning, organization, coordination, and carrying out of the above-described offense; (b) communications relating to the planning, organization, coordination, and carrying out of the above-described offense; (c) evidence, including Internet Protocol (“IP”) addresses, email addresses, and any other evidence that will help identify individuals who participated in the above-described offense, planned for the above-described offense, organized the above-described offense, or incited the

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above-described offense; and (d) evidence about the state of mind of individuals who participated (or, knowing about planned violence, refused to participate) in the above-described offense, planned for the above-described offense, organized the above-described offense, or incited the above-described offense (collectively, the “Scope of Seizure”); AND

IT IS FURTHER ORDERED that, so long as it falls within the Scope of Seizure as defined above, the government may seize all information relating to the development, publishing, advertisement, access, use, administration or maintenance of the Account, including:

1. Files, databases, and database records stored by DreamHost on behalf of the subscriber or user operating the Account, including:
 - a. HTML, CSS, JavaScript, image files, or other files;
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 - c. MySQL, PostgreSQL, or other databases related to the website;
 - d. The contents of all e-mail accounts that are within the @disn.iptj20.org domain (including info@disruptj20.org).
 2. DreamHost subscriber information for the Account, to include:
 - a. Names, physical addresses, telephone numbers and other identifiers, email addresses, and business information;
 - b. Length of service (including start date), types of service utilized, means and source of payment for services (including any credit card or bank account number), and billing and payment information;
 - c. The date that the domain name disruptj20.org was registered, the registrant information, administrative contact information, the technical contact information and billing contact used to register the domain and the method of payment tendered to secure and register the Internet domain name;
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IT IS FURTHER ORDERED that, prior to a review of the data and information provided by DreamHost to the government (except that the government may conduct a general review of the data and information to determine the procedures it will use for the detailed review, so long as the general review is limited to determining the type of data and information that is included and not a review of individual pieces of data and information), the government shall file a report with the Court, and provide DreamHost a copy of the same report, identifying the following: (a) the individuals who will be involved in or are authorized to participate in the review of the data and information, including all individuals who conducted the general review described above; (b) the process the government will use to review the data and information; (c) to the extent not already addressed by that process, the procedures the government will implement to minimize the review of data and information that does not fall within the Scope of Seizure; and (d) to the extent it can be determined based on the general review, the government's plan for deleting from its files and servers all data and information that does not fall within the Scope of Seizure following the search and seizure of evidence; AND

IT IS FURTHER ORDERED that the government shall not begin its review of the data and information until such time as this Court approves all aspects of the report submitted by the government;

IT IS FURTHER ORDERED that, upon completion of the government's review of the data and information provided by DreamHost to the government, and having identified the data and information that is within the Scope of Seizure from that which is outside of the Scope of Seizure, the government shall: (a) permanently delete from its servers or any other storage medium any data or information that does not fall within the authorized Scope of Seizure; and (b) file with the Court, *ex parte* and under seal, a copy of all data and information that is outside of the Scope of Seizure and separately file under seal, but not *ex parte*, a report identifying how such data is permanently deleted and cannot be restored or recovered; AND

IT IS FURTHER ORDERED that, after filing a copy with the Court of the data or information that does not fall within the authorized Scope of Seizure, the government shall not have any access to this data or information without a further Court order; AND

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Deleted: , which the government may comply with by filing the full scope of the original material disclosed by DreamHost.

IT IS FURTHER ORDERED that the government shall not distribute, publicize, or otherwise make known to any other person or entity, to include any other law enforcement or government entity, the data and information that does not fall within the authorized Scope of Seizure; AND

IT IS FURTHER ORDERED that all data and information that falls within the Scope of Seizure may be copied and retained by the government; AND

IT IS FURTHER ORDERED that, upon completion of the government's review of the data and information provided by DreamHost to the government, the government shall file, *ex parte* and under seal, an itemized list of the data and information that the government has copied and retained as

falling within the Scope of Seizure and the specific reason(s) the government believes that each individual items of data and information falls within the Scope of Seizure; AND

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IT IS FURTHER ORDERED that, along with its itemized list of the data and information that the government has copied and retained as falling within the Scope of Seizure, the government shall file with the Court ex parte and under seal a copy of the information contained on this itemized list; AND

IT IS FURTHER ORDERED that, to the extent the government needs a full digital copy of all material provided by DreamHost for purposes of authentication at trial, the government may seek leave of the Court to obtain from the Court the full scope of material disclosed by DreamHost that the government is providing to the Court consistent with the procedures set forth in this Order and that the Court will maintain under seal in this case; AND

IT IS FURTHER ORDERED that this Order is stayed pending the resolution of any appeal of this Order, except that DreamHost is still required to provide the government with a copy of all data and information that it is otherwise required to produce under this Order, and that the government is hereby forbidden from reviewing, processing, or otherwise accessing the data and information in any manner during the pendency of the appeal.

SO ORDERED.

Chief Judge Robert E. Morin

Superior Court for the District of Columbia

Date: _____

Copies to:

Jennifer A. Kerkhoff
John W. Borchert
Assistant United States Attorneys

Raymond O. Aghaian
Counsel for DreamHost, Inc.