FILED: January 8, 2014

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-4625 (L) (1:13-sw-00522-CMH-1) (1:13-dm-00022-CMH-1)

In re: UNDER SEAL

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LAVABIT, LLC.; LADAR LEVISON

Parties-in-Interest - Appellants

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA; EMPEOPLED, LLC.; ELECTRONIC FRONTIER FOUNDATION

Amici Supporting Appellant

O R D E R

Upon consideration of submissions relative to the motion of amicus curiae to

participate in oral argument, the court denies the motion.

For the Court

/s/ Patricia S. Connor, Clerk

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT Lewis F. Powell, Jr. United States Courthouse Annex 1100 East Main Street, Suite 501 Richmond, Virginia 23219-3517 <u>www.ca4.uscourts.gov</u>

PATRICIA S. CONNOR CLERK **TELEPHONE** (804) 916-2700

January 9, 2014

Ian James Samuel, Esquire JONES DAY 290 West 12th Street New York, NY 10014

Andrew Peterson, Esquire OFFICE OF THE UNITED STATES ATTORNEY 2100 Jamieson Avenue Alexandria, VA 22314-5194

Re: No. 13-4625, In re: Under Seal 1:13-sw-00522-CMH-1

Dear Counsel:

Oral argument in this case is scheduled for January 28, 2014. Please respond to this notice within 7 days and advise this office of your position as to whether the courtroom should be sealed during all or a portion of the presentation of oral argument in this case. Your responses will be forwarded to the argument panel upon filing.

Sincerely,

/s/ Mark J. Zanchelli

Chief Deputy Clerk

MJZ:abw



Dana J. Boente Acting United States Attorney U.S. Department of JusticeUnited States Attorney's OfficeEastern District of Virginia

2100 Jamieson Avenue Alexandria, VA 22314 (703) 299-3700 (703) 299-3892 (fax)

January 9, 2014

Patricia S. Connor, Clerk United States Court of Appeals for the Fourth Circuit 1100 East Main Street, Suite 501 Richmond, VA 23219-3517

Re: 13-4625, In re: Under Seal

Dear Ms. Connor:

The Office of the Clerk requested the United States' position on whether the courtroom needed to be sealed during all or a portion of the presentation of oral argument in the above-referenced matter. It is the position of the United States that the courtroom need not be sealed during presentation of the oral argument. Because the District Court has unsealed nearly the entire record below, and the information that remains sealed is both known to the Parties and irrelevant to the issues before the Court, the United States believes there will be no need for either Party to present sealed information at oral argument.

Sincerely,

Dana J. Boente Acting United States Attorney

/s/

By:

Andrew Peterson Assistant United States Attorney



Dana J. Boente Acting United States Attorney U.S. Department of JusticeUnited States Attorney's OfficeEastern District of Virginia

2100 Jamieson Avenue Alexandria, VA 22314 (703) 299-3700 (703) 299-3892 (fax)

January 10, 2014

Patricia S. Connor, Clerk United States Court of Appeals for the Fourth Circuit 1100 East Main Street, Suite 501 Richmond, VA 23219-3517

Re: 13-4625, In re: Under Seal

Dear Ms. Connor:

I write to bring to the Court's attention two published opinions of this Court that have been issued since briefing in the above-captioned matter concluded.

First, in their opening brief, Appellants argued that the warrant issued below was invalid because the information sought was not "fruits, instrumentalities, or evidence" of any crime. (Lavabit Opening Br. at 21-24.) In response, the government argued that the encryption keys listed in the warrant were lawfully seized as property involved in crime. (Gov't Br. at 34-36.) On December 24, 2013, in *United States v. Dargan*, this Court upheld the seizure of a purchase receipt from a suspect's residence as relevant evidence in a bank robbery investigation. Slip Op. at 9-11. This case provides additional support for the government's argument that the Fourth Amendment does not prohibit the seizure of items that alone are not direct evidence of an element of a crime. Moreover, the Court's reasoning that warrants should be interpreted in a common sense matter to encourage the government to seek warrants when intruding into constitutionally protected areas, *Dargan*, slip op. at 8, is equally applicable here.

Second, to succeed on their appeal, Appellants must identify error committed by the District Court. (Gov't Br. at 16-17.) On January 8, 2014, in *United States v. Chinua Shepperson*, this Court held a district court is not required to raise, *sua sponte*, statutory claims of a criminal

defendant, even when the defendant is charged with a death-eligible offense. (Slip Op. at 6-8.) Here, Appellants seek to invalidate the Pen Register Order and Search Warrant based on issues they failed to raise before the district court. As *Shepperson* indicates, the district court's failure to consider those issues was not error.

Sincerely,

Dana J. Boente Acting United States Attorney

By: _____/s/

Andrew Peterson Assistant United States Attorney



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Jonathan R. Bronley, Partner Jesse R. Binnall, Partner

January 10, 2014

Patricia S. Connor, Clerk United States Court of Appeals for the Fourth Circuit 1100 East Main Street, Suite 501 Richmond, VA 23219-3517

Re: 13-4625, In re: Under Seal

Dear Ms. Connor:

The Office of the Clerk requested our position on whether the courtroom needed to be sealed during all or a portion of the presentation of oral argument in the above-referenced matter. We agree with the United States' position that sealing the courtroom is unnecessary due to the District Court unsealing the majority of the record below, and the parties will not need to present any presently sealed information at oral argument.

Very truly yours,

/s/ Jesse R. Binnall

Jesse R .Binnall

LTG/alc