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 Premises Owned, Maintained, Controlled, Operated by DreamHost	)	Special Proceeding No. 17 CSW 3438
	)	Chief Judge Morin

MOTION OF DOE 6, DOE 7, AND DOE 8 FOR LEAVE TO INTERVENE TO OPPOSE ENTRY OF AN ORDER GIVING THE GOVERNMENT ACCESS TO IDENTIFYING INFORMATION ABOUT INDIVIDUALS WHO SENT AND RECEIVED EMAILS TO AND FROM ADDRESSES ON THE DisruptJ20.org DOMAIN

Doe 6, Doe 7, and Doe 8 seek leave of Court to intervene in this proceeding to oppose the order requested by the Government seeking to require DreamHost to disclose documents that contain identifying information about individuals who sent and received emails from addresses on the DisruptJ20.org domain, including documents that list the members of email listservs associated with the DisruptJ20.org web site, for the following reasons:

1. As shown by the attached affidavits (from which the names and signatures have been redacted), each of the Does either was a member of an email listserv pursuant to which the Doe received emails from email addresses on the DisruptJ20.org domain, and/or sent email to and/or received email from an address on the DisruptJ20.org domain. These communications were made and/or sent in connection with the Does' political activism, including legal support work. Each of the Does had expected that the communications that they sent (and the addresses at which they received communications) were private and anonymous. The execution of the warrant would lead to the loss of the anonymity that they enjoyed in sending and receiving those communications, and in being included in the membership list for the listserv.

2. None of the Does were engaged in any criminal activity during the January 2017

inauguration weekend. However, the Does object to disclosures that would lead to identifying them to a federal government that is increasingly hostile to dissent. Accordingly, the Does wish to ask the Court to protect their First Amendment right to speak and read anonymously

3. The Does first learned of the search warrant seeking their identifying information after the motion to enforce was first reported on DreamHost's blog on August 14, and thereafter in the press. The Government proposed narrowing the warrant in the reply brief that it filed on August 22, 2017; at August 24 hearing on the Government's motion to enforce the subpoena, the Court accepted the proposed narrower warrant but also decided that Doe Internet users in intervenors' position were subject to being identified, without any provision for providing notice. Does 6, 7, and 8 are submitting this motion for leave to intervene less than three weeks week after learning that their anonymity was at risk, and only eight days after the August 24 hearing.

4. Although DreamHost has opposed execution of the warrant, the Does are not DreamHost's customers and believe that they are best able to articulate to the Court the reason why their identities should be protected against compelled disclosure. Moreover, although DreamHost argues for particularly exacting scrutiny because of the presence of "First Amendment issues" that affect the interest of third parties, it does not assert any First Amendment rights of its own, and it does not purport to represent the individuals whose First Amendment rights are at issue. The Does unquestionably have standing to raise their First Amendment rights in opposition to discovery that would take away their First Amendment right to send and receive communications anonymously, and DreamHost is not an adequate representative in presenting that question. *See In re Grand Jury Subp. No. 11116275*, 846 F. Supp. 2d 1, 4 (D.D.C. 2012) (Doe Twitter user allowed to intervene anonymously to oppose grand jury subpoena seeking identity of Twitter account owner); *see also*

Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154, 1166 (W.D. Wash. 2010) (allowing Internet users whose information was sought by state agency to intervene to protect First Amendment right to read anonymously even though company that held the information was also opposing the discovery).

5. The Doe intervenors seek leave to intervene at this time not only to present objections to a proposed order which, counsel understand, is likely to be prejudicial to the Does' rights, but also to enable them to pursue an appeal of the proposed order if entered, and to move promptly for a stay pending appeal. The D.C. Court of Appeals has held that it has appellate jurisdiction to consider an appeal by a Doe internet user objecting to an order enforcing a subpoena to a third-party host, in that case Wikipedia. *Doe No. 1 v Burke*, 91 A.3d 1031 (D.C. 2014). The Doe intervenors will also ask the Court to direct DreamHost to provide notice to other Doe Internet users, as required by the D.C. Court of Appeals in *Solers v. Doe*, 977 A.2d 941, 956 (D.C. 2009). Counsel for intervenors has been unable to obtain any assurance from counsel for DreamHost that DreamHost will seek appellate review or that it will give the required notice to the holders of the email addresses in question.

6. The D.C. Rules of Criminal Procedure have no express provision for intervention, but Rule 57(b) provides that, "when there is no controlling law[, t]he court may regulate practice in any manner consistent with applicable law and these rules." Moreover, the D.C. Court of Appeals has authorized intervention in criminal proceedings by non-parties seeking to assert their First Amendment rights. *See In re Jury Questionnaires*, 37 A.3d 879 (D.C. 2012).

7. Movants are not providing their proposed brief because the precise arguments in the brief will depend on the terms of the proposed order that the Court is asked to issue. However, movants recognize that the Court has already declined to exclude the listserv email address lists and the emails to and from outside visitors to the web site from the scope of the materials to be disclosed.

Thus, intervention at this time is warranted.

8. Although the Court has already rejected, implicitly if not explicitly, many of the First Amendment arguments that intervenors expect to present, intervenors plan to argue on appeal, and in support of a stay pending appeal, that the Government's argument for use of the two-step process rests on distinguishable case law.

9. In addition, intervenors anticipate making an argument that the Court has not, to our knowledge, yet addressed — that the Government has never established probable cause to believe that the specific documents on which intervenors are focused contain evidence of crimes (that is, the emails to and from the site and the list of members of the email listservs). The Court has ruled that there is probable cause to search documents pertaining to the web site in general, but it has not addressed the question whether access to these documents in particular meets the test of "scrupulous exactitude." *See Zurcher v Stanford Daily*, 436 U.S. 547, 564 (1978).

10. It was only at last week's hearing that counsel learned that the affidavit in support of the issuance of the search warrant had been made public. Upon reviewing that affidavit, counsel believe that the affidavit, when read in light of the contents of the actual DisruptJ20 web site, was misleading in several respects and in any event does not support any finding that there is probable cause to believe that emails sent to and from addresses on the domain, or documents revealing the identities of members of DisruptJ20 listservs, will contain evidence of criminal intent or planning for illegal activity as argued by the Government. And unless the affidavit contains specific facts to support a finding of probable cause that those emails, and the lists of members of the listservs, do contain such evidence, there is no basis for taking away the right to speak and read anonymously by compelling the disclosure of the email addresses of outside Internet users who sent emails to the site or received

emails from the site.

10. Undersigned counsel Paul Alan Levy certifies that he attempted to confer with counsel for DreamHost and for the United States about this motion for leave to intervene. The United States objects to the proposed motion for leave to intervene. DreamHost has not taken a position on the proposed motion.

CONCLUSION

The motion for leave to intervene should be granted.

Respectfully submitted,

/s/ Paul Alan Levy

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of September, 2017, I am filing this motion using the Court's efiling system, which will, in turn, cause copies to be served on counsel for the Government and counsel for DreamHost:

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