SUPREME COURT OF THE STATE OF NEW YORK, CRIMINAL TERM
COUNTY OF NEW YORK

IN RE 381 SEARCH WARRANTS DIRECTED TO FACEBOOK, INC. AND DATED JULY 23, 2013.

Index No.: _____
Part 23
Justice Melissa C. Jackson

FILED UNDER SEAL

MEMORANDUM OF LAW IN SUPPORT OF FACEBOOK, INC.'S MOTION TO QUASH BULK SEARCH WARRANTS AND STRIKE NONDISCLOSURE PROVISIONS

I. INTRODUCTION

This motion seeks to quash hundreds of sealed search warrants directing Facebook to produce virtually all records and communications – including photos, videos, messages, likes, and comments – of nearly 400 Facebook accounts. *See* Affirmation of Manny J. Caixeiro ("Caixeiro Aff."), ¶ 2 (Exs. 1-381 thereto). These warrants fail to include date restrictions or any other criteria to limit the voluminous data sought, nor do they provide for procedures to minimize the collection or retention of information that is unrelated to the investigation. The warrants' extraordinary overbreadth and lack of particularity render them constitutionally infirm and defective under state and federal law, and they should be quashed. In the alternative, Facebook should be permitted to provide notice to the people whose accounts are subject to these warrants to afford an opportunity to object to their expansive scope. *Id.* (Exs. 1-381).

II. ARGUMENT

A. The Bulk Search Warrants Violate the Fourth Amendment and Art. I, § 12 of the State Constitution.

The Warrants Clauses of the Federal and New York Constitutions require that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See* U.S. Const. Amend. IV; *see also* N.Y. Const., art. I, § 12. "To achieve its goal, the Warrants Clause requires particularity and forbids overbreadth." *United States v. Cioffi*, 668 F.Supp.2d 385, 390 (E.D.N.Y. 2009). "Although somewhat similar in focus, these are two distinct legal issues: (1) whether the items listed as 'to be seized' in the warrant were overbroad because they lacked probable cause and (2) whether the warrant was sufficiently particularized on its face to provide the necessary guidelines for the search by the executing officers." *United States v. Hernandez*, No. 09 Cr. 625(HB), 2010 WL 26544, at *7 (S.D.N.Y. Jan. 6, 2010) (citations omitted). The warrants at issue violate the Fourth Amendment and Art. I, § 12 of the New York Constitution because (1) the searches they authorize are overbroad, and (2) the warrants lack particularity.

1. The Search Warrants Are Overbroad.

"Probable cause" is required for the issuance of all search warrants. *See* United States Const. Amend. IV; *see also* N.Y. Const., art. I, § 12. A finding of probable cause requires "information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place." *People v. Bigelow*, 66 N.Y.2d 417, 423 (1985). Thus, the scope of a search is defined by the contents of the probable cause affidavit.

Here, the requisite probable cause for each of the 381 warrants appears to be supported by a single affidavit from an investigator. *See* Caixeiro Aff. (Exs. 1-381). While Facebook has not been provided with a copy of this affidavit, it is difficult to conceive how one affidavit could support searches of nearly 400 accounts in the same investigation. Indeed, the investigator's affidavit would need to individually demonstrate that each one of the accounts is so connected to the crimes under investigation as "to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found." *Bigelow*, 66 N.Y.2d at 423.

The required probable cause showing would appear to be especially difficult to make where, as here, there is no allegation that the accounts are instrumentalities of a crime. Probable cause cannot be established simply by linking an online account to an alleged target of a criminal investigation, and mere speculation as to what may be uncovered by searching through this vast amount of electronic data is insufficient to support a finding of probable cause. *People v. Taylor*, Indictment Nos. 1845/2000, 1012/2001, 2002 WL 465094, at *16 (Queens Co. Sup. Mar. 20, 2002) (speculation that suspect used a cell phone to plan criminal activity "does not provide probable cause to believe that a search of the memory of the defendant's cellular telephone would yield fruits, instrumentalities or evidence of the crime under investigation"). Accordingly, the Court should quash these warrants because they are fatally overbroad.

2. The Search Warrants Lack Particularity.

All search warrants must particularly describe the place to be searched "so that the right of privacy is protected from arbitrary police intrusion." *People v. Cahill*, 2 N.Y.3d 14, 41, 809 N.E.2d 561, 572 (2003), citing N.Y. Const., art. I, § 12; U.S. Const. Amend. IV. "The requirement was designed to prohibit law enforcement agents from undertaking a general exploratory search of a person's belongings." *People v. Brown*, 96 N.Y.2d 80, 84, 749 N.E.2d

170, 173 (2001), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). "Indeed, indiscriminate searches pursuant to general warrants 'were the immediate evils that motivated the framing and adoption of the Fourth Amendment.'" *Brown*, 749 N.E.2d at 174, quoting *Payton v. New York*, 445 U.S. 573, 583 (1980). Hence, the particularity requirement is intended to ensure that searches are "as limited as possible." *Coolidge*, 403 U.S. at 467. Searches involving documents must also contain limiting language and be "conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976).

Here, the bulk warrants authorize impermissible, general and indiscriminate searches. A search of all the data in hundreds of accounts without any limitation as to date range, the individuals under investigation, or the type of data sought amounts to a prohibited "general exploratory search of a person's belongings." *Brown*, 749 N.E.2d at 173-74; see also *U.S. v. Zemlyansky*, --- F.Supp.2d ----, 2013 WL 2151228, at *16 (S.D.N.Y. May 20, 2013) ("[a] warrant's failure to include a time limitation, where such limiting information is available and the warrant is otherwise wide-ranging, may render it insufficiently particular"), quoting *United States v. Costin*, No. 5 Cr. 38, 2006 WL 2522377, at *12 (D. Conn. July 31, 2006).

The warrants also lack particularity because they fail to describe how the officers conducting their searches could ascertain how the specific data requested could contain evidence regarding the crimes under investigation or reveal persons involved in those crimes. *United States. v. Vilar*, No. S305CR621KMK, 2007 WL 1075041, at *22 (S.D.N.Y. Apr. 4, 2007) (warrant lacked particularity where it contained "an oblique reference to 'participants in the fraud schemes,' but this would have been unhelpful to the Inspectors executing the search, as the Warrant does not identify those participants or explain the referenced fraud schemes, nor does it

identify the particular transactions and illicit activities upon which the Warrant was founded."). Indeed, beyond mere citation of the criminal statutes, the warrants do not identify the subjects or the alleged criminal activity. *Id.* The reference to the investigator's affidavit does not save this infirmity because it is neither specifically incorporated in nor attached to the warrants. *People v. Bennett*, 171 Misc.2d 264, 268 (Bronx Co. Sup. 1996) ("a description contained in the application for a search warrant may, by incorporation into the warrant, cure what would otherwise be a defect in the warrant's description of the property to be seized" when "the application [is] attached to the warrant, or at least physically accompan[ies] it, and [] the warrant explicitly incorporate[s] the affidavit by reference").

Finally, the warrants also lack particularity because they fail to include any procedures or requirements to minimize the collection of evidence unrelated to the alleged crimes. *Cf. People v. Teicher*, 52 N.Y.2d 638, 655 (1980) ("Minimization is also necessary for a warrant authorizing video electronic surveillance," which "constitutes an extensive invasion of the individual's privacy."); *People v. Rothman*, 801 N.Y.S.2d 780, 2005 WL 1645271, at *3 (Nassau Co. Sup. 2005) (minimization requirement for interception of electronic conversations "has its underpinnings" in the Fourth Amendment's particularity requirement). Here, the bulk warrants demand virtually all information from nearly 400 accounts, thus compelling the inevitable disclosure of data that has no connection to the crimes under investigation. Accordingly, protocols for filtering and return or disposal of irrelevant data should also be in place to ensure compliance with the Fourth Amendment. *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1179 (9th Cir. 2010) ("the warrant application should normally include, or the issuing judicial officer should insert, a protocol for preventing agents involved in the investigation from examining or retaining any data other than that for which probable cause is

shown.") (Kozinski, J., concurring); *In re Search Warrant*, --- A.3d ----, 2012 WL 6217042, at *20-22 (Vt. 2012) (upholding warrant requiring filtering of electronic data by "the time period relevant to the alleged criminal activity, key words, and specific file types," and return and destruction of irrelevant data); *In re Applications for Search Warrants for Information Associated with Target Email Address*, Nos. 12–MJ–8119–DJW, 12–MJ–8191–DJW, 2012 WL 4383917, at *9 (D. Kansas, Sept. 21, 2012) (appropriate minimization procedures involving email search warrant may include "appointing a special master with authority to hire an independent vendor to use computerized search techniques to review the information for relevance and privilege, or setting up a filter group or taint-team to review the information for relevance and privilege").

B. The Warrants' Defective Nondisclosure Provisions Should be Stricken.

Each warrant contains a nondisclosure provision entered "pursuant to 18 USC § 2703(b)" that commands "Facebook not to notify or otherwise disclose the existence or execution" of the warrants "to any associated user/account holder, since such disclosure could cause individuals to flee, destroy evidence, or otherwise interfere with an ongoing criminal investigation." If the warrants are not quashed, the nondisclosure provisions should be stricken because they fail to meet the applicable statutory requirements and deny the account holders an opportunity to address these expansive intrusions.

Section 2703(b), the statutory provision identified in the warrant to support nondisclosure, does not actually authorize a nondisclosure order. Rather, this section identifies when the government may require a provider of a remote computer service to disclose the contents of a wire or electronic communication. Section 2705(b), the provision that does provide for nondisclosure in limited circumstances, requires the Court to set a definite time period on

nondisclosure. *See* 18 U.S.C. § 2705(b); *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 877-78, 895 (S.D. Tex. 2008) (rejecting indefinite nondisclosure provisions that prohibit providers from the disclosing a legal demand to their users "until further order of the court."). Because no time period is specified in the warrant, the nondisclosure provision is fatally defective.

In addition, while a warrant may preclude advance notice, this can only occur upon a showing of "reasonable cause to believe that (1) the property sought may be easily and quickly destroyed or disposed of, or (2) the giving of such notice may endanger the life or safety of the executing officer or another person[.]" CPL § 690.35[4][b]. Here, the government has requested preservation of the accounts, so there is no concern regarding destruction of evidence, and no safety concerns are apparent. Nor does it appear from the warrants that the District Attorney can satisfy the high bar for "interfer[ing] with the important liberty rights implicated" by nondisclosure orders. *Matter of Grand Jury Applications for Court-Ordered Subpoenas and Nondisclosure Orders-December 1988 Term,* 142 Misc.2d 241, 248 (N.Y. Co. Sup. 1988) (finding that "[n]one of the applications before the court are sufficiently specific to permit a finding of compelling circumstances" to issue a nondisclosure order to the recipient of a grand jury subpoena).

These search warrants authorize invasive searches unbounded by time or subject of the people whose accounts are targeted. The expansive seizure is coextensive with the search since the warrant fails to establish procedures for ensuring that the authorities only seize and maintain data limited to a legitimate criminal investigation. The people whose accounts are the targets of the searches deserve the opportunity to contest the seizure of their information in advance.

III. CONCLUSION

Facebook respectfully requests that the Court: 1) quash the search warrants; or, in the alternative, 2) strike the nondisclosure provisions.

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Respectfully submitted,

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