SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – SPECIAL PROCEEDINGS

In the Matter of the Search of Information Associated with Facebook Accounts disruptj20, lacymacauley, and legba.carrefour That Is Stored at Premises Controlled by Facebook, Inc.	)	Special Proceedings Nos. 17-CSW-658, 17-CSW-659 & 17-CSW-660
	)	Chief Judge Morin

SUPPLEMENTAL BRIEF OF ACCOUNT HOLDERS / PROPOSED INTERVENORS

Account holders and proposed intervenors Lacy MacAuley, Legba Carrefour, and Emmelia Talarico respectfully submit this supplemental brief in response to the Court's questions at the hearing on Friday, October 13. This brief will first summarize the privacy-setting information requested by the Court, then explain how limited-purpose intervention is regularly granted for the purpose of seeking to broaden or narrow the scope of court orders governing access to information and for other purposes as well. Finally, proposed intervenors will argue that a modified version of the *Dreamhost* protocol could serve most of the parties' interests here.

ARGUMENT

I. Lacy MacAuley's and Legba Carrefour's Accounts Include Substantial Private Information About Their Personal Lives and Associations.

As the Second MacAuley and Carrefour Declarations (attached as Exhibits E and F, respectively) explain, both of their accounts have the privacy settings adjusted so that a significant portion of their content, including all messages (such as chats and direct messages) exchanged with particular individuals, is visible only to themselves and the individuals with whom they have chosen to communicate — not the general public. Second Decl. of L. MacAuley at ¶¶ 4(b)-(d), 5 & 6; Second Decl. of L. Carrefour at ¶ 3(b)-(d), 5 & 6. These chats and direct messages are akin to private emails between individuals.

Both MacAuley and Carrefour reiterate that the warrants at issue would require disclosure to the government of substantial information that (a) is dated between November 1, 2016 and February 9, 2017; (b) is not visible to the general public but rather just to MacAuley's and Carrefour's Facebook friends or particular individuals with whom they have chosen to communicate particular messages (like sending an individual an email); and (c) is about either deeply private details about their lives (such as communications with romantic partners, family pictures, details of domestic violence, or medical and psychiatric history) or political activities and associations (such as political views, events they organized and attended, political organizations with which they affiliate, and pictures and names of other event attendees) that have nothing to do with any alleged "riot" that occurred on January 20, 2017. Second Decl. of L. MacAuley at ¶ 5; Second Decl. of L. Carrefour at ¶ 5.

Therefore, the disclosure of their account contents will significantly impinge on MacAuley's and Carrefour's privacy and chill both their own First Amendment-protected activity and that of others who associate with them. In light of the "scrupulous exactitude" with which the Fourth Amendment must be applied when First Amendment rights are implicated, *Stanford v. Texas*, 379 U.S. 476, 485 (1965), and in light of the privacy interests themselves, the warrants at issue should not be carried out without sufficient safeguards.

II. Limited-Purpose Intervention for the Purpose of Regulating the Scope of Access to Information Is Commonplace.

The account holders have explained why full intervention is permitted by law and is in the interest of justice, and have shown that none of the government's authorities requires a different result. *See* Reply in Support of Motion To Intervene 3-11 (Oct. 10, 2017).

If, however, the Court decides that limited-purpose intervention is appropriate — for instance, intervention limited to challenging the scope of the warrant but not challenging whether

it was valid *ab initio* — that alternative is amply supported in the case law. Cases permitting limited intervention for the purpose of broadening or narrowing the scope of access to information abound.

For instance, the D.C. Court of Appeals and numerous federal courts of appeals have permitted limited-purpose intervention for a party seeking access to sealed judicial records or oppose sealing orders. *See Mokhiber v. Davis*, 537 A.2d 1100, 1105-06 (D.C. 1988); *see generally In re Assoc. Press*, 162 F.3d 503, 507 (7th Cir. 1998) ("[T]he most appropriate procedural mechanism [to enable third parties to obtain access to court proceedings and documents] is by permitting those who oppose the suppression of the material to intervene *for that limited purpose*." (emphasis added)); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045-46 (D.C. Cir. 1998) ("[E]very circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders. … Accordingly, we hold that third parties may be allowed to permissively intervene under Rule 24(b) for the limited purpose of seeking access to materials that have been shielded from public view either by seal or by a protective order."); *accord Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778-79 (3d Cir. 1994); *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 293-94 (2d Cir. 1979).

Perhaps even more relevant here, courts have allowed limited-purpose intervention by parties seeking to shield information from disclosure as well as to elicit it. *See In re Search of Elec. Commc'ns in the Account of chakafattah gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d 516, 522 (3d Cir. 2015) (intervention granted to move to quash search warrant on constitutional grounds and grounds of privilege); *Doe No. 1 v. United States*, 749 F.3d 999, 1005

(11th Cir. 2014) (limited-purpose intervention to challenge disclosure of allegedly privileged material); *In re Sealed Case*, 237 F.3d 657, 663-64 (D.C. Cir. 2001) (reversing denial of motion to intervene for limited purpose of preventing "unauthorized disclosures" of FEC investigation materials); *Eng v. Coughlin*, 865 F.2d 521, 522 (2d Cir. 1989) (limited-purpose intervention to oppose discovery of personnel records); *Gawker Media, LLC v. F.B.I.*, 2015 WL 4064971, at *1-2 (M.D. Fla. July 1, 2015) (limited-purpose intervention in FOIA action to seek protective order against disclosure of video footage depicting a sexual affair); *Blum v. Schlegel*, 150 F.R.D. 38, 39 (W.D.N.Y. 1993) (limited-purpose intervention to seek protective order for professor's tenure-review file); *Tavoulareas v. Piro*, 93 F.R.D. 11, 23 & n.15 (D.D.C. 1981) (limited-purpose intervention to seek protective order limiting scope of deposition). "As a general proposition, persons or corporations which are adversely affected by the disclosure of privileged material have the right to intervene, assuming standing, in pending criminal proceedings to seek protective orders, and if denied, to seek immediate appellate review." *United States v. Crawford Enterprises, Inc.*, 735 F.2d 174, 176 (5th Cir. 1984).

Limited-purpose intervention has been permitted for a variety of other purposes as well, including to participate in proceedings concerning the scope of a remedy to an unlawful practice, *see Williams v. City of New Orleans*, 763 F.2d 667, 668 (5th Cir. 1985), to appeal, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394–95 (1977), and even to litigate a substantive matter alongside an original party, *see Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 537 (1972).

In sum, limited-purpose intervention presents a well-trod path that would enable the account holders to participate in the proceedings and protect their rights. *See generally* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 727 (1968) ("It is both feasible and desirable to break down the concept of intervention

into a number of litigation rights and to conclude that a given person has one or some of these rights but not all."). Consistent with these various examples of limited-purpose intervention and with this Court's authority under Rule 57(b) to "regulate practice in any manner consistent with applicable law and these rules," the Court should at a minimum grant account holders limited-purpose intervention to challenge the scope of the search warrants, which seek their private posts and messages revealing their political activity and associations as well as deeply private aspects of their personal lives.

III. The Court May Order the Warrants Narrowed to Certain Key Words or Search Protocols.

If the Court is not inclined to quash the warrants outright or require that a neutral third party identify the material that the government is entitled to see, then in order to safeguard the account holders' Fourth Amendment rights — and the First Amendment interests of both the account holders and all of the individuals with whom they have communicated privately via Facebook for the purpose of political association — the Court should order that the government narrow its warrants by providing key words or search protocols to the Court for review (as this Court ordered in *Dreamhost*). If technically feasible, Facebook should then be ordered to disclose only the material responsive to the approved protocol.

A search protocol that is tailored to the government's showing of probable cause is a safeguard that several courts, including this one, have imposed or affirmed. *See United States v. Matter of Search of Info. Associated With Fifteen Email Addresses Stored at Premises Owned Maintained, Controlled or Operated By 1&1 Media, Inc., Google, Inc., Microsoft5 Corp. and Yahoo! Inc.*, 2017 WL 4322826, at *8 (M.D. Ala. Sept. 28, 2017) ("*Fifteen Email Addresses District Court*"); *In re Search Warrant*, 71 A.3d 1158, 1182-83 (Vt. 2012) ("*Vt. Search Warrant*"); *In the Matter of the Search of www.disruptj20.org That Is Stored at Premises Owned, Maintained,*

Controlled, or Operated by Dreamhost, Spec. Proc. No. 17 CSW 3438, slip op. at 6-7 (D.C. Super. Ct. Oct. 10, 2017) ("*Dreamhost*"). Several other courts have suggested that such a safeguard would be a useful and appropriate one. *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1179-80 (9th Cir. 2010) (Kozinski, C.J., concurring); *In re Applications for Search Warrants for Info. Associated with Target Email Accounts/Skype Accounts*, 2013 WL 4647554, at *10 (D. Kan. Aug. 27, 2013); *In re Search of Info. Associated with the Facebook Account Identified by the Username Aaron.Alexis*, 21 F. Supp. 3d 1, 11 (D.D.C. 2013).

The restriction of a search to particular key words or a search protocol approved by the Court is well within the power of a court to order. If a court can (as no party here seems to dispute) limit the scope of an electronic search by file type, *see United States v. Grimmett*, 439 F.3d 1263, 1270 (10th Cir. 2006), by date range, *see United States v. Blake*, 868 F.3d 960, 974 (11th Cir. 2017), or by particular senders and recipients, *see id.*, it can limit it by other parameters as well, such as key words. *See Fifteen Email Addresses District Court*, 2017 WL 4322826, at *8; *Vt. Search Warrant*, 71 A.3d at 1182-83. "Even in traditional contexts, a judicial officer may restrict a search to only a portion of what was requested—a room rather than an entire house, or boxes with certain labels rather than an entire warehouse. In other words, some ex ante constraints—of the form 'here, not there' — are perfectly acceptable." *Vt. Search Warrant*, 71 A.3d at 1170; *accord Fifteen Email Addresses District Court*, 2017 WL 4322826, at *7. In the electronic context, because "particular information is not accessed through corridors and drawers, but through commands and queries," often "the only feasible way to specify a particular 'region' of the computer will be by specifying *how* to search." *Vt. Search Warrant*, 71 A.3d at 1171 (emphasis added); *accord Fifteen Email Addresses District Court*, 2017 WL 4322826, at *7.

Indeed, the government conceded at the October 13 hearing that it did not need Facebook to disclose all the information sought by the warrants in their present form; for instance, the government admitted that it did not need a record of everyone who "liked" the disruptj20 Facebook account, and it did not need any photographs taken prior to January 20. *See* Tr. of Proceedings, *In the Matter of the Search of Information Associated with Facebook Accounts disruptj20, lacymacauley, and legba.carrefour That Is Stored at Premises Controlled by Facebook, Inc.*, Special Proceedings Nos. 17-CSW-658, 17-CSW-659 & 17-CSW-660, at 47, 53-54 (D.C. Super. Ct. Oct. 13, 2017). Therefore, a judicially supervised and carefully tailored protocol would not deprive the government of any information it actually needs. Should its initial search prove too narrow, "the Government is free to return and seek additional search warrants based on the new evidence it discovers." *Fifteen Email Addresses District Court*, 2017 WL 4322826, at *10; *accord Vt. Search Warrant*, 71 A.3d at 1184-85.

If possible, Facebook itself should execute the protocol, to avoid the problem of information concerning private matters or political associations falling into the government's hands unnecessarily. Any concern on the government's part regarding the confidentiality of the protocol can be addressed using a non-disclosure order of the type initially issued to Facebook in connection with these very warrants — an order that kept this entire controversy secret for months and kept the account holders from learning of the warrants until the non-disclosure order was lifted. Notwithstanding its skill at facilitating the dissemination of information, Facebook has shown through these proceedings that it knows how to keep a secret, and that it knows how to comply with court orders.

If the warrants are narrowed only by content type rather than key word or subject matter, then the core purpose of the Fourth Amendment — to protect privacy — would not be served.

Even if limitations are imposed on the government's access to "likers," Friend lists, and photos, the warrants would still require disclosure to the government of all of MacAuley's and Carrefour's private communications, intended only for specific individuals or their Facebook friends, about their political activities, group affiliations, and some of the most private details of their lives. That result would both chill political activity — by revealing details of protest activity and protestors themselves to officials representing the very Administration that they are protesting — and unjustifiably invade MacAuley's and Carrefour's privacy. The Court's basic holding in *Dreamhost* is applicable to these warrants as well:

> Because of the potential breadth of the government's review in this case, the Warrant[s] in [their] execution may implicate otherwise innocuous and constitutionally protected activity. As the Court has previously stated, while the government has the right to execute its Warrant[s], *it does not have the right to rummage through the information* contained on [the electronic accounts in question] *and* discover the identity of, or *access communications by, individuals not participating in alleged criminal activity, particularly those persons who were engaging in protected First Amendment activities*.

Dreamhost, slip op., at 1 (emphasis added).

MacAuley and Carrefour are just such individuals — "individuals not participating in alleged criminal activity" but "who were engaging in protected First Amendment activities." The Court should therefore safeguard both their privacy and their political activities and associations by requiring a court-approved search protocol.

CONCLUSION

To protect the account holders' Fourth and First Amendment rights, the Court should grant full or limited-purpose intervention and should quash the warrants or narrow them by requiring, in addition to the other concessions the government made at the October 13 hearing, the use of a Court-approved search protocol. If technologically feasible, Facebook should respond to the warrants with only the information elicited under the Court-approved protocol.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of October 2017, I caused copies of the foregoing Motion to Intervene along with a proposed order to be served on all counsel by first-class mail, postage prepaid, as well as by email, as follows:

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