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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. DAVID LEE FRY, Defendant.	Case No. 3:16-CR-00051-13-BR DEFENDANT'S REPLY TO GOVERNMENT'S AMENDED RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE (FACEBOOK ACCOUNTS) (ECF No. 1129)

Defendant David Lee Fry, through his attorney, Per C. Olson, hereby replies to the Government's Amended Response to Defendant's Motion to Suppress Evidence.[1]

INTRODUCTION

During oral argument on the underlying motion to suppress the Facebook evidence, held on July 18, 2016, the government certified that the process required by the Facebook warrant of segregating responsive from non-responsive material "is now complete and the relevant materials have been provided to the defense" and that "as

[1] The government characterizes its pleading as also a Response to Defendant's Motion to Reopen the Suppression Motion. However, the government already has responded to defendant's motion to reopen (ECF No. 1077); and the Court already has granted that motion. (ECF No. 1097).

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required under the search procedure in Attachment B, the information that's not responsive to the warrant is now stored in a secure location at the FBI, and it will not be accessed again without further order from the Court." (8/23/16 Tr., p. 37) (Exhibit 1). When defendant sought clarification, the government reiterated, "[t]he raw materials are in a secure location at the FBI. They will not be accessed unless there is a follow-on search warrant or order from this Court. * * *." (Id., page 53) (Exhibit 1). The Court relied upon those representations, in part, when it denied defendant's underlying motion to suppress the Facebook evidence. (ECF No. 915).

The government acknowledges that all raw data was not sealed at the time that statement was made, and that some had made its way onto the U.S. Attorney's office network and into the discovery stream. The government has now explained how that mistake happened, but in the course of providing that explanation and responding to the Court's order for a detailed factual presentation on how the warrant was executed, the government has opened up a new frontier of questions about how the *FBI* handled the Facebook data and whether it complied with the warrant requirement of sealing and securing nonresponsive material. As discussed below, the factual presentation leaves one with the impression that, to extent the original and *all* copies of the raw Facebook data have now been sealed, that sealing occurred only after defendant raised this issue with the government on August 3, and not as the final step in the review process required by the warrant. If that is the case, the terms of the warrant were flagrantly ignored.

To avoid suppression for a failure to properly execute the warrant, the government must provide greater precisions regarding *when* the Facebook data was

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sealed, and whether all versions of the data is, in fact, now sealed. To that end, defendant has requested discovery designed to answer those questions, with the hope that it will be available for the Court to consider when the parties convene to address this matter on September 6 at 10:00 a.m.

RESPONSE TO GOVERNMENT'S FACTUAL SUBMISSION

1. Handling of Facebook Data at the USAO

The government has provided an adequate explanation as to how raw Facebook data made its way onto Volume 39 of the discovery. Although Mr. Angel and Ms. Ralis have appeared willing to accept as much responsibility as possible for the mistake, it clearly was not their fault. Neither of them was told about the review process required by the warrant or that nonresponsive material was supposed to be sealed. However, their supervisors were aware of the warrant requirement, and they should have taken greater care to ensure that staff were aware of those terms. As a result of this mistake, raw Facebook data was residing on the USAO computer network at the time the government certified that it had been sealed. See Angel Decl., ¶ 5 (stating that he copied non-privileged material from the first Facebook production onto a network folder).[2] By itself, this is not a flagrant violation of the warrant that should lead to suppression. But the error does demonstrate a lack of respect for a critical aspect of the warrant that the Ninth Circuit has approved for preventing a warrant for digital

[2] The government labels as "nonsensical" the argument that the inadvertent disclosure violates the Fourth Amendment and the warrant (Gov. Am. Resp., 16), but defendant has never made that argument. The inadvertent disclosure here is akin to the inadvertent disclosure of attorney-client communications in the Holly Grigsby/Joey Petersen case handled by Judge Ancer Haggerty, in which the dispute centered not so much on the disclosure itself, but the fact that the government possessed those protected communications in the first place.

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information from becoming an impermissible general warrant – *i.e.,* the process of segregating and securing private information for which there is no probable cause to avoid an "over-seizing." *See United States v. Flores*, 802 F.3d 1028, 1046 (9th Cir. 2015) (rejecting the defendant's challenge to the execution of a Facebook warrant on the basis that the warrant required a similar process for segregating and securing nonresponsive material).

2. Handling of Facebook Data by the FBI

The Court has provided the government with an opportunity to correct the factual record regarding who received raw Facebook data, for what purpose, and how the data was handled up to the present. In response, the government has provided declarations of several FBI agents who handled the Facebook data in various ways. What's striking about the government's latest factual submission is the complete lack of specificity on the one question that goes to the heart of defendant's challenge to the manner in which the search warrant was executed: that is, how and when the nonresponsive, raw Facebook data was sealed and secured as required by the warrant. Not one of the declarants is able to say that he or she personally sealed the nonresponsive material or that he or she witnessed the sealing of any nonresponsive material. Moreover, none of the declarants say **when** the nonresponsive material was sealed as required by the warrant.

One logical conclusion to draw from what appears to be a purposeful lack of specificity on a matter of such importance is that the process of sealing the raw Facebook data received from Facebook, including all copies thereof, was not done in compliance with the warrant, but instead was done in response to the defendant, on

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August 3, having raised the question of whether the warrant was properly executed.

As a preliminary matter, it is not even clear from the government's latest submissions that all copies of the raw Facebook data have now been sealed or deleted. The Facebook data was copied and disseminated for review to six FBI agents, some of whom were out of the Seattle office, plus a Washington County Sheriff Deputy, and an Oregon State Police trooper. (See Bonilla Dec. ¶ 7).[3] The government has provided declarations from only three of those people – Special Agents Matthew Yeager, Claudia Bonilla, and Peter Summers. The government provides no information about the copies that were sent to the other five officials, including the two who work for local and state law enforcement. Did they copy their versions onto their local hard drive or network? Did they destroy or seal their copies of the raw data upon completion of the review process? The government provides no assurance that they have.

Also, none of the agents who did provide declarations explain what they did with their copy of the raw data after their review process was completed. Instead, they each end their declarations with an identically-worded and suspiciously vague assertion written in the passive voice: "As of the date of this communication, it is my understanding all copies of the Facebook raw data have been destroyed or sealed."[4]

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[3] Defendant has requested that the government produce the transmittal letters or emails that accompanied these disseminations.

[4] "A sentence written in the active voice is the straight-shooting sheriff who faces the gunslinger proudly and fearlessly. It is honest, straightforward; you know where you stand. * * * A sentence written in passive voice is the shifty desperado who tries to win the gunfight by shooting the sheriff in the back, stealing his horse, and sneaking out of town."

Sherry Roberts, 11 Ways to Improve Your Writing and Your Business.

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(Bonilla Decl. ¶ 8; Summers Decl. ¶10; Yeager Decl. ¶6). As each of these agents had a complete copy of the raw Facebook data, why would they not state what they did with their copy at the end of their review process? Agent Yeager talks about the CDs he had sitting on his desk leading up to his review of the Bundy accounts. Why would he not describe when and how those CDs were sealed or destroyed following his review, rather than end with a sentence about his "understanding" that gives the impression that he has no personal knowledge of how those CDs left his desk. Agent Summers clearly had a leadership role with regard to the Facebook warrant. (He authored the affidavit in support of the search warrant application). Yet he too appears to disclaim any personal knowledge as to how and when the data was sealed, and instead relies only on his "understanding" that somehow someone sealed or destroyed all remnants of raw Facebook material that had not been segregated as responsive.

Can anyone at the Portland FBI office say when and how all copies of the raw Facebook data were secured as required by the warrant?

The diversion of raw data to the Domestic Terrorism Operations Unit (DTOU) in Washington DC raises the same concern. According to the government, the DTOU loaded the data into the Palantir Mint software program in order to organize the data and identify relevant matters using search terms. This procedure generated a report of potentially responsive material that was then edited with input from the Portland FBI agents. We are told that after a final "Mint" report was generated, the raw data on the software program was deleted. (Baltzersen Decl. page 4). But how long after? In the declaration of Agent Hiemstra, who oversaw the DTOU process, he states that on August 8, 2016, his analyst received an email from the Palantir system operator

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advising that all of the data from the Portland Facebook warrant had been deleted from the Palantir system. (Hiemstra Decl., para. 5). The government has provided defendant a copy of this email, and an originating message from Agent Hemstra's analyst saying that she too deleted what she could from the system. (Exhibit 2). But her email, dated August 4, does not say when she did that. Because the analyst's email was sent one day after defendant first raised a concern about compliance with the warrant, defendant suspects that it was only that concern that prompted the deletion, rather than compliance with the warrant. Further inquiry is needed.

ARGUMENT

As mentioned, the error that occurred in the handling of Facebook evidence as it passed through the USAO filter team, by itself, does not warrant suppression. But if the FBI failed to seal the raw Facebook data, including all copies that had been disseminated to the reviewing agents, upon its completion of the review for responsive material, and if it instead took action only after defendant raised a concern with compliance with the warrant on August 3, then such a failure, coupled with the USAO's error, would constitute a flagrant violation of the warrant's terms. *See generally United States v. Chen*, 979 F.2d 714 (9th Cir. 1992) (flagrant disregard for the terms of a warrant may result in the suppression of all evidence, including evidence not tainted by the violation). The government should be compelled to produce whatever evidence it can, documentary or otherwise, to establish that the sealing of nonresponsive data occurred reasonably in connection with the completion of the review process as mandated by the warrant, not six weeks later.

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Also, as mentioned, at oral argument on July 18 on the underlying motion, the government certified the review process was completed and that all raw nonresponsive Facebook data had been sealed by the FBI. If that turns out to be false, then the Court will be asked to suppress all Facebook data pursuant to its inherent supervisory authority. *See generally United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980) (recognizing the court's inherent authority to regulate the administration of criminal justice among parties before the bar and to exclude evidence when there has been a misrepresentation to the court), *citing United States v. Payner*, 447 US 727 (1980). *Cf. United States Harrington*, 681 F2d 612 (1982) (leaving open the question whether to adopt the holding in *Cortina* that the exclusionary rule can apply absent a constitutional violation).

DATED this 1st day of September, 2016.

HOEVET OLSON HOWES, PC

s/ Per C. Olson
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Attorney for Defendant David Fry

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. AMMON BUNDY (1), JON RITZHEIMER (2), JOSEPH O'SHAUGHNESSY (3), RYAN PAYNE (4), RYAN BUNDY (5), BRIAN CAVALIER (6), SHAWNA COX (7), PETER SANTILLI (8), JASON PATRICK (9), DUANE LEO EHMER (10), DYLAN ANDERSON (11), SEAN ANDERSON (12), DAVID LEE FRY (13), JEFF WAYNE BANTA (14), SANDRA LYNN ANDERSON (15), KENNETH MEDENBACH (16), BLAINE COOPER (17), WESLEY KJAR (18), COREY LEQUIEU, 19, NEIL WAMPLER (20), JASON CHARLES BLOMGREN (21), DARRYL WILLIAM THORN (22), GEOFFREY STANEK (23), TRAVIS COX (24), ERIC LEE FLORES (25), JAKE RYAN (26), Defendants.	Case No. 3:16-CR-0051-BR July 18, 2016 Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

(Motions Hearing)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

specifically mentioned in Attachment B, and that's 18 USC 372. And it even -- and it even says what the statute is: Conspiracy to impede a federal officer by threat, violence, or intimidation.

A very narrow time limitation is listed from November 1st to the date of the account holder's arrest, which is about three months. And that generally corresponds to the time frame of the conspiracy, your Honor.

And then the agents are provided a specific list of evidence they're authorized to seize as responsive to the warrant.

And then finally, your Honor, Attachment B sets forth detailed search procedure under which the agents segregate that responsive or relevant from nonrelevant material. And they have 180 days under which to do that.

And for the Court's benefit, that separation process is now complete and the relevant materials have been provided to the defense.

And then, finally, as required under the search procedure in Attachment B, the information that's not responsive to the warrant is now stored in a secure location at the FBI, and it will not be accessed again without further order from the Court.

And I think what's most important -- and this bears out in the case law, your Honor -- is that Judge Papak was

THE COURT: I think that's what Mr. Gabriel confirmed.

Are you asking for confirmation on this record?

MR. OLSON: I remember him mentioning that. I just want sure if he actually said that --

THE COURT: Can you confirm that, Mr. Gabriel?

MR. GABRIEL: Yes, your Honor. The warrant has been executed. The raw materials are in a secure location at the FBI. They will not be accessed unless there is follow-on search warrant or order from this Court.

And I will say, your Honor, that each account holder was provided with his or her raw data from the account. So, for example, the -- the voluminous exhibit that Mr. Per -- excuse me, Per Olson provided to the Court, he has that, his client has that. No other defendant has that because that's his account. And the Government's lawyers have not seen that.

The search was undertaken by the FBI, and so that raw data is in two places. It's with each individual account holder, and it's in a sealed, secure location at the FBI.

THE COURT: All right. I am taking these two motions under advisement. I'll endeavor to get a written decision out to you without delay, but they're important issues.

And I'll take the time I need to get them done as soon as I can.

All right. We are in recess on this matter.

RE_Palantir_Mint_PDF_Removal_---_UNCLASSIFIED
Sent: Monday, August 08, 2016 7:01 AM
Subject: RE: Palantir Mint PDF Removal --- UNCLASSIFIED

Classification: UNCLASSIFIED
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Hi Armanda,

Sorry for the slow reply- I was OOTO Friday.

I'm really glad that Mint was helpful.

Looks like everything is out. I deleted REDACTED from the list of case files, but I don't see the –
RESTRICTED version. If you can still see the restricted case, just go to the import interface in Mint, filter
down to your Restricted case, and then way over on the right hand side of the screen you should see
an ellipses (…). Hover over it, and there should be a "Delete" option. That's what you need!

Let me know if you hit snags.

Best,
John

_____
From: VENEZIA, ARMANDA (CTD)(FBI)
Sent: Thursday, August 04, 2016 5:16 PM
To: DOYLE, JOHN M. (DO) (CON)
Cc: LARSEN, ERIC A. (CTD) (FBI); GARCIA, EDGAR R. (CTD) (FBI); KRAMETBAUER, ADAM V. (PD) (FBI);
ADLER, GARY (PD) (FBI); JEFFERY, BIANCA (CTD) (FBI)
Subject: Palantir Mint PDF Removal --- UNCLASSIFIED

Classification: UNCLASSIFIED
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Hi John!

Thanks for all your help with the DTOU Mint project a while back, it was crucial for us. We are now
completed with the project and need to make sure that all the data we added to the system has been
removed as per Portland Division's request. I went into Palantir Mint and deleted the information for

RE_Palantir_Mint_PDF_Removal_---_UNCLASSIFIED

our cases (REDACTED and REDACTED -RESTRICTED). The case file numbers are still showing
up in Mint. Is it possible for you to confirm that all the information for those two cases has been
removed from the system?

Thanks,

Armanda

IA Armanda Venezia
Domestic Terrorism Operations Unit I
Counterterrorism Division
202-695-4920 (Mobile)
202-324-0211 (Desk)

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Classification: UNCLASSIFIED

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