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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF OREGON**

**UNITED STATES OF AMERICA**

**3:16-CR-00051-BR**

**v.**

**AMMON BUNDY, et al.,**

**Defendants.**

**GOVERNMENT'S SUR-REPLY TO  
DEFENDANTS' MOTIONS TO SUPPRESS  
EVIDENCE (FACEBOOK ACCOUNTS)  
(ECF #741) AND TO REOPEN MOTION  
TO SUPPRESS (ECF #1040)**

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Scott E. Bradford, Assistant United States Attorney, hereby submits this sur-reply to defendants' Motion to Suppress Evidence (Facebook Accounts) (ECF No. 741) and Motion to Reopen Motion to Suppress (ECF No. 1040), filed by defendant Fry on behalf of all similarly situated defendants. Because the government complied with the terms of the search warrant, this Court should deny the Motion to Suppress, including the new argument raised in the Motion to Reopen.<sup>1</sup>

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<sup>1</sup> In this sur-reply, the government does not address the other arguments defendants raised in defendant Fry's Motion to Suppress and Motion to Reopen Motion to Suppress. The government has previously addressed those arguments in its prior submission and relies on those prior submissions.

## I. Background

### A. Facebook Search Warrant

On April 8, 2016, U.S. Magistrate Judge Paul Papak issued a search and seizure warrant for 23 Facebook accounts associated with several defendants in this case. The warrant was limited to information that constituted evidence of a violation of 18 U.S.C. § 372 related to defendants' activities at the Malheur National Wildlife Refuge. (Defs.' Sealed Ex. B to ECF No. 742). Specifically, the warrant sought:

- Records, including photographs, comments, videos, and other postings, of or about individuals illegally occupying the Malheur National Wildlife Refuge (MNWR), the planning and preparation of the occupation, and requests for support or assistance and the recruitment of others in furtherance of the occupation of the MNWR;
- Records, including photographs and videos or the sharing of any photographs and videos, of individuals in possession of firearms or with others in possession of firearms, while at the MNWR or in Harney County, Oregon;
- Records of communications, including private messages, with other coconspirators;
- Evidence indicating how and when the Facebook account was accessed or used, to determine the chronological and geographic context of account access, use, and events relating to the crime under investigation and to the Facebook account owner;
- Records relating to who created, used, or communicated with the user ID, including records about their identities and whereabouts; Evidence indicating the Facebook account owner's or user's state of mind as it relates to the crimes under investigation; and
- The identity of the person(s) who communicated with the user ID about matters relating to the armed occupation of MNWR, including records that help reveal their whereabouts.

*Id.* The warrant also had temporal confines, limiting the search to information from November 1, 2015, through defendant-specific dates in late January 2016 to February 2016.

*See id.*

Aside from the aforementioned limitations on the search for information, the warrant included a specific search procedure—that is:

[L]aw enforcement will segregate the information into two groups: (i) information that is responsive to the warrant and that the government may therefore seize; and (ii) information that is not responsive to the warrant.

Information that is responsive to the warrant will be copied onto a separate storage device or medium. Responsive information may be used by law enforcement in the same manner as any other seized evidence. Information that is not responsive to the warrant will be sealed and stored on a secure medium or in a secure location. Nonresponsive information will not be reviewed again without further order of the Court (e.g., subsequent search warrant or order to unseal by the district court).

*Id.* Under the terms of the warrant, law enforcement officers have 180 days to segregate responsive materials from nonresponsive materials. *Id.* Under the terms of the warrant, the government is only required to seal the information on a secure medium or in a secure location at the conclusion of the 180-day timeframe. *Id.* Of note, that time limit has not yet expired and does not expire until October.

The warrant also permitted law enforcement to retain a complete copy of the information provided by Facebook “for a number of reasons, including proving the authenticity of evidence to be used at trial, responding to questions regarding the corruption of data, establishing the chain of custody of data, refuting claims of fabricating, tampering, or destroying data, and addressing potential exculpatory evidence claims where, for example, a defendant claims that the government avoided its obligations by destroying data or returning it to a third party.” *Id.*

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On April 11, 2016, Special Agent Peter Summers with the Federal Bureau of Investigation (FBI) served Facebook with a copy of the warrant. (Summers Am. Decl. ¶ 3, Sept. 7, 2016).

**B. Chronology of Material Received Under the Facebook Warrant**

In response to the warrant, Facebook produced information for the 23 Facebook accounts on different dates and in different ways. On May 2, 2016, Special Agent Summers downloaded Facebook's first response through Facebook's law enforcement portal to a single DVDR. (Summers Am. Decl. ¶ 4). It included text and pictures, and he entered that disk into evidence as 1B1079.<sup>2</sup> *Id.* Videos were not included in the download because the files were too large. *Id.* He also provided a working copy of that disk to the United States Attorney's Office for the District of Oregon. (Summers Am. Decl. ¶ 4).

On May 4, 2016, Special Agent Summers received Facebook's second response, five disks that contained videos and the text and pictures that Facebook had previously provided on May 2, 2016. (Summers Am. Decl. ¶ 5). He entered the May 4, 2016, response into evidence as 1B1083. *Id.* On May 5, 2016, Special Agent Summers transferred possession of the disks to Special Agent Claudia Bonilla.

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<sup>2</sup> Items of evidence are stored in the FBI evidence control room, a secure location, and are labeled with a 1B number. (Baltzersen Am. Decl. ¶ 3, Sept. 7, 2016). The information can only be accessed by signing the chain of custody, checking the item out of the FBI evidence control room, and with a court order authorizing access to the information. (Baltzersen Decl. ¶¶ 3, 5).

To comply with the segregation requirement of the warrant, three search teams were created. (Bonilla Am. Decl. ¶ 5, Sept. 7, 2016). Special Agent Bonilla downloaded the disks to her non-networked computer. (Bonilla Am. Decl. ¶ 4). She then organized the Facebook accounts by the defendants assigned to each search team, then made five working copies for each team's use; one copy was sent to the Assistant United States Attorney (AUSA) assigned to the search team, three copies were provided to the FBI personnel on each of the search teams, and one copy of each search team's data was sent to the Domestic Terrorism Operations Unit (DTOU) in Virginia. (Bonilla Am. Decl. ¶ 5). The Ammon Bundy and Bundy Ranch Facebook account information was provided only to the search team led by Special Agent J. Matthew Yeager. (Bonilla Am. Decl. ¶ 5) and (Yeager Am. Decl. ¶ 4, Sept. 7, 2016). *Id.* The other search teams did not receive the Ammon Bundy or Bundy Ranch Facebook account information. (Bonilla Am. Decl. ¶ 5). Special Agent Yeager did not review the Ammon Bundy or Bundy Ranch Facebook accounts until they had been filtered for potentially privileged information. (Yeager Am. Decl. ¶ 4).

On or about May 6, 2016, Special Agent Matthew Hiemstra received the disks with Facebook's first two responses to the warrant for review sent to him by Special Agent Bonilla. (Hiemstra Am. Decl. ¶ 3). At that time, Special Agent Hiemstra was assigned to the DTOU. (Hiemstra Am. Decl. ¶ 3).

On May 13, 2016, Special Agent Bonilla received a third response from Facebook, two disks containing data through February 11, 2016, as requested in the warrant. (Bonilla Am. Decl. ¶ 6). She downloaded the disks to her non-networked computer and then placed the disks

into evidence as 1B1094. *Id.* She did not organize and distribute the data as she had done previously; instead, she was instructed to send a copy of the discs to AUSA Barrow on May 13, 2016. *Id.*

Also on or about May 13, 2016, the filter team at the United States Attorney's Office (USAO) received the disks that were given to the USAO by Special Agent Summers and Bonilla. (Kerin Decl. ¶ 6, Aug. 29, 2016, ECF No. 1135).

On or about May 16, 2016, AUSA Kerin sent the complete Facebook accounts for Ammon Bundy and the Bundy Ranch to Ammon Bundy's lawyer Michael Arnold. (Kerin Decl. ¶ 6).

Also, on May 16, 2016, so that defense counsel could begin preparing for trial, the government provided each defendant with a complete, unsegregated copy of each defendant's respective Facebook account that the government received from Facebook under the warrant. (Ex. 1). The prosecution team has not reviewed these complete, unsegregated copies, and they are maintained in a secure location in the USAO with a warning that they may not be opened absent a court order.

On May 19, 2016, Special Agent Summers received Facebook's fourth response, another download from Facebook's law enforcement portal. (Summers Am. Decl. ¶ 7) and (Bonilla Am. Decl. ¶ 7). Facebook explained that it was reproducing all of the prior responses to the warrant in a user-friendlier format. *Id.* Special Agent Summers downloaded the response to an external hard drive and entered that hard drive into evidence as 1B1107. *Id.* The size of this response from Facebook was 10.7 gigabytes.

On May 19, 2016, Special Agent Summers provided FBI Special Agent Matthew Hiemstra with the link to Facebook's law enforcement portal for the May 19, 2016, response from Facebook. (Summers Am. Decl. ¶ 8) and (Hiemstra Am. Decl. ¶ 3). Special Agents Summers and Bonilla also gave Special Agent Hiemstra a copy of the search warrant, its attachments, and search terms to assist with the review of the information provided by Facebook under the warrant.<sup>3</sup> (Summers Am. Decl. ¶ 8) and (Hiemstra Am. Decl. ¶ 3).

Special Agent Hiemstra downloaded the information from Facebook and, with the assistance of others in his unit, uploaded it into a software program, Palantir Mint, in order to review the information. (Hiemstra Am. Decl. ¶ 3). He and members of his unit used the supplied search terms to search the information that Facebook provided under the warrant for items that were responsive to the warrant. (Hiemstra Am. Decl. ¶ 3). If an item was identified as potentially responsive under the warrant, it was flagged, a report was generated, also known as a Mint report, and the report with the corresponding item was sent to personnel at the FBI in Portland, Oregon, for further review to determine whether the item was indeed responsive to the warrant. *Id.* This process continued until law enforcement officers at the FBI in Portland, Oregon, determined that the identified items were either responsive or not responsive to the warrant. *Id.*<sup>4</sup> Once individuals at the DTOU completed their work, the information Facebook

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<sup>3</sup> The search terms are attached to Hiemstra's Declaration.

<sup>4</sup> A list of the law enforcement officers who reviewed the reports and corresponding items for responsiveness under the warrant are identified in Special Agents Summer's, Bonilla's and Baltzsen's Amended Declarations. It also notes the dates of completions for the reviews.

provided under the warrant was deleted from the DTOU's computer systems and from the software program that was used. (Hiemstra Am. Decl. ¶¶ 5, 7). The disks that Special Agent Bonilla sent are currently in a secure location at the DTOU. (Hiemstra Am. Decl. ¶ 6). No copies of the disks were made, and they were not accessed after the DTOU received the May 19, 2016, download from Facebook's law enforcement portal. *Id.*

On May 25, 2016, AUSA Kerin received five disks from Special Agent Summers. (Kerin Decl. ¶ 8). She gave them to ALS Specialist Doug Angel. (Kerin Decl. ¶ 9). Angel copied all of the material onto his local (non-network) hard drive and created separate folders for each defendant's Facebook account. (Angel Decl. ¶ 5, Aug. 26, 2016, ECF No. 1136). The prosecution team did not have access to this material. He created privileged and non-privileged folders for the Ammon Bundy and Bundy Ranch accounts and, thereafter, burned the potentially privileged material to a disk to give to defense counsel. (Angel Decl. ¶ 6).

Following the filter review, Kerin instructed Angel to return the non-protected material to the Prosecution Team. (Kerin Decl. ¶ 9). Angel copied the remaining non-privileged account data to a thumb drive and gave it to ALS Specialist Rallis. (Angel Decl. ¶ 6). Thereafter, Angel deleted all data from his local drive and returned the disks back to AUSA Kerin in June 2016. (Angel Decl. ¶ 6) and (Kerin Decl. ¶ 10). All disks received by the filter team have remained in AUSA Kerin's sole possession in a secure location. (Kerin Decl. ¶ 10).

As stated during his testimony on August 23, 2016, Angel believed that he copied all 23 Facebook accounts onto a thumb drive and that he provided it to ALS Specialist Rena Rallis, a member of the prosecution team. (Angel Decl. ¶ 7). In preparation for this response, Angel

found that he only copied 11 of the 23 accounts to the thumb drive he provided to Rallis. (Angel Decl. ¶ 7). No member of the prosecution team has reviewed any privileged information or any unsegregated information.

After FBI personnel completed their review of the information Facebook provided under the warrant and segregated the responsive items from the unresponsive items, the government provided the responsive items to all defendants in Volumes 39 of discovery on June 24, 2016. (Rallis Decl. ¶ 2, Aug. 26, 2016, ECF No. 1137). Due to an issue in the discovery process, the government inadvertently provided 11 Facebook accounts in their entirety to all defendants in Volume 39 of discovery. (Angel Decl. ¶ 7) and (Rallis Decl. ¶ 2). This production did not include the Facebook accounts for Ammon Bundy, the Bundy Ranch, or any other defendant whose case is currently set for trial on September 7, 2016. After the filter and segregation processes were complete on the Facebook accounts for Ammon Bundy and the Bundy Ranch, the government provided the non-protected, segregated information in discovery on July 1, 2016, in Volume 41. (Rallis Decl. ¶ 2). Complete copies of the information provided by Facebook under the warrant have been removed from the USAO's systems and only responsive items to the warrant remain. (Angel Decl. ¶ 7) and (Rallis Decl. ¶ 3).

On August 4, 2016, Special Agent Travis Welter took back the third Facebook production that Special Agent Bonilla sent to the USAO. (Welter Decl. ¶ 3, Sept. 7, 2016). He sealed and labeled the disks and were into evidence as 1B1188. (Welter Decl. ¶ 4). On or about August 4 or 5, 2016, Special Agent Welter collected any remaining working copies of unsegregated Facebook information from the FBI search teams in Portland, Oregon, and

destroyed them. (Welter Decl. ¶ 5). On or about August 23, 2016, he ensured that any Facebook information on Special Agent Bonilla’s non-networked computer was permanently deleted. (Welter Decl. ¶ 5). Special Agent Bonilla left the Portland FBI office on June 30, 2016, and her non-networked computer was not accessed after she left.

The disks that Special Agent Yeager received from Special Agent Bonilla were maintained at the FBI office in Bend, Oregon, until they were destroyed on August 29, 2016. (Yeager Am. Decl. ¶ 6). No one accessed those disks after Special Agent Yeager completed his search under the warrant. *Id.*

At the present time, all working copies of the Facebook search warrant responses received by the search teams at the FBI in Portland and Bend, Oregon, have been destroyed or deleted. All original material has been placed into evidence and may not be accessed absent a court order. (Welter Decl. ¶ 7).

## II. Argument

Citing *United States v. Chen*, 979 F.2d 714 (9th Cir. 1992), defendants argue the government’s execution of the warrant was fatally flawed, requiring this Court to suppress all of the Facebook evidence. In essence, defendants contend that the government did not comply with the terms of the search warrant. Their argument lacks merit. The government’s execution of the warrant was reasonable and comported to the procedures set forth in the warrant.

As the Ninth Circuit explained in *Chen*, suppression is only appropriate where there is a “flagrant disregard” for the terms of the warrant. 979 F.2d at 717. Flagrant Disregard only

occurs when law enforcement disregards the terms of the warrant to such a degree as to transform it into an impermissible search. *Id.* In other words, so long as law enforcement officers have not engaged in indiscriminate fishing, they have not flagrantly disregarded the terms of the warrant. *Id.*; see also *Unites States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1992). Here, the law enforcement officers executing the search followed the terms of the warrant and did not engage in indiscriminate fishing.

As noted above, the search procedure outlined in the warrant required law enforcement officers, within 180 days of the execution of the warrant, to review the material provided by Facebook under the warrant for information that was responsive to the warrant, to segregate responsive information from nonresponsive information, and to seal the nonresponsive information on a secure medium or in a secure location. That 180-day time limit has not yet expired. To review the information provided by Facebook under the warrant, law enforcement personnel used a key-word search to identify responsive items and further reviewed those items to ensure they were responsive to the warrant. They also reviewed any videos to determine their responsiveness. After that review, they segregated the responsive items, and, as noted above and in the supporting declarations, any complete copies of the information Facebook provided pursuant to the warrant remain in secure locations at the FBI and the USAO. In fact, it seems that defendants do not necessarily quibble with law enforcements' actual review of the Facebook information for responsiveness to the warrant. Rather, it appears defendants claim law enforcement officers flagrantly disregarded the terms of the warrant because they had not as of June 24, 2016, the day government inadvertently disclosed 11 unsegregated Facebook

accounts in discovery, destroyed or sealed all unsegregated working copies of the information Facebook provided under the warrant.<sup>5</sup>

While the segregation process was basically complete at that time, the terms of the warrant did not yet require the FBI to have completed that process and to have placed all nonresponsive items on a secure medium or in a secure location. Thus, law enforcement could not have flagrantly disregarded the terms of the warrant. Moreover, it is important to note that law enforcement was attempting to meet constrained timelines and was dealing with a rather large production from Facebook, 10.7 gigabytes. The fact that law enforcement officers had not yet destroyed or sealed all unsegregated working copies of the information from Facebook as of June 24, 2016, does not demonstrate that law enforcement officers engaged in conduct forbidden by the warrant.

To be clear, once Mr. Olson raised a concern, the government has diligently attempted to ensure that all unsegregated working copies have been destroyed or secured on a secure medium or in a secure location.<sup>6</sup> As noted above, the original unsegregated information from Facebook is in the FBI evidence control room and has not been accessed after the responsive review was completed on or about June 21, 2016. It cannot be accessed absent a court order. All working

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<sup>5</sup> Defendants also have not challenged the government's use of a filter team.

<sup>6</sup> The government's efforts to alleviate Mr. Olson's concerns are not and should not be viewed as a concession that the government did not follow the terms of the warrant. The government is simply trying to address the issues raised by Mr. Olson and the Court. In any event, the government has completed the segregation and sealing process as contemplated the terms of the warrant well within the 180-day time limit.

copies of the unsegregated information provided to the search team have been destroyed. All working copies of the unsegregated information provided to the DTOU are in a secure location, and all information has been removed from their computer systems. All working copies of the unsegregated information provided to the USAO are stored in secure locations and cannot be accessed absent a court order or in accordance with the filter protocols.

As to the inadvertent disclosure of the 11, unsegregated Facebook accounts, while regrettable, it did not violate the Fourth Amendment, the terms of the warrant in this case, or any order from this Court. It also does not establish that the agents did not follow the terms of the warrant or engaged in indiscriminate fishing. It is important to note that the prosecution team has not reviewed any unresponsive information to the warrant or any potentially privileged information from the Ammon Bundy and Bundy Ranch Facebook accounts. A filter team was used to remove any potentially privileged information from the two Facebook accounts that were identified by defense counsel before law enforcement reviewed them for responsive items under the warrant. Accordingly, the government properly executed the warrant.

### III. The Government Acted in Good Faith

As noted above, the Facebook warrant was supported by probable cause and is nonetheless be protected by the “good faith” exception:

Even if the warrant were deficient, the officers’ reliance on it was objectively reasonable and the “good faith” exception to the exclusionary rule applies. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984) (“[T]he marginal benefit or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”). The . . . judge was not misled by information in the affidavit, he did not wholly abandon his judicial role,

and the affidavit certainly was not “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Id.* at 923, 104 S.Ct. 3405 (quoting *Brown v. Illinois*, 422 U.S. 590, 611, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975) (Powell, J., concurring in part)).

*United States v. Schesso*, 730 F.3d 1040, 1050 (9th Cir. 2013). The remedy for an overly broad warrant is not wholesale suppression; it is severance. “We have embraced the doctrine of severance, which allows us to strike from a warrant those portions that are invalid and preserve those portions that satisfy the Fourth Amendment. Only those articles seized pursuant to the invalid portions need be suppressed.” *Flores*, 802 F.3d at 1045 (citation and internal quotation marks omitted). If the Court is inclined to suppress any portion of the information that Facebook provided under the warrant issued by U.S. Magistrate Judge Paul Papak, the government respectfully requests the opportunity to submit supplemental briefing regarding the appropriate scope of severance.

#### IV. Conclusion

For the foregoing reasons, the government recommends that the Court deny defendants’ Motion to Suppress Evidence (ECF No. 741) and reject defendants’ new argument raised in the Motion to Reopen Motion to Suppress (ECF No. 1040).

Respectfully submitted this 7th day of September 2016.

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Re: Facebook Records  
*United States v. Ammon Bundy, et al.*, Case No. 3:16-CR-00051-BR

Dear Counsel:

Enclosed to each of you is an unencrypted CD that includes an individualized production of records received pursuant to a search warrant issued to Facebook. The pages are not numbered at this time. You will receive a Bates-stamped version of the records we seize once we complete execution of the warrants.

If you have any questions or concerns, please do not hesitate to contact us.

Sincerely,

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United States Attorney



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Enclosure