IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No: 23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS;
DANIEL SUMMEY, a detective with the Colorado Springs Police Department, in his individual capacity;
B.K. STECKLER, a detective with the Colorado Springs Police Department, in his individual capacity;
JASON S. OTERO, a sergeant with the Colorado Springs Police Department, in his individual capacity;
ROY A. DITZLER, a police officer with the Colorado Springs Police Department, in his individual capacity; and
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

STECKLER'S AND OTERO'S MOTION TO DISMISS

Defendants B.K. Steckler and Jason S. Otero (collectively, the "Officers") move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss all claims asserted against them in Plaintiffs' First Amended Complaint (Doc. 12).

Certification of Conferral Pursuant to Civ. Practice Standard 7.1B(b): Undersigned counsel certifies that she conferred with Plaintiffs' counsel, Sara Neel, concerning this motion. Plaintiffs oppose the motion.

Introduction

In this case, Plaintiffs complain of search warrants that neutral judges concluded were amply supported by probable cause and sufficiently particular and, thus, constitutional. Plaintiffs' claims against the Officers should be dismissed with prejudice.

Argument

I. Qualified Immunity on Section 1983 Claims

A. Fourth Amendment Search and Seizure

In Claim 2 of the Amended Complaint, Chinook asserts that the Officers violated its Fourth Amendment rights by seeking a search warrant that "any reasonably well-trained officer" allegedly would have known "failed to comply with the Fourth Amendment." (Doc. 12 ¶¶ 174-179) More specifically, Chinook challenges the warrant for "All Facebook Messenger chats tied" to the Chinook Facebook page which, it alleges, "were private, confidential, and not available to the public." (*Id.* ¶¶ 45-46) The Officers are entitled to qualified immunity on Chinook's Fourth Amendment claim because the Facebook Warrant was valid and because it was objectively reasonable for the Officers to rely on the judge's issuance of the Facebook Warrant.

1. Search Warrant Validity

A search warrant is valid if it meets three requirements: it must (1) have been "issued by a neutral, disinterested" judicial officer; (2) be based on " 'probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense' "; and (3) "particularly describe the things to be seized, as well as the place to be searched." *Eckert v. Dougherty*, 658 F. App'x 401, 406 (10th Cir. 2016).

As to the first requirement, the Facebook Warrant was issued by El Paso County, Colorado, Judge Dennis McGuire. (*See* Doc. 51-1, Facebook Warrant)[1] Chinook does not allege that Judge McGuire was not a neutral and disinterested judge. Thus, the first requirement is satisfied.

As to the second requirement, Chinook alleges that the "affidavit in support of the warrant was wholly lacking in probable cause" because it "identified no particular crime or … person under investigation," and it "did not specify what was 'illegal'" about the housing march. (Doc. 12 ¶¶ 50, 52 174) The Tenth Circuit described the legal standard for evaluating a search warrant as follows:

> Where a warrant is obtained, a reviewing court determines the sufficiency of the warrant by examining the affidavit supporting it. The court determines the sufficiency of the affidavit "by looking at the totality of the circumstances and simply ensuring that the magistrate had a substantial basis for concluding that probable cause existed." Probable cause exists when "there is a fair probability that the contraband or evidence of a crime will be found in a particular place." The "affidavit supporting the search warrant need not contain direct evidence or personal knowledge that the items sought are located at the place to be searched." Instead, the magistrate judge may draw reasonable inferences from the information in the affidavit supporting the warrant.

United States v. Shelton, 817 F. App'x 629, 633–34 (10th Cir. 2020) (internal citations omitted).

In this case, Officer Steckler's affidavit demonstrated probable cause to believe that the Messenger chats on Chinook's Facebook page between July 27 and August 2, 2021 would contain evidence in the apprehension and/or subsequent criminal prosecutions arising out of the July 31, 2021 housing march. First, Chinook organized the July 31, 2021 housing march through its

[1] Although Chinook did not attach the Facebook Warrant to the Amended Complaint, it is central to its claims and, therefore, may be considered by the Court without converting this Motion to a motion for summary judgment. *See Walker v. Park Cnty. Sheriff's Off.*, No. 21-1119, 2022 WL 538121, at *4 n.6 (10th Cir. Feb. 23, 2022); *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

Facebook page. (Doc. 12, ¶ 48; Doc. 51-1, Facebook Warrant at 4 (a Facebook profile under the name of the Chinook Center was located in which the July 31, 2021 "March for Housing" was organized under the events tab)) Moreover, although warrants "do not have to identify specific statutes for the crimes to which they are limited," the search warrant affidavit identified "Obstructing Passage or Assembly" as a crime for which the evidence was sought. *United States v. Palms*, 21 F.4th 689, 698-99 (10th Cir. 2021). (Doc. 51-1 at 3) Contrary to Chinook's allegations (Doc. 12, ¶ 52), the affidavit also provided the factual basis for deeming the housing march illegal and for charging participants in it with obstructing passage:

> On 07/31/21 … [a]t approximately 1137 hours, … a group of approximately 60 protestors [were] illegally marching northbound up South Tejon Street, blocking vehicle traffic in the process…. Lieutenant Chacon gave numerous verbal warnings to the group to inform them it was illegal to march in the roadway and they needed to immediately exit the roadway to the sidewalk or face arrest. The announcements were made with a bullhorn megaphone and could be heard clearly. The protestors continued to block both northbound and southbound lanes of South Nevada Avenue….

(Doc. 51-1, Facebook Warrant at 3) Third, Officer Steckler testified to his experience that "people involved in illegal demonstrations use social media to organize planned events." (*Id.* at 4) Chinook takes issue with Officer Stecker's "training or experience" (Doc. 12 ¶ 105), but the Tenth Circuit recognizes such training and experience as valid bases for upholding search warrants for such computer data. *See United States v. Burgess*, 576 F.3d 1078, 1091–92 (10th Cir. 2009) (search warrant affidavit which stated that "Based upon training and experience," the affiant "knows that persons involved in trafficking or the use of narcotics often keep photographs of coconspirators or photographs of illegal narcotics in their vehicle" was not overbroad and demonstrated probable cause to search computers and hard drives). From these facts, the Officers—and the judge—reasonably could believe that evidence of participants' intent to commit and commission of the

crime of obstructing passage existed in Chinook's Facebook Messenger chats. (*See* Colo. Rev. Stat. 18-9-107(1)(b); Doc. 51-2, Colorado Springs City Code § 9.2.104) The judge's finding that probable cause did exist is entitled to "great deference." *Poolaw v. Marcantel*, 565 F.3d 721, 728 (10th Cir. 2009).

In fact, criminal prosecutions of individuals who disobeyed the repeated orders to move out of the street and onto the sidewalk ensued. (*See* Docs. 51-3 (S. Walls), 51-4 (J. Christiansen))[2] The Facebook Messenger chats also were sought to aid in the apprehension of other participants in the illegal march (of approximately 60 persons). *Eckert*, 658 F. App'x at 406 (a warrant may lawfully seek information that will aid in a particular apprehension). Had participants posted to the Chinook Facebook Messenger chats about their intent to commit or their commission of such obstruction crimes, then such evidence would be probative of their guilt in their criminal prosecutions.

The criminal investigation into the January 6, 2021 riot at the Capitol Building in Washington, D.C. demonstrates the evidentiary value of Facebook Messenger chats. The criminal complaint in *United States v. Kelly*, No. 1:21-mj-00128 (D. D.C.) (submitted as Doc. 51-5) details Facebook Messenger chats from the days before, the day of, and the days immediately after the riot that were obtained pursuant to a warrant. (Doc. 51-5 ¶¶ 14, 19-25) They evidenced the criminal defendant's intention to go to Washington, D.C. on January 6, 2021, to "disrupt, prevent and otherwise interfere with [the] Joint Session of Congress," and that he did so. (*Id.*) The Facebook

[2] The court may take judicial notice of the exhibits without converting this into a motion for summary judgment because they are court records from related cases. *See Hutchinson v. Hagn*, 402 Fed. App'x 391, 394-95 (10th Cir. 2010) ("[A] court may take judicial notice of its own records as well of those of other courts, particularly in closely-related cases.") (unpublished).

Messenger chats sought by warrant in this case could have accomplished the same in the prosecutions of the march leaders and participants.

Finally, as to the third requirement, the search warrant and incorporated Affidavit were sufficiently particular. A warrant that " 'enables the searcher to reasonably ascertain and identify the things authorized to be seized' " satisfies the particularity requirement. *United States v. Pulliam*, 748 F.3d 967, 972 (10th Cir. 2014) (citation omitted). Furthermore, " 'a warrant that describes the items to be seized in broad or generic terms may be valid when the description is as specific as the circumstances and the nature of the activity under investigation permit.' " *Id.* (citation omitted). Search warrants for electronic devices must "affirmatively limit the search to evidence of specific ... crimes or specific types of material." *Palms*, 21 F.4th at 698-99; *see also United States v. Allen*, No. 16-10141-01-EFM, 2018 WL 1726349, at *6 n. 25 (D. Kan. Apr. 10, 2018) (denying a motion to suppress for lack of particularity in a warrant seeking broad categories of Facebook account information because "it did not authorize on its face a search for every record associated with the Facebook accounts."); *United States v. Liburd*, No. 17-CR-296 (PKC), 2018 WL 2709199 at *2 (E.D.N.Y. June 5, 2018) (Facebook search warrant was not overbroad because it was " 'limited by reference to an exemplary list of items to be seized' ... related to the existence of ... [the] robbery conspiracy" (citation omitted)); *United States v. Lowry*, No. 1:15–cr–043, 2015 WL 4399627 at *3 (S.D. Ohio July 17, 2015) (Search warrant for "all communications between any user or recipient and the substance of those communications" was not overbroad where criminal defendant used Facebook Messenger to exchange nude photographs with minors.).

Here, the search warrant was sufficiently particular because it limited the search of Chinook's Facebook page to a specific type of material—"Facebook Messenger chats." (Doc. 51-1 at 5) Moreover, it limited the search to the one-week period surrounding the July 31, 2021 march,

when evidence of the leaders' and participants' intent and commission of the obstruction crimes most likely was to be found. (*Id.*; Doc. 12 ¶ 54) Chinook complains that the warrant "failed to limit sufficiently the scope of the search; and … failed to limit the search to evidence of a specific crime." (Doc. 12 ¶ 175) But it could not limit the search to particular individuals' chats, because not all of the approximately 60 participants in the illegal march who might have confessed their intention to obstruct or their commission of obstruction had been identified. And the warrant effectively limited the search to chats concerning the illegal march by limiting it to the few days before and the few days after the march. The warrant was "as specific as the circumstances and the nature of the activity under investigation permit[ted]" and, thus, was valid. *Pulliam*, 748 F.3d at 972.

Contrary to Plaintiffs' allegation in the Amended Complaint, the Constitution does not protect organizations (like Chinook) that initiate demonstrations in which the protesters engage in criminal conduct from the search of their records for evidence of instigation or commission of crime. (Doc. 12 ¶ 142) *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), on which Plaintiffs rely, says nothing about the protection of organizers of First Amendment activities from search warrants such as the Facebook Warrant.

Because the allegations of the Amended Complaint fail to establish a violation of the Fourth Amendment, the Officers are entitled to qualified immunity on Chinook's Fourth Amendment claim.

2. Objective Reasonableness and No Clearly Established Law

The Officers also are entitled to qualified immunity on Chinook's Fourth Amendment claim against them because Chinook fails to allege that the Officers' reliance on the warrant was objectively unreasonable. *See Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). As explained

by the Supreme Court, "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'" *Id.* Few exceptions to this rule exist, and the "threshold" for establishing them "is a high one, and it should be. [That is because] '[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination' because '[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment.' " *Id.* at 547. *See also United States v. Augustine*, 742 F.3d 1258, 1262 (10th Cir. 2014) (listing the exceptions to the presumption of objective reasonableness of an officer's reliance on a court-issued search warrant). Here, Chinook has not alleged that any of the exceptions to the rule exist. (Doc. 12, ¶¶ 45-55) Thus, the Officers are entitled to qualified immunity on Chinook's claim under 42 U.S.C. § 1983 that they violated Chinook's Fourth Amendment rights.

In addition, Chinook will be unable to meet its burden to show that her clearly established Fourth Amendment rights were violated under these circumstances. *See, e.g., United States v. Palms*, 21 F.4th 689, 699–700 (10th Cir. 2021); *United States v. Sadlowski*, 948 F.3d 1200, 1204–05 (10th Cir. 2020); *United States v. Pulliam*, 748 F.3d 967, 971–72 (10th Cir. 2014); *United States v. Christie*, 717 F.3d 1156, 1165–66 (10th Cir. 2013); *United States v. Christie*, 717 F.3d 1156, 1165–66 (10th Cir. 2013).

B. First Amendment Retaliation

1. No constitutional violation

Chinook alleges that the "search and seizure of [its] private Facebook messages was … retaliatory," in violation of the First Amendment. (Doc. 12 ¶ 173,) To state a First Amendment retaliation claim, Chinook must allege: (1) that it "was engaged in constitutionally protected

activity"; (2) defendants' "actions caused [it] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) defendants' "adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007). In addition, "a plaintiff claiming that a search warrant was executed in retaliation for a protected activity is required to show a lack of probable cause as an element of that claim." *Chavez v. City of Albuquerque*, No. 13cv00557 WJ/SMV, 2014 WL 12796875, at *3 (D.N.M. Apr. 14, 2014), *citing Hartman v. Moore*, 547 U.S. 265-66 (2006).

Here, Chinook wholly fails to allege facts that, if true, plausibly show that Chinook's exercise of constitutionally protected conduct substantially motivated Officer Steckler to draft and Sgt. Otero to review and approve the search warrant affidavit for Chinook's Facebook Messenger chats. For starters, the warrant itself shows that it was not even Officer Steckler's or Sgt. Otero's idea to seek the warrant. Officer Steckler averred that on August 2, 2021, he was assigned to "research a tip regarding a Facebook post that was posted after arrest[s] were made for Obstructing Passage or Assembly, and Resisting, Interference with a Public Official … on 07/31/21." (Doc. 51-1 at 3) Sgt. Otero merely reviewed and approved Ofc. Steckler's search warrant affidavit. (Doc. 12 ¶ 55) Furthermore, as discussed herein, the Officers sought the search warrant to investigate Chinook's organization of an illegal protest that already had occurred—one where Chinook's leaders and participants obstructed city streets and then resisted arrest. By the time the Officers sought the search warrant, some of the criminal prosecutions for which the evidence was sought already had been instituted. (Doc. 12 ¶ 45; Docs. 51-3 at 9 (Walls), 51-4 at 7 (Christiansen) (summonses issued July 31, 2021); Doc. 51-1 (warrant sought Aug. 3, 2021)) The search warrants weren't sought to retaliate against Chinook but rather to collect evidence probative of the

obstruction and resistance charges already pending and possible obstruction charges to come. (Doc. 51-1 at 3-4) Chinook fails to allege any facts to support the notion that Chinook's protected speech activities substantially motivated the Officers to seek the warrant and, thus, fails to state a claim for a violation of Chinook's First Amendment rights.

2. No clearly established law

The Officers also are entitled to qualified immunity on Chinook's First Amendment retaliation claim because it was not clearly established in August 2021 that Chinook had a protected right against the search and seizure of Facebook Messenger chats surrounding the date of an illegal march that it organized through its Facebook page. Scant caselaw exists concerning search warrants for Facebook pages. *See Allen*, 2018 WL 1726349, at *6 n.25; *Liburd*, 2018 WL 2709199 at *2; *Lowry*, 2015 WL 4399627 at *3. There does not appear to be any from the Supreme Court, Tenth Circuit, or the consensus of other Circuit Courts. Chinook will be unable to meet its burden to show that its clearly established First Amendment rights were violated under these circumstances.

II. Stored Communications Act

In Claim 3 of the Amended Complaint, Chinook asserts that the Officers violated provisions of the Stored Communications Act, 18 U.S.C. 2701 *et seq.* ("SCA"). (Doc. 12 at 45-46) The SCA "bars unauthorized access to stored electronic communications." *Davis v. Gracey*, 111 F.3d 1472, 1482 (10th Cir. 1997). The government may compel a provider of electronic communication services (such as Facebook) to disclose the contents of communications that it possesses and stores with "a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures …) by a court of competent jurisdiction." 18 U.S.C. § 2703(a), (b)(1)(A). "The SCA does not require

perfection from the officials who implement it." *John K. Maciver Inst. for Pub. Policy, Inc. v. Schmitz*, 885 F.3d 1004, 1010 (7th Cir. 2018). "Instead, it provides that 'good faith reliance on a court warrant or order … is a complete defense to any civil or criminal action brought under this chapter or any other law.'" *Id.*, quoting 18 U.S.C. § 2707(e)(1). Furthermore, "qualified immunity is available to SCA defendants." *Id.* at 1015. Where the search warrant is valid or the officers' reliance on it is "objectively reasonable," the officers are entitled to dismissal of an SCA claim asserted against them. *Davis*, 111 F.3d at 1484 (where a valid warrant authorized seizure of computer equipment, officers were entitled to "the statutory good faith defense as a matter of law"); *John K. Maciver Inst.*, 885 F.3d at 1014 (officers were entitled to "the good-faith defense [to plaintiff's SCA claim] at the motion-to-dismiss stage" where they had "sought warrants from state circuit judges" for plaintiff's electronic records when investigating suspected illegal campaign coordination). Furthermore, to be liable under the SCA, "a person must know he or she is accessing … subscriber records or stored communications … without an appropriate form of legal process." § 9:26. Knowing or intentional state of mind required under Stored Communications Act, 1 Data Sec. & Privacy Law § 9:26 (2023-2024), citing *Long v. Insight Commc'ns of Cent. Ohio, LLC*, 804 F.3d 791, 797-98 (6th Cir. 2015) (finding that the plain language and legislative history of the SCA supported the interpretation that a "knowing or intentional state of mind" was required for liability under the SCA).

Here, Chinook fails to state a SCA claim against the Officers because it concedes that the Officers obtained a warrant for the Facebook Messenger chats pursuant to Colorado state court warrant procedures. (Doc. 12 ¶¶ 55-56) Thus, Chinook fails to allege a violation of the SCA. *See* 18 U.S.C. § 2703(a), (b)(1)(A) (the government can require the disclosure of the contents of an electronic communication with a warrant).

Next, as discussed above, even if the warrant was invalid, the Officers "proceed[ed] in good faith" and "behaved in an objectively reasonable manner." *John K. Maciver Inst.*, 885 F.3d at 1014. *See also Davis*, 111 F.3d at 1484. Thus, they are entitled to the statutory good faith defense to Chinook's SCA claim.

Finally, Chinook fails to allege—with facts and not mere conclusions—that the Officers knew or intended to access Chinook's Facebook Messenger chats without a valid warrant. Chinook alleges only that the Officers "acted with a knowing and intentional state of mind," which is insufficient. (Doc. 12 ¶ 193) Chinook's SCA claim against the Officers should be dismissed.

III. Colorado Constitution Claims

In claim 5 of the Amended Complaint, Chinook asserts unlawful search and protected speech violation claims against the Officers under the Colorado Constitution. For the same reasons that Chinook fails to state federal constitutional violation claims, it fails to allege the violation of its rights under the Colorado Constitution. (*See supra* Parts I.A.1 and I.B.1)

Conclusion

All of Plaintiffs' claims against Officers Stekler and Otero should be dismissed with prejudice.

Respectfully submitted this 20th day of November, 2023.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 20th day of November, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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