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.

REPLY IN SUPPORT OF CITY OF COLORADO SPRINGS' MOTION TO DISMISS

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Defendant City of Colorado Springs ("City") replies to Plaintiffs' response (Doc. 61) to its motion to dismiss (Doc. 52).

INTRODUCTION

Plaintiffs' claims against the City arise from search warrants drafted, reviewed, obtained, and/or executed by City police officers following two demonstrations that occurred in Colorado Springs. At both demonstrations, masked participants engaged in criminal conduct. At the July 31, 2021 "March for Housing," "approximately 60 protestors illegally march[ed] northbound up South Tejon Street, blocking vehicle traffic in the process," despite "numerous verbal warnings" to move to "the sidewalk or face arrest." (Doc. 51-1 at 3) When officers began to make arrests at the scene, more than one person resisted. (*Id.*; Docs. 51-3, 51-4) A police officer "ran to assist other police officers who were attempting" to arrest one such resisting subject. (Doc. 49-2 at 6) A woman threw her bicycle at that officer "with a clear intent to strike him with it." (*Id.*)

After identifying Plaintiff Jacqueline Armendariz as the woman who threw the bike, officers drafted, and neutral judges issued, search warrants for her home and electronic devices, to search for and seize evidence of Ms. Armendariz's commission of attempted assault on a police officer and, because of her "close relationship" with march leaders, participation in planning the march where most, if not all, participants engaged in the criminal conduct of obstructing passage. (Docs. 49-1, 49-2) Officers also drafted, and a neutral judge issued, a search warrant for the Facebook account through which the march was organized—Plaintiff Chinook Center's Facebook page. (Doc. 51-1) It likely would contain evidence that could be used to help identify the wrongdoers and in subsequent criminal prosecutions of them for obstructing passage and resisting arrest.

Approximately one year earlier, on August 3, 2020, at a protest planned and marketed by the Empowerment Solidarity Network ("ESN") through its Facebook page, masked and armed individuals surrounded uninvolved citizens' vehicles, terrifying the drivers and blocking their passage. (*See, e.g.,* Doc. 68-1 at 3-5, 7, 13) In the days and weeks following the event, Officers sought to identify the masked individuals in their investigation into "Attempted Robbery, Menacing, and Riot related charges." (Doc. 68-2 at 5) They drafted and, again, neutral judges issued search warrants for (1) a cell phone of a woman whose vehicle was parked at the protest and whose longtime partner was believed to be one of the armed intimidators, (2) the ESN Facebook page, and (3) a notebook found at the home of one of the armed suspects. (Docs. 68-1, 68-2, 68-3)

All the warrants sought evidence related to specified crimes: obstructing passage, resisting arrest, attempted robbery, menacing, riot, etc. All the warrants demonstrated why the officers believed evidence was likely to exist in the places to be searched. All the warrants were limited by date range and/or type of material to be searched. And all the warrants were issued by neutral judges who had substantial bases for concluding that they satisfied the Fourth Amendment.

This Court's job is not to review the search warrants *de novo*. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983). Rather, it must accord the issuing judges' probable cause determinations "great deference." *Id.* As explained herein, each of the issuing judges had a substantial basis for issuing the warrants. Thus, none support Plaintiffs' claim that the City has a custom of "drafting, obtaining, and executing overbroad and insufficiently particular warrants" for protesters' communications. (Doc. 61 at 7) Plaintiffs' claims against the City should be dismissed with prejudice.

Argument

I. Section 1983 Claims

A. Municipal Unlawful Search and Seizure

1. No Unlawful Search and Seizure By An Employee

Plaintiffs take issue with the cases cited by the City, but they do not dispute that they must plausibly allege that a City employee violated their constitutional rights to state a claim against the City. (Doc. 61 at 6-7) For the reasons stated in the Officers' own Motions to Dismiss, Plaintiffs fail to do so.

2. No Customs of Unlawful Search Warrant Applications

Plaintiffs concede that to state a claim against the City, they must allege "'multiple similar instances of misconduct.'" (Doc. 61 at 11 (citation omitted)) But Plaintiffs improperly lump together all sorts of different types of warrants—digital device warrants, "novel"[1] Facebook warrants, even a warrant for a physical notebook—to argue that the City has a custom of "drafting, obtaining, and executing overbroad and insufficiently particular warrants" for protesters' communications. (*Id.* at 7) Moreover, Plaintiffs grossly mischaracterize the various warrants by claiming that they authorized the search and seizure of evidence "unrelated to any crime." (Doc. 61 at 8, 10)

Plaintiffs rely on two digital device search warrants as support for their claims against the City: (1) the Armendariz digital device warrant (Doc. 49-2) and (2) the E.B cell phone warrant (Doc. 68-1). (Doc. 61 at 8-9) As discussed at length in Officers Summey's and Ditzler's motions to dismiss, the Armendariz warrant is not overbroad. (Doc. 49 at 10-14; Doc. 50 at 3-6; Doc. 67 at 7-12) In a detailed, 24-page warrant affidavit, it set forth

[1] *United States v. Purcell*, 967 F.3d 159, 183 (2d Cir. 2020).

facts demonstrating probable cause for believing Armendariz committed attempted assault on a police officer at the July 31, 2021 march. (Doc. 49-2 at 5-18) In addition, because of Armendariz's "close relationship" with leaders of the Chinook Center (also detailed in the warrant affidavit (*id.* at 25-28)), they had reason to believe that Armendariz may have been involved in planning of the July 31, 2021 march that turned illegal. (*Id.* at 5, 27) Accordingly, they established probable cause for the search and seizure of Armendariz's digital devices for evidence of her crime and the planning and execution of the march. The warrant was so limited. (Doc. 49-2 at 29)

The search warrant for E.B.'s phone also thoroughly demonstrated probable cause for believing that evidence of a crime would be found in it. Again, in a detailed, 12-page warrant affidavit, the officer averred facts showing that at the August 3, 2020 protest at the home of the officer who shot De'von Bailey, E.B.'s longtime partner, M.A., stood holding an "AR-15 style rifle in a 'low ready' stance while facing [a] vehicle," preventing it from proceeding. (Doc. 68-1 at 4) Others who engaged in such behavior had been "charged with engaging in a riot, menacing, obstructing highway or other passageway, and disobedience of public safety orders under riot conditions." (*Id.* at 6)

Plaintiffs contend in the Response that there was no evidence "that E.B. had even attended the demonstration." (Doc. 61 at 9) But E.B.'s own vehicle was parked nearby the protest, leading the affiant to believe it "likely that [E.B] was also present." (Doc. 68-1 at 9-10) In addition, publicly available Facebook posts showed that E.B. shared her Facebook account with M.A. (*Id.* at 7-8) In sum, as the officer averred, "Given the close relationship between [E.B] and [M.A], their history of sharing social media, and the

presence of [E.B.]'s Ford Escape on 08/03/20, Your Affiant believes that [E.B.]'s cell phone will contain material evidence for this case." (*Id.* at 14) A neutral judge agreed. (*Id.*)

For Facebook warrants, Plaintiffs likewise rely on just two: (1) the Chinook Facebook Warrant (Doc. 51-1) and (2) the Empowerment Solidarity Network ("ESN") Facebook Warrant (Doc. 68-2). As thoroughly addressed in Officers Steckler's and Otero's motion to dismiss, the Chinook Facebook Warrant sought evidence of the "Obstructing Passage or Assembly" and "Resisting, Interference with a Public Official" conduct that occurred at the July 31, 2021 march. (Doc. 51 at 4; Doc. 67 at 4) Chinook had organized the march through its Facebook account, and participants in the march utilized Facebook as a medium to communicate about and share photos of the march. (Doc. 67 at 9) The Chinook Facebook Warrant was limited to the one-week period surrounding the July 31, 2021, march and to just four Facebook account data categories. (Doc. 51-1 at 5) It was not overbroad or lacking probable cause.

Similarly, the ESN Facebook Warrant sought information for the limited period of July 20, 2020 to August 27, 2020, about the August 3, 2020 protest in which masked and armed individuals blocked—at gunpoint—drivers of vehicles from proceeding through the neighborhood. (Doc. 68-2) "Based on the behaviors displayed …, the event evolved into a riot as defined by Colorado Revised Statute (CRS) 18-9-101 …." (*Id.* at 5) ESN had "marketed" the event through its Facebook account. (*Id.* at 3) As averred in the ESN Facebook Warrant:

> Your Affiant believes obtaining the information from [ESN's] Facebook profile … for the period of 07/20/2020 through 08/27/2020 would help identify persons that were in contact with the Empowerment Solidarity Network in the weeks and days leading up to, during, and after the event that took place on 08/03/2020. Obtaining the messages associated with the identified account will assist with better understanding the event planning

> process, specifically to determine if the armed subjects were directed to use intimidation and force towards uninvolved citizens travelling through the area, and to help identify the unknown actors.
>
> This is an ongoing criminal investigation into the criminal acts of Attempted Robbery, Menacing, and Riot related charges. The identification of those involved is paramount [to] further the investigation, to bring justice to the victims of the stated crimes, and to determine if the Empowerment Solidarity Network along with its contributors, are planning for further public disorder.

(*Id.* at 5-6) As with all the other warrants Plaintiffs challenge, a neutral judge concluded that the warrant satisfied the Fourth Amendment. (*Id.* at 6, 8)

Finally, the zippered notebook was found when officers were executing a search warrant at the home of a woman suspected of "pointing an AR-15 style rifle" at a citizen's truck at the August 3, 2020 protest. (Doc. 68-3 at 11) When searching the primary bedroom of the home for "indicia" of occupancy, "detectives located a black in color portfolio zippered notebook underneath the bed." (*Id.*) "[T]he notebook contained arrest wills, organizational information, to include; rosters, contact information, and personal identification of other members pertaining to and related to both the John Brown Gun Club and Redneck Revolt," groups known to support "gun rights and members [that] often openly carry firearms." (*Id.*) "Upon locating [the notebook], [the detective] started applying for this search warrant," believing "that the documents located within the zippered notebook would be critical material evidence of identifying the outstanding unknown suspects who have yet to be identified and charged from the riot that occurred in Colorado Springs, CO on 08/03/2020." (*Id.*) The judge agreed, authorizing the search and seizure of the "notebook containing various documents." (*Id.* at 12-13)

In sum, Plaintiffs grossly mischaracterize the search warrants on which they rely to show a purported City custom of "drafting, obtaining, and executing overbroad and insufficiently particular" search warrants. None support their claim. All the warrants were

justified by and tethered to crimes for which the warrant affidavits demonstrated probable cause. They all set forth why the affiants believed the places to be searched were likely to contain evidence of those crimes. And they all constrained their search and seizure authority to the dates and to the search terms and/or specific locations in Facebook or elsewhere most likely to contain that evidence. Even under the Tenth Circuit's general tenets of Fourth Amendment search warrant law, the digital device, "novel" Facebook, and zippered notebook warrants fail to demonstrate a City custom of seeking overbroad and insufficiently particular warrants. Plaintiffs fail to allege that the City has an unconstitutional custom and, thus, fail to state a Fourth Amendment claim against it.

B. Municipal First Amendment Retaliation

Plaintiffs do not specifically address the City's arguments supporting the dismissal of their First Amendment retaliation claim. (Doc. 52 at 7-8) As further demonstrated above and in the attached warrants, the officers' motivation in drafting, obtaining, and executing the warrants was the desire to identify and prosecute individuals who engaged in criminal conduct during the August 3, 2020 and July 31, 2021 protests. Where, as here, the warrants were supported by probable cause, Plaintiffs cannot show any violation of their First Amendment rights. *See* *Novak v. City of Parma*, No. 1:17-CV-2148, 2021 WL 720458, at *7 (N.D. Ohio Feb. 24, 2021), *aff'd*, 33 F.4th 296 (6th Cir. 2022).

II. Stored Communications Act Claim

Plaintiffs appear to assert their SCA claim against the City based on Officer Steckler's drafting and Officer Otero's review of the Chinook Facebook Warrant, on a vicarious liability theory. (Doc. 12 ¶ 193) In the Response, Plaintiffs concede that a search

and seizure pursuant to a valid warrant satisfies the SCA. (Doc. 61 at 13) As demonstrated in the briefing, the Chinook Facebook Warrant was valid.

But even if it wasn't, Plaintiffs fail to state a claim against the City under the SCA for two additional reasons. First, the statutory good faith defense under the SCA applies because the Chinook Facebook Warrant was not facially deficient; the Officers were entitled to rely on its issuance by the judge. (*See* Doc. 51 at 11-12; Doc. 67 at 10-11) Second, Plaintiffs have not alleged that Officers knew or intended to access Chinook's Facebook account without a valid warrant. (Doc. 51 at 12)

III. Injunctive Relief

As Plaintiffs acknowledge in the Response, "the headings of their state constitutional and injunctive relief claims erroneously did not identify the City." (Doc. 61 at 16) The omission did mislead undersigned counsel for the City. As she stated on the record, she indicated her intention to and belief that she had moved to dismiss all claims against all Defendants.

For the same reasons that the FBI argued that Plaintiffs fail to state a claim for injunctive relief based on the FBI's retention of Armendariz's electronic data, Plaintiffs fail to state such a claim against the City. (Doc. 49 at 21-23) The City therefore joins in and adopts the FBI's argument in its motion (*id.*) and in its reply brief (Doc. 66 at 19-20), for purposes of economy and efficiency.

Conclusion

All of Plaintiffs' claims against the City of Colorado Springs should be dismissed with prejudice.

Respectfully submitted this 9th day of January 2024

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 9th day of January 2024, 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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