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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

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11 THE REPUBLIC OF KAZAKHSTAN,
12 Plaintiff,
13 v.
14 DOES 1 TO 100, INCLUSIVE,
15 Defendant.

Case No. 2:15-mc-00159-TLN-KJN

**NON-PARTY FACEBOOK, INC.’S
OPPOSITION TO THE REPUBLIC OF
KAZAKHSTAN’S MOTION TO COMPEL
AND MOTION TO QUASH SUBPOENA**

Date: March 3, 2016
Time: 9:00 a.m.
Dept.: 25
Judge: Kendall J. Newman

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18 **I. INTRODUCTION**

19 Non-Party Facebook, Inc. (“Facebook”) opposes the Republic of Kazakhstan’s Motion to
20 Compel because Kazakhstan’s subpoena to Facebook is unauthorized, unnecessary, and improper.
21 The Court should therefore deny Kazakhstan’s Motion and quash the subpoena to Facebook.

22 Kazakhstan seeks Facebook account information for the creators or administrators of the
23 Respublika newspaper Facebook Page and an individual named Muratbek Ketebayev, both of
24 whom Kazakhstan has been granted leave to depose directly. *See* Motion at 8-10. But that leave
25 allows only for depositions from Respublika and Ketebayev, not for document discovery from
26 Facebook. The subpoena to Facebook has not been authorized as required and Kazakhstan cannot
27 shoehorn its subpoena to Facebook within the scope of the court-authorized depositions.
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1 In addition, even if wide ranging discovery from third parties is somehow authorized, the
2 subpoena to Facebook is unnecessary: Kazakhstan can ask Respublika and Ketebayev about their
3 roles in the alleged hacking, relationship with the alleged hackers, and who was responsible for
4 publishing or removing the identified posts on Facebook during their depositions. And, as with
5 any Facebook user, these users can access and testify about their own Facebook accounts.

6 Finally, by its own admission, Kazakhstan is using its lawsuit to investigate a purported
7 criminal “mastermind” Mukhtar Ablyazov, *see* Motion at 6-7 (also not named as a defendant),
8 and allegedly criminal activity supporting him. But a foreign government masquerading an
9 international criminal investigation under the guise of civil discovery is improper. If Kazakhstan
10 is investigating purportedly criminal activity then the mechanisms for international cooperation in
11 criminal investigations, not civil discovery subpoenas, are the means for discovery.

12 II. FACTUAL BACKGROUND

13 Facebook has received multiple subpoenas from Kazakhstan in connection with its lawsuit
14 regarding an alleged hacking of Kazakh government computers and government officials’ email
15 accounts by unknown persons. The operative subpoena, dated November 12, 2015, seeks the
16 name, email address, IP addresses, and media access control (“MAC”) addresses for the
17 (1) administrators of the Respublika Facebook Page, (2) registrant of the account with the unique
18 Facebook username mur.ketebayev, (3) user(s) who removed two Facebook Posts, and (4) users
19 who created 28 posts, Notes, or other pieces of content on Facebook. *See* Motion at 10-11.
20 Facebook has no other connection to this case and no substantive knowledge about its allegations.

21 Kazakhstan filed its lawsuit in March 2015 in the Southern District of New York alleging
22 violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and then began discovery to
23 identify its Doe defendants¹ *See* Motion at 3. In the ten months that Kazakhstan has conducted
24 discovery, it has not named any defendants. *See Kazakhstan v. Does 1-100*, Case No. 15-cv-
25 1900 (S.D.N.Y filed March 12, 2015) (as of January 14, 2015, naming only Doe defendants).

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28 ¹ The jurisdictional basis for the underlying litigation remains unclear to Facebook.

1 After receiving the operative subpoena, which was slightly modified from prior subpoenas
2 also received by and objected to by Facebook, Facebook again objected and met and conferred
3 with counsel for Kazakhstan and Respublika (who is also opposing the Motion), but was unable
4 to resolve its objections. *See* Motion at 11. Facebook also sent notice of the subpoena to the
5 email addresses associated with the targeted accounts and received in response an objection from
6 the email address associated with the mur.ketebayev Facebook account. *See* Declaration of Ryan
7 Mrazik in Support of Non-Party Facebook’s Opposition to Motion to Compel and Motion to
8 Quash Subpoena, Ex. A. Facebook now opposes Kazakhstan’s Motion to Compel.

9 III. ARGUMENT

10 A. The Document Subpoena to Facebook Constitutes Unauthorized Discovery.

11 Fed. R. Civ. P. 26(a)(1)(B) provides that a “a party may not seek discovery from any
12 source before the parties have conferred as required by Rule 26(f), except in a proceeding
13 exempted from initial disclosure ... or when authorized by these rules, by stipulation, or by court
14 order.” Here, there is no named defendant and the parties have not conferred, so any discovery
15 must be specifically authorized and, if not, must be quashed. *See, e.g., Deuss v. Siso*, Case No.
16 14-cv-00710-YGR (JSC), 2014 WL 4275715 (N.D. Cal. Aug. 29, 2014) (quashing subpoenas
17 issued to nonparties in violation of Fed. R. Civ. P. 26(d)(1) and imposing sanctions where a party
18 did not withdraw the subpoenas even after the violation was brought to its attention).

19 As it concedes, Kazakhstan has not been authorized to conduct discovery from Facebook.
20 Kazakhstan argues that its requests to Facebook falls within the scope of the deposition
21 subpoenas to Respublika and Ketebayev as authorized by Judge Ramos and Judge Pittman. *See*
22 Motion at 12-14. But this glosses over that these judges authorized only depositions of
23 Respublika and Katebayev. *See* Motion at 8-10. Indeed, Kazakhstan’s Motion expressly says
24 that “The District Court Authorizes Discovery from Respublika”, “The District Court Authorizes
25 Discovery from Ketebayev”, the “District Court expressly authorized Plaintiff to examine
26 Katabaev [sic]” and the court “granted [its] cross-motion for expedited discovery from
27 Respublika.” *See id.* It does not matter that the discovery to Facebook would “further[]the goal”
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1 of the authorized discovery, Motion at 11-13, because no court or judge has authorized the
2 document subpoena to Facebook.

3 Kazakhstan also reasons that the limited court authorizations should be interpreted broadly
4 because its subpoena to Facebook “adheres directly to these discovery rulings.” *Id.* at 13.
5 Kazakhstan provides a chart attempting to cross-reference its document requests to Facebook
6 with the depositions permitted directly from Respublika and Ketebayev. *Id.* at 22. Implicit in this
7 effort is an obvious conclusion: discovery from Facebook has not been authorized.

8 Finally, although Kazakhstan references an earlier discovery ruling in its procedural
9 background about the case, it does not argue that that ruling supports the current subpoena.
10 *Compare* Motion at 5 *with* 11-14. And even if discovery from Facebook was authorized earlier,
11 the purported need for that discovery no longer exists. The subpoena to Facebook seeks the
12 name, email address, IP addresses, and MAC addresses for the accounts of Respublika and
13 mur.ketebayev. *See id.* at 13-14. That type of request might have made sense in a case where a
14 plaintiff did not know the identity of the user and needed that information to identify a “Doe”
15 defendant. Here, however, Kazakhstan knows the identity of the users and has been authorized to
16 depose them. Kazakhstan should not be able to use a lawsuit to investigate, for more than ten
17 months now, information about people it has identified but has declined to name as defendants.

18 Further, to the extent that the subpoena might establish a possible forensic connection
19 between unspecified information from unnamed internet service providers and the Facebook
20 pages, *see* Motion at 13-14, it reveals that Kazakhstan’s request is based only on speculation that
21 there may be something relevant in the information sought. In other words, Kazakhstan appears
22 to be on a fishing expedition. Kazakhstan’s theory only makes sense on the chance that
23 Respublika or Ketebayev did not merely receive their information from journalistic sources, but
24 were directly involved in the hacking. Yet as the Motion provides, there is no reason to believe
25 that is the case.

26 For these reasons, the Court should deny Kazakhstan’s Motion and quash the subpoena to
27 Facebook because it has not been authorized as required by Fed. R. Civ. P. 26(a)(1)(B).
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1 **B. Respublika and Ketebayev Can Respond Directly to Kazakhstan’s Questions**
2 **Regarding Their Involvement in the Alleged Hacking If They Are Deposed.**

3 It is well established that non-party discovery should avoid burdening uninvolved non-
4 parties. *See* Fed. R. Civ. P. (d)(1); *see, e.g., Intermarine, LLC v. Spliethoff Bevrachtingskantoor,*
5 *B.V.*, ---F. Supp. 3d ---, No. 15-MC-80211-MEJ, 2015 WL 4967280, at *2 (N.D. Cal. Aug. 20,
6 2015) (quashing subpoena to non-party online service provider because “the Court must limit
7 discovery if ‘the discovery sought . . . can be obtained from some other source that is more
8 convenient, less burdensome, or less expensive.’”) (quoting Federal Rules of Civil Procedure).

9 Although Respublika and Ketebayev are also non-parties, Kazakhstan clearly believes
10 they are more involved in the substance of the lawsuit than Facebook, which is not alleged to be
11 involved at all. Therefore, as a matter of law and commonsense, Kazakhstan should seek and
12 complete, if appropriate, the court-authorized discovery from Respublika and Ketebayev before
13 continuing to pursue discovery from Facebook, an entity which is entirely uninvolved in this
14 lawsuit. Moreover, the information Kazakhstan seeks from Facebook is information that
15 Respublika and Ketebayev have within their control. Facebook users can easily download their
16 account information, including IP session logs such as those sought in Plaintiff’s subpoena, by
17 using the Download Your Information tool. Instructions are available at
18 <https://www.facebook.com/help/131112897028467/> (“Downloading Your Info”), and a full
19 description of all data that can be obtained through this tool is available at
20 <https://www.facebook.com/help/405183566203254/> (“Accessing Your Facebook Data”).

21 Finally, the discovery sought by Kazakhstan appears to raise important First Amendment
22 considerations; it involves action against a newspaper and an associated person who sought to
23 publish materials critical of a government. First Amendment concerns are at their peak in cases
24 involving political speech and the Supreme Court has recognized that “speech on ‘matters of
25 public concern’ . . . is ‘at the heart of the First Amendment’s protection.’” *Dun & Bradstreet,*
26 *Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759 (1985), *quoting First Nat. Bank of*
27 *Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Indeed, “speech on public issues occupies the
28 highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”

1 *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted). Facebook
2 understands that Respublika intends to raise this issue in its own opposition but reinforces for the
3 Court the importance of this concern.

4 **C. Kazakhstan is Investigating Allegedly Criminal Conduct and Should Use**
5 **Established Means for International Cooperation in Criminal Investigations.**

6 Kazakhstan suggests that its lawsuit is an attempt to investigate the conduct of Mukhtar
7 Ablyazov, a criminal “mastermind” and hacking of government computers and email accounts.
8 *See* Motion at 3, 5-7. But, using U.S. federal civil discovery to investigate foreign criminal
9 activity is improper.

10 Instead, Kazakhstan may use the mechanisms expressly provided for international
11 cooperation in criminal investigations, specifically the Inter-American Convention on Mutual
12 Assistance in Criminal Proceedings, which Kazakhstan has ratified and to which the United
13 States is also a party. *See* Inter-American Convention on Mutual Assistance in Criminal Matters
14 (1995) available at <http://www.oas.org/juridico/english/treaties/a-55.html>; *see also* List of
15 Signatories and Ratifications available at <http://www.oas.org/juridico/english/Sigs/a-55.html>
16 (listing the United States and Kazakhstan as having ratified the treaty). Further, Kazakhstan and
17 the United States recently negotiated and signed a bilateral treaty for Mutual Legal Assistance in
18 Criminal Matters. *See* U.S. Department of State, Media Note, *Signing of a Mutual Legal*
19 *Assistant Treaty Between the United States and Kazakhstan* (Feb. 20, 2015) available at
20 <http://www.state.gov/r/pa/prs/ps/2015/02/237732.htm>. The clear intent of the governments of
21 Kazakhstan and the United States is to pursue information in connection with criminal matters
22 through these established international mechanisms for cooperation and, in turn, not by co-opting
23 and burdening the other country’s civil court systems with wide-ranging investigations
24 masquerading as civil discovery.

25 **IV. CONCLUSION**

26 For all of the foregoing reasons, Facebook requests that this Court deny Kazakhstan’s
27 Motion and quash Plaintiff’s subpoena dated November 12, 2015 directed to Facebook.
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Respectfully submitted,

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