CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART JURY 2

The People of the State of New York,

Plaintiffs,

—against—

Malcolm Harris,

Defendant,

Twitter, Inc.,

Non-Party Movant.

MEMORANDUM OF LAW IN OPPOSITION TO ORDER TO SHOW CAUSE

Docket No.: 2011NY080152

I. INTRODUCTION

Twitter, Inc. respectfully submits this Memorandum of Law in opposition to the New York County District Attorney's (DANY) Order to Show Cause. On June 30, 2012, the Criminal Court issued its Decision and Order for Twitter's Motion to Quash. The trial court ordered Twitter to produce certain content and non-content information related to defendant Harris. On July 18, 2012, Twitter filed a Notice of Appeal seeking to have the issues concerning the subpoenas heard by the Appellate Term of the Supreme Court, First Judicial Department. That Appeal is on-going. On August 20, 2012, the trial court signed an Order to Show Cause in which DANY seeks to hold Twitter in Criminal Contempt of Court pursuant to Judiciary Law § 750(A)(3) and Civil Contempt of Court pursuant to Judiciary Law § 753(A)(8). Under that Order, Twitter's response was due on September 5, 2012. However, on August 23, 2012, Twitter moved for a stay of all proceedings. On August 24, 2012, the Appellate Term granted a stay of all proceedings pending its determination of the stay application. By Order dated September 7, 2012 and served on Twitter, September 10, 2012, Appellate Term denied Twitter's motion of August 23, 2012.

Twitter seeks to appeal the Court's June 30th order because it will have implications for millions of Twitter users in New York. If Twitter is forced to comply with the Court's Order under the pain of sanctions, Twitter will necessarily forfeit its right to appeal and these important issues will never be resolved by an appellate court. *In re Shapiro v. Chase Manhattan Bank, N.A.*, 84 Misc.2d 938, 943 (Sup. Ct. N.Y. County 1975) (noting third-party bank's compliance with a subpoena "clearly would frustrate any judicial determination of the issue."); *see also Brunswick Hosp. Center, Inc. v. Hynes*, 52 N.Y.2d 333, 339, 420 N.E.2d 51, 54, 438 N.Y.S.2d 253, 256 (1981)("Quite simply, having complied with the process the subpoenaed party no longer possesses the option of challenging its validity. . . ."); *The Cadle Co. v. Court Living Corp.*, 34 A.D.3d 254, 823 N.Y.S.2d 401, 402 (N.Y.A.D. 1 Dept., 2006) (appeal of a motion to quash was rendered moot where non-party "provided the information sought"); *Cheney v. Cheney*, 255 A.D. 302, 304, 5 N.Y.S.2d 744, 745 (N.Y.A.D. 1 Dept. 1938) (same). For these reasons and those stated further below, Twitter respectfully requests that the Court exercise its discretion not to impose any contempt sanctions on Twitter as the appellate process continues to play out.

II. ARGUMENT

A. Twitter Should Not Be Held in Criminal Contempt

Contempt is a drastic remedy which should not issue absent a clear right to such relief. *Benson Park Associates LLC v. Herman*, 941 N.Y.S.2d 108, 109 (N.Y. A.D. 1 Dept., 2012). "To prevail on a motion to punish for criminal contempt, the movant must establish, beyond a reasonable doubt, the willful disobedience of a court's lawful mandate." *Town of Riverhead v. T.S. Haulers, Inc.*, 890 N.Y.S.2d 332, 333 (N.Y. A.D. 2 Dept. 2009). The alleged contemnor's

actions must "clearly bespeak of an intent to defy the dignity and authority of the court." *Sheridan v. Kennedy*, 12 A.D.2d 332, 333 (N.Y. A.D. 1 Dept., 1961). Willful disobedience is not present where the alleged contemnor provides "evidence of good cause for noncompliance" with the Court's order. *Dalessio v. Kressler*, 6 A.D.3d 57, 66 (N.Y. A.D. 2 Dept., 2004).

Twitter respectfully submits that it has good cause for noncompliance with the Court's Order because, as the non-party recipient of a subpoena, it will forfeit its right to appeal if it complies with the Court's Order and produces the desired records before its appeal is heard. *Chase Manhattan Bank, N.A.*, 84 Misc.2d at 943; *see also Hynes*, 52 N.Y.2d at 339; *The Cadle Co.*, 823 N.Y.S.2d at 402; *Cheney*, 255 A.D. 302 at 304.[1] In this case, Twitter's preservation of its appellate rights is all the more important because the Court has determined that Twitter is the only party with standing to challenge the government's subpoenas.[2] Moreover, Twitter has sought stays from both this Court and the Appellate Term in an effort to allow the appellate process to run its course while these important issues are decided. Thus, the facts demonstrate that Twitter has no intent to defy the Court's dignity or authority. On the contrary, Twitter has good cause for declining to produce the requested documents because to do otherwise would frustrate judicial determination of the important issues of first impression addressed by the Court's Order. Given the unique issues raised by the Court's Order and the millions of Twitter users in New York who may be affected by it, Twitter respectfully requests that the Court allow

[1] The government acknowledges that Twitter's appeal will be extinguished if it complies with the Court's Order. *See* Memorandum of Law in Opposition to Twitter's Application for a Stay Pending the Resolution of its Appeal from the Denial of the Motion to Quash, at 9 (Sept. 6, 2012) (acknowledging that Twitter's only recourse if it complies with the Order will be to "file an amicus brief in support of [Defendant] Harris's direct appeal.").

[2] As noted in Twitter's opening brief at the Appellate Term, the Court erred in ruling that the proprietary language in Twitter's Terms of Service was not in effect when the subpoenas were issued in 2012. *See* Order at 3. In fact, this language has been in Twitter's Terms of Service since September 10, 2009. *See* Version 2 of Twitter's Terms of Service, effective September 10, 2009 (available at http://twitter.com/tos/previous/version_2). The Court can take judicial notice of Twitter's prior Terms of Service available on its Web site. *People v. Larsen*, 29 Misc.3d 423, 425, 906 N.Y.S.2d 709, 711 (N.Y. Crim. Ct. 2010)(taking judicial notice of a press release on a company's Web site).

the appellate process to play out and deny the government's request that Twitter be held in criminal contempt.

B. Twitter Should Not Be Held in Civil Contempt

In order to sustain a finding of civil contempt, "it must be established that the rights of a party to the litigation have been prejudiced." *Department of Environmental Protection of City of New York v. Department of Environmental Conservation of State of N.Y.*, 70 N.Y.2d 233, 239-40 (1987). The government cannot show any prejudice because, upon information and belief, the non-jury trial of Defendant Harris for the offense of Disorderly Conduct (Penal Law § 240.20[5]), which does not rise to the level of a "crime" as defined by the Penal Law, is currently scheduled to commence on or about December 12, 2012, thus there is no urgency requiring immediate production of the Twitter records. On the contrary, the government will not be harmed by allowing the Appellate Term additional time decide these important issues. Twitter has already filed its opening brief in the Appellate Term and has requested argument on November 5, 2012, the opening day of the term. Twitter respectfully submits that the Court should allow the Appellate Term to hear this case and render a decision rather than forcing Twitter to waive its appellate rights by immediately producing the documents.

There are also serious questions as to whether the government has any need at all for the records requested by the subpoena. Defendant Harris does not dispute that the Twitter account at issue is his, thus establishing that the government has no need for the non-content basic subscriber records called for in the subpoena. Moreover, the Court's Order presumes that Defendant's Tweets are publicly available, even if they have been deleted. *See* Order at 7 ("Even when a user deletes his or her tweets, there are search engines available such as

'Untweetable', 'Tweleted' and 'Politwoops' that hold users accountable for everything they had publicly tweeted and later deleted."). If this presumption is correct, then the government can obtain copies of those Tweets on their own and authenticate them through the testimony of the officer who copies or downloads them without forcing Twitter to produce the documents itself and thereby waive its appellate rights. *People v. Clevenstine*, 68 A.D.3d 1448, 1450, 891 N.Y.S.2d 511, 514 (N.Y. A.D. 3 Dept., 2009) (admitting MySpace communications where "an investigator from the computer crime unit of the State Police related that he had retrieved such conversations from the hard drive of the computer used by the victims").[3]

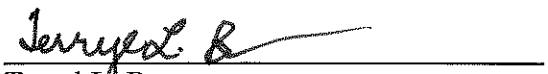
[3] *See also People v. Valdez*, 201 Cal. App. 4th 1429, 1434-37 (2011) (admitting printouts of MySpace page printed by investigator from the prosecutor's office); *State v. Mosley*, 164 Wash. App. 1046, 2011 WL 5831756, at *3 (Wash. App. Div. 1, 2011) (unpublished) (admitting photographs found on a MySpace page by a third-party witness); *State v. Bell*, No. CA2008-05-044, 2009 WL 1395857, at *5-6 (Ohio App. 12 Dist., May 18, 2009) (unpublished) (admitting victim's printouts of MySpace communications). In *Clevenstine* a legal compliance officer for MySpace also testified "that the messages on the computer disk had been exchanged by users of accounts created by defendant and the victims," but similar evidence from Twitter is unnecessary here because, as noted above, Defendant does not dispute that he is the user of the account. *Clevenstine*, 68 A.D.3d at 1450.

III. CONCLUSION

For the reasons stated, Twitter respectfully submits that it should not be held in civil or criminal contempt.

Dated: September 11, 2012

HARRIS BEACH PLLC



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