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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD CLYMORE, an individual;
DEBRA HARBIN-CLYMORE, an
individual,

Plaintiffs,

v.

FEDERAL RAILROAD
ADMINISTRATION, a Federal Public
Entity; CHARLES MARK HAGOOD, an
individual; and DOES 1 through 10,
Inclusive,

Defendants.

Case No. 1:14-cv-00101-AWI-SMS

ORDER DENYING DEFENDANTS'
MOTION TO COMPEL

(Doc. 40)

This is a wrongful death action arising from the alleged negligent conduct of Charles Hagood while acting within the course and scope of his employment with the Federal Railroad Administration. The matter is before this Court on Defendant United States of America's¹ motion to compel discovery response from Plaintiffs, the decedent's parents. Doc. 40. The parties have submitted a joint statement regarding the discovery disagreement.

After careful consideration, the Court finds this matter suitable for decision without oral argument. Local Rule 230(g).

¹ On September 29, 2015, District Judge Anthony W. Ishii signed an order substituting the United States of America as the defendant in place of Charles Hagood and the Federal Railroad Administration. Doc. 48.

I. BACKGROUND²

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2 On November 10, 2014, Plaintiffs provided initial disclosures under Federal Rule of Civil
3 Procedure 26. Included were text messages, emails, and Facebook³ screen shots of
4 communications between the decedent and Plaintiffs. Thereafter, Defendant requested production
5 of all “email correspondence, data, social media, and documents for the time period surrounding the
6 emails provided[.]” Doc. 50. Plaintiffs eventually responded with objections and noted “they do
7 not have in their possession or control the emails or texts sent to or received from [the decedent]
8 during the six months prior to his death, which have not already been produced.” Doc. 50. With
9 regard to the Facebook communications, Plaintiffs stated they “do not have in their possession or
10 control the password or user name to gain access” to his Facebook account. Doc. 50.
11

12 Plaintiffs’ response prompted Defendant to subpoena Facebook, which Plaintiffs did not
13 oppose, to seek production of the decedent’s Facebook contents. Facebook responded that they
14 were without authority, under the Stored Communications Act (SCA), to produce the contents
15 absent the account owner’s consent. Defendant thus requested that Plaintiffs obtain the contents
16 from Facebook, but they refused.
17

18 A. *Defendant’s Contentions*

19 Defendant contends the text messages and Facebook contents which they seek are in
20 Plaintiffs’ possession and control. These include all the decedent’s text messages between
21 September 21, 2012 and February 14, 2013 and his Facebook contents from February 24, 2010 to
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23
24 ² The relevant facts and procedural history are taken from the parties’ “Joint Statement Re Discovery
Disagreement.” Doc. 50.

25 ³ “For information about how Facebook works, *see* Mark Allen Chen, *Interactive Contracting in*
26 *Social Networks*, 97 Cornell L.Rev. 1533, 1542 (2012); James Grimmelmann, *Saving Facebook*, 94
27 Iowa L.Rev. 1137, 1142–50 (2009); *United States v. Jeffries*, No. 3:10–CR–100, 2010 WL 4923335,
28 at *5 n. 3 (E.D.Tenn. Oct. 22, 2010); *Facebook, Inc. v. Power Ventures, Inc.*, No. 08–5780, 2009 WL
1299698, at *1 (N.D.Cal. May 11, 2009); *Lane v. Facebook, Inc.*, No. 08–3845, 2009 WL 3458198,
at *1 & n. 1 (N.D.Cal. Oct. 23, 2009); *Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d 965, 989 n.
50 & 51 (C.D.Cal.2010).” *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 662
n 1 (D.N.J. 2013).

1 February 5, 2013. Specific to Facebook, Defendant asserts that because Plaintiffs alleged they are
2 the decedent's legal heirs, they have custody and control of his Facebook account such that they
3 can and should be compelled to produce the requested contents.

4 B. *Plaintiffs' Contentions*

5 Plaintiffs do not dispute the propriety of Defendant's Facebook request, but contend the
6 request is misplaced. Contrary to Defendant's assertion, Plaintiffs aver they have produced all
7 requested Facebook communications of which they possess or that the decedent made available to
8 them. Further, Plaintiffs insist they cannot obtain control over the decedent's Facebook account
9 because, contrary to Defendant's assertion, Facebook does not give such authority to a deceased
10 person's heirs. Moreover, they do not wish to obtain such access and control out of respect for the
11 decedent's privacy. Plaintiffs did not expressly address Defendant's request for the text messages.
12

13 II. DISCUSSION

14 As reflected in the parties' joint statement, at issue between them is not whether Defendant
15 is entitled to the information it seeks. It also is not whether the SCA⁴ governs Defendant's request
16 or whether Facebook properly declined to comply with the subpoena. Rather, it concerns
17 Defendant's attempt to seek additional discovery—namely digital communications in the form of
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19

20 ⁴ Congress passed the SCA in 1986 as part of the Electronic
21 Communications Privacy Act. The SCA was enacted because the
22 advent of the Internet presented a host of potential privacy breaches
23 that the Fourth Amendment does not address. To address these
24 potential privacy breaches, the SCA creates a set of Fourth
25 Amendment-like privacy protections by statute, regulating the
26 relationship between government investigators and service providers in
27 possession of users' private information. Specifically, the statute
28 protects the privacy of electronic communications by (1) placing limits
on the government's ability to compel network service providers to
disclose information they possess about their customers and
subscribers, 18 U.S.C. § 2703, and (2) restricting the ability of network
service providers to voluntarily disclose information about their
customers and subscribers to the government, 18 U.S.C. § 2702.

Sams v. Yahoo! Inc., 713 F.3d 1175, 1179 (9th Cir. 2013) (internal quotations omitted).

1 text messages and Facebook contents—discovery which Plaintiffs assert they cannot provide
2 beyond what they already have. The issue therefore is whether Plaintiffs have possession and
3 control of the communications or can obtain them to satisfy Defendant’s discovery request.

4 As the moving party, Defendant bears the burden of showing why Plaintiffs’ refusal to
5 disclose or obtain the communications is unjustified. *See Stanislaus Food Products Co. v. USS-*
6 *POSCO Indus.*, No. CV F 09-0560 LJO BAM, 2012 WL 1940662, at *4 (E.D. Cal. May 29, 2012)
7 (“To succeed on a motion to compel, the moving party bears the burden of demonstrating that it is
8 entitled to the requested discovery and has satisfied the proportionality and other requirements of
9 Rule 26.”) (citation omitted).⁵ For the reasons that follow, the Court concludes Defendant has not
10 satisfied its burden.
11

12 Turning first to the Facebook communications: While insisting that Plaintiffs have custody
13 and control of the decedent’s Facebook account because they are the decedent’s legal heirs,
14 Defendant cites to a form on Facebook’s website, captioned “Special Request for Deceased
15 Person’s Account.” <https://www.facebook.com/help/contact/228813257197480>. The form states in
16 relevant part: “Please use this form to request the removal of a deceased person’s account or for
17 memorialization special requests.” Nothing on the form suggests that the heir(s) of a deceased
18 account holder, by virtue of their status, obtains control of the deceased’s account or that request for
19 such control *will* be granted. Nor does the form suggest that Facebook *will* honor an heir’s request
20 for the account’s information or content.⁶
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23 ⁵ This unpublished decision is citable under Rule 32.1 of the Federal Rules of Appellate Procedure.
24 *See also* 9th Cir. R. 36–3(b).

25 ⁶ When asked by a user at its Help Center about seeking content from the account of a deceased
26 person, Facebook stated:

27 Once an account is memorialized, the content the person shared (ex:
28 photos, posts) remains on Facebook and is visible to the audience with
whom it was shared.

In rare cases, we consider requests for additional account information
or content. You’ll be required to provide proof that you’re an
authorized representative (ex: family member) and a court order.

1 Defendant has not therefore shown, based on the form for memorializing a Facebook account, that
2 Plaintiffs have custody and control of the decedent’s Facebook contents beyond what they already
3 have or that they can successfully obtain such content.

4 *In re Facebook, Inc.*, 923 F.Supp.2d 1204 (N.D. Cal. 2012) is unhelpful to Defendant.

5 There, the deceased’s surviving family members sought Facebook records as evidence to dispute an
6 alleged suicide. *Id.* at 1205. The court granted Facebook’s motion to quash the subpoena and held
7 that it lacked jurisdiction to address whether the surviving family members may consent on the
8 deceased’s behalf to allow Facebook to disclose the records voluntarily. *Id.*⁷ The court’s holding
9 thus undermines Defendant’s assertion that Plaintiffs have control of the decedent’s Facebook
10 account.
11

12 Concerning the text messages, Defendant cites to cases which also do little, if any, to
13 support their contentions. In *Mintz v. Mark Bartelstein & Associates, Inc.*, 885 F.Supp.2d 987, 990
14 (C.D. Cal. 2012), the plaintiff moved to quash a subpoena from the defendants who sought
15 “information related to his telephone calls and text messages made or received by [his] AT &T
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19 Please keep in mind that *sending a request or filing the required*
20 *documentation doesn’t guarantee that we’ll be able to provide you with*
21 *the content of the deceased person’s account.*

22 FACEBOOK, <https://www.facebook.com/help/everyphone-standard/123355624495297> (last visited
23 December 2, 2015) (emphasis added). Facebook’s response here shows it will, at most, *consider* a
24 request by an authorized representative for information or content, not that it will grant such request.
25 Understandably, this is in line with Facebook’s policy of protecting the privacy of its users. *See*
26 Facebook, *Statement of Rights and Responsibilities* § 4.8, <https://www.facebook.com/legal/terms>
27 (“You will not share your password . . . let anyone else access your account, or do anything else that
28 might jeopardize the security of your account.”) (last visited December 2, 2015); *see also*
<https://www.facebook.com/help/117177641701328> (Facebook “will never ask for [a user’s]
password in an email or Facebook message”) (last visited December 2, 2015).

⁷ The *In re Facebook* court also stated that Facebook could “conclud[e] *on its own* that the surviving
family members have standing to consent on [the deceased’s] behalf and provid[e] the requested
materials voluntarily.” *In re Facebook*, 923 F.Supp.2d at 1205 (emphasis added). That statement,
however, was obiter dictum. The court was attempting to encourage Facebook to assist the parties in
understanding cause of death.

1 account[.]” After concluding that the “SCA does not contain an exception for civil discovery
2 subpoenas[.]” the court explained that the defendants could, instead, request the plaintiff to obtain
3 copies of his text messages under Rule of Civil Procedure 34⁸—messages which are “within his
4 control because he has the right to obtain [them] . . . on demand[.]” *Id.* At 994 (internal quotations
5 omitted). The court ultimately ruled that federal law supports enforcing the subpoena “for
6 information *other than the content* of communications.” *Id.* at 1001 (emphasis added).

7
8 Unlike the plaintiff in *Mintz*, Plaintiffs have disclosed text messages which are within their
9 control and there is no evidence of their legal right to obtain the decedent’s other messages of
10 which they were neither recipients nor senders. And, Defendant has not shown that Plaintiffs can
11 obtain all of the decedent’s text messages on demand. More importantly, the court’s ultimate ruling
12 belies Defendant’s position herein. *Mintz* is therefore unavailing.

13 *Doe v. City of San Diego*, No. 12-CV-0689-MMA-DHB, 2013 WL 2338713 (S.D. Cal. May
14 28, 2013) is equally unavailing. Addressing the City of San Diego’s civil subpoena to Verizon for
15 records of the plaintiff’s cell phone number, including text messages and Blackberry Instant
16 Messages (BBIMs), the court there concluded that “the SCA “prohibits [a wireless communications
17 provider like] Verizon from disclosing the content of any text messages or BBIMs sought by the
18 City’s subpoena.” *Id.* at *4. Citing to *Mintz*, the court noted that the SCA does not prevent the City
19 from seeking the cell phone records via a Rule 34 request and that the plaintiff had control of such
20 records “as the addressee, intended recipient and/or originator of the communications.” *Id.* The
21 court, however, declined to address whether plaintiff could successfully object to the request. *Id.*
22
23 In this case, there is no dispute that Plaintiffs have control of the text messages addressed to them
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26 ⁸ Rule 34 states, in relevant part: “A party may serve on any other party a request within the scope of
27 Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test,
28 or sample the following items in the responding party’s possession, custody, or control” Fed. R.
Civ. P. 34.

1 or sent by them to the decedent. There is no evidence that they have control of the messages of
2 which they were not the addressee, intended recipient or originator. And Defendant has not shown
3 otherwise.

4 Failing to show that Plaintiffs have possession and control or can obtain the decedent's text
5 messages and Facebook communications for the requested time period, Defendant has not met their
6 burden of showing why Plaintiffs' refusal is unjustified.

7
8 III. CONCLUSION

9 Accordingly, the court DENIES Defendant's motion to compel.

10 IT IS SO ORDERED.

11 Dated: December 2, 2015

/s/ Sandra M. Snyder
12 UNITED STATES MAGISTRATE JUDGE