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SUPREME COURT
FILED

AUG 10 2018

Jorge Navarrete Clerk

Deputy

No. S245203

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;

LANCE TOUCHSTONE,
Real Party in Interest.

After Published Opinion by the Court of Appeal, Fourth Appellate District, Division One, No. D072171; Superior Court of San Diego County, No. SCD268262, Hon. Kenneth So, Presiding Judge

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PETITIONER'S OPPOSITION TO INTERVENOR SAN DIEGO COUNTY'S MOTION TO AUGMENT THE RECORD

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TABLE OF CONTENTS

Page

I. INTRODUCTION 4

II. ARGUMENT 4

A. The DA has not met the standard for augmenting the record 4

B. The evidence the DA seeks to introduce is unnecessary to resolve any issues before this Court, or in which the DA has an interest 5

III. CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Brandwein v. Butler
(2013) 218 Cal.App.4th 1485 5

People v. Brooks
(1980) 26 Cal.3d 471 ....4, 5

People v. Landry
(1996) 49 Cal.App.4th 785 6

Wagner v. Chambers
(1965) 232 Cal.App.2d 14 5

STATUTES

Federal Stored Communications Act 4-6

OTHER AUTHORITIES

Cal. Rules of Court, rule 8.155(a)(1) 4

Real Party In Interest's Motion for Judicial Notice, 1-2....................6

I. Introduction

Intervenor San Diego County District Attorney ("DA") asks this Court to take judicial notice of, and augment the record with, certain information concerning Facebook, Inc.'s ("Facebook") terms of use, data policy, and other details. (Mot. to Augment the Record, p. 1; Exs. B-E.) The Court should deny the motion as to all of this new evidence. None of it was part of the trial court record, and none of it is necessary to resolve the single issue on which the DA asked to intervene.

The DA intervened on a narrow issue: whether a court could compel the DA to obtain a search warrant on behalf of the defense. (Pet. Resp. to Intervenor's Br., p. 6.) The DA now seeks to enlarge the issues and evidence before this Court by injecting a new argument that Respondent Touchstone has waived: whether the federal Stored Communications Act ("SCA") applies to the Facebook communications at issue. The DA did not raise this issue in its motion to intervene and it acknowledges that Touchstone has abandoned this argument. (Intervenor's Br., p. 5.) The DA's Motion to Augment the Record improperly seeks to introduce and support new arguments that are not currently before the Court and it should be denied.

II. Argument

A. The DA has not met the standard for augmenting the record

A motion to augment allows a party to augment the record only with "document[s] filed or lodged in the case in superior court." (Cal. Rules of Court, rule 8.155(a)(1).) It is not a vehicle for introducing new evidence not already before the Court. (See *People v. Brooks* (1980) 26 Cal.3d 471, 484 ["Augmentation is not available [] for the purpose of adding material that was not a proper part of the record in the trial court."]; *Wagner v.*

Chambers (1965) 232 Cal.App.2d 14, 21 ["a 'motion to augment' cannot be used to create a record."].)

Exhibits B through E[1] of the DA's Motion to Augment were not "filed or lodged" in the Superior Court either before or after the order on appeal. The DA cannot now "augment" the record by introducing them for the first time now. (See *Brooks, supra,* 26 Cal.3d at p. 484.) The DA's attempt to augment the record with these exhibits is improper, and the Court should deny the request with respect to all exhibits provided.

B. The evidence the DA seeks to introduce is unnecessary to resolve any issues before this Court, or in which the DA has an interest

In addition, the Court should deny the Motion as to Exhibits B through E because the DA seeks to introduce new evidence in support of *new arguments* that are not before this Court.

The DA sought leave to intervene to address one of the issues on which the Court sought additional briefing: whether a trial court can order a prosecutor to obtain a search warrant on behalf of the defense. (Mot. for Leave to Intervene, 1.) The Court granted the motion to intervene on that one narrow issue. However, the DA's brief exceeded that scope and sought to introduce a new argument and evidence that is not part of the record in this matter: whether the SCA governs the Facebook communications at issue. (Mot. to Augment the Record, 1; Intervenor's Br., p. 4-6.) The DA concedes that this argument is not before the Court. (Intervenor's Br., p. 5.) And, Touchstone has waived it. (See *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1520; Petitioner Facebook, Inc.'s Suppl. Br., p. 8.)

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[1] Facebook takes no position with respect to Exhibits A, F-M, which are filings and a related transcript at the trial court.

The DA does not argue that Exhibits B through E to the Motion affect whether the DA can be compelled to obtain a warrant. Instead, it argues that these Exhibits are necessary to address its new argument that is not before this Court. The new evidence the DA seeks to provide therefore support none of the theories raised by the parties on appeal or the single issue on which the DA sought to intervene.[2]

In addition, the evidence is irrelevant to any issue the DA may have in this matter. The DA implicitly admits that it has no "direct or immediate interest" in the resolution of whether the SCA governs the Facebook communications at issue in this case, because regardless of whether the SCA applies, the DA must obtain a warrant to compel Facebook to disclose them (see Intervenor's Br., at p. 18) and other provisions of California law may also restrict Touchstone's ability to obtain them from Facebook. (*id.* at p. 23.) In other words, the DA – as an intervenor – seeks to introduce improper evidence not previously provided to the lower courts to support a waived argument, the resolution of which changes nothing for the DA. This is improper. (Cf. *People v. Landry* (1996) 49 Cal.App.4th 785, 791-92 [augmentation may be proper when "useful to *appellant* to support the theories he articulates for reversal"] [italics added].) The Court should not allow an intervenor to broaden the scope of issues and evidence on appeal,

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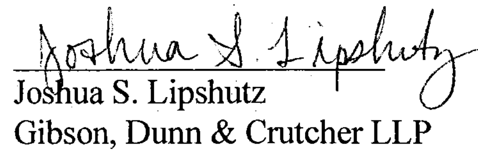
[2] Similarly, shortly before oral argument at the Court of Appeal, Touchstone sought to introduce Facebook's Terms of Service and Data Policy into the record to support a new argument it planned to make for the first time at oral argument. (Opp'n. to Real Party In Interest's Motion for Judicial Notice, 1-2, *Facebook, Inc. v. Superior Court*, (Cal.App. 4th, Sept. 8, 2017, No. D072171).) The Court of Appeal rejected that belated attempt to introduce irrelevant material. (Order, Facebook, Inc. v. Superior Court, (Cal.App. 4th, Sept. 11, 2017, No. D072171).) This Court should similarly reject the DA's attempt to introduce evidence not relevant to any argument raised by the parties on appeal.

particularly where doing so requires the introduction of additional facts, and the resolution of the new issue will not impact the intervenor.

III. Conclusion

Because the DA seeks to augment the record for the sole purpose to enlarge the issues in this case, the Court should deny the DA's motion.

DATED: August 10, 2018



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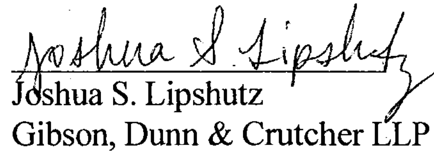
CERTIFICATE OF WORD COUNT

I, Joshua Lipshutz, certify that, according to the software used to prepare this brief, the word count of this brief is 1,009 words. I swear under penalty of perjury that the foregoing is true and correct.

DATED: August 10, 2018



Joshua S. Lipshutz
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Case Name: Facebook, Inc. v. Superior Court of San Diego
Case No: S245203

PROOF OF SERVICE

I, Teresa Motichka, declare as follows:

I am a citizen of the United States and employed in San Francisco County, California; I am over the age of eighteen years, and not a party to the within action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921. On August 10, 2018, I served the within documents:

PETITIONER'S OPPOSITION TO INTERVENOR SAN DIEGO COUNTY DISTRICT ATTORNEY'S MOTION TO AUGMENT THE RECORD

On the parties stated below, by the following means of service:

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☑ **BY UNITED STATES MAIL**: I placed a true copy in a sealed envelope or package addressed to the persons as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

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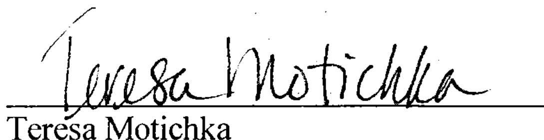
Executed on August 10, 2018, at San Francisco, California.



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