

July 24, 2019

SUPREME COURT  
**FILED**

JUL 24 2019

Jorge Navarrete Clerk

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Deputy

VIA COURIER

Chief Justice Cantil-Sakauye  
and Associate Justices  
Supreme Court of California  
350 McAllister Street  
Room 1295  
San Francisco, CA 94102-4797

Re: **Facebook, Inc. v. Superior Court of San Diego County (“Touchstone”)**, Case No. S245203 (Fourth District Court of Appeal Case No. D072171)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to this Court’s order of July 10, 2019, Petitioner Facebook, Inc. (“Facebook”) submits this letter brief to address the following two issues: (1) this Court’s contemplated judicial notice of the underlying preliminary hearing transcript of September 29, 2016 and related exhibits, and (2) this Court’s contemplated unsealing of the April 21, 2017 declaration and related exhibits (quoting from and presenting copies of public social media posts and conditionally confidential probation reports). (July 10, 2019 Order.)

**I. This Court Has Discretion to Take Judicial Notice of the Preliminary Hearing Transcript and Exhibits**

California Evidence Code section 459 allows this Court to take judicial notice of “any matter specified in [Evidence Code] Section 452.” (Evid. Code, § 459(a).) Section 452, subdivision (d), in turn., grants this Court discretionary authority to take judicial notice of “[r]ecords of . . . any court of this state.” (Evid. Code, § 452, subd. (d).) The Superior Court’s September 29, 2016 preliminary hearing transcript and exhibits are “[r]ecords of [a] court of this state,” and therefore fall within the scope of § 452. (E.g., *People v. Murray* (1978) 77 Cal.App.3d 305, 308 [Court of Appeal taking judicial notice of preliminary hearing transcript even when not offered as direct evidentiary basis for parties’ appellate arguments]; *People v. Sanchez* (2017) 18 Cal.App.5th 727, 737, fn. 6 [Court of Appeal taking judicial notice of suppression hearing transcript].)

The Preliminary Hearing Transcript will corroborate Facebook’s argument that Defendant has numerous other ways to obtain the materials he seeks, without requiring

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Facebook to violate federal law. (See Facebook’s Answer Brief at pp. 19-35.) As reflected in the transcript, Defendant has not even attempted to subpoena Mr. Renteria or any other recipient of the communications Defendant seeks, nor sought to obtain the information through a court order (1) compelling disclosure by the account holder, or (2) requiring the prosecution to choose between obtaining a search warrant or facing evidentiary sanctions.

**II. The Court Has Discretion to Unseal the April 21, 2017 Declaration and Exhibits**

California Rules of Court, rule 8.46, subdivision (f) permits this Court to unseal a record that was sealed by the Superior Court if it sends notice to the parties stating the reason for unsealing the record. (Cal. Rules of Court, rule 8.46(f)(3).) By ordering briefing on the issue of unsealing and explaining that unsealing is contemplated “on the ground that access by Petitioner Facebook, Inc. and Intervenor San Diego County District Attorney is necessary to fairly address and resolve whether the underlying subpoena’s request for private and restricted social media communications is supported by good cause”<sup>1</sup> (July 10, 2019 Order), this Court has followed the procedure mandated by Rule 8.46.

Rule 8.46 further directs a reviewing court contemplating the unsealing of records to “consider the matters addressed in [California Rules of Court,] rule 2.550(c)-(e).” (Cal. Rules of Court, rule 8.46(f)(5).) Rule 2.550 explains that “court records are presumed to be open,” and that they should only be sealed if:

- (1) There exists an overriding interest that overcomes the right of public access to the record;
- (2) The overriding interest supports sealing the record;
- (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- (4) The proposed sealing is narrowly tailored; and
- (5) No less restrictive means exist to achieve the overriding interest.

(Cal. Rules of Court, rule 2.550(c)-(d).)

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<sup>1</sup> The Stored Communications Act, 18 U.S.C. § 2701, *et seq.*, bars Facebook from producing the documents sought by Defendant’s subpoena, regardless of whether good cause exists. (See Facebook’s Answer Brief at p. 18.)

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Here, unsealing of the April 21, 2017 Declaration and Exhibits in their entirety is warranted because there is no “overriding interest that overcomes the right to public access to” the information contained in the Declaration that “supports sealing the record.” The Declaration appears to redact the content of Jeffrey Renteria’s Facebook posts, but notes that those posts were captured—apparently by defense counsel—from the publicly available portions of Mr. Renteria’s Facebook account. (Appendix of Exhibits (“AE”) 77 ¶ 11.) This Court has previously ruled that a person who configures social media content to be accessible to the public at large consents to the disclosure of that content. (*Facebook, Inc. v. Superior Court (“Hunter II”)* (2018) 4 Cal.5th 1245, 1291.) Therefore, there is no “overriding interest” in confidentiality here.

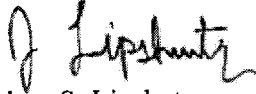
Further, in the presently unsealed portions of the April 21, 2017 Declaration, Defendant contends that he has not served Mr. Renteria with a subpoena because he “believes that Mr. Renteria is likely to destroy or delete relevant evidence from his Facebook account, if he is personally served with a subpoena to produce his own records.” (AE 81 ¶ 35, italic emphasis added.) The defense’s belief is apparently predicated on the sealed probation records extracted in paragraph 34 of the Declaration; unsealing that material would allow the parties and the Court to address the merits of that contention. Any interest in keeping the parole records confidential is not an “overriding interest” because, if Defendant can obtain the information he seeks from Mr. Renteria himself, he cannot obtain it by requiring Facebook to violate the Stored Communications Act. (*Hunter II, supra*, 4 Cal.5th at p. 1290.) And to the extent that the Court does have concerns about maintaining the privacy of those records, it may require disclosure to Petitioner Facebook and to Intervenor San Diego County District Attorney so that the parties may brief related issues, but not to the public at large.

Facebook understands that this Court may order further briefing on “whether the underlying subpoena is supported by good cause.” (July 10, 2019 Order.) Facebook would welcome the opportunity for such further briefing once it has access to the materials discussed above. Facebook believes it is likely these materials will corroborate Facebook’s argument that the private social media records being sought by Defendants are cumulative and immaterial. (See Facebook’s Answer Brief at pp. 27-28.) For example, Defendant admits he already has exculpatory evidence from Mr. Renteria’s *public* records (Defendant’s Opening Brief at pp. 9-10, 28), and admits “it is unknown” whether the private posts contain “additional relevant posts” (AE 78 ¶ 20).

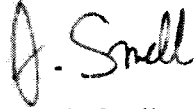
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Very truly yours,



Joshua S. Lipshutz  
Gibson, Dunn & Crutcher LLP



James G. Snell  
Perkins Coie LLP

Counsel for Petitioner Facebook, Inc.

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

**PROOF OF SERVICE**

I, Ramona Gonzalez, 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 333 South Grand Avenue, Los Angeles, CA 90071. On July 24, 2019, I served the within documents:

**PETITIONER'S LETTER BRIEF RE JUDICIAL NOTICE AND UNSEALING**

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

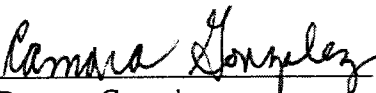
**SEE ATTACHED SERVICE LIST**

- 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.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at San Francisco, California.

- I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 24, 2019, at Los Angeles, California.

  
\_\_\_\_\_  
Ramona Gonzalez

**SERVICE LIST FOR *Facebook, Inc. v. Superior Court of San Diego***  
**CALIFORNIA SUPREME COURT CASE NO. S245203**

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