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SUPREME COURT NO. S248130

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA Ortega Navarrete Clerk

THE PEOPLE , Plaintiff and Respondent, v. Si H.Liu, Defendant and Petitioner.	Court of Appeal No. B279393 Superior Court No. GA090351	Deputy
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**APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES
COUNTY**

Honorable Robert P. Applegate, Judge

PETITIONER'S REPLY BRIEF ON THE MERITS

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I. The Court of Appeal's decision is erroneous.

The Court of Appeal held, “Where, as here, the access card information was actually used to procure goods or services, common sense tells us that the unauthorized charges are proof of at least the minimum value of the access card information....[¶]...Surely, stolen access card information would sell for at least the value of the property obtained by a defendant who used the information, and in many cases, it would sell for much more.” (*People v. Liu* (2018) 21 Cal.App.5th 143, 149, review granted June 13, 2018, S248130.) Under the Court of Appeal's formulation, the amount of property obtained using a stolen access card would serve as a minimum for its valuation. As explained in petitioner's opening brief, such a valuation makes no sense and conflicts with this court's decision in *People v. Romanowski* (2017) 2 Cal.5th 903.

The Santa Clara Law Review article cited by respondent drives home petitioner's point that the valuation of stolen access card information is far less than the amount of property obtained using the card. According to the article,

[T]he types of information for sale on carding forums has evolved from the sale of a few pieces of sensitive information, such as credit card numbers and expiration dates, to full blown identity packages containing multiple types of sensitive information. Indeed, the pricing reflects the evolving nature of information available on the forms, with more readily available information priced lower than information that is harder to obtain. In the first half of 2007, for example, credit card information ranged from \$0.50 to \$5.00 per card, bank account information ranged from \$30.00 to \$400.00, and full identity

information from \$10 to \$150.

(Peretti, *Data Breaches: What the Underground World of “Carding” Reveals* (2009) 25 Santa Clara Computer & High Technology L.J. 375, 388-389, citing Symantec Corporation, *Symantec Internet Threat, Trends for January-June 2007* (2007), p. 13

<http://eval.symantec.com/mktginfo/enterprise/white_papers/enterprise/whitepaper_internet_security_threat_report_xii_09_2007.en-us.pdf>.)

The Court of Appeal’s defense of its decision in *Caretto v. Superior Court* (2018) 28 Cal.App.5th 909, is equally illogical. There, the court stated that its decision in *Liu* was correct, as was its reasoning. (*Id.* at p. 575.) The court then opined, “In short, consistent with *Romanowski* and *Liu*, a host of evidence could be relevant to the fair market value of stolen access cards, from actual fraudulent charges and the balances in linked accounts to expert testimony on the illegal market for stolen cards. We merely reiterate that the proper analysis under *Romanowski* is the fair market value test, whatever evidentiary components might go into that determination in any given case.” (*Id.* at pp. 920-921.) In defending the earlier decision, the Court of Appeal overlooked that its mandate of a minimum valuation based on the property obtained is inconsistent with the evidentiary inquiry required by *Romanowski*.

The case stands in contrast to *People v. Franco* (2018) __ Cal.5th

___, 240 Cal.Rptr.3d 766, where this court held that the value of a forged check for Proposition 47 purposes is the amount written on the check. (*Id.* at p. 774.) This court reasoned that the “fair market value” test applied in *Romanowski* to determine the value of stolen access card information under Proposition 47’s provisions concerning theft would be inappropriate because *Romanowski* was a theft case. (*Id.* at p. 771.) Section 484, subdivision (a), states the test only “for the purposes of this section,” i.e., the section defining theft. (*Ibid.*) Forgery is different than theft. (*Ibid.*) This court continued,

Thus, the gravamen of forgery is the intent to defraud, not an actual injury. The amount written on the check is generally the best indicator of the extent of the intended fraud, and thus of the severity of the crime. Moreover, forgery does not merely concern the specific intended victim. As this court explained long ago, ‘A very large part of the business of civilized countries is done by means of negotiable instruments. These are rarely presented by the makers, but are paid to others on the faith that the signatures, and the bodies of the instruments, are genuine. The business of a bank would come to a standstill if the paying teller would not pay any check until he could communicate with the drawer. Hence, if there were many successful forgeries there would be the utmost confusion in business circles.’ [Citation.] Or, as more recently explained, forgery ‘is maintained as a distinct, felony offense from theft by false pretenses because forgery threatens the system of written instruments upon which modern commerce critically depends.’ [Citation.] The greater the stated value on the forged instrument, the greater the threat to the system.

(*Id.* at p. 772.)

This court should reject any attempt by respondent to apply the valuation test in *Franco* to this case. This court has made abundantly

clear that the valuations for theft and forgery for Proposition 47 purposes differ. This court also reaffirmed that the valuation of a stolen access card is its value on the black market.

II. This court should decline petitioner's invitation to exalt the amount of property obtained using a stolen access card to assess its value.

Respondent concedes that the proper valuation of stolen access cards is the fair market value, which is how much the stolen access card information would sell for. (RBM 10, 22.) Rather, respondent argues that the value of property or services acquired with stolen access card information may be considered in determining the reasonable and fair market value of the information. (RBM 10-22.)

Respondent overlooks that a thief who acquires an access card does not know how much property he or she acquire using the card. It is a crapshoot. The ex post facto result does not equate to valuation of the access card on the black market.

Petitioner does not assert that this court should bar the introduction of evidence of the value of the property obtained using a stolen access card during a fact finder's evidentiary hearing. But this court should not endorse this evidence as being particularly probative of the card's valuation as respondent urges. Rather, this court should stress that the valuation is based on the black-market price, all factors

considered, but—as in the real world—without the benefit of a crystal ball. The limit on the card, on the other hand, might prove probative—but only if the buyer and seller know the amount in advance.

Conclusion


This court should confirm that the valuation of stolen access cards for Proposition 47 analysis equals the value of those cards on the open market and not the amount fortuitously obtained by using those cards. This court should not endorse the amount obtained as being particularly probative of black market value. This court should reverse the Court of Appeal's decision denying Proposition 47 relief for the three counts of access card theft and remand—as respondent concedes—for an evidentiary hearing on fair market value.

DATED: January 2, 2019

Respectfully Submitted,

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By:


David R. Greifinger
Attorney for Petitioner

Certificate of Word Count

(Cal. Rules of Court, Rule 8.204(c)(1))

This opening brief on the merits contains approximately 1,168 words per a computer-generated word count.

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

Executed on January 2, 2019, at Pacific Palisades, California

By: 
David Greifinger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is 15515 Sunset Blvd., No. 214, Pacific Palisades, California 90272.

On January 2, 2019, I served the following document(s) described as: **PETITIONER'S REPLY BRIEF ON THE MERITS** on all interested parties to the action by transmitting a true copy by electronic mail or by placing a true copy enclosed in sealed envelope(s) addressed as indicated on the attached service list, in the United States Mail, first class postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in the affidavit.

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

Executed on January 2, 2019, at Pacific Palisades, California.


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