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.	No. S245203 Court of Appeal No. D072171 Superior Court No. SCD268262

REAL PARTY IN INTEREST TOUCHSTONE'S REPLY BRIEF ON THE MERITS

After Published Opinion by the Court of Appeal, Fourth District, Division One, No. D072171 Filed September 26, 2017

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ARGUMENT

I. FACEBOOK FAILS TO DEMONSTRATE THAT THE RECORDS COULD ACTUALLY BE OBTAINED FROM THE ACCOUNT HOLDER OR HIS "FRIENDS."

Facebook argues that Touchstone can obtain the user's records by directly serving the user with a subpoena for production. (Answer at pp. 10, 19-23.) This argument is replete with logistical and legal impediments that have been discussed at length in previous briefings. One issue that presents most poignantly at this time is spoliation. Since the lower court's ruling issued in this case, the subject user removed his personal Facebook page. As predicted by Touchstone since the inception of this litigation, the user appears to have destroyed records that were exculpatory and material to Touchstone's defense. Having removed his account, the user leaves Facebook—and Facebook alone—as the sole source of account records for this user. Despite these facts, Facebook persists in its false advice to the Court that Touchstone can obtain the records from the user himself. This user has repeatedly proven himself an unpredictable and unreliable source of personal information, consistently demonstrating that he will avoid responsibility and compliance with the judicial process of this case.

Further, Facebook fails to provide the Court with an explanation for the discrepancies in production value between user-based production and production from Facebook directly. Records obtained from the user vary tremendously in quality, format, and content from those records obtained from Facebook by law enforcement or the prosecution, a fact that Facebook avoids addressing in its papers. There is no indication on the record that a production of materials from the user himself—if even possible in the first place—is reliable, comprehensive, or comparable in form or substance to a direct production from Facebook. These discrepancies render user-based production inadequate.

Facebook asserts the belief that Touchstone can obtain the user's records by serving subpoenas on the user's "friends" from the social media site. (Answer at pp. 10, 23-24.) First, Facebook fails to demonstrate how a subpoena to a "friend" would result in a complete or comprehensive production of user records as sought in the underlying subpoena. Touchstone does not seek a cobbled collection of public posts and timeline information from someone with partial or limited access to the user's page; such content does not satisfy the demands of the underlying subpoena or reliably provide sufficient content that is material to Touchstone's defense. Second, Facebook does not tell the Court how a list of Facebook "friends" would lead Touchstone to real human beings that could be identified, located, and served. There is no evidence that the "friends" list includes contact information such as true name, address, email, phone number, or even a photograph with which defense counsel might use to reach an actual person. Facebook thus provides no support to their assertion that a subpoena to "friends" could possibly lead the defense to service and/or production of the sought records.

Third, and most importantly, Facebook refuses to produce the list of "friends" to Touchstone. Facebook argues before this Court that Touchstone should reach out to the user's "friends," while simultaneously withholding the very records required to even begin exploring those sources by name or identity. Who knows the user's "friends"? Facebook. Who has their identifying information? Facebook. Who is refusing to produce that information? Facebook. Facebook thus proposes a disingenuous solution to this Court, withholding the precise information that they are suggesting Touchstone utilize to obtain the records. Facebook fails to demonstrate to the Court that either of their proposed solutions of serving the user or serving "friends" would work in reality—particularly when the user's personal page has been removed and their "friends" are wholly undisclosed.

II. FACEBOOK FAILS TO PROVIDE REMEDIES, OTHER THAN DISMISSAL, THAT WOULD OFFER APPROPRIATE RELIEF TO TOUCHSTONE IF THE RECORDS CONTINUE TO BE WITHHELD.

Facebook suggests that, as a remedy for non-production, "the trial court can preclude the user from testifying, [or] condition the victim's testimony on his pretrial production of complete records." (Answer at p. 10.) This suggestion ignores the fact that the records are admissible at trial independent of the user's presence. Whether or not this user testifies does not bear on the records' relevance, materiality, exculpatory nature, or admissibility at trial. Touchstone must assert an affirmative defense that includes the presentation of evidence showing this user's character for violence, which is shown throughout the previously-public pages of his Facebook account and is presumed to be shown throughout the undisclosed record. For this reason, precluding the user from testifying as a penalty for non-production does not resolve Touchstone's constitutional need for the sought records. It is not a viable alternative or remedy to non-production.

Facebook suggests another remedy for non-production, offering that the trial court can "provide the jury with adverse instructions regarding any failure to disclose records.... instructing the jury that the unproduced social media records would have been favorable to the defendant." (Answer at pp. 10, 28.) If this Court would approve a jury instruction in this case stating that favorable evidence exists for the Defendant that was not disclosed by the prosecution, or that material evidence favorable to the defense was withheld from the jury, Touchstone submits. Such an instruction represents the embodiment of reasonable doubt and would effectively preclude a jury from rendering any verdict other than an acquittal. For this reason, Touchstone does not object to the suggestion in theory, but acknowledges the improbability of such an instruction issuing in a real criminal trial in light of the obvious impact it would have on the prosecution's case and the

trial court's inevitable hesitance to entertain it as an option.

Facebook suggests that the trial court can leverage the threat of dismissal over the prosecution, or *sua sponte* dismiss the case, if the records are not produced. (Answer at pp. 29-30.) Touchstone welcomes a ruling from this Court that orders the prosecution to obtain this user's Facebook records and permits a dismissal of the case in the absence of compliance. Touchstone sought this ruling via discovery litigation at the onset of this case, moving to compel the records from the prosecution pursuant to their discovery obligations under the penal code. As argued in the opening briefs, the prosecution is obligated to produce these records under state rules of professional responsibility and the penal code governing discovery procedures in criminal cases. A ruling from the trial court dismissing the case for failure to comply with reasonable discovery demands, such as this one, is consistent with the court's inherent authority to manage discovery and govern the cases before it. However, given the serious nature of the charges in this case alleging attempted murder with a firearm and great bodily injury, it is uncertain, if not highly unlikely, that any trial court would give this option heavy consideration.

Facebook and the prosecution have exclusive access to, and constructive possession of, the subpoenaed records; it is Touchstone's position that one or both of them should be ordered to produce the records as they are imperative to the achievement of a fair and just trial under the U.S. and California Constitutions. Other remedies fashioned by the imagination of Facebook do not provide appropriate relief that would withstand logical scrutiny at the trial court level.

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III. FACEBOOK WANTS THIS COURT TO HOLD TOUCHSTONE TO ANTIQUATED METHODS OF PRODUCTION AND PRETEND THAT THE SCA IS APPROPRIATE LEGISLATION FOR MODERN COMMUNICATION TECHNOLOGY.

The thrust of Facebook's argument is that Touchstone "remain[s] free to obtain those records the same way people have sought communications for hundreds of years: from senders, recipients, and public sources" – as if to ignore the overwhelming changes in the breadth and manner of electronic communication in the last thirty years. (Answer at p. 10.) Yet Facebook directly acknowledges this growth, praising the SCA as a "prescient piece of legislation, foreseeing and encouraging the growth in electronic communications" from "before the advent of the Internet." (Answer at p. 11.) Facebook wishes to have it both ways, forcing Touchstone to adhere to antiquated norms of production while upholding the SCA as a bastion of modern technology and privacy.

When the SCA became law in 1986, social media and the World Wide Web did not exist. Communication occurred through the postal service and in limited circumstances on local servers. A person could write a letter and send it to the recipient through the post office. There was one copy of the letter; only one person could possess it at a time. To obtain that letter, interested parties served the sender or the recipient. They would not serve the post office. Why? The post office did not keep the letter. The post office did not read the letter. The post office did not duplicate the letter. The post office did not display or distribute the letter. The post office did not know when and where the letter was written. The post office did not know how the postage stamp was acquired or paid for. The post office did not review the letter contents and use those contents for their own purpose or profit. The post office did not ask the mail carrier about the sender and recipient's personal habits. The post office did not share the contents of the

letter with other companies, vendors, partners, or associates, or sell the contents to other parties for third party use and manipulation. If the sender or recipient burned the letter, it was gone forever; the post office did not keep backup copies. The post office had no role in the letter's life beyond the single transmission from one person to another with no information collected, received, or retained about the letter or its contents.

This is vastly different than the role that Facebook plays in modern communications. The traditional letter has been replaced with social media posts and messaging, managed in a vastly different manner than the post office ever managed its correspondence. Today, Facebook keeps the letter. Facebook opens the letter and reads it. Facebook stores the letter and copies its content. Facebook collects and stores data about the letter, including when and where it was written, what instrument was used to write it, and who received it and touched it along the way. Facebook knows who paid for the letter and what method of payment was used. Facebook takes intellectual-property ownership of the letter's contents. Facebook duplicates the letter and facilitates distribution to other people, groups, forums, communities, and companies. Facebook uses the letter's contents to develop targeted and personalized services to every party to the communication. Facebook collects and analyses the letter's contents to personalize marketing efforts, selling the letter's contents to third party venders and corporate partners for targeted advertising services on and off the site.

Facebook user data is collected, stored, duplicated, analyzed, and sold for profit. Facebook users understand and explicitly consent to this when they open an account with the social media provider. (See "Terms of Service" at https://www.facebook.com/legal/terms and "Data Policy" at https://www.facebook.com/about/privacy, last viewed on April 9, 2018.) Facebook users do not place a stamp on a handwritten letter and place it in

the mail for the postal service to deliver; they deliberately engage in a community forum of communication on the World Wide Web, where every picture posted, thought shared, and link clicked is collected and dissected by Facebook to enhance their services and increase profitability.

Expecting Touchstone to obtain electronic communications in this case "the same way people have sought communications for hundreds of years" is akin to the Court asking counsel to submit their briefs via carrier pigeon. (Answer at p. 10.) Why is this no longer a reasonable expectation? Because communication has changed. Technology has changed. There are more efficient methods of conveying information and transmitting data that render old methods of production obsolete. These new methods come with tremendous benefits, but also inherent drawbacks such as changes in privacy rights and a diminished ability to escape responsibility for online content. Deleting content does not destroy or erase it like burning a letter thirty years ago; the moment a user's content touches Facebook servers it is captured, read, duplicated, shared, and up for sale. Facebook's argument that "California and the rest of the world are moving toward greater privacy of electronic communications," is not only false but directly contradicts their own business model, which openly monetizes communication content. (Answer at p. 11.) Facebook does not advance the cause of privacy in electronic communications but leverages it for financial gain, trading two billions users' information for profit on a daily basis with open disclosure and full consent of the user.

It is inappropriate to hold Touchstone to antiquated standards of production when such an arrangement exists between Facebook and its users. Serving the sender or recipient may have been appropriate when the post office was the primary method of communication, but today's communication relies on much different platforms with vastly different terms of service and expectations of privacy. The law, and practice of it,

must adapt to accommodate these changes in communication so that the rights and privileges protected in the U.S. and California Constitutions do not go the way of the carrier pigeon. The instant case presents the California Supreme Court with an opportunity to facilitate those changes needed to bring current law into concert with modern electronic communication.

CONCLUSION

A solution to this issue of constitutional magnitude must be fashioned so that Touchstone can obtain the complete Facebook records of the subject user in the same quality, manner, and format that is obtained by prosecution and law enforcement. This is the only way to achieve a fair trial for Touchstone, and it is what our constitution and justice system demands. Real Party in Interest Touchstone submits that these records must come from Facebook directly, either by (1) a finding of user consent based on the terms and policies of the social media platform, (2) a ruling that the prosecution has an obligation to produce the records based on their discovery obligations, or (3) an invalidation of the Stored Communications Act based on its failure to accommodate the constitutional rights of the criminally accused.

Dated: April 9, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, KATE TESCH, hereby certify that, based on the software in the Microsoft Word program used to prepare this document, the word count for this brief is 2,381 words. I swear under the penalty of perjury that the foregoing is true and correct.

Dated: April 9, 2018

Respectfully submitted,

/s Kate Tesch
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PROOF OF SERVICE

I, undersigned declarant, state that I am a citizen of the United States and a resident of the County of San Diego, State of California. I am over the age of 18 years and not a party to the action herein. My office address is 450 "B" Street, Suite 1200, San Diego, California 92101.

On April 9, 2018, I personally served the attached **REPLY BRIEF ON THE MERITS IN SUPPORT OF PETITION FOR REVIEW** to the following parties:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 9, 2018, in San Diego, California.

Signed: Josephina Rodriguez

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DECLARANT