

# SUPREME COURT COPY

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## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

### SUPREME COURT FILED

JUL 25 2018

_____ FACEBOOK, INC.,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
THE SUPERIOR COURT OF SAN DIEGO	)	No. S245203
COUNTY,	)	
	)	
	)	
Respondent.	)	Court of Appeal No. D072171
	)	
	)	
LANCE TOUCHSTONE,	)	
	)	
Real Party in Interest.	)	Superior Court No. SCD268262
_____	)	

Jorge Navarrete Clerk

Deputy

### **REAL PARTY IN INTEREST TOUCHSTONE'S SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF *FACEBOOK V. SUPERIOR COURT (HUNTER) (S230051)***

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## ARGUMENT

Real Party in Interest Touchstone is entitled to more than the subject user's public Facebook records. Mr. Touchstone made a showing to the trial court that the complete record of sought communications is necessary for a constitutional and fair trial. The ruling in *Facebook, Inc. v. Superior Court (Hunter)* (S230051) grants only the disclosure of public records by defense subpoena; this ruling does not remedy the constitutional demands in Mr. Touchstone's case. (*Facebook, Inc. v. Superior Court (Hunter)* (2018) 4 Cal.5th 1245.)

This brief addresses the bases for implied consent to disclosure of Facebook communications based on (1) consent to Facebook terms of service and (2) the very nature of these communications that renders them sufficiently public and excepted under the Stored Communications Act, 18 U.S.C. §2701 et seq. ("SCA").<sup>1</sup> If the language of the SCA cannot be reconciled to permit disclosure of the *complete* Facebook records sought by Mr. Touchstone, the Court must address the constitutionality of that Act, as it deprives Mr. Touchstone of his constitutional guarantees to due process and a fair trial.

- 1. Users impliedly consent to disclosure of communications, including posts to friends and direct messaging, based on the terms and conditions agreed to upon admission to Facebook.**
  - a. Agreement to terms of service is a valid method of implied consent regardless how the content is configured.**

Mr. Touchstone agrees with the Court's ruling that the SCA does not prohibit disclosure of public communications.<sup>2</sup> By designating a communication public or rendering it available to Facebook's two billion users, a user impliedly consents to disclosure of the communications by the provider (e.g., Facebook) as an exception to the SCA at §2702(b)(3).

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<sup>1</sup> Further statutory references are to Title 18 of the United States Code.

<sup>2</sup> As discussed *infra*, this ruling still does not facilitate a fair trial for Mr. Touchstone.

Congress acknowledged this notion of implied consent via public configuration in their reports on the Act. (See H.R. Rep. No. 99-647, 2d Sess. (hereafter House Rep.) and Sen. Rep. No. 99-541, 2d Sess.)

In their reports, Congress makes clear that user can *also* impliedly consent to disclosure by accepting a provider's terms of service, such as Facebook's Terms of Service and Data Policy, which govern the dealings between user and provider and require acceptance as a prerequisite to use.<sup>3</sup> Congress lists numerous ways to imply consent when a user accepts or agrees to a provider's terms of service. This implied consent relies on the nature of the relationship with the provider and agreements made between the provider and user; it does not rely on distinctions between private or public configurations by the user. As the House noted:

Consent may... flow from a user having had *a reasonable basis for knowing that disclosure or use may be made* with respect to a communication, and *having taken action that evidences acquiescence to such disclosure or use*—e.g., continued use of such an electronic communication system.... If conditions governing disclosure or use are *spelled out in the rules of an electronic communication service, and those rules are available to users* or in contracts for the provision of such services, it would be appropriate to imply consent on the part of a user to disclosures or uses consistent with those rules.

(House Rep. at p. 66, *emphasis added*.) As the Court correctly noted in reference to this language, the House “viewed consent to disclosure as being implied by a user's act of posting publicly, *and/or* by a user's acceptance of a provider's terms of service.” (*Hunter, supra*, 4 Cal.5th at 1267-1268, *emphasis added*.)

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<sup>3</sup> See Facebook, *Terms of Service* <[https://www.facebook.com/legal/terms/plain\\_text\\_terms](https://www.facebook.com/legal/terms/plain_text_terms)> [as of July 22, 2018] [“To provide these services, we must collect and use your personal data. We detail our practices in the Data Policy, which you must agree to in order to use our Products.... if you do not agree to our updated Terms and no longer want to be a part of the Facebook community, you can delete your account at any time....”]; See Facebook, *Data Policy* <[https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy)> [as of July 22, 2018].

**b. Users impliedly consent to disclosure by Facebook in Facebook's own terms of service.**

A Facebook user impliedly consents to disclosure of communications by Facebook where (1) the user makes their content “sufficiently public”<sup>4</sup> by configuration OR (2) accepts Facebook's terms of service, which explicitly outline Facebook's vast disclosure policies. This second method of implied consent envelopes all Facebook users, as all Facebook users must accept and agree to Facebook's Terms of Service and Data Policy in order to use the service.<sup>5</sup> Facebook's terms directly reference their data disclosure policies, notifying users that their communications-regardless of public designation or private configuration-will be disclosed by Facebook in numerous circumstances.<sup>6</sup> Facebook tells every user:

We need certain permissions from you to provide our services... You own the content you create and share on Facebook and the other Facebook Products you use.... To provide our services, though, *we need you to give us some legal permissions to use that content*. Specifically, when you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Products, you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content... You give us permission to use your name and profile picture and information about actions you have taken on Facebook next to or in connection with ads, offers, and other sponsored content that we display across our Products, without any compensation to you.

(Facebook, *Terms of Service/Your Commitments to Facebook and Our*

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<sup>4</sup> *Hunter, supra*, 4 Cal.5th at fn. 37

<sup>5</sup> Facebook, *Terms of Service* <[https://www.facebook.com/legal/terms/plain\\_text\\_terms](https://www.facebook.com/legal/terms/plain_text_terms)> [as of July 22, 2018] [“We detail our practices in the Data Policy, which you must agree to in order to use our Products... if you do not agree to our updated Terms and no longer want to be a part of the Facebook community, you can delete your account at any time.”]

<sup>6</sup> See also Amici Brief by California Attorneys for Criminal Justice in Support of Real Party in Interest Mr. Touchstone at p. 4-11 for an effective and compelling discussion of these terms as they relate to user consent.

*Community/The permission you give us*  
<[https://www.facebook.com/legal/terms/plain\\_text\\_terms](https://www.facebook.com/legal/terms/plain_text_terms)> [as of July 22, 2018], *emphasis added.*)

Not only does Facebook award itself legal rights to user content, but Facebook expansively uses the content by collecting, processing, and analyzing it:

We collect the content, communications and other information you provide when you use our Products, including when you sign up for an account, create or share content, *and message or communicate with others....* Our systems automatically process content and communications you and others provide to analyze context and what's in them .... We also receive and analyze content, communications and information that other people provide when they use our Products. This can include information about you, such as when others share or comment on a photo of you, *send a message to you*, or upload, sync or import your contact information....

(Facebook, *Data Policy/What kinds of information do we collect?/Things you and others do and provide*  
<[https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy)> [as of July 22, 2018], *emphasis added.*)

Taking ownership of user content and mining its profitable value, Facebook then notifies users how their content is shared with third parties:

We work with third-party partners who... use Facebook Business Tools to grow their businesses.... We provide aggregated statistics and insights that help people and businesses understand how people are engaging with their posts, listings, Pages, videos and other content on and off the Facebook Products.... We provide advertisers with reports about the kinds of people seeing their ads and how their ads are performing.... We share information about you with companies that aggregate it to provide analytics and measurement reports to our partners.... We provide information and content to vendors and service providers who support our business.... We also provide information and

content to research partners and academics to conduct research

....

(Facebook, *Data Policy/How is this information shared?/Sharing with Third Party Partners* <[https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy)> [as of July 22, 2018].)

Thus, as a condition of use, Facebook users (1) agree to give Facebook legal rights to their content, (2) notice that Facebook collects, processes and analyses the content, and (3) consent to disclosure of their content to third parties.<sup>7</sup> By opening and maintaining a Facebook account, every user agrees to these terms and consents to Facebook's use of their content in the expansive manner described therein. This is implied consent.

**c. Facebook users are notified that their content is subject to subpoena; all users consent to this term of service.**

In a final explicit notice to users, Facebook notes in no uncertain terms that the provider will respond to legal service for production of user content via search warrant, court order, or subpoena. Facebook tells all users:

We access, preserve and share your information with regulators, law enforcement or others: In response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so.... When we have a good-faith belief it is necessary to: detect, prevent and address... violations of our terms or policies, or other harmful or illegal activity; to protect... you or others, including as part of investigations or regulatory inquiries.... Information we receive about you... can be accessed and preserved for an extended period when it is the subject of a

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<sup>7</sup> Facebook is keen to note that “we don’t sell any of your information to anyone, and we never will.” (Facebook, *Data Policy/How is this information shared?/Sharing with Third Party Partners* <[https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy)> [as of July 22, 2018].) Rather, Facebook repeats words like “provide” and “share” to describe the exchange that occurs between their company and third-party advertisers, vendors, partners, researchers, and service providers. (*Ibid.*) According to Facebook, business relationships with these parties “make it possible [for Facebook] to operate our companies and provide free services to people around the world.” (*Ibid.*) Again, Facebook is careful to state that the company doesn’t “sell” user data, but rather “provides” and “shares” user data with business partners who, in exchange for that user data, engage in a financial business relationship with Facebook.



legal request or obligation, governmental investigation, or investigations of possible violations of our terms or policies, or otherwise to prevent harm.

(Facebook, *Data Policy/How do we respond to legal requests or prevent harm?* <[https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy)> [as of July 22, 2018].)

Facebook gives itself the lawful right to collect, use, and share users' data by the very terms of their service, which all users must accept upon initiation of an account. Users agreeing to these terms give their consent for Facebook to disclose personal communication content to regulators, law enforcement, and others in connection with criminal actions. Facebook's terms of service thus provide consent to the type and manner of disclosure contemplated in this very action. A Facebook user does not have to configure their communications to be public or private; the very act of placing that content on the platform releases privacy expectations to Facebook in a manner that constitutes consent to disclosure.<sup>8</sup>

**2. Through expansive use of content beyond delivery and storage, Facebook does not conform to Congress or case law's notion of the nature of electronic service providers prohibited from disclosing content under the SCA.**

Knowing that Facebook takes legal rights to user content and uses that content in various ways (providing reports to advertisers who may improve

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<sup>8</sup>This argument does not suggest that users' content can or should be directly disclosed in any conceivable circumstance, as amicus for Facebook hyperbolically warns in their papers. (Amici Brief of Apple, et al. at p. 31 “[users] would have good reason to think that individuals involved in litigation would harness this power with little self-restraint, and perhaps even with malice.”) Mr. Touchstone does not seek a ruling that every Facebook user's content should be subject to disclosure at the whim or mere asking of a party. Rather, as sought in this case, if a party to a criminal action makes a threshold showing to the court that the sought records are relevant and material to an ongoing criminal matter, the court can order the records disclosed to the court and then conduct an *in camera* review prior to their release, issuing any necessary limiting or protective orders to preserve privacy interests. If threshold showings are not made, or the content is not found relevant upon judicial review, disclosure is not made. Neither self-restraint nor malice are parties to the inquiry.

their advertisements, statistics to partners who may understand how people engage with their product, and content to academics who may research innovation, scholarship, and technological advancement<sup>9</sup>), it cannot be said that Facebook “serve[s] only as a medium and neutral repository for the message.” (*O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1446.) While Facebook is an electronic service provider as described in the code, Facebook’s role is not just a “data bailee to whom [social media communication] is entrusted for delivery and secure storage.” (*Id.* at 1447.)

Facebook does not just store user data for the purpose of providing storage or processing services to the user. Facebook is not a neutral repository or bailee. Rather, Facebook harvests user content, takes legal rights to the content, shares the content with third parties who pursue independent use of the data, analyses the content to provide services to outside companies, and uses the content to research, enhance, and target services to other users on the platform. Facebook’s comprehensive use of content beyond storage and delivery takes the provider out of the narrowly-protected category of service providers contemplated by Congress under the SCA. Facebook cannot simultaneously claim to be a mere data bailee while also engaging in prolific use, manipulation, and sharing of user content.

The House in fact contemplated the application of SCA as follows: “[W]here an electronic communication is transmitted by a subscriber or customer to such a service, and is stored on the subscriber's behalf *solely for the purpose of providing storage or computer processing services to the subscriber*, the Committee intends that the communication-together with the products of any processing that the service performs for the customer-remain available only to the subscriber and to the persons he designates...” (House Rep., *supra*, at p. 66, *emphasis added*.) Facebook as an electronic service

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<sup>9</sup> See Facebook, *Data Policy/How is this information shared?/Sharing with Third Party Partners* <[https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy)> [as of July 22, 2018].

provider does not fit this ideal description because, in addition to providing electronic storage and content delivery, Facebook also performs a multitude of extraneous functions with users' content and data-and with users consent for Facebook to do so.

**3. The very nature of Facebook communication renders user content-regardless of recipient designation-sufficiently public to imply consent to disclosure under Section 2702(b)(3).**

The Court's opinion in *Hunter* does not resolve the question of what public configuration would render a particular communication "public" under the SCA. The term "public" is not defined in numeric terms. Rather, the Court finds that communications limited to a "large group" are not automatically public, while communications limited to two billion users, or two billion users except one or two, may be public. The Court remands this determination to the trial court to determine "whether such communications would be sufficiently public to imply consent to disclosure under section 2702(b)(3)." (*Hunter, supra*, 4 Cal.5th at fn. 37.) In doing so, the Court leaves the decision to trial courts throughout the state to establish what precise number or designation would render individual communications public and thus subject to disclosure under the consent exception of §2702(b)(3).

Mr. Touchstone asserts that, by its very nature, communications on the Facebook platform are sufficiently public to render implied consent under §2702(b)(3). This platform is not a commercial storage unit. It is not personal emails or even an electronic bulletin board. These analogies do not aptly describe the social media provider's role in communication today. By its very name, *social* media connotes an interaction with groups in society, relating to or designed for sociability, in an electronic-based format.<sup>10</sup> The

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<sup>10</sup> Miriam Webster defines social as "of or relating to human society, the interaction of the individual and the group; of, relating to, or designed for sociability; tending to form cooperative and interdependent relationships with others" <<https://www.merriam-webster.com/dictionary/social>> [as of July 22, 2018].

communication is always outward and inherently seeks interaction and response from recipients. This is the nature of social media, as Facebook specifically admonishes its users. Facebook writes in their Data Policy:

[C]onsider who you choose to share with, because people who can see your activity on our Products can choose to share it with others on and off our Products.... when you share a post or send a message to specific friends or accounts, they can download, screenshot, or reshare that content to others across or off our Products....

(Facebook, *Data Policy/How is this information shared?/Sharing on Facebook products/Content others share or reshare about you* <[https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy)> [as of July 22, 2018].)

Thus Facebook reminds its users that *nothing* they post, even to restricted groups, is free from further dissemination or proliferation from the private to public forum. This admonition perfectly illustrates the dynamic of communications on Facebook. Anyone using social media today who does not believe that they can or will be held accountable for their contents is willfully ignoring the plain reality of this platform. Facebook users are willing participants in a social forum designed specifically for outward expression and community engagement. They are consenting participants governed by terms of service and data policies that they are free to reject by refusing to create or maintain an account. Instead, users agree to the terms and consent to disclosures, because they want the services provided and are willing to compromise on the incidental terms of delivery. Users know that their content is constantly subject to public distribution and dissemination at any time.

Note the House finding that “implied consent might be inferred from the very nature of the electronic transaction. For example, a subscriber who places a communication on a computer electronic bulletin board, with a reasonable basis for knowing that such communications are freely made

available to the public, should be considered to have given consent to the disclosure or use of the communication.” (House Rep., *supra*, at p. 66.) A Facebook user who places a communication on their personal page thus has a reasonable basis—found in common sense practice and Facebook’s clear terms of service—to know that such communication can be freely made available to the public. In this sense, by proceeding with use of the platform to communicate, the user impliedly gives consent to disclosure of that information. All content on Facebook, regardless of user designation or limitation, “is readily accessible to the general public” and “the sender has... extended an ‘authorization’ to the public to access those communications.” (*Id.* at p. 41, 62.)

**4. Without any means for Touchstone to obtain the full records necessary for his fair trial under current statutory interpretation of the SCA, the Court must address constitutionality of the Act.**

In the instant case, Mr. Touchstone already has the publicly-available communications of the sought user. The public portion of this user’s page—available to two billion Facebook users—revealed a plethora of relevant, material, and exculpatory content. These communications established good cause to support a court-ordered subpoena duces tecum to Facebook for the user’s records. These communications further provided good cause for the trial court to deny Facebook’s motion to quash the subpoena. The public social media records that Mr. Touchstone presented to the trial court in support of the subpoena duces tecum and in opposition to the provider’s motion to quash were the basis for the trial court’s “good cause” finding (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074-75) that all user content for the relevant time period—including messages and communications with restricted settings—be produced to the trial court for *in camera* review. If the trial court thereafter found that “the requested information will facilitate the ascertainment of the fact and a fair trial”

(*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536), then the records must be produced to the defense regardless of privacy settings—and certainly subject to any protective orders—to effectuate Mr. Touchstone’s panoply of constitutional rights as a criminal defendant.

The public communications on this user’s page are merely the starting point to the inquiry into the user’s character and credibility; they are the tip of the iceberg for the exact type of evidence required for Mr. Touchstone to assert his affirmative defense. The records sought in this case—the users complete record of communications on the Facebook platform from the date of the incident forward—is not a fishing expedition or an irrelevant, unreasonable inquiry. It is tailored to the period after the alleged shooting and supported by individual posts from the public record.<sup>11</sup> All of this content—not limited to public portions—are relevant and material to Mr. Touchstone’s defense.<sup>12</sup>

Providing only public posts and denying Mr. Touchstone the right to exculpatory posts with more restricted configurations deprives him of his right to effective assistance of counsel as well as his due process right to a fair trial. To be constitutionally effective, defense counsel has an affirmative responsibility to conduct a pre-trial investigation on behalf of a criminal defendant; whether that defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment depends upon the pretrial investigation and preparation conducted by the attorney. (*Strickland v.*

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<sup>11</sup> See sealed portions of the Court of Appeal record in D072171 for such evidence.

<sup>12</sup> The rule of completeness under Evidence Code §356 additionally demands full production of these records, since a portion of them are indisputably relevant to the case. (Cal. Evid. Code §356 [“when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence”].) This rule applies to the records sought in this case; knowing that the public portions of the user’s records are exculpatory, it is imperative to access the complete record so that the entirety of relevant facts and context are unearthed. All of the content must be disclosed and reviewed by the trial court for disclosure to the defense so that the jury is properly able to evaluate the character and credibility of the complaining witness in the case.

*Washington* (1984) 466 U.S. 668, 691 [“[C]ounsel has a duty to make reasonable investigations or to make reasonable decision that makes particular investigation unnecessary.”].)

Both trial courts in Mr. Hunter and Touchstone’s cases found that the defense needs the subpoenaed records to achieve due process and a fair trial. If the Courts opinion in *Hunter* only permits the defense to obtain public records without offending SCA, the ruling leaves both defendants without a complete record from which to obtain due process and a fair trial. Thus, the SCA, as interpreted by the Court, functions to deprive both these men of their constitutional rights. As such, the Court should reach a decision as to the constitutionality of the Act itself.

### CONCLUSION

The effect of the Court’s ruling in *Facebook, Inc. v. Superior Court (Hunter)*, which only permits disclosure by Facebook of a user’s public communications and not the user’s more limited communications, is to deprive Mr. Touchstone of his constitutionally-guaranteed fair trial. Mr. Touchstone needs the user’s complete Facebook record of communications to adequately prepare for his trial. Without a means to obtain those records within the language of the SCA, the Court must address the constitutionality of the SCA to balance the privacy interests of Facebook users against the constitutional rights of the criminally accused. Mr. Touchstone asserts that, in this balance, the rights of the accused trump those of the user.

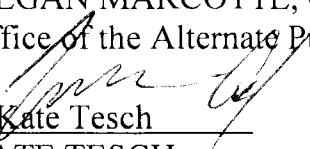
To avoid reaching the constitutionality of the SCA, Touchstone implores the Court to consider the above arguments demonstrating that (1) all Facebook users consent to disclosure of their content by agreement to Facebook’s terms of service, and (2) all communications on the platform are reasonably accessible to the public and as such can be disclosed by Facebook without conflict with the SCA. Such disclosure should only occur

with sufficient showing at the trial court level as to relevance and materiality, to balance and protect all parties' interests in the records. Mr. Touchstone made such a showing to the trial court in this case, and the records should be disclosed accordingly so he may achieve his fair trial upon return to that court.

Dated: July 25, 2018

Respectfully submitted,

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/s/ Kate Tesch

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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 4,112 words. I swear under the penalty of perjury that the foregoing is true and correct.

Dated: July 25, 2018

Respectfully submitted,

  
/s Kate Tesch

KATE TESCH

Deputy Alternate Public Defender

Attorney for Real Party in Interest  
LANCE TOUCHSTONE

## 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 July 25, 2018, I personally served the attached **SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF *FACEBOOK V. SUPERIOR COURT (HUNTER) (S230051)*** to the following parties via U.S. Postal Service:

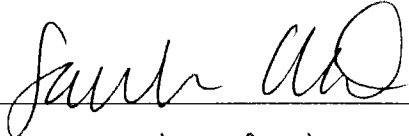
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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 25, 2018, in San Diego, California.

Signed:   
Printed: Sarah Astor  
DECLARANT