

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT  
FILED

JUL 26 2018

Jorge Navarrete Clerk

Deputy

FACEBOOK, INC.,  
Petitioner,

No. S245203

v.

THE SUPERIOR COURT OF  
SAN DIEGO COUNTY,  
Respondent.

LANCE TOUCHSTONE,  
Real Party in Interest.

**Motion to Augment the Record on Appeal  
(Cal. Rules of Court, Rule 8.340(c))**

Pursuant to the California Rules of Court, rule 8.340(c), Intervenor San Diego County District Attorney, by and through their attorneys, SUMMER STEPHAN, District Attorney, MARK A. AMADOR, Deputy District Attorney, LINH LAM, Deputy District Attorney, and KARL HUSOE, Deputy District Attorney, hereby request that the record on appeal be augmented with Intervenor Exhibits A through M, listed in table of contents. Intervenor incorporates by reference its Brief in Intervention, which contains supporting authority which would permit the court to

augment the record, as well as take judicial notice of and admit into evidence Intervenor's Exhibits B, C, D, and E.

Dated: July 25, 2018

Respectfully Submitted,

SUMMER STEPHAN

District Attorney

MARK A. AMADOR

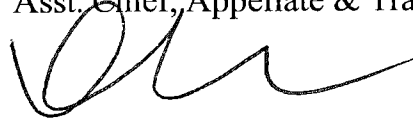
Deputy District Attorney

Chief, Appellate & Training Division

LINH LAM

Deputy District Attorney

Asst. Chief, Appellate & Training Division



KARL HUSOE

Deputy District Attorney

Attorney for Intervenor

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC.,  v.  THE SUPERIOR COURT OF SAN DIEGO COUNTY,  _____ LANCE TOUCHSTONE,  _____	Petitioner,     Respondent.   Real Party in Interest.	No. S245203
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**EXHIBITS**

**Motion to Augment the Record on Appeal  
(Cal. Rules of Court, Rule 8.340(c))**

SUMMER STEPHAN  
District Attorney  
MARK A. AMADOR  
Deputy District Attorney  
Chief, Appellate & Training Division  
LINH LAM  
Deputy District Attorney  
Asst. Chief, Appellate & Training Division  
KARL HUSOE  
Deputy District Attorney  
  
Attorney for Intervenor

## TABLE OF CONTENTS

Exhibit	Page
<b>Intervenor’s Exhibit A:</b>	Victim Jeffery R.’s motion and complaint for victim rights violations in case no. CD268262. Dated February 13, 2018 ..... 4
<b>Intervenor’s Exhibit B:</b>	The Senate Committee on the Judiciary and Senate Committee on Commerce, Science, and Transportation video recorded hearing entitled: “Facebook, Social Media Privacy, and the Use and Abuse of Data.” < <a href="https://www.judiciary.senate.gov/meetings/facebook-social-media-privacy-and-the-use-and-abuse-of-data">https://www.judiciary.senate.gov/meetings/facebook-social-media-privacy-and-the-use-and-abuse-of-data</a> > ..... 10
<b>Intervenor’s Exhibit B-1:</b>	Transcript of Exhibit B <a href="https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/?utm_term=.d6289664fdb8">https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/?utm_term=.d6289664fdb8</a> ..... 10
<b>Intervenor’s Exhibit C:</b>	The House Committee on Energy and Commerce video recorded hearing entitled: “Facebook: Transparency and Use of Consumer Data” < <a href="https://energycommerce.house.gov/hearings/facebook-transparency-use-consumer-data">https://energycommerce.house.gov/hearings/facebook-transparency-use-consumer-data</a> > ..... 10
<b>Intervenor’s Exhibit C-1:</b>	Transcript of Exhibit C ..... 10
<b>Intervenor’s Exhibit D:</b>	Facebook Terms of Service <a href="https://www.facebook.com/legal/terms">https://www.facebook.com/legal/terms</a> ..... 11
<b>Intervenor’s Exhibit E:</b>	Facebook Data Policy <a href="https://www.facebook.com/about/privacy/">https://www.facebook.com/about/privacy/</a> Update ..... 21
<b>Intervenor’s Exhibit F:</b>	Certified transcript of proceedings before the Honorable Judge Michael T. Smyth, Judge of the San Diego County Superior Court, on April 18, 2018..... 33

<b>Intervenor’s Exhibit G:</b>	Ex-parte minute order of Judge Michael T. Smyth, issued on March 14, 2018 .....	41
<b>Intervenor’s Exhibit H:</b>	Facebook’s motion to quash and vacate subpoena duces tecum .....	46
<b>Intervenor’s Exhibit I:</b>	Declaration of Christian Lee in support of motion to quash and vacate .....	57
<b>Intervenor’s Exhibit J:</b>	Touchstone’s opposition to Facebook’s motion to quash .....	103
<b>Intervenor’s Exhibit K:</b>	Request to seal and redact portions of defense counsel’s declaration in opposition to Facebook’s motion to quash .....	117
<b>Intervenor’s Exhibit L:</b>	Redacted defense counsel’s declaration in opposition to Facebook’s motion to quash ..	123
<b>Intervenor’s Exhibit M:</b>	Facebook’s reply in support of motion to quash and vacate.....	150

INTERVENOR'S  
EXHIBIT A

AEB571  
Reilly

The SUPERIOR COURT OF SAN DIEGO COUNTY  
330W. Broadway  
San Diego, Ca

Date:

Jeffrey Ryan Renteria

vs.

Case No:

The State of California  
does 1-25

RECEIVED  
SUPERIOR COURT  
SAN DIEGO COUNTY  
APR 22 2008

**Motion and complaint for victim Rights Violations in Case  
No:CD268262**

I, Jeffrey Ryan Renteria, the Victim, and now Plaintiff, do, hereby, Motion the court to hold a victims rights hearing in THE SUPERIOR COURT OF SAN DIEGO COUNTY case of the People vs. Lance Touchstone, CD268262, to address Civil Rights violations of the victim in the case; Jeffrey Ryan Renteria pursuant to Proposition 9, the Victims Bill of Rights act of 2008, by the Court representing the People of the State of California and its agents involved in this case, and to hold all those responsible for violating Jeffrey Ryan Renteria's Civil Rights.

**Cause**

Under Marsy's Law, the California Constitution article I, § 28, section (b) now provides victims with the following enumerated rights:

1. To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.
1. To be reasonably protected from the defendant and persons acting on behalf of the defendant.
2. To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant.
3. To prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.
4. To refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents.

1. To reasonable notice of and to reasonably confer with the prosecuting agency, **upon request**, regarding, the arrest of the defendant if known by the prosecutor, the charges filed, the determination whether to extradite the defendant, and, **upon request**, to be notified of and informed before any pretrial disposition of the case.
1. To reasonable notice of all public proceedings, including delinquency proceedings, **upon request**, at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings.
1. To be heard, **upon request**, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.
2. To a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings.
3. To provide information to a probation department official conducting a pre-sentence investigation concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant.
1. To receive, **upon request**, the pre-sentence report when available to the defendant, except for those portions made confidential by law.

Page 1

- To be informed, **upon request**, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant, and the release of or the escape by the defendant from custody.
- To restitution.
  - It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.
  - Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.
  - All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.
- To the prompt return of property when no longer needed as evidence.
- To be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, **upon request**, of the parole or other release of the offender.
- To have the safety of the victim, the victim's family, and the general public considered before any parole or other post-judgment release decision is made.
- To be informed of the rights enumerated in paragraphs (1) through (16).



### Reason for Motion

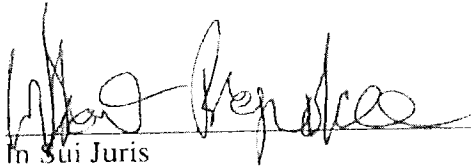
- Jeffrey Renteria, the victim in case no: CD268262, was neither informed of Lance Touchstone's release from jail on bail for charges of attempted murder and discharging a firearm in violation of rule 2, and 3, by allowing the defendant Lance Touchstone to be free to harm the victim Jeffrey Renteria with no way to officially monitor the actions of Lance Touchstone who has already admitted he has shot Jeffrey Renteria on August 8<sup>th</sup>, 2016, resulting in the loss of Jeffrey's Right Kidney, severe damage to his Liver, and the ulnar nerves in both arms.

- Jeffrey Renteria, suffered civil rights violations under Marcys Law rule 1,2, and 4, when the state of California ordered Facebook to release the private messages, friends and family to the defendant Lance Touchstone, (D072171) which,
- violated the privacy and dignity of Jeffrey Renteria, the victim in this case. Releasing this information to the defendant, Lance Touchstone, leaves Jeffrey Renteria, his friends, and family unreasonably unprotected from the defendant and a witness in this case named Rebecca Touchstone who was sitting next to Lance Touchstone, when he shot Jeffrey Renteria.

There is also a clear violation of rule 4 to prevent disclosure of confidential information or records to the defendant by the state attempting to enforce Facebook Inc. to disclose Jeffrey Renteria's private messages which include medical information of the victim Jeffrey Renteria.

- Violation of rule 9 by the state attempting to enforce the disclosure of private information from Facebook Ink that can be used to harass the victim and his family, in clear violation of rule for and thereby prolonging unnecessarily the trial and a prompt and final conclusion of the case and any related post-judgement proceedings.

I, Jeffrey Ryan Renteria, in Sui Juris, possessing full Social and Civil Right, do hereby swear and affirm that these violations have, and are happening in violation of my Civil Rights pursuant to Proposition 9, the Victims Bill of Rights act of 2008, Under Marsy's Law, the California Constitution article I, § 28, section (b).



In Sui Juris

Jeffrey Ryan Renteria  
2701 Midway Drive  
San Diego, Ca  
92110

cc: Court Clerk, D.A.,  
Defendant

Page3

## ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California  
County of San Diego

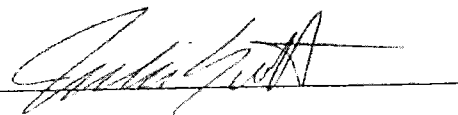
On February 15, 2018 before me, Julia Ann Scott, Notary Public  
(insert name and title of the officer)

personally appeared Jeffrey Ryan Renteria  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

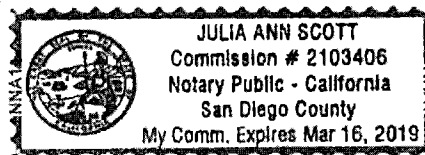
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature



(Seal)



Attached: Motion and Complaint for Victims Rights Violations in  
Case No: CD 268262

INTERVENOR'S  
EXHIBIT B  
TO  
EXHIBIT C-1  
(Compact Disk)

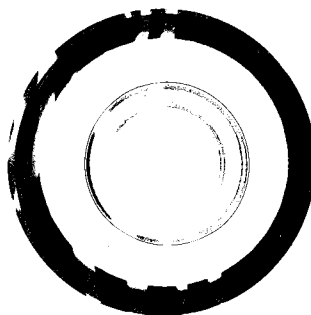
EXHIBIT B  
TO  
EXHIBIT C-1

Facebook

v.

Superior Court (Touchstone)

Supreme Court Case No. S245203



Intervenor's Exhibits

B, B-1, C, C-1

# INTERVENOR'S EXHIBIT D

[Sign Up](#)

[Log In](#)

1. Our Services

2. Your Data Rights and Choices  
3. Notices

4. Your Content, Information, Photos, and  
Other Content

5. Additional provisions

6. Other terms and policies that  
may apply to you

[Facebook Ads To and From](#)

[Privacy Policy](#)

[Cookies Policy](#)

[Data Policy](#)

[More Resources](#)

[View a printable version of the Terms of Service](#)

Email or Phone

Password

[Forgot password?](#)

[Do you want to join Facebook?](#)

[Sign Up](#)

# Terms of Service

Welcome to Facebook!

These Terms govern your use of Facebook and the products, features, apps, services, technologies, and software we offer (the [Facebook Products](#) or [Products](#)), except where we expressly state that separate terms (and not these) apply.

[Return to Top](#)

## 1. Our Services

Our mission is to give people the power to build community and bring the world closer together. To help advance this mission, we provide the Products and services described below to you:

### Provide a personalized experience for you:

Your experience on Facebook is unlike anyone else's: from the posts, stories, events, ads, and other content you see in News Feed or our video platform to the Pages you follow and other features you might use, such as Trending, Marketplace, and search. We use the data we have - for example, about the connections you make, the choices and settings you select, and what you share and do on and off our Products - to personalize your experience.

### Connect you with people and organizations you care about:

We help you find and connect with people, groups, businesses, organizations, and others that matter to you across the Facebook Products you use. We use the data we have to make suggestions for you and others - for example, groups to join, events to attend, Pages to follow or send a message to, shows to watch, and people you may want to become friends with. Stronger ties make for better communities, and we believe our services are most useful when people are connected to people, groups, and organizations they care about.



**Empower you to express yourself and communicate about what matters to you:**

There are many ways to express yourself on Facebook and to communicate with friends, family, and others about what matters to you - for example, sharing status updates, photos, videos, and stories across the Facebook Products you use, sending messages to a friend or several people, creating events or groups, or adding content to your profile. We also have developed, and continue to explore, new ways for people to use technology, such as augmented reality and 360 video to create and share more expressive and engaging content on Facebook.

**Help you discover content, products, and services that may interest you:**

We show you ads, offers, and other sponsored content to help you discover content, products, and services that are offered by the many businesses and organizations that use Facebook and other Facebook Products. Our partners pay us to show their content to you, and we design our services so that the sponsored content you see is as relevant and useful to you as everything else you see on our Products.

**Combat harmful conduct and protect and support our community:**

People will only build community on Facebook if they feel safe. We employ dedicated teams around the world and develop advanced technical systems to detect misuse of our Products, harmful conduct towards others, and situations where we may be able to help support or protect our community. If we learn of content or conduct like this, we will take appropriate action - for example, offering help, removing content, blocking access to certain features, disabling an account, or contacting law enforcement. We share data with other [Facebook Companies](#) when we detect misuse or harmful conduct by someone using one of our Products.

**Use and develop advanced technologies to provide safe and functional services for everyone:**

We use and develop advanced technologies - such as artificial intelligence, machine learning systems, and augmented reality - so that people can use our Products safely regardless of physical ability or geographic location. For example, technology like this helps people who have visual impairments understand what or who is in photos or videos shared on Facebook or Instagram. We also build sophisticated network and communication technology to help more people connect to the internet in areas with limited access. And we develop automated systems to improve our ability to detect and remove abusive and dangerous activity that may harm our community and the integrity of our Products.

**Research ways to make our services better:**

We engage in research and collaborate with others to improve our Products. One way we do this is by analyzing the data we have and understanding how people use our Products. You can [learn more](#) about some of our research efforts.

**Provide consistent and seamless experiences across the Facebook Company Products:**

Our Products help you find and connect with people, groups, businesses, organizations, and others that are important to you. We design our systems so that your experience is consistent and seamless across the different [Facebook Company Products](#) that you use. For example, we use data about the people you engage with on Facebook to make it easier for you to connect with them on Instagram or Messenger, and we enable you to communicate with a business you follow on Facebook through Messenger.

**Enable global access to our services:**

To operate our global service, we need to store and distribute content and data in our data centers and systems around the world, including outside your country of residence. This infrastructure may be operated or controlled by Facebook, Inc., Facebook Ireland Limited, or its affiliates.

[Return to top](#)

## 2. Our Data Policy and Your Privacy Choices

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.

We also encourage you to review the privacy choices you have in your [settings](#).

[Return to top](#)

## 3. Your Commitments to Facebook and Our Community

We provide these services to you and others to help advance our mission. In exchange, we need you to make the following commitments:

### 1. Who can use Facebook

When people stand behind their opinions and actions, our community is safer and more accountable. For that reason, you must:

- Use the same name that you use in everyday life.
- Provide accurate information about yourself.
- Create only one account (your own) and use your timeline for personal purposes.
- Not share your password, give access to your Facebook account to others, or transfer your account to anyone else (without our permission).

We try to make Facebook broadly available to everyone, but you cannot use Facebook if:

- You are under 13 years old.
- You are a convicted sex offender.
- We previously disabled your account for violations of our terms or policies.
- You are prohibited from receiving our products, services, or software under applicable laws.

### 2. What you can share and do on Facebook

We want people to use Facebook to express themselves and to share content that is important to them, but not at the expense of the safety and well-being of others or the integrity of our community. You therefore agree not to engage in the conduct described below (or to facilitate or support others in doing so):

1. You may not use our Products to do or share anything:
  - That violates these Terms, our Community Standards, and other terms and policies that apply to your use of Facebook.
  - That is unlawful, misleading, discriminatory or fraudulent.
  - That infringes or violates someone else's rights.
2. You may not upload viruses or malicious code or do anything that could disable, overburden, or impair the proper working or appearance of our Products.
3. You may not access or collect data from our Products using automated means (without our prior permission) or attempt to access data you do not have permission to access.

We can remove content you share in violation of these provisions and, if applicable, we may take action against your account, for the reasons described below. We may also disable your account if you repeatedly infringe other people's intellectual property rights.

To help support our community, we encourage you to report content or conduct that you believe violates your rights (including intellectual property rights) or our terms and policies.

### 3. The permissions you give us

We need certain permissions from you to provide our services:

1. Permission to use content you create and share: You own the content you create and share on Facebook and the other Facebook Products you use, and nothing in these Terms takes away the rights you have to your own content. You are free to share your content with anyone else, wherever you want. 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 (consistent with your privacy and application settings). This means, for example, that if you share a photo on Facebook, you give us permission to store, copy, and share it with others (again, consistent with your settings) such as service providers that support our service or other Facebook Products you use.

You can end this license any time by deleting your content or account. You should know that, for technical reasons, content you delete may persist for a limited period of time in backup copies (though it will not be visible to other users). In addition, content you delete may continue to appear if you have shared it with others and they have not deleted it.

2. Permission to use your name, profile picture, and information about your actions with ads and sponsored 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. For example, we may show your friends that you are interested in an advertised event or have liked a Page created by a brand that has paid us to display its ads on Facebook. Ads like this can be seen only by people who have your permission to see the actions you've taken on Facebook. You can learn more about your ad settings and preferences.

If you are under the age of eighteen (18), you represent that a parent or legal guardian also agrees to this section on your behalf. (This language is included pursuant to a court-approved legal settlement.)

3. Permission to update software you use or download: If you download or use our software, you give us permission to download and install upgrades, updates, and additional features to improve, enhance, and further develop it.

#### 4. Limits on using our intellectual property

If you use content covered by intellectual property rights that we have and make available in our Products (for example, images, designs, videos, or sounds we provide that you add to content you create or share on Facebook), we retain all rights to that content (but not yours). You can only use our copyrights or trademarks (or any similar marks) as expressly permitted by our Brand Usage Guidelines or with our prior written permission. You must obtain our written permission (or permission under an open source license) to modify, create derivative works of, decompile, or otherwise attempt to extract source code from us.

[Return to top](#)

## 4. Additional provisions

### 1. Updating our Terms

We work constantly to improve our services and develop new features to make our Products better for you and our community. As a result, we may need to update these Terms from time to time to accurately reflect our services and practices. Unless otherwise required by law, we will notify you before we make changes to these Terms and give you an opportunity to review them before they go into effect. Once any updated Terms are in effect, you will be bound by them if you continue to use our Products.

We hope that you will continue using our Products, but 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.

### 2. Account suspension or termination

We want Facebook to be a place where people feel welcome and safe to express themselves and share their thoughts and ideas.

If we determine that you have violated our terms or policies, we may take action against your account to protect our community and services, including by suspending access to your account or disabling it. We may also suspend or disable your account if you create risk or legal exposure for us or when we are permitted or required to do so by law. Where appropriate, we will notify you about your account the next time you try to access it. You can learn more about what you can do if your account has been disabled.

If you delete or we disable your account, these Terms shall terminate as an agreement between you and us, but the following provisions will remain in place: 3, 4.2-4.5

**3. Limits on liability**

We work hard to provide the best Products we can and to specify clear guidelines for everyone who uses them. Our Products, however, are provided "as is," and we make no guarantees that they always will be safe, secure, or error-free, or that they will function without disruptions, delays, or imperfections. To the extent permitted by law, we also **DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT.** We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct (whether online or offline) or any content they share (including offensive, inappropriate, obscene, unlawful, and other objectionable content).

We cannot predict when issues might arise with our Products. Accordingly, our liability shall be limited to the fullest extent permitted by applicable law, and under no circumstance will we be liable to you for any lost profits, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to these Terms or the Facebook Products, even if we have been advised of the possibility of such damages. Our aggregate liability arising out of or relating to these Terms or the Facebook Products will not exceed the greater of \$100 or the amount you have paid us in the past twelve months.

**4. Disputes**

We try to provide clear rules so that we can limit or hopefully avoid disputes between you and us. If a dispute does arise, however, it's useful to know up front where it can be resolved and what laws will apply.

For any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms or the Facebook Products ("claim"), you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions.

## 5. Other

1. These Terms (formerly known as the Statement of Rights and Responsibilities) make up the entire agreement between you and Facebook, Inc. regarding your use of our Products. They supersede any prior agreements.
2. Some of the Products we offer are also governed by supplemental terms. If you use any of those Products, supplemental terms will be made available and will become part of our agreement with you. For instance, if you access or use our Products for commercial or business purposes, such as buying ads, selling products, developing apps, managing a group or Page for your business, or using our measurement services, you must agree to our [Commercial Terms](#). If you post or share content containing music, you must comply with our [Music Guidelines](#). To the extent any supplemental terms conflict with these Terms, the supplemental terms shall govern to the extent of the conflict.
3. If any portion of these Terms are found to be unenforceable, the remaining portion will remain in full force and effect. If we fail to enforce any of these Terms, it will not be considered a waiver. Any amendment to or waiver of these Terms must be made in writing and signed by us.
4. You will not transfer any of your rights or obligations under these Terms to anyone else without our consent.
5. You may designate a person (called a legacy contact) to manage your account if it is memorialized. Only your legacy contact or a person who you have identified in a valid will or similar document expressing clear consent to disclose your content upon death or incapacity will be able to seek [disclosure](#) from your account after it is memorialized.
6. These Terms do not confer any third-party beneficiary rights. All of our rights and obligations under these Terms are freely assignable by us in connection with a merger, acquisition, or sale of assets, or by operation of law or otherwise.
7. You should know that we may need to change the username for your account in certain circumstances (for example, if someone else claims the username and it appears unrelated to the name you use in everyday life).
8. We always appreciate your feedback and other suggestions about our products and services. But you should know that we may use them without any restriction or obligation to compensate you, and we are under no obligation to keep them confidential.
9. We reserve all rights not expressly granted to you.

[Return to top](#)

## 5. Other terms and policies that may apply to you

- **Community Standards:** These guidelines outline our standards regarding the content you post to Facebook and your activity on Facebook and other Facebook Products.
- **Commercial Terms:** These terms apply if you allow access or use our Products for any commercial or business purpose, including advertising, operating an app on our Platform, using our measurement services, managing a group or a Page for a business, or selling goods or services.
- **Advertising Policies:** These policies specify what types of ad content are allowed by partners who advertise across the Facebook Products.
- **Self-Serve Ad Terms:** These terms apply when you use self-serve advertising interfaces to create, submit, or deliver advertising or other commercial or sponsored activity or content.
- **Pages, Groups, and Events Policy:** These guidelines apply if you create or administer a Facebook Page, group, or event, or if you use Facebook to communicate or administer a promotion.
- **Facebook Platform Policy:** These guidelines outline the policies that apply to your use of our Platform (for example, for developers or operators of a Platform application or website or if you use social plugins).
- **Developer Payment Terms:** These terms apply to developers of applications that use Facebook Payments.
- **Community Payment Terms:** These terms apply to payments made on or through Facebook.
- **Commerce Policies:** These guidelines outline the policies that apply when you offer products and services for sale on Facebook.
- **Facebook Brand Resources:** These guidelines outline the policies that apply to use of Facebook trademarks, logos, and screenshots.
- **Music Guidelines:** These guidelines outline the policies that apply if you post or share content containing music on Facebook.

Date of Last Revision: April 19th, 2018

English (UK) Español Français Italiano 日本語 العربية Português (Brasil) 中文 Deutsch हिन्दी हिन्दी

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What kind of information do we collect?

How do we use that information?

How do we share that information?

How do the Facebook companies work together?

How can I manage or delete information about me?

How do we respond to legal requests or process claims?

How do we operate and handle data as part of our global operations?

How will we not form part of what gets in this policy?

How to contact Facebook with questions

[Facebook Ads Controls](#)

[Privacy Basics](#)

[Cookie Policy](#)

[Terms](#)

[Your Reviews](#)

[View available versions of the Data Policy](#)

[Information Tools](#)

[What's new lately](#)

[Facebook Store](#)

[Facebook Settings](#)

[Create a new account](#)

[Help, privacy and other resources](#)

# Data Policy

This policy describes the information we process to support Facebook, Instagram, Messenger and other products and features offered by Facebook ([Facebook Products](#) or [Products](#)). You can find additional tools and information in the [Facebook Settings](#) and [Instagram Settings](#).

[Return to top](#)

## What kinds of information do we collect?

To provide the Facebook Products, we must process information about you. The types of information we collect depend on how you use our Products. You can learn how to access and delete information we collect by visiting the [Facebook Settings](#) and [Instagram Settings](#).

#### Things you and others do and provide.

- **Information and content you provide.** 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. This can include information in or about the content you provide (like metadata), such as the location of a photo or the date a file was created. It can also include what you see through features we provide, such as our [camera](#), so we can do things like suggest masks and filters that you might like, or give you tips on using camera formats. Our systems automatically process content and communications you and others provide to analyze context and what's in them for the purposes described [below](#). Learn more about how you can control who can see the things you [share](#).
- **Data with special protections:** You can choose to provide information in your Facebook [profile fields](#) or Life Events about your religious views, political views, who you are "interested in," or your health. This and other information (such as racial or ethnic origin, philosophical beliefs or trade union membership) could be subject to special protections under the laws of your country.
- **Networks and connections.** We collect information about the people, [Pages](#), accounts, [hashtags](#) and groups you are connected to and how you interact with them across our Products, such as people you communicate with the most or groups you are part of. We also collect contact information if you [choose to upload, sync or import it from a device](#) (such as an address book or call log or SMS log history), which we use for things like helping you and others find people you may know and for the other purposes listed [below](#).
- **Your usage.** We collect information about how you use our Products, such as the types of content you view or engage with; the features you use; the actions you take; the people or accounts you interact with; and the time, frequency and duration of your activities. For example, we log when you're using and have last used our Products, and what posts, videos and other content you view on our Products. We also collect information about how you use features like our camera.
- **Information about transactions made on our Products.** If you use our Products for [purchases](#) or other financial transactions (such as when you make a purchase in a game or make a [donation](#)), we collect information about the purchase or transaction. This includes payment information, such as your credit or debit card number and other card information; other account and authentication information; and billing, shipping and contact details.
- **Things others do and information they provide about you.** 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.

#### Device Information

As described below, we collect information from and about the computers, phones, connected TVs and other web-connected devices you use that integrate with our Products, and we combine this information across different devices you use. For example, we use information collected about your use of our Products on your phone to better personalize the content (including ads) or features you see when you use our Products on another device, such as your laptop or tablet, or to measure whether you took an action in response to an ad we showed you on your phone on a different device.

Information we obtain from these devices includes:

- **Device attributes:** information such as the operating system, hardware and software versions, battery level, signal strength, available storage space, browser type, app and file names and types, and plugins.
- **Device operations:** information about operations and behaviors performed on the device, such as whether a window is foregrounded or backgrounded, or mouse movements (which can help distinguish humans from bots)
- **Identifiers:** unique identifiers, device IDs, and other identifiers, such as from games, apps or accounts you use, and Family Device IDs (or other identifiers unique to Facebook Company Products associated with the same device or account).
- **Device signals:** Bluetooth signals, and information about nearby Wi-Fi access points, beacons, and cell towers
- **Data from device settings:** information you allow us to receive through device settings you turn on, such as access to your GPS location, camera or photos.
- **Network and connections:** information such as the name of your mobile operator or ISP, language, time zone, mobile phone number, IP address, connection speed and, in some cases, information about other devices that are nearby or on your network, so we can do things like help you [stream a video from your phone to your TV](#).
- **Cookie data:** data from cookies stored on your device, including cookie IDs and settings. Learn more about how we use cookies in the [Facebook Cookies Policy](#) and [Instagram Cookies Policy](#).

#### Information from partners.

Advertisers, app developers, and publishers can send us information through [Facebook Business Tools](#) they use, including our social plug-ins (such as the Like button), Facebook Login, our [APIs and SDKs](#), or the Facebook pixel. These partners provide information about your activities off Facebook—including information about your device, websites you visit, purchases you make, the ads you see, and how you use their services—whether or not you have a Facebook account or are logged into Facebook. For example, a game developer could use our API to tell us what games you play, or a business could tell us about a purchase you made in its store. We also receive information about your online and offline actions and purchases from third-party data providers who have the rights to provide us with your information.

Partners receive your data when you visit or use their services or through third parties they work with. We require each of these partners to have lawful rights to collect, use and share your data before providing any data to us. [Learn more](#) about the types of partners we receive data from.

To learn more about how we use cookies in connection with Facebook Business Tools, review the [Facebook Cookies Policy](#) and [Instagram Cookies Policy](#).

[Return to top](#)

## How do we use this information?

We use the information we have (subject to choices you make) as described below and to provide and support the Facebook Products and related services described in the [Facebook Terms](#) and [Instagram Terms](#). Here's how:

#### Provide, personalize and improve our Products.

We use the information we have to deliver our Products, including to personalize features and content (including your [News Feed](#), [Instagram Feed](#), Instagram Stories and ads) and make suggestions for you (such as groups or [events](#) you may be interested in or topics you may want to follow) on and off our Products. To create personalized Products that are unique and relevant to you, we use your connections, preferences, interests and activities based on the data we collect and learn from you and others (including any [data with special protections](#) you choose to provide); how you use and interact with our Products; and the people, places, or things you're connected to and interested in on and off our Products. Learn more about how we use information about you to personalize your Facebook and Instagram experience, including features, content and recommendations in Facebook Products; you can also learn more about how we choose the [ads](#) that you see.

- **Information across Facebook Products and devices:** We connect information about your activities on different Facebook Products and devices to provide a more tailored and consistent experience on all Facebook Products you use, wherever you use them. For example, we can suggest that you join a group on Facebook that includes people you follow on Instagram or communicate with using Messenger. We can also make your experience more seamless, for example, by automatically filling in your registration information (such as your phone number) from one Facebook Product when you sign up for an account on a different Product.
- **Location-related information:** We use [location-related information](#) such as your current location, where you live, the places you like to go, and the businesses and people you're near to provide, personalize and improve our Products, [including ads](#), for you and others. Location-related information can be based on things like precise device location (if you've allowed us to collect it), IP addresses, and information from your and others' use of Facebook Products (such as check-ins or events you attend).
- **Product research and development:** We use the information we have to develop, test and improve our Products, including by conducting surveys and research, and testing and troubleshooting new products and features.
- **Face recognition:** If you have it turned on, we use face recognition technology to recognize you in photos, videos and camera experiences. The face-recognition templates we create may constitute [data with special protections](#) under the laws of your country. Learn more about how [we use face recognition technology](#), or control our use of this technology in [Facebook Settings](#). If we introduce face-recognition technology to your Instagram experience, we will let you know first, and you will have control over whether we use this technology for you.
- **Ads and other sponsored content:** We use the information we have about you—including information about your interests, actions and connections—to select and personalize ads, offers and other sponsored content that we show you. Learn more about how we [select and personalize ads](#), and your choices over the data we use to select ads and other sponsored content for you in the [Data Use Settings](#) and [Instagram Settings](#).

**Provide measurement, analytics, and other business services.**

We use the information we have (including your activity off our Products, such as the websites you visit and ads you see) to help advertisers and other partners measure the effectiveness and distribution of their ads and services, and understand the types of people who use their services and how people interact with their websites, apps, and services. [Learn how we share information](#) with these partners.

**Promote safety, integrity and security.**

We use the information we have to verify accounts and activity, combat harmful conduct, detect and prevent spam and other bad experiences, maintain the integrity of our Products, and promote safety and security on and off of Facebook Products. For example, we use data we have to investigate suspicious activity or violations of our terms or policies, or to [detect when someone needs help](#). To learn more, visit the [Facebook Security Help Center](#) and [Instagram Security Tips](#).

**Communicate with you.**

We use the information we have to send you marketing communications, communicate with you about our Products, and let you know about our policies and terms. We also use your information to respond to you when you contact us.

**Research and innovate for social good.**

We use the information we have (including from research partners we collaborate with) to conduct and support [research](#) and innovation on topics of general social welfare, technological advancement, public interest, health and well-being. For example, [we analyze information we have about migration patterns during crises](#) to aid relief efforts. [Learn more](#) about our research programs.

Research in good

## How is this information shared?

Your information is shared with others in the following ways:

### Sharing on Facebook Products

**People and accounts you share and communicate with**

When you share and communicate using our Products, you choose the audience for what you share. For example, when you post on Facebook, you select the audience for the post, such as a group, all of your friends, the public, or a customized list of people. Similarly, when you use Messenger or Instagram to communicate with people or businesses, those people and businesses can see the content you send. Your network can also see actions you have taken on our Products, including engagement with ads and sponsored content. We also let other accounts see who has viewed their Facebook or Instagram Stories.

**Public information** can be seen by anyone, on or off our Products, including if they don't have an account. This includes your Instagram username; any information you share with a public audience; information in your [public profile on Facebook](#); and content you share on a Facebook Page, [public Instagram account](#) or any other public forum, such as [Facebook Marketplace](#). You, other people using Facebook and Instagram, and we can provide access to or send public information to anyone on or off our Products, including in other Facebook Company Products, in search results, or through tools and APIs. Public information can also be seen, accessed, reshared or downloaded through third-party services such as search engines, APIs, and offline media such as TV, and by apps, websites and other services that integrate with our Products.

Learn more about what information is public and how to control your visibility on [Facebook](#) and [Instagram](#).

**Content others share or reshare about you**

You should consider 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, including people and businesses outside the audience you shared with. For example, 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, in person or in virtual reality experiences such as [Facebook Spaces](#). Also, when you comment on someone else's post or react to their content, your comment or reaction is visible to anyone who can see the other person's content, and that person can change the audience later.

People can also use our Products to create and share content about you with the audience they choose. For example, people can share a photo of you in a Story, mention or tag you at a location in a post, or share information about you in their posts or messages. If you are uncomfortable with what others have shared about you on our Products, you can learn how to [report the content](#).

**Information about your active status or presence on our Products.**

People in your networks can see signals telling them whether you are active on our Products, including whether you are currently active on [Instagram](#), [Messenger](#) or Facebook, or when you last used our Products.



**Apps, websites, and third-party integrations on or using our Products.**

When you choose to use third-party apps, websites, or other services that use, or are integrated with, our Products, they can receive information about what you post or share. For example, when you play a game with your Facebook friends or use a Facebook Comment or Share button on a website, the game developer or website can receive information about your activities in the game or receive a comment or link that you share from the website or Facebook. Also, when you download or use such third-party services, they can access your public profile on Facebook, and any information that you share with them. Apps and websites you use may receive your list of Facebook friends if you choose to share it with them. But apps and websites you use will not be able to receive any other information about your Facebook friends from you, or information about any of your Instagram followers (although your friends and followers may, of course, choose to share this information themselves). Information collected by these third-party services is subject to their own terms and policies, not this one.

Devices and operating systems providing native versions of Facebook and Instagram (i.e. where we have not developed our own first-party apps) will have access to all information you choose to share with them, including information your friends share with you, so they can provide our core functionality to you.

*Note: We are in the process of restricting developers' data access even further to help prevent abuse. For example, we will remove developers' access to your Facebook and Instagram data if you haven't used their app in 3 months, and we are changing Login, so that in the next version, we will reduce the data that an app can request without app review to include only name, Instagram username and bio, profile photo and email address. Requesting any other data will require our approval.*

**New owner.**

If the ownership or control of all or part of our Products or their assets changes, we may transfer your information to the new owner.

**Sharing with Third-Party Partners**

We work with third-party partners who help us provide and improve our Products or who use Facebook Business Tools to grow their businesses, which makes it possible to operate our companies and provide free services to people around the world. We don't sell any of your information to anyone, and we never will. We also impose strict restrictions on how our partners can use and disclose the data we provide. Here are the types of third parties we share information with:

**Partners who use our analytics services.**

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. For example, Page admins and Instagram business profiles receive information about the number of people or accounts who viewed, reacted to, or commented on their posts, as well as aggregate demographic and other information that helps them understand interactions with their Page or account.

**Advertisers.**

We provide advertisers with reports about the kinds of people seeing their ads and how their ads are performing, but we don't share information that personally identifies you (information such as your name or email address that by itself can be used to contact you or identifies who you are) unless you give us permission. For example, we provide general demographic and interest information to advertisers (for example, that an ad was seen by a woman between the ages of 25 and 34 who lives in Madrid and likes software engineering) to help them better understand their audience. We also confirm which Facebook ads led you to make a purchase or take an action with an advertiser.

**Measurement partners.**

We share information about you with companies that aggregate it to provide analytics and measurement reports to our partners.

**Partners offering goods and services in our Products.**

When you subscribe to receive premium content, or buy something from a seller in our Products, the content creator or seller can receive your public information and other information you share with them, as well as the information needed to complete the transaction, including shipping and contact details.

**Vendors and service providers.**

We provide information and content to vendors and service providers who support our business, such as by providing technical infrastructure services, analyzing how our Products are used, providing customer service, facilitating payments or conducting surveys.

**Researchers and academics.**

We also provide information and content to research partners and academics to conduct research that advances scholarship and innovation that support our business or mission, and enhances discovery and innovation on topics of general social welfare, technological advancement, public interest, health and well-being.

**Law enforcement or legal requests.**

We share information with law enforcement or in response to legal requests in the circumstances outlined below.

Learn more about how you can control the information about you that you or others share with third-party partners in the Facebook Settings and Instagram Settings.

[Return to top](#)

## How do the Facebook Companies work together?

Facebook and Instagram share infrastructure, systems and technology with other Facebook Companies (which include WhatsApp and Oculus) to provide an innovative,

relevant, consistent and safe experience across all [Facebook Company Products](#) you use. We also process information about you across the Facebook Companies for these purposes, as permitted by applicable law and in accordance with their terms and policies. For example, we process information from WhatsApp about accounts sending spam on its service so we can take appropriate action against those accounts on Facebook, Instagram or Messenger. We also work to understand how people use and interact with Facebook Company Products, such as understanding the number of unique users on different Facebook Company Products.

[Return to top](#)

## How can I manage or delete information about me?

We provide you with the ability to access, rectify, port and erase your data. Learn more in your [Facebook Settings](#) and [Instagram Settings](#).

We store data until it is no longer necessary to provide our services and Facebook Products, or until your account is deleted - whichever comes first. This is a case-by-case determination that depends on things like the nature of the data, why it is collected and processed, and relevant legal or operational retention needs. For example, when you search for something on Facebook, you can access and delete that query from within your search history at any time, but the log of that search is deleted after 6 months. If you submit a copy of your government-issued ID for account verification purposes, we delete that copy 30 days after submission. Learn more about deletion of [content you have shared](#) and [cookie data obtained through social plugins](#).

When you delete your account, we [delete things](#) you have posted, such as your photos and status updates, and you won't be able to recover that information later. Information that others have shared about you isn't part of your account and won't be deleted. If you don't want to delete your account but want to temporarily stop using the Products, you can deactivate your account instead. To delete your account at any time, please visit the [Facebook Settings](#) and [Instagram Settings](#).

[Return to top](#)

## How do we respond to legal requests or prevent harm?

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. This may include responding to legal requests from jurisdictions outside of the United States when we have a good-faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards.

- When we have a good-faith belief it is necessary to: detect, prevent and address fraud, unauthorized use of the Products, violations of our terms or policies, or other harmful or illegal activity; to protect ourselves (including our rights, property or Products), you or others, including as part of investigations or regulatory inquiries; or to prevent death or imminent bodily harm. For example, if relevant, we provide information to and receive information from third-party partners about the reliability of your account to prevent fraud, abuse and other harmful activity on and off our Products.

Information we receive about you (including financial transaction data related to purchases made with Facebook) can be accessed and preserved for an extended period when it is the subject of a legal request or obligation, governmental investigation, or investigations of possible violations of our terms or policies, or otherwise to prevent harm. We also retain information from accounts disabled for terms violations for at least a year to prevent repeat abuse or other term violations.

[Return to top](#)

## How do we operate and transfer data as part of our global services?

We share information globally, both internally within the Facebook Companies, and externally with our partners and with those you connect and share with around the world in accordance with this policy. Your information may, for example, be transferred or transmitted to, or stored and processed in the United States or other countries outside of where you live for the purposes as described in this policy. These data transfers are necessary to provide the services set forth in the [Facebook Terms](#) and [Instagram Terms](#) and to globally operate and provide our Products to you. We utilize [standard contract clauses](#), rely on the European Commission's [adequacy decisions](#) about certain countries, as applicable, and obtain your consent for these data transfers to the United States and other countries.

[Return to top](#)

## How will we notify you of changes to this policy?

We'll notify you before we make changes to this policy and give you the opportunity to review the revised policy before you choose to continue using our Products.

[Return to top](#)

**INTERVENOR'S  
EXHIBIT F**

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO  
CENTRAL DIVISION

DEPARTMENT 102

HON. MICHAEL T. SMYTH, JUDGE

THE PEOPLE,  
PLAINTIFF,  
VS.  
LANCE TOUCHSTONE,  
DEFENDANT.

CASE NO. SCD268262

REPORTER'S CERTIFIED TRANSCRIPT OF PROCEEDINGS

APRIL 18, 2018

PAGES 1 THROUGH 9

APPEARANCES:

FOR THE PLAINTIFF:

SUMMER STEPHAN,  
DISTRICT ATTORNEY  
BY: MICHAEL REILLY  
DEPUTY DISTRICT ATTORNEY  
WEST BROADWAY, SUITE 1300  
SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT:

MEGAN MARCOTTE,  
CHIEF DEPUTY ALT. PUBLIC DEFENDER  
BY: KATHERINE TESCH  
DEPUTY ALT. PUBLIC DEFENDER  
450 B STREET, SUITE 1200  
SAN DIEGO, CALIFORNIA 92101

REPORTED BY:

TERESA D. MENDOZA  
OFFICIAL COURT REPORTER  
CSR NO. 12947  
SAN DIEGO, CALIFORNIA 92101

1 SAN DIEGO, CALIFORNIA, WEDNESDAY, APRIL 18, 2018, D-102

2  
3 THE BAILIFF: NUMBER THREE, LANCE TOUCHSTONE.

4 MR. REILLY: GOOD MORNING, AGAIN, YOUR HONOR. MICHAEL  
5 REILLY APPEARING ON BEHALF OF THE PEOPLE.

6 MS. TESCH: KATE TESCH, DEPUTY ALTERNATE PUBLIC  
7 DEFENDER ON BEHALF OF MR. TOUCHSTONE, WHO IS PRESENT  
8 BEFORE THE COURT OUT CUSTODY.

9 YOUR HONOR, WE HAVE BEEN COMING HERE ABOUT EVERY  
10 THREE MONTHS FOR THE LAST YEAR OR SO AS THIS CASE GOES  
11 THROUGH THE APPELLATE PROCESS. IT'S FULLY BRIEFED AT THE  
12 SUPREME COURT. I DON'T EXPECT ARGUMENT TO BE SET UNTIL  
13 2019. MR. TOUCHSTONE FLIES DOWN FOR EVERY COURT  
14 APPEARANCE. HE'S HAS BEEN AT EVERY COURT APPEARANCE.  
15 INSTEAD OF EVERY THREE MONTHS, I'D ASK THAT WE SET IT OUT  
16 A LITTLE BIT LONGER SINCE I DON'T EXPECT ANY CHANGES FROM  
17 THE SUPREME COURT AT LEAST FOR ANOTHER YEAR OR SO. WE'RE  
18 HAPPY TO DO WHATEVER YOUR HONOR WOULD LIKE. I WOULD ASK  
19 FOR A SIX MONTH DATE. AGAIN, MR. TOUCHSTONE HAS BEEN  
20 MAKING EVERY APPEARANCE. HE FLIES DOWN FOR EVERY COURT  
21 APPEARANCE.

22 MR. REILLY: YOUR HONOR --

23 THE COURT: MR. REILLY?

24 MR. REILLY: I UNDERSTAND THE DEFENSE'S POSITION,  
25 HOWEVER, THIS CASE OBVIOUSLY IS GETTING ON THE OLDER SIDE.  
26 I UNDERSTAND THE SUPREME COURT TAKES A WHILE FOR THIS  
27 ISSUE TO BE RESOLVED. I AM AGAIN ASKING FOR ANOTHER THREE  
28 MONTH DATE JUST IN CASE SOMETHING HAPPENS.

1 THE COURT: WHY DON'T I PUT IT ON A SIX MONTH SCHEDULE  
2 WITH THE AGREEMENT THAT IF SOMETHING DOES HAPPEN THAT  
3 ALLOWS IT TO BE EARLIER THAT MR. TOUCHSTONE WILL AGREE TO  
4 BE IN CONTACT WITH HIS ATTORNEY AND COME DOWN IF I  
5 SCHEDULE SOMETHING EARLIER THAN SIX MONTHS?

6 THE DEFENDANT: YES, YOUR HONOR.

7 MS. TESCH: YES, YOUR HONOR. THERE IS 977 AUTHORITY.  
8 WHEN MR. TOUCHSTONE IS ORDERED TO BE BACK, HE'LL  
9 ABSOLUTELY BE HERE, BUT I HAVE RETAINED 977 AUTHORITY ON  
10 THE RECORD WITH JUDGE DANIELSON FOR ANY OTHER APPEARANCE  
11 THAT HE MIGHT NOT BE ABLE TO MAKE IT IN TIME FOR.

12 THE COURT: WE'LL SET A SIX MONTH DATE. FOR NOW, YOU  
13 ARE EXPECTED TO BE HERE, BUT IF SOMETHING COMES UP, YOU  
14 CAN COME EX PARTE TO DO THAT. IF WE KNOW NOTHING IS GOING  
15 TO HAPPEN, I'LL CONSIDER THAT.

16 MS. TESCH: SURE. THANK YOU.

17 MR. REILLY: YOUR HONOR, TWO OTHER THINGS.  
18 ADDITIONALLY, WHATEVER SIX MONTH DATE THAT IS, AGAIN, WE  
19 HAVE A WITNESS IN THE COURTROOM, REBECCA TOUCHSTONE, THE  
20 COURT HAS BEEN ORDERING BACK AS WE GO. I'D ASK THE COURT  
21 TO DO THE SAME THING. SHE'S HERE.

22 MR. VECCHIONE: GOOD MORNING, YOUR HONOR. FRANK  
23 VECCHIONE APPEARING WITH WITNESS REBECCA TOUCHSTONE, WHO  
24 IS PRESENT IN COURT.

25 THE COURT: YOU'RE ASKING ME TO ORDER HER BACK FOR THE  
26 SIX MONTH DATE?

27 MR. REILLY: I AM, YOUR HONOR. AND AFTER THAT, I HAVE  
28 ONE MORE MATTER.



1 THE COURT: WHAT'S YOUR OTHER MATTER?

2 MR. REILLY: YOUR HONOR, I ALSO HAVE THE NAMED VICTIM  
3 JEFF RENTERIA, WHO IS PRESENT IN THE COURTROOM.

4 MR. RENTERIA?

5 YOUR HONOR, I HAVE EXPLAINED TO MR. RENTERIA THAT  
6 THE CURRENT STATUS OF THE CASE, THE SUPERIOR COURT ISSUED  
7 A STAY AND THERE'S NOTHING WE CAN DO ON THE CASE AT THIS  
8 TIME. DUE TO HIS INJURIES, INITIALLY, HE WAS NEVER ABLE  
9 TO APPEAR AT THE ARRAIGNMENT OR ADDRESS THE COURT. IF THE  
10 COURT IS SO INCLINED, HE WANTED TO BRIEFLY ADDRESS THE  
11 COURT.

12 THE COURT: I THINK HE'S ENTITLED TO DO THAT.

13 GOOD MORNING, SIR.

14 THE WITNESS: HELLO, YES. I'M HERE TODAY TO ADDRESS  
15 THE VIOLATIONS OF MARSY'S LAW AND MY VICTIM'S RIGHTS IN  
16 THIS CASE. I HAVE A RIGHT TO A SPEEDY TRIAL. I HAVE A  
17 RIGHT TO NOT BE HARASSED BY THE DEFENDANT AND HIS  
18 ATTORNEY. THEY HAVE SENT PEOPLE OVER TO MY FRIEND'S AND  
19 PARENT'S HOUSE. IT'S JUST BEEN ONE THING RIGHT AFTER THE  
20 OTHER. I FILED A LAWSUIT ALREADY.

21 WHEN DO I GET TO ASSERT MY RIGHTS? THIS THING HAS  
22 BEEN GOING ON FOR SO LONG THAT EVERYTHING HAS JUST FALLEN  
23 OFF TO THE WAYSIDE, LIKE IT'S NOT EVEN GOING TO HAPPEN. I  
24 AM COMING DOWN HERE OUT OF MY OWN FREE WILL. THIS GUY IS  
25 OUT HERE RUNNING AROUND FREE RIGHT.

26 I HAVEN'T GOTTEN ANY OF MY VICTIM'S COMPENSATION.  
27 I HAVE RECEIVED NOTHING. I'M BASICALLY HOMELESS ON FOOD  
28 STAMPS BECAUSE I HAD TO CHANGE THE NAME OF MY BUSINESS

1 BECAUSE THIS GUY IS OUT RUNNING AROUND FREE AND BECAUSE OF  
2 THE THINGS THAT HIS LAWYER SAID IN OPEN COURT ABOUT ME,  
3 WHICH WASN'T TRUE. AND I JUST WOULD LIKE THE COURT TO  
4 ADDRESS THESE ISSUES RIGHT NOW.

5 THE COURT: WELL, I'M LIMITED TO WHAT I CAN ADDRESS  
6 NOW. I'LL SAY A FEW THINGS. ONE, I DON'T HAVE ANY POWER  
7 TO MOVE THE CASE UP WHEN THE SUPREME COURT HAS STAYED THE  
8 PROCEEDING ON APPEAL. I LITERALLY HAVE NO ABILITY TO DO  
9 THAT. IF I COULD DO IT, I'D SEE WHAT I COULD DO.

10 THE WITNESS: THE STAY IS IN VIOLATION OF MARSY'S LAW  
11 BY EVEN GOING AFTER MY PRIVATE MESSAGES ON FACEBOOK AS  
12 WELL.

13 THE COURT: IF THE STAY IS IN VIOLATION OF MARSY'S  
14 LAW, I SUGGEST STRONGLY THAT YOU TAKE IT UP WITH THE  
15 SUPREME COURT BECAUSE I HAVE NO POWER TO DO ANYTHING ABOUT  
16 WHAT THEY'RE DOING.

17 AS FAR AS YOUR BEING HARASSED, I WOULD SUGGEST  
18 THAT THE DISTRICT ATTORNEY'S OFFICE TALK TO YOU AND SEE  
19 WHETHER THERE'S ACTUALLY ANY VIOLATION GOING ON THAT THEY  
20 CAN HAVE ADDRESSED BY THE COURT.

21 THE DEFENSE COUNSEL CONTACTING PEOPLE, IT DEPENDS  
22 WHY THEY'RE DOING THAT AS TO WHETHER IT'S APPROPRIATE OR  
23 NOT. IF THEY'RE INTERVIEWING WITNESSES AND THINGS LIKE  
24 THAT --

25 THE WITNESS: THEY'RE HARASSING MY FRIENDS AND FAMILY.

26 THE COURT: WELL, HARASSING TO YOU MIGHT BE  
27 INTERVIEWING TO THEM. MY POINT IS THAT I DON'T KNOW WHAT  
28 THEY'RE ACTUALLY DOING. I WOULD SUGGEST YOU TALK TO THE

1 DA.

2 THE WITNESS: ARE THEY ALLOWED TO CONTACT MY FRIENDS  
3 AND FAMILY ON HIS BEHALF? ISN'T THAT AGAINST MARSY'S LAW?

4 THE COURT: NOT NECESSARILY, AT ALL, NO. IT DEPENDS  
5 WHY THEY'RE DOING IT AND WHAT THEY'RE DOING. AGAIN, I'LL  
6 SUGGEST, AGAIN, AND DIRECT THE DISTRICT ATTORNEY TO TALK  
7 TO YOU IN DETAIL ABOUT YOUR CONCERNS AND SEE IF SOMETHING  
8 NEEDS TO BE --

9 THE WITNESS: I HAVEN'T BEEN GETTING ANYTHING  
10 ADDRESSED BY THE DISTRICT ATTORNEY OR ANYTHING ON THE  
11 STATE SIDE. I HAVEN'T BEEN GIVEN THE VICTIM'S  
12 COMPENSATION FUND. I WAS APPROVE FOR \$61,000. I WASN'T  
13 ABLE TO ACCESS IT AND I HAVE NOW HAVE PERMANENT NERVE  
14 DAMAGE THAT IS IRREVERSIBLE.

15 THE COURT: WHY HAVEN'T YOU BEEN ABLE TO ACCESS IT?

16 THE WITNESS: BECAUSE THEY WILL NOT GIVE IT TO ME.  
17 EVERY SINGLE REQUEST THAT I HAVE MADE FOR TREATMENT OR  
18 ACCESS TO THOSE FUNDS, I HAVE RECEIVED NOTHING. THEY ALL  
19 GOT PAID TO PROCESS MY APPLICATION THROUGH. EACH ONE GOT  
20 PAID 500 BUCKS FOR EACH APPLICATION AND I HAVE RECEIVED  
21 NOTHING. I HAVE RECEIVED NOTHING FOR THE TESTIMONY THAT I  
22 MADE THE FIRST TIME THAT I CAME IN AT A PRETRIAL  
23 CONFERENCE. I'VE RECEIVED ABSOLUTELY NO COMPENSATION FOR  
24 THAT. I'VE RECEIVED NOTHING FROM THE STATE. THEY DON'T  
25 FEEL INCLINED TO GIVE ME ANYTHING.

26 I JUST -- I REALLY DON'T FEEL LIKE MY RIGHTS ARE  
27 BEING UPHELD BY THE STATE AND I JUST WONDER WHAT'S GOING  
28 ON HERE, YOU KNOW. IT'S LIKE I WAS PROMISED ALL THIS

1 STUFF TO TESTIFY IN COURT, OKAY, AND I HAVEN'T RECEIVED  
2 ANY OF IT, NOT ONE THING.

3 THE COURT: MR. REILLY, ANY IDEA ABOUT THE  
4 COMPENSATION HE IS NOT RECEIVING FOR HAVING TESTIFIED?

5 MR. REILLY: YOUR HONOR, I DON'T BELIEVE THERE'S ANY  
6 COMPENSATION FOR A SOMEONE WHO IS A SUBPOENAED VICTIM IN A  
7 PRELIMINARY HEARING TO GET COMPENSATED FOR  
8 THEIR TESTIMONY.

9 THE COURT: I'M CERTAINLY NOT FAMILIAR WITH THAT  
10 EITHER, BUT HE'S CLAIMING THAT HE WAS GOING TO GET PAID TO  
11 TESTIFY.

12 THE WITNESS: I'M NOT HERE FOR FREE.

13 THE COURT: YOU MIGHT BE. WE'RE DONE WITH THIS  
14 PROCEEDING. I AM GOING TO ORDER MR. REILLY TO MEET WITH  
15 THE VICTIM AFTER THIS, AFTER WE'RE DONE HERE, AND ADDRESS  
16 HIS CONCERNS TO THE EXTENT POSSIBLE.

17 MR. REILLY: FOR THE RECORD, I KNOW THAT MANY PEOPLE  
18 AND MYSELF IN THIS OFFICE HAVE SPOKEN TO MR. RENTERIA ON  
19 MULTIPLE OCCASIONS. THE VICTIM COMPENSATION, ALL THOSE  
20 THINGS, AGAIN, THERE'S LOT OF PROCESSES GOING ON AND  
21 REASONS AND OTHER DECISIONS, BUT JUST TO ASSURE THE COURT  
22 AND MR. RENTERIA THAT EVERYTHING THAT WE HAVE BEEN ABLE TO  
23 DO IS WITHIN REASON AND LAWFULLY BEEN ATTEMPTING TO DO.

24 THE COURT: KEEP ATTEMPTING ESPECIALLY WITH RESPECT TO  
25 THE VICTIM COMPENSATION FUND. YOU HAVE PEOPLE THAT  
26 SPECIALIZE IN THAT, USE THEM AGAIN OR MORE.

27 MR. REILLY: UNDERSTOOD, YOUR HONOR.

28 THE COURT: YOU KNOW THERE'S NOT A LOT I CAN DO FROM

1 THIS END ESPECIALLY WHEN THE PROCEEDINGS ARE STAYED.

2 THE WITNESS: I'M NOT SATISFIED WITH THAT, JUDGE. I  
3 WISH TO RETRACT MY PARTICIPATION IN THIS HEARING.

4 THE COURT: YOU DO WHAT YOU NEED TO DO. I'LL LET THE  
5 DA DEAL WITH THAT.

6 CONFIRM THE DATE ON JUNE 25TH.

7 FOR THE RECORD, I'M NOT AUTHORIZING YOU TO IGNORE  
8 SUBPOENAS.

9 WE'LL HAVE A SIX MONTH DATE. WE'LL GIVE YOU A  
10 SIX MONTH DATE. I'LL ORDER -- THE WITNESS WAS REBECCA  
11 TOUCHSTONE, ORDER HER TO RETURN ON THE DATE WE'RE ABOUT TO  
12 SET.

13 WHAT IS THAT DATE?

14 THE CLERK: OCTOBER 15, 9:00 A.M., DEPARTMENT 102.

15 THE COURT: THANK YOU.

16

17 (THE PROCEEDINGS WERE CONCLUDED)

18

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1 STATE OF CALIFORNIA )  
2 COUNTY OF SAN DIEGO ) SS

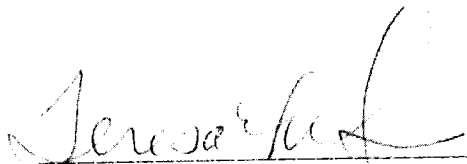
3 PEOPLE VS. LANCE TOUCHSTONE, CASE NO. SCD268262  
4

5  
6 I, TERESA D. MENDOZA, OFFICIAL REPORTER FOR THE  
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE  
8 COUNTY OF SAN DIEGO, DO HEREBY CERTIFY:

9 THAT AS SUCH REPORTER, I REPORTED IN MACHINE SHORTHAND  
10 THE PROCEEDINGS HELD IN THE FOREGOING CASE;

11 THAT MY NOTES WERE TRANSCRIBED INTO TYPEWRITING UNDER  
12 MY DIRECTION AND THE PROCEEDINGS HELD ON APRIL 18, 2018,  
13 CONTAINED WITHIN PAGES 1 THROUGH 9, ARE A TRUE AND CORRECT  
14 TRANSCRIPTION.

15 DATED THIS 4TH DAY OF MAY, 2018.  
16  
17

18  
19  
20   
21 TERESA D. MENDOZA  
22 CSR NO. 12947  
23  
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1                    TERESA D. MENDOZA, CSR NO. 12947

2                    SAN DIEGO SUPERIOR COURT  
3                    1100 UNION STREET  
4                    DIEGO, CALIFORNIA, 92101  
5                    (619) 844-2304

6 **PROCEEDINGS:** PEOPLE VS TOUCHSTONE

7 **DATE OF INVOICE:** 6/14/18

8 **CASE NO:** SCD268262

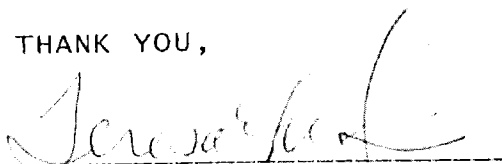
9 **DATE OF HEARING:** 4/18/18

10 **AMOUNT DUE:** \$25.20/9 PAGES/ORIGINAL PLUS ONE COPY

11                    TO WHOM IT MAY CONCERN, PER THE REQUEST OF MARITES  
12 BALAGTAS, A TRANSCRIPT OF THE PROCEEDINGS HELD IN THE  
13 ABOVE-ENTITLED MATTER WAS TRANSCRIBED AND DELIVERED ON  
14 JUNE 14, 2018, VIA E-MAIL. PAYMENT IS DUE UPON RECEIPT OF  
15 TRANSCRIPT.

16                    SHOULD YOU NEED ANY FURTHER INFO, PLEASE FEEL FREE TO  
17 CONTACT ME.

18                    THANK YOU,

19 

20                    \_\_\_\_\_  
21                    TERESA D. MENDOZA  
22                    619-844-2304

INTERVENOR'S  
EXHIBIT G



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Date: March 14, 2018

Dept. 102

Reporter: Not reported

PRESENT: MICHAEL T. SMYTH

EX-PARTE MINUTE ORDER

Case No. SCD268262

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff

VS.

LANCE TOUCHSTONE, Defendant

LANCE TOUCHSTONE, Defendant, is charged in the above-referenced case with attempted murder and firearms enhancements. On or about February 13, 2018, the alleged victim in this case, Jeffrey R., filed a "Motion and complaint for victim Rights Violations," hereinafter, "Motion." The Motion seeks damages in the sum of \$2,000,000.00, against the State of California, for alleged violations of Marcy's Law, also known as Victims' Bill of Rights of 2008, as set forth in Cal. Const. Art. 1, § 28. Jeffrey R. also asserts that the Office of the District Attorney has not provided sufficient notification and/or assistance in enforcement his rights under subdivision (b) of Cal. Const. Art. 1, § 28.


Cal. Const., art. I, § 28(c)(2) states, "This section does not create any cause of action for compensation or damages against the State, any political subdivision of the State, any officer, employee, or agent of the State or of any of its political subdivisions, or any officer or employee of the court." Accordingly, to the extent the Motion requests monetary damages against the State of California pursuant to Cal. Const., art. I, § 28, it is summarily denied.

Cal. Const., art. I, § 28(c)(1) provides, "A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney **upon request of the victim**, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request." (Emphasis added.) The court is informed and believes that the Motion filed by Jeffrey R. constitutes a request for the assistance of the Office the District Attorney for the enforcement of his rights under the above-quoted provision. However, since the Motion was unaccompanied by a proof of service, the court is uncertain whether the Motion was served upon the Office of the District Attorney.

A copy of the Motion and this Order is ordered served on counsel for the Defendant<sup>1</sup> and the Office of the District Attorney. A copy of this Order is ordered served of Jeffrey R.

IT IS SO ORDERED:

Dated: March 19, 2018

  
MICHAEL T. SMYTH  
JUDGE OF THE SUPERIOR COURT

<sup>1</sup>Counsel for Defendant may NOT disclose or permit to be disclosed to Defendant, members of the Defendant's family, or anyone else, the address or telephone number of the alleged victim, Jeffrey R., unless specifically permitted to do so by the court after a hearing and a showing of good cause. (Pen. Code, § 1054.2(a)(1))

INTERVENOR'S  
EXHIBIT H

APR 28 2017  
BY: P. Reyes

1 James G. Snell, State Bar No. 173070  
JSnell@perkinscoie.com  
2 Christian Lee, State Bar No. 301671  
CLee@perkinscoie.com  
3 PERKINS COIE LLP  
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Telephone: 650.838.4300  
5 Facsimile: 650.838.4350

6 Attorneys for Non-Party  
7 Facebook, Inc.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN DIEGO

11 THE PEOPLE OF THE STATE OF  
12 CALIFORNIA,

13 Plaintiff,

14 v.

15 LANCE TOUCHSTONE,

16 Defendant.

Case No. CD268262

**NON-PARTY FACEBOOK, INC.'S  
NOTICE OF MOTION AND MOTION TO  
QUASH SUBPOENA DUCES TECUM AND  
VACATE ORDER ALLOWING  
SUBPOENA DUCES TECUM;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

Date: April 27, 2017  
Time: 9:00 A.M.  
Dept.: 11  
Judge: Hon. David Danielsen

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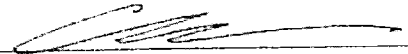
TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on April 27, 2017 at 9:00 A.M. or as soon after as this matter may be heard, in the Superior Court of the State of California, County of San Diego, non-party Facebook, Inc. ("Facebook") will and hereby does move this Court for an order quashing the subpoena duces tecum that defendant Lance Touchstone ("Defendant") served on Facebook and to vacate the Court's March 16, 2017 order.

Facebook makes this motion pursuant to this Notice of Motion and Motion, Memorandum of Points and Authorities, and the concurrently filed Declaration of Christian Lee in Support; the files and records in this case; and any argument advanced at the hearing on this Motion.

DATED: April 6, 2017

**PERKINS COIE LLP**

By:   
Christian Lee

Attorneys for Non-Party  
Facebook Inc.

1 I. INTRODUCTION

2 Non-party Facebook, Inc. ("Facebook") is a service provider that allows people to  
3 communicate and share with one another. Defendant Lance Touchstone ("Defendant") issued a  
4 subpoena to Facebook, accompanied by an Order from this Court, for the content of  
5 communications associated with a purported Facebook account that Defendant contends belongs  
6 to the victim. But the federal Stored Communications Act, 18 U.S.C. § 2701, *et seq.* ("SCA")  
7 does not allow private parties, including criminal defendants, to use a subpoena or court order to  
8 obtain other persons' electronic communications from service providers such as Facebook.  
9 Defendant can instead seek the communications from the account owner, who is not bound by the  
10 SCA and who can log into Facebook at any time to preserve, collect, produce, and authenticate  
11 their own account content. Defendant can also seek assistance from the prosecutor to obtain a  
12 search warrant for the content he needs.

13 Because federal law prohibits Defendant from obtaining the requested content from  
14 Facebook, and Defendant has other means of obtaining the information he seeks, Facebook  
15 respectfully requests that the Court quash the subpoena and vacate its prior Order endorsing the  
16 subpoena.

17 II. STATEMENT OF FACTS

18 On March 6, 2017, Facebook received a subpoena from Defendant seeking the contents of  
19 communications for a purported Facebook account. (Declaration of Christian Lee in Support of  
20 Non-Party Facebook, Inc.'s Motion to Quash Subpoena Duces Tecum and Vacate Order  
21 Allowing Subpoena Duces Tecum ("Lee Decl."), Ex. A.) On March 20, 2017, Facebook sent a  
22 letter to Defendant's counsel objecting to the subpoena, including on the grounds that the SCA  
23 does not permit private parties to compel disclosure of the content of stored communications with  
24 a subpoena or court order, and requesting that Defendant withdraw the subpoena. (*Id.*, Ex. B.)

25 On March 20, 2017, Facebook received another subpoena from Defendant, dated March  
26 16, 2017, seeking "[a]ll records . . . including timeline posts, messages, phone calls, photos,  
27 videos, location information, and user-input information." (*Id.*, Ex. C.) This subpoena was  
28 accompanied by two orders from this Court, one of which commanded Facebook to preserve

1 stored content and account information for 180 days, and one of which endorsed the March 16,  
2 2017 subpoena. (*Id.*) Facebook preserved the requested information on March 21, 2017. (*Id.*,  
3 ¶ 5.)

4 On March 21, 2017, counsel for Facebook met and conferred by telephone with counsel  
5 for Defendant. (*Id.*, ¶ 6.) Defense counsel refused to withdraw the subpoena and stated that he  
6 had not attempted to subpoena the records directly from the user nor attempted to work with the  
7 People to obtain the information sought with a search warrant. (*Id.*)

8 Facebook now files this Motion to Quash Defendant's subpoena and vacate the Court's  
9 prior order endorsing the subpoena.

### 10 III. ARGUMENT

#### 11 A. Federal Law Does Not Allow Criminal Defendants to Obtain the Contents of 12 Communications from a Service Provider Via a Subpoena or Court Order.

13 The federal Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.*, does not  
14 allow private parties to obtain the contents of a user's electronic communications from a service  
15 provider via a subpoena or court order. 18 U.S.C. § 2702(a)(1), (2) (service providers "shall not  
16 knowingly divulge to any person or entity" the contents of users' communications). The SCA  
17 contains several narrow exceptions, none of which allow disclosure in response to criminal  
18 defense subpoenas. *See id.* § 2702(b)(1)-(8) (enumerating exceptions to prohibition); *Facebook,*  
19 *Inc. v. Superior Court (Hunter)*, 240 Cal. App. 4th 203, 215 (2015), *review granted and opinion*  
20 *superseded sub nom. Facebook v. S.C.*, 362 P.3d 430 (Cal. 2015) (holding that the SCA prohibits  
21 Instagram, Facebook, and Twitter from disclosing content to a criminal defendant)<sup>1</sup>; *cf. United*  
22 *States v. Pierce*, 785 F.3d 832, 842 (2d Cir. 2015) (declining to consider criminal defendant's  
23 challenge to the SCA and affirming order quashing subpoena to Facebook because "[t]he SCA  
24 does not, on its face, permit a defendant to obtain" the contents of communications, and  
25 defendant could obtain the content through other means). As a result, courts routinely quash  
26 subpoenas issued by criminal defendants seeking the contents of users' communications from

27 \_\_\_\_\_  
28 <sup>1</sup> The *Facebook* decision may be cited for persuasive value while review by the California  
Supreme Court is pending. Cal. Rules of Court, rule 8.1115(e)(1).

1 Facebook. *See, e.g., People v. Tolentino*, No. H56734, slip op. at 6 (Cal. Sup. Ct. Feb. 10, 2015)  
2 (granting Facebook’s motion to quash subpoena because the SCA “lacks any language that  
3 explicitly authorizes a service provider to divulge the contents of a communication pursuant to a  
4 subpoena or court order”) (Lee Decl., Ex. D); *Texas v. Herrera*, Cause Nos. F11-42288-U, F11-  
5 42289-U and F11-42290-U, slip op. ¶ 3 (Tex. Dist. Ct. Oct. 28, 2014) (granting Facebook’s  
6 motion to quash criminal defendant’s subpoena and holding that “Defendant is not entitled to the  
7 content of the subpoenaed information based on” the SCA) (Lee Decl., Ex. E); *People v. Pour*,  
8 No. 08 CF 2781, slip op. at 1 (Ill. Cir. Ct. July 1, 2010) (denying defendant’s motion to compel  
9 production from Facebook because defendant’s subpoena was “barred under federal law”) (Lee  
10 Decl., Ex. F). Courts also vacate orders that erroneously direct Facebook to disclose user  
11 communications. *See, e.g., Commw. v. McCarthy*, No. 1059CR2265, slip op. at 5 (Mass. Dist.  
12 Ct. Sept. 13, 2011) (“[T]he terms of the [SCA] do not permit Facebook to comply with this  
13 court’s order to produce the records that the defendant seeks.”) (Lee Decl., Ex. G).<sup>2</sup>

14 Indeed, the California Court of Appeal has specifically held that an order directing a  
15 service provider to disclose the content of a user’s electronic communications violated the SCA,  
16 and that “insofar as any state law requires a person to violate federal law, it is preempted and  
17 unenforceable.” *Negro v. Superior Court*, 230 Cal. App. 4th 879, 888-89 (2014); *see also*  
18 *Facebook*, 192 Cal. Rptr. 3d 443, 450 (citing *Negro*, 230 Cal. App. 4th at 889); *O’Grady v.*  
19 *Superior Court*, 139 Cal. App. 4th 1423, 1442 (2006) (a service provider’s compliance with a  
20 subpoena seeking content, even if accompanied by a court order, is unlawful).

21 Only a governmental entity, such as a prosecutor or law enforcement officer, can obtain  
22 the content of user communications from a service provider with legal process, and even then it  
23 must be pursuant to a search warrant. 18 U.S.C. § 2703(a), (b); Cal. Penal Code § 1546.1(a), (b)  
24 (requiring governmental entities to obtain a search warrant or wiretap order before obtaining  
25 “electronic communications information”); *see also United States v. Warshak*, 631 F.3d 266, 288  
26 (6th Cir. 2010) (search warrant required for the production of the contents of communications).

27 \_\_\_\_\_  
28 <sup>2</sup> Facebook does not cite these orders as precedential authority, but rather to provide the Court  
with context on how other courts have treated this issue.

1 Neither criminal defendants, their attorneys, or the Court, are governmental entities for purposes  
2 of the SCA. *See* 18 U.S.C. § 2711(4) (limiting a governmental entity to “a department or agency  
3 of the United States or any State or political subdivision thereof”); *United States v. Amawi*, 552 F.  
4 Supp. 2d 679, 680 (N.D. Ohio 2008) (finding that public defender’s office is not a governmental  
5 entity, and that the SCA “distinguishes between courts, which issue orders, and government  
6 entities, which can apply for orders”). And even if they were, a subpoena or court order is  
7 insufficient to obtain content -- only a search warrant is sufficient to compel disclosure of content.  
8 Cal. Penal Code § 1546.1(a), (b); *Warshak*, 631 F.3d at 288 (requiring the government to obtain a  
9 search warrant to obtain content).<sup>3</sup>

10 **B. Defendant Can Obtain the Communications He Seeks Directly From the**  
11 **Account Owner or by Working With the Prosecution to Obtain a Search**  
12 **Warrant.**

12 Instead of seeking communications content from Facebook, Defendant should seek  
13 content directly from the parties to those communications, who own and have custody and control  
14 over their accounts and are untrammelled by the SCA’s restrictions. *See O’Grady*, 139 Cal. App.  
15 4th at 1446-47; *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730-31 (9th Cir. 2011)  
16 (stating that “[the user] himself is the person who should be responsible for disclosing his own  
17 emails”); *Juror No. One v. Superior Court*, 206 Cal. App. 4th 854, 864 (2012) (stating that SCA  
18 protection would apply “only as to attempts by the court or real parties in interest to compel  
19 Facebook to disclose the requested information”). Indeed, the principle that criminal defendants  
20 should seek stored communications directly from the parties to the communications was recently  
21 confirmed by the Second Circuit when it declined to consider a criminal defendant’s  
22 constitutional challenge to the SCA. *Pierce*, 785 F.3d at 842. In *Pierce*, Facebook successfully  
23 moved to quash a criminal defense subpoena seeking the content of a user’s Facebook account.  
24 785 F.3d at 841-42. The defendant then obtained at least some of the desired content via a private

25  
26 <sup>3</sup> The fact that the SCA provides the government means to access the contents of stored  
27 communications using certain criminal investigative tools unavailable to private parties is hardly  
28 unique. For example, “the search warrant provisions of Fed. R. Crim. P. 41(b) and the wiretap  
application provisions of 18 U.S.C. § 2516(a) both provide a means for the government to obtain  
evidence without a mechanism for defendants to do so.” *Pierce*, 785 F.3d at 842, n.2.



1 investigator and used it at trial. On appeal, the defendant argued that the SCA violated his Fifth  
2 and Sixth Amendment rights “because it provides a mechanism for the government to obtain  
3 stored content from a provider, without a comparable mechanism for criminal defendants to do  
4 so,” noting that “he had no way of knowing whether or not the Facebook records that he had for  
5 [the user] were complete.” *Id.* at 842. The Second Circuit rejected the defendant’s claim, noting  
6 that the defendant had other methods to obtain the desired content and that he had not issued  
7 subpoenas directly to the user or parties to the communications. *Id.*

8 *Pierce* is instructive in this case. Defendant can seek the content he desires directly from  
9 the user or anyone that has permission to access the user’s communications. As our Court of  
10 Appeal explained in *O’Grady*, service providers are a “kind of data bailee,” and the SCA “does  
11 not render the data wholly unavailable; it only means that the discovery must be directed to the  
12 owner of the data, not the bailee to whom it was entrusted.” *Id.* at 1447; *see also Juror No. One*,  
13 206 Cal. App. 4th at 864. The SCA “invest[s] users with the final say regarding disclosure of the  
14 contents of their stored messages while limiting the burdens placed on service providers by the  
15 Act.” *Negro*, 230 Cal. App. 4th at 896. The Ninth Circuit and other federal courts have similarly  
16 noted that the inability to obtain documents from a provider does not affect the ability to obtain  
17 the documents directly from the user. *Suzlon*, 671 F.3d at 731; *see also Flagg v. City of Detroit*,  
18 252 F.R.D. 346, 366 (E.D. Mich. 2008) (noting that “it seems apparent” that it would be unlawful  
19 for the provider to disclose content in response to a subpoena, and ordering the issuing party to  
20 direct his request to the account holder).

21 Here, Defendant admitted he has made no attempt to obtain the content he seeks from the  
22 owner of the account in question. (Lee Decl., ¶ 6.) But Defendant’s failure to serve a subpoena  
23 duces tecum on the account owner, and his speculative belief that the account owner would be  
24 uncooperative, and are not enough to overcome federal law. Facebook users have control over  
25 the content stored in their account and may log into their accounts anytime to preserve, collect,  
26 and produce the contents of their accounts. Defendant should obtain the requested content from  
27 the account holder, rather than requesting it from non-party Facebook.

1 of the requested information, and finding that the SCA did not infringe on the defendant's  
2 Constitutional rights); *Pierce*, 785 F.3d at 842 (affirming order granting Facebook's motion to  
3 quash subpoena and declining to address constitutional issues because defendant "possessed the  
4 very contents he claims the SCA prevented him from obtaining" and he could have, but "failed to  
5 subpoena" the user of the Facebook account in question.); *Juror No. One*, 206 Cal. App. 4th at  
6 864. Accordingly, the Court need not consider the constitutionality of the SCA because it can be  
7 construed consistent with the Constitution and because courts may not anticipate a question of  
8 constitutional law. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (Courts are obligated  
9 to construe statutes to avoid constitutional problems.); *see also Wash. State Grange v. Wash.*  
10 *State Rep. Party*, 552 U.S. 442, 450 (2008) (Courts may not "anticipate a question of  
11 constitutional law in advance of the necessity of deciding it.").

12 Furthermore, Defendant's suggestion that the due process clause requires a private party  
13 such as Facebook to disclose communications in violation of the SCA is meritless. The due  
14 process clause prevents abuses by the government, and imposes no obligations on a private party  
15 such as Facebook. U.S. Const. Amend. XIV, § 1 ("nor shall any *State* deprive any person of life,  
16 liberty, or property, without due process of law") (emphasis added); *Lugar v. Edmondson Oil Co.*,  
17 457 U.S. 922, 924 (1982) (explaining that the Constitution "can be violated only by conduct that  
18 may be fairly characterized as 'state action'"). Even if Defendant was correct that the SCA  
19 somehow violates his due process rights -- and he is not -- his remedy is against the State, not  
20 Facebook. For example, the Court could prohibit certain witnesses from testifying if they do not  
21 agree to disclose their own Facebook content, decline to consider Facebook evidence offered by  
22 the prosecution, or dismiss the indictment altogether. The remedy would not be to order  
23 Facebook to violate federal law. U.S. Const., Art. VI; *see also Negro*, 230 Cal. App. 4th at 888  
24 (holding that "insofar as any state law requires a person to violate federal law, it is preempted and  
25 unenforceable.").

26 **D. The Subpoena Is Impermissibly Overbroad and A Fishing Expedition.**

27 Finally, Defendant's demand that Facebook produce "[a]ll records . . . including timeline  
28 posts, messages, phone calls, photos, videos, location information, and user-input information,"

1 (Lee Decl., Ex. C.) is overbroad and a fishing expedition into the victim's account. *See People v.*  
2 *Jackson*, 110 Cal. App. 4th 280, 286 (2003) ("Although policy may favor granting liberal  
3 discovery to criminal defendants, courts may nevertheless refuse to grant discovery if the burdens  
4 placed on government and on third parties substantially outweigh the demonstrated need for  
5 discovery."). Defendant does not have an unbridled right to criminal discovery, as criminal  
6 defendants must demonstrate the following when seeking documents by subpoena duces tecum:  
7 "(1) that the documents are evidentiary and relev[a]nt; (2) that they are not otherwise procurable  
8 reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly  
9 prepare for trial without such production and inspection in advance of trial and that the failure to  
10 obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is  
11 made in good faith and is not intended as a general 'fishing expedition.'" *United States v. Nixon*,  
12 418 U.S. 683 699-700 (1974).

13 Here, the subpoena provides no constraints but broadly seeks all "posts, messages, phone  
14 calls, photos, videos, location information, and user-input information," (Lee Decl., Ex. C.) for a  
15 purported account so Defendant can sift through and see if potential relevant material exists. This  
16 is a clear example of a fishing expedition, and thus fails *Nixon*. In addition, as a non-party with  
17 no stake in this matter, Facebook should not be forced to respond to such an expansive and  
18 speculative request. *Calcor Space Facility, Inc. v. Superior Court*, 53 Cal. App. 4th 216, 224-25  
19 (1997) (noting that limits on "fishing expeditions" apply "with even more weight to a nonparty");  
20 *Monarch Healthcare v. Superior Court*, 78 Cal. App. 4th 1282, 1289-90 (2000) (holding that  
21 "nonparty witnesses should be somewhat protected from the burdensome demands of litigation")  
22 (citation omitted).

#### 23 IV. CONCLUSION

24 For these reasons, Facebook respectfully asks the Court to quash Defendant's subpoena  
25 and vacate its March 16, 2017 Order.

26 DATED: April 6, 2017

PERKINS COIE LLP

By: 

Christian Lee

Attorneys for Non-Party Facebook, Inc.

APR 06 2017  
S. P. [unclear]

PROOF OF SERVICE VIA EMAIL AND U.S. MAIL

I am a citizen of the United States and employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3150 Porter Drive, Palo Alto, California 94304-1212. On April 6, 2017, I served the:

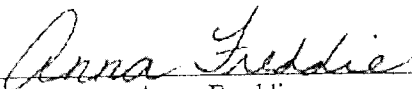
**NON-PARTY FACEBOOK, INC.'S NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA DUCES TECUM AND VACATE ORDER ALLOWING SUBPOENA DUCES TECUM; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

By transmitting a copy of the above-listed document in PDF form via electronic mail to Kate Tesch and placing a copy in a sealed envelope, postage fully paid, addressed as follows:

Kate Tesch  
Office of the Alternate Public Defender  
450 B Street, Suite 1200  
San Diego, CA 92101-3905  
[kate.tesch@sdcountry.ca.gov](mailto:kate.tesch@sdcountry.ca.gov)

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

Executed on April 6, 2017, at Palo Alto, California.

  
\_\_\_\_\_  
Anna Freddie

INTERVENOR'S  
EXHIBIT I

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James G. Snell, State Bar No. 173070  
JSnell@perkinscoie.com  
Christian Lee, State Bar No. 301671  
CLee@perkinscoie.com  
PERKINS COIE LLP  
3150 Porter Drive  
Palo Alto, CA 94304-1212  
Telephone: 650.838.4300  
Facsimile: 650.838.4350

Attorneys for Non-Party  
Facebook, Inc.

FILED  
APR 06 2017  
BY: P. Reyes

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff,

v.

LANCE TOUCHSTONE,

Defendant.

Case No. SCD268262

**DECLARATION OF CHRISTIAN LEE IN  
SUPPORT OF NON-PARTY FACEBOOK  
INC.'S MOTION TO QUASH SUBPOENA  
DUCES TECUM AND VACATE ORDER**

Date: April 27, 2017  
Time: 9:00 A.M.  
Dept.: 11  
Judge: Hon. David Danielsén

FILED

1 I, Christian Lee, declare as follows:

2 1. I am an attorney with the law firm of Perkins Coie LLP in Palo Alto and am one of  
3 the attorneys representing non-party Facebook Inc. ("Facebook") in the above-entitled action. I  
4 have personal knowledge of the facts set forth in this declaration and am competent to testify.

5 2. Attached as **Exhibit A** is a true and correct copy of a subpoena Facebook received  
6 in this matter, dated February 28, 2017, with account identifying information redacted, which was  
7 served on Facebook by defendant Lance Touchstone ("Defendant") on March 6, 2017.

8 3. Attached as **Exhibit B** is a true and correct copy of the objection letter sent by  
9 Facebook's counsel to Defendant's counsel on March 20, 2017, objecting to the subpoena and  
10 requesting that the Defendant withdraw the subpoena. Facebook's objection was lodged with the  
11 court via the accompanying cover letter.

12 4. Attached as **Exhibit C** is a true and correct copy of the subpoena and two orders  
13 Facebook received in this matter, each dated March 16, 2017, with account identifying  
14 information redacted, which were served on Facebook by Defendant on March 20, 2017.

15 5. I am informed that on March 21, 2017, Facebook preserved the specified account.

16 6. On March 21, 2017, I had a telephonic meet and confer with Defendant's counsel,  
17 who refused to withdraw the subpoena. Defense counsel also stated that he had not attempted to  
18 subpoena the records directly from the account owner, nor had he attempted to work with the  
19 People to obtain the information sought with a search warrant. We were not able to come to an  
20 agreement regarding Facebook's objections to the subpoena.

21 7. Attached as **Exhibit D** is a true and correct copy of the court's order in *People v.*  
22 *Tolentino*, No. H56734 (Cal. Sup. Ct. Feb. 10, 2015).

23 8. Attached as **Exhibit E** is a true and correct copy of the court's order in *Texas v.*  
24 *Herrera*, Cause Nos. F11-42288-U, F11-42289-U and F11-42290-U, (Tex. Dist. Ct. Oct. 28,  
25 2014).

26 9. Attached as **Exhibit F** is a true and correct copy of the court's order in *People v.*  
27 *Pour*, No. 08 CF 2781, (Ill. Cir. Ct. July 1, 2010)  
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10. Attached as **Exhibit G** is a true and correct copy of the court's order in *Commv. v. McCarthy*, No. 1059CR2265, (Mass. Dist. Ct. Sept. 13, 2011).

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

DATED this 6th day of April, 2017 at Palo Alto, California.

  
Christian Lee



APR 06 2017

PROOF OF SERVICE VIA EMAIL AND U.S. MAIL BY: P. Reyes

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I am a citizen of the United States and employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3150 Porter Drive, Palo Alto, California 94304-1212. On April 6, 2017, I served the:

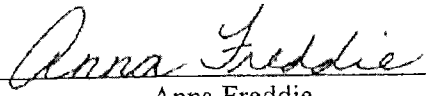
**DECLARATION OF CHRISTIAN LEE IN SUPPORT OF NON-PARTY FACEBOOK INC.'S MOTION TO QUASH SUBPOENA DUCES TECUM AND VACATE ORDER**

By transmitting a copy of the above-listed document in PDF form via electronic mail to Kate Tesch and placing a copy in a sealed envelope, postage fully paid, addressed as follows:

Kate Tesch  
Office of the Alternate Public Defender  
450 B Street, Suite 1200  
San Diego, CA 92101-3905  
[kate.tesch@sdcounty.ca.gov](mailto:kate.tesch@sdcounty.ca.gov)

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

Executed on April 6, 2017, at Palo Alto, California.

  
\_\_\_\_\_  
Anna Freddie

# EXHIBIT A

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): KATE TESCH OFFICE OF THE ALTERNATE PUBLIC DEFENDER 450 B STREET, SUITE 1200 SAN DIEGO, CALIFORNIA 92101-3905 TELEPHONE NO: (619) 446-2900 FAX NO (Optional): (619) 446-2955	FOR COURT USE ONLY
MAIL ADDRESS (Optional): ATTORNEY FOR (Name): LANCE TOUCHSTONE	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 220 WEST BROADWAY MAILING ADDRESS: CITY AND ZIP CODE: SAN DIEGO 92101 BRANCH NAME:	
CASE NAME: THE PEOPLE OF THE STATE OF CA vs. LANCE TOUCHSTONE	
ORDER TO ATTEND COURT OR PROVIDE DOCUMENTS: Subpoena Duces Tecum	CASE NUMBER: CD268262

You must attend court or provide to the court the documents listed below. Follow the orders checked in item 2 below. If you do not, the judge can find you, send you to jail, or issue a warrant for your arrest.

1. To: (name or business) Custodian of Records, Facebook, Inc.
2. You must follow the court order(s) checked below:
  - a.  Attend the hearing  You may be placed on call by contacting the attorney below.
  - b.  Attend the hearing *and* bring all items checked in c. below.
  - c.  Provide a copy of these items to the court (Do not use this form to obtain Juvenile Court records):  
 All records associated with account [REDACTED] including posts, messages, phone calls, photos, user-input information from account inception to present date.
  - d.  If this box is checked, provide all items listed on the attached sheet labeled "Provide These Items."
  - e.  If someone else is responsible for maintaining the items checked in c. above, that person (the Custodian of Records) must also attend the hearing.
  - e.  If this box is checked and you deliver all items listed above to the court within 5 days of service of this order, you do not have to attend court if you follow the instructions in item 5.

3. Court Hearing Date: \_\_\_\_\_ The court hearing will be at (name and address of court): \_\_\_\_\_

Date: 03/22/2017 Time: 09:00 am SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Dept: 11 Rm: \_\_\_\_\_ 220 WEST BROADWAY, SAN DIEGO, CA 92101

Call the person listed in item 4 below to make sure the hearing date has not changed. If you cannot go to court on this date, you must get permission from the person in item 4. You may be entitled to witness fees, mileage, or both, in the discretion of the court. Ask the person in item 4 after your appearance.

4. The person who has required you to attend court or provide documents is:

Name: KATE TESCH Phone No.: (619) 446-2900

Title: DEPUTY ALTERNATE PUBLIC DEFENDER

Address: 450 B STREET, SUITE 1200

SAN DIEGO CA 92101-3905  
 City State Zip

Date: February 28, 2017 Signature: [Signature]

**ORDER TO ATTEND COURT OR PROVIDE DOCUMENTS:**  
 Subpoena/Subpoena Duces Tecum  
 (Criminal and Juvenile)

Form Adopted by Mandatory Use  
 Judicial Council of California  
 CR-125/JV-625, Dec 3 January 1, 2007

CASE NAME	CASE NUMBER
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- 5 a. Put all items checked in item 2c and your completed *Declaration of Custodian of Records* form in an envelope. (You can ask the person in item 4 where to get this form.) Attach a copy of page 1 of this order to the envelope.
- b. Put the envelope inside another envelope. Then, attach a copy of page 1 of this form to the outer envelope or write this information on the outer envelope.
  - (1) Case name
  - (2) Case number
  - (3) Your name
  - (4) Hearing date, time, and department
- c. Seal and mail the envelope to the Court Clerk at the address listed in item 3. You must mail these documents to the court within five days of service of this order
- d. If you are the Custodian of Records, you must also mail the person in item 4 a copy of your completed *Declaration of Custodian of Records*.

The server fills out the section below.

**Proof of Service of CR-125/JV-525**

1. I personally served a copy of this subpoena on:  
 Date: \_\_\_\_\_ Time: \_\_\_\_\_  a.m.  p.m.  
 Name of the person served: \_\_\_\_\_  
 At this address: \_\_\_\_\_  
 After I served this person, I mailed or delivered a copy of this Proof of Service to the person in Item 4 on (date): \_\_\_\_\_  
 Mailed from (city): \_\_\_\_\_

2. I received this order for service on (date): \_\_\_\_\_ and was not able to serve (name of person) \_\_\_\_\_ after (number of attempts) \_\_\_\_\_ attempts because:  
 a.  The person is not known at this address.  
 b.  The person moved and the forwarding address is not known.  
 c.  There is no such address.  
 d.  The address is in a different county.  
 e.  I was not able to serve by the hearing date.  
 f.  Other (explain): \_\_\_\_\_

3. Server's name: \_\_\_\_\_ Phone no. \_\_\_\_\_

4. The server (check one)  
 a.  is a registered process server.      d.  works for a registered process server.  
 b.  is not a registered process server.      e.  is exempt from registration under Business and Professional Code section 22350(b).  
 c.  is a sheriff, marshal, or constable.

5. Server's address: \_\_\_\_\_  
 If server is a registered process server:  
 County of registration: \_\_\_\_\_ Registration no.: \_\_\_\_\_

I declare under penalty of perjury under the laws of the State of California that I am at least 18 years old and not involved in this case and the information above is true and correct.

Date: \_\_\_\_\_

TYPE OR PRINT NAME OF SERVER

SIGNATURE OF SERVER

CENTRAL OFFICE  
1500 Street, Suite 1700  
San Diego, CA 92101  
(619) 446-2000  
FAX (619) 446-2955

NORTH COUNTY BRANCH  
410 S. Melrose Drive, Suite 200  
Vista, CA 92081  
(760) 946-6450  
FAX (760) 940-6462

SOUTH BAY BRANCH  
363 H Street, Suite 410  
Chula Vista, CA 91910  
(619) 498-2085  
FAX (619) 498-2084



OFFICE OF THE ALTERNATE PUBLIC DEFENDER

COUNTY OF SAN DIEGO

MEGAN MARCOTTE, CHIEF DEPUTY

EAST COUNTY BRANCH  
250 East Main Street, 8th Fl.  
El Cajon, CA 92020  
(619) 441-4890  
FAX (619) 441-4846

JUVENILE DELINQUENCY  
5530 Overland Street, Ste 104  
San Diego, CA 92123  
(858) 974-5818  
FAX (858) 974-5808

February 28, 2017

Facebook, Inc.

Dear Custodian of Records:

You have been served by this office with a Subpoena Duces Tecum (SDT), which requires that the custodian of records for your business, or other qualified witness, appear in court at the time specified in the SDT and produce the business records described.

You may comply with the SDT, without the necessity of appearing in court, if you follow the instructions set forth below. Strict compliance with these instructions is necessary in order to make the subpoenaed records admissible in court and avoid the necessity of a personal appearance by your custodian of records or other qualified witness:

1. Make two (2) complete sets of photo copies of the records described in the SDT;
2. Complete the "Declaration of Custodian of Records" form, which is included with this letter. Be sure that the appropriate boxes are checked and that the CITY, DATE, and SIGNATURE lines are completed at the bottom of the form;
3. Place the second copy of the records and the ORIGINAL of the "Declaration of Custodian of Records" form in a sealed envelope with the following on the outside of the envelope;

CASE TITLE: People vs. Lance Touchstone  
CASE NUMBER: CD268262  
WITNESS: Custodian of Records, Facebook, Inc.  
DATE OF HEARING: 03/22/2017

4. Place the sealed envelope prepared in step 3 inside a second sealed envelope addressed as follows:

CLERK OF THE SUPERIOR COURT  
220 WEST BROADWAY  
DEPARTMENT 11  
SAN DIEGO, CA 92101

5. Mail, or otherwise deliver to the court, the package prepared in steps 3 and 4.

CAUTION: YOU MUST COMPLY EXACTLY WITH THE FORGOING INSTRUCTION WITHIN FIVE (5) DAYS OF YOUR RECEIPT OF THE SDT, UNLESS YOU MAKE OTHER ARRANGEMENTS WITH THE ATTORNEY WHO ISSUED THE SDT, OR ELSE APPEAR IN COURT WITH THE SUBPOENAED RECORDS ON THE DATE AND TIME INDICATED ON THE SDT. YOUR FAILURE IN ANY WAY TO RESPOND TO THE SDT MAY RESULT IN THE ISSUANCE OF A WARRANT FOR YOUR ARREST AND/OR YOUR BEING FOUND IN COMTEMPT OF COURT.

We genuinely appreciate your cooperation in providing the subpoenaed records. We will gladly extend the time within which you must comply with the SDT if the trial of the case is continued. If you have any questions regarding the SDT or how to comply with it, please do not hesitate to call me at the Department of the Alternate Public Defender (446-2900). I am in court a great deal of the time; however, if you will leave a message with the telephone receptionist stating your name, the name of your business, and the title of the case on the SDT, I will return your phone call at the earliest opportunity.

Sincerely yours,



Kate Tesch  
Deputy Alternate Public Defender for  
Lance Touchstone

DECLARATION OF CUSTODIAN OF RECORDS

I, \_\_\_\_\_, declare that I am the custodian of records or other qualified witness for \_\_\_\_\_, and I have the authority to certify the records of the business described in the Subpoena Duces Tecum issued on \_\_\_\_\_, 2017, by the Department of the Alternate Public Defender of the County of San Diego in the matter of:  
The People of the State of California vs. Lance Touchstone

- The documents attached to this declaration are true and correct copies of the records of the business described in the Subpoena Duces Tecum and were prepared by the personnel of the business in the ordinary course of the business at or near the time of the act, condition, or event described therein.
- a. The records are:  
**All records associated with account \_\_\_\_\_, including posts, messages, phone calls, photos, user-input information from account inception to present date.**
- b. They were prepared by \_\_\_\_\_ (e.g.: photocopying, computer reproduction, originals)
- The business has none of the records described in the Subpoena Duces Tecum.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at \_\_\_\_\_, California, on \_\_\_\_\_, 2017.

\_\_\_\_\_  
Signature

# EXHIBIT B



March 20, 2017

Christian Lee  
CLee@perkinscoie.com  
D +1 650 838 4408  
F +1 650 838 4608

VIA EMAIL AND OVERNIGHT MAIL

Kate Tesch  
Office of the Alternative Public Defender  
450 B Street, Suite 1200  
San Diego, CA 92101-3905  
[kate.tesch@sdcountry.ca.gov](mailto:kate.tesch@sdcountry.ca.gov)

**Re: Subpoena for Facebook Records, *People v. Lance Touchstone*, San Diego County Superior Court, Case No. CD268262, Internal Reference No. 1038870**

Dear Ms. Tesch:

We represent Facebook, Inc. ("Facebook") and respond to your February 28, 2017 subpoena, which seeks "[a]ll records . . . including posts, messages, phone calls, photos, [and] user-input information" for a purported Facebook account. Facebook cannot comply with your subpoena because it commands a violation of the federal criminal code, but provides further information about how to obtain the information you seek.

To ensure that all parties are aware of Facebook's position, please forward a copy of this letter to the prosecutor involved in this matter. Please also either copy me on that correspondence or provide me with confirmation that the prosecutor has received this letter.

The federal Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701, *et seq.*, prevents you from obtaining electronic communications content from Facebook, such as profile content.<sup>1</sup> The SCA is part of the federal criminal code, was "drafted in such a manner that clearly anticipates the criminal context,"<sup>2</sup> and applies to criminal defense subpoenas.<sup>3</sup> Even the government must

<sup>1</sup> 18 U.S.C. § 2702(a)(1), (2); *see, e.g., Negro v. Superior Court*, 230 Cal. App. 4th 879, 888-89 (2014) (holding that order directing an email provider to disclose email content violated the SCA, noting that "insofar as any state law requires a person to violate federal law, it is preempted and unenforceable" and "California's discovery laws cannot be enforced in a way that compels [a provider] to make disclosures violating the [SCA]."); *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1442 (2006) (A service provider's compliance with a subpoena seeking the content of a user's communications, even if accompanied by a court order, would be an "unlawful act.").

<sup>2</sup> *FTC v. Netscape Commc'ns Corp.*, 196 F.R.D. 559, 560 (N.D. Cal. 2000).

<sup>3</sup> *Facebook, Inc. v. Superior Court*, 240 Cal. App. 4th 203, 224 (Cal. Ct. App. 2015) (quashing criminal defense subpoenas to providers, and finding "no basis" under the constitution to override the SCA), *petition for review granted by California Supreme Court*, 362 P.3d 430 (Mem); *United States v. Pierce*, 785 F.3d 832, 842 (2d Cir.

obtain a search warrant based on probable cause to obtain communications content from a service provider.<sup>4</sup>

Instead, you should send requests for a person's Facebook communications to that person, who has custody and control of his or her account, is not bound by the SCA, and is the proper party for discovery requests.<sup>5</sup> As the Second Circuit has held, the SCA presents no constitutional issue where a criminal defendant can obtain content via other means.<sup>6</sup> Litigants—including criminal defendants—must avoid burdening non-parties whenever possible.<sup>7</sup>

Facebook users can log in to their accounts to download, preserve, collect, produce, and authenticate their content. They can also use the Download Your Info tool and user Activity Log to obtain content and related information. *See* <http://www.facebook.com/help/405183566203254/> (last visited Mar. 20, 2017).

If your subpoena seeks information about an alleged crime victim, you should also direct your request to that person because the California Constitution provides additional privacy rights during criminal proceedings. *See* Cal. Const. art. 1, § 28(b)(1), (4).

Facebook also objects to the subpoena as overbroad and vague.<sup>8</sup> For example, your request for “[a]ll records . . . including posts, messages” would likely include communications with people that have nothing to do with this matter. As a nonparty with no stake in the case, Facebook should not have to scour through a user's account when you have other ways to obtain the information.<sup>9</sup>

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2015) (rejecting criminal defendant's constitutional challenge to the SCA, noting because he could obtain content via other means, such as by private investigator or issuing a subpoena directly to the communications participants).

<sup>4</sup> 18 U.S.C. § 2703(a); *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (Compelled production of email content from a service provider by a governmental entity requires a search warrant supported by probable cause).

<sup>5</sup> *See, e.g., O'Grady*, 139 Cal. App. 4th at 1447 (Service providers such as Facebook are a “kind of data bailee,” and “discovery must be directed to the owner of the data, not the bailee to whom it was entrusted.”); *see also Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 731 (9th Cir. 2011) (finding the inability to obtain documents from a provider does not affect the ability to obtain the documents directly from the user).

<sup>6</sup> *Pierce*, 785 F.3d at 842 (rejecting criminal defendant's constitutional challenge to the SCA because he could obtain content via other means).

<sup>7</sup> *O'Grady*, 139 Cal. App. 4th at 1446-47; *People v. Jackson*, 110 Cal. App. 4th 280, 286 (2003) (“Although policy may favor granting liberal discovery to criminal defendants, courts may nevertheless refuse to grant discovery if the burdens placed on government and on third parties substantially outweigh the demonstrated need for discovery.”).

<sup>8</sup> *See Jackson*, 110 Cal. App. 4th at 286; *see also* CAL. CIV. PROC. CODE §§ 2017.020, 2019.030.

<sup>9</sup> *Calcor Space Facility, Inc. v. Superior Court*, 53 Cal. App. 4th 216, 224-25 (1997) (defining “improper fishing” as an “attempt to place the burden and cost of supplying information equally available to [a party] solely upon the

Katie Tesch  
March 20, 2017  
Page 3

The most that Facebook could produce in response to a subpoena or court order is non-content information, such as basic subscriber information and IP logs. If you agree to withdraw your subpoena to the extent it seeks content, Facebook might be able to provide reasonably available non-content information after providing the users with notice and the opportunity to object.<sup>10</sup> Please let me know if you would like to pursue this option.

Your subpoena purports to command Facebook to appear in court in San Diego if it does not produce the requested records, which it cannot do for the reasons described above. Facebook is headquartered in Menlo Park, which is located more than 150 miles from San Diego, and thus is not required to attend the hearing absent an endorsement on the subpoena from the court directing it to appear. *See* Cal. Penal Code § 1330.

Finally, the subpoena was not properly served according to California Penal Code sections 1328, 1328d.

If you have any questions, feel free to contact me. Facebook preserves and does not waive any available rights and objections.

Sincerely,



Christian Lee

cc: Investigator Pascual Benitez ([pascual.benitez@sdcountry.ca.gov](mailto:pascual.benitez@sdcountry.ca.gov))

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[nonparty]”); *Monarch Healthcare v. Superior Court*, 78 Cal. App. 4th 1282, 1289-90 (2000) (holding that “nonparty witnesses should be somewhat protected from the burdensome demands of litigation”).

<sup>10</sup> *Cf. Krinsky v. Doe*, 159 Cal. App. 4th 1154, 1164-65 (2008) (stating that “[s]peech on the Internet is . . . accorded First Amendment protection,” and that, “[o]nce notified of a lawsuit by the website host or ISP, a defendant may then assert his or her First Amendment right to speak anonymously through an application for a protective order or . . . a motion to quash the subpoena”).

# EXHIBIT C

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): KATE TESCH OFFICE OF THE ALTERNATE PUBLIC DEFENDER 450 B STREET, SUITE 1200 SAN DIEGO, CALIFORNIA 92101-3905 TELEPHONE NO.: (619) 446-2934 FAX NO. (Optional): (619) 446-2955 E-MAIL ADDRESS (Optional):	FOR COURT USE ONLY
ATTORNEY FOR (Name): LANCE TOUCHSTONE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 220 WEST BROADWAY MAILING ADDRESS: CITY AND ZIP CODE: SAN DIEGO 92101 BRANCH NAME:	
CASE NAME: THE PEOPLE OF THE STATE OF CA vs. LANCE TOUCHSTONE	CASE NUMBER:
ORDER TO ATTEND COURT OR PROVIDE DOCUMENTS: Subpoena Duces Tecum	CD268262

You must attend court or provide to the court the documents listed below. Follow the orders checked in item 2 below. If you do not, the judge can find you, send you to jail, or issue a warrant for your arrest.

1. To: (name or business) Custodian of Records, Facebook Inc./o Corporation Services Company, 2730 Gateway Oaks Drive Suite 150N, Sacramento, CA 95833.

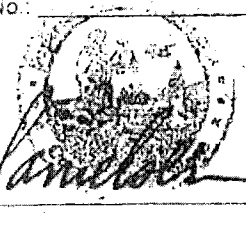
2. You must follow the court order(s) checked below:

- a.  Attend the hearing  You may be placed on call by contacting the attorney below.
- b.  Attend the hearing and bring all items checked in c. below.
- c.  Provide a copy of these items to the court (Do not use this form to obtain Juvenile Court records):  
 All records associated with account [REDACTED], including basic subscriber records as well as stored contents of the account including timeline posts, messages, phone calls, photos, videos, location information, and user-input information from account inception to present date.  
 If this box is checked, provide all items listed on the attached sheet labeled "Provide These Items."  
 d.  If someone else is responsible for maintaining the items checked in c. above, that person (the Custodian of Records) must also attend the hearing.  
 e.  If this box is checked and you deliver all items listed above to the court within 5 days of service of this order, you do not have to attend court if you follow the instructions in item 5.

3. Court Hearing Date: \_\_\_\_\_ The court hearing will be at (name and address of court): \_\_\_\_\_  
 Date: 04/07/2017 Time: 09:00 am SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO  
 Dept: 11 Rm: \_\_\_\_\_ 220 WEST BROADWAY, SAN DIEGO, CA 92101  
 Call the person listed in item 4 below to make sure the hearing date has not changed. If you cannot go to court on this date, you must get permission from the person in item 4. You may be entitled to witness fees, mileage, or both, in the discretion of the court. Ask the person in item 4 after your appearance.

4. The person who has required you to attend court or provide documents is:

Name: David Danielson Phone No.: \_\_\_\_\_  
 Title: JUDGE, SAN DIEGO SUPERIOR COURT  
 Address: 220 WEST BROADWAY  
SAN DIEGO CA 92101  
 City State Zip  
 Date: 3/16/17 Signature: David Danielson



CASE NAME:  
THE PEOPLE OF THE STATE OF CA vs. LANCE TOUCHSTONE

CASE NUMBER:  
CD268262

- 5 a. Put all items checked in item 2c and your completed *Declaration of Custodian of Records* form in an envelope. (You can ask the person in item 4 where to get this form.) Attach a copy of page 1 of this order to the envelope.
- b. Put the envelope inside another envelope. Then, attach a copy of page 1 of this form to the outer envelope or write this information on the outer envelope:
  - (1) Case name
  - (2) Case number
  - (3) Your name
  - (4) Hearing date, time, and department
- c. Seal and mail the envelope to the Court Clerk at the address listed in item 3. You must mail these documents to the court within five days of service of this order
- d. If you are the Custodian of Records, you must also mail the person in item 4 a copy of your completed *Declaration of Custodian of Records*.

The server fills out the section below.

**Proof of Service of CR-125/JV-525**

1. I personally served a copy of this subpoena on:  
 Date: \_\_\_\_\_ Time: \_\_\_\_\_  a.m.  p.m.  
 Name of the person served: \_\_\_\_\_  
 At this address: \_\_\_\_\_  
 After I served this person, I mailed or delivered a copy of this Proof of Service to the person in item 4 on (date): \_\_\_\_\_  
 Mailed from (city): \_\_\_\_\_

2. I received this order for service on (date): \_\_\_\_\_ and was not able to serve (name of person) \_\_\_\_\_ after (number of attempts) \_\_\_\_\_ attempts because:  
 a.  The person is not known at this address.  
 b.  The person moved and the forwarding address is not known.  
 c.  There is no such address.  
 d.  The address is in a different county.  
 e.  I was not able to serve by the hearing date.  
 f.  Other (explain): \_\_\_\_\_

3. Server's name: \_\_\_\_\_ Phone no. \_\_\_\_\_

4. The server (check one)  
 a.  is a registered process server. d.  works for a registered process server.  
 b.  is not a registered process server. e.  is exempt from registration under Business and Professional Code section 22350(b).  
 c.  is a sheriff, marshal, or constable.

5. Server's address: \_\_\_\_\_  
 If server is a registered process server:  
 County of registration: \_\_\_\_\_ Registration no.: \_\_\_\_\_

I declare under penalty of perjury under the laws of the State of California that I am at least 18 years old and not involved in this case and the information above is true and correct.

Date: \_\_\_\_\_

TYPE OR PRINT NAME OF SERVER

SIGNATURE OF SERVER

CENTRAL OFFICE  
450 B Street, Suite 1200  
San Diego, CA 92101  
(619) 446-2900  
FAX (619) 446-2955



EAST COUNTY BRANCH  
250 East Main Street, 8th Fl.  
El Cajon, CA 92020  
(619) 441-4890  
FAX (619) 441-4846

NORTH COUNTY BRANCH  
410 S. Melrose Drive, Suite 200  
Vista, CA 92081  
(760) 940-6450  
FAX (760) 940-6462

JUVENILE DELINQUENCY  
5530 Overland Street, Ste 104  
San Diego, CA 92123  
(858) 974-5818  
FAX (858) 974-5808

OFFICE OF THE ALTERNATE PUBLIC DEFENDER

COUNTY OF SAN DIEGO

MEGAN MARCOTTE, CHIEF DEPUTY

March 16, 2017

Facebook Inc. c/o Corporation Services Company  
2730 Gateway Oaks Drive Suite 150N,  
Sacramento, CA 95833

Dear Custodian of Records:

You have been served by this office with a Subpoena Duces Tecum (SDT), which requires that the custodian of records for your business, or other qualified witness, appear in court at the date and time specified on the attached SDT and produce the business records described.

Statement of Good Cause: Information is present on Facebook servers that presents material, exculpatory evidence in this case. Given the exculpatory (non-"fishing") nature of the evidence that is confirmed present in Facebook's possession, this request under the Fifth and Fourteenth Amendments guarantee of Due Process under the United States Constitution would supersede any State ("ECPA") or Federal ("Stored Communications Act; 18 U.S.C. 2701 et seq.") statute involving privacy concerns of Facebook users. The information requested in the attached SDT has been tailored specifically for one individual user with a precise and specific timeframe to limit any overbroad or burdensome demands within of the request. Similar business records from Facebook, Inc. are provided to law enforcement and the Office of the District Attorney in numerous similar cases pursuant to valid warrants without objection; the defense in this case is entitled to the same legal cooperation.

Attendance Pursuant to Penal Code §1330: The Superior Court has endorsed this subpoena additionally by requiring your attendance pursuant to Penal Code §1330, in the event that you are unamenable to complying with this subpoena via record production as illustrated below.

You may comply with the SDT, without the necessity of appearing in court, if you follow the instructions set forth below. Records may be provided digitally to further reduce the cost and burden on Facebook Inc. Strict compliance with these instructions is necessary in order to make the subpoenaed records admissible in court and avoid the necessity of a personal appearance by your custodian of records or other qualified witness:

1. Make two (2) complete sets of photo copies of the records described in the SDT;
2. Complete the "Declaration of Custodian of Records" form, which is included with this letter. Be sure that the appropriate boxes are checked and that the CITY, DATE, and SIGNATURE lines are completed at the bottom of the form;
3. Place the second copy of the records and the ORIGINAL of the "Declaration of Custodian of Records" form in a sealed envelope with the following on the outside of the envelope;

CASE TITLE: People vs. Lance Touchstone  
CASE NUMBER: CD268262  
WITNESS: Custodian of Records, Facebook, Inc.  
DATE OF HEARING: 04/07/2017

4. Place the sealed envelope prepared in step 3 inside a second sealed envelope addressed as follows:

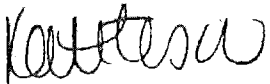
CLERK OF THE SUPERIOR COURT  
220 WEST BROADWAY  
DEPARTMENT 11  
SAN DIEGO, CA 92101

5. Mail, or otherwise deliver to the court, the package prepared in steps 3 and 4.

CAUTION: YOU MUST COMPLY EXACTLY WITH THE FORGOING INSTRUCTION WITHIN FIVE (5) DAYS OF YOUR RECEIPT OF THE SDT, UNLESS YOU MAKE OTHER ARRANGEMENTS WITH THE ATTORNEY WHO ISSUED THE SDT, OR ELSE APPEAR IN COURT WITH THE SUBPOENAED RECORDS ON THE DATE AND TIME INDICATED ON THE SDT.

I genuinely appreciate your cooperation in providing the subpoenaed records. I understand the nature of these requests is sometimes burdensome and have made every effort to limit both the scope and the burdensome nature of this request. If you have any questions regarding the SDT or how to comply with it, please do not hesitate to call me at the Department of the Alternate Public Defender (619-446-2900) or email me at [kate.tesch@sdcounty.ca.gov](mailto:kate.tesch@sdcounty.ca.gov).

Sincerely,



Kate Tesch  
Deputy Alternate Public Defender for  
Lance Touchstone



DECLARATION OF CUSTODIAN OF RECORDS

I, \_\_\_\_\_, declare that I am the custodian of records or other qualified witness for \_\_\_\_\_, and I have the authority to certify the records of the business described in the Subpoena Duces Tecum issued on \_\_\_\_\_, 2017, by the Department of the Alternate Public Defender of the County of San Diego in the matter of:  
The People of the State of California vs. Lance Touchstone

The documents attached to this declaration are true and correct copies of the records of the business described in the Subpoena Duces Tecum and were prepared by the personnel of the business in the ordinary course of the business at or near the time of the act, condition, or event described therein.

a. The records are:

All records associated with account \_\_\_\_\_ including basic subscriber records as well as stored contents of the account including timeline posts, messages, phone calls, photos, videos, location information, and user-input information from account inception to present date.

b. They were prepared by \_\_\_\_\_ (e.g.: photocopying, computer reproduction, originals)

The business has none of the records described in the Subpoena Duces Tecum.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at \_\_\_\_\_, California, on \_\_\_\_\_, 2017.

\_\_\_\_\_  
Signature

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,  
  
Plaintiff,  
  
vs.  
  
LANCE TOUCHSTONE,  
  
Defendant.

Case No.: SCD268262

ORDER FOR PRESERVATION OF  
STORED ACCOUNT CONTENT

**GOOD CAUSE APPEARING, IT IS HEREBY ORDERED** that all stored content and account information from August 8, 2016, to present be preserved by Facebook, Inc. for 180 days (six (6) months) for the following account [REDACTED]

The Court orders that Facebook, Inc. shall provide written notice to the Court when such preservation has been completed.

The Court further orders that Facebook, Inc., the District Attorney, and law enforcement NOT disclose this Order directing preservation, as such notification may lead to tampering with or destruction of evidence.

Dated: 3/16/17

*David J. Lamberth*  
JUDGE OF SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,  
  
Plaintiff,  
  
vs.  
  
LANCE TOUCHSTONE,  
  
Defendant.

Case No.: SCD268262

**ORDER PURSUANT TO PENAL CODE  
SECTION 1330 FOR ATTENDANCE  
AND COMPLIANCE WITH  
ACCOMPANYING SUBPOENA  
DUCES TECUM**

**GOOD CAUSE APPEARING, IT IS HEREBY ORDERED** that, probable cause being established that the requested records do appear to be in in the custody and control of Facebook Inc., and that the requested documents are material and of exculpatory nature, the Custodian of Records for Facebook Inc. is ordered to appear on April 7, 2017, at 9 a.m. in Department 11 of Central Superior Court, County of San Diego, pursuant to the attached Subpoena Duces Tecum. If the Custodian of Records does comply with the attached Subpoena Duces Tecum and does provide the documents requested to the court, such personal appearance will not be necessary.

Dated: 3/16/17

*David J. Daniels*  
JUDGE OF SUPERIOR COURT

# EXHIBIT D

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF ALAMEDA

FILED  
 ALAMEDA COUNTY  
 FEB 10 2015  
 CLERK OF THE SUPERIOR COURT  
 By: *Brian J. Wallace*  
 Deputy

People of the State of California,	)	HAYWARD HALL OF JUSTICE
	)	No. H56734
	)	Date: February 13, 2015
Plaintiff,	)	Dept. 517
	)	
v.	)	
	)	
EDGAR TOLENTINO,	)	DECISION GRANTING
	)	NON-PARTY FACEBOOK'S
	)	MOTION TO QUASH
Defendant.	)	SUBPOENA DUCES TECUM

PROCEDURAL POSTURE

In the instant matter, Defendant TOLENTINO is charged with one count of RAPE BY USE OF DRUGS and one count of RAPE OF AN UNCONSCIOUS PERSON on May 25, 2014.<sup>1</sup>

At the preliminary hearing on October 28, 2014, the victim, Jane Doe, was questioned on cross-examination about anyone to whom she had disclosed information about the rape around the time of the event. She testified she had told a female friend and her fiancé/boyfriend. She communicated with the male two times, once by private FaceBook email, and also in a phonecall.

Armed with that testimony, DEFENDANT filed a narrowly tailored *subpoena duces tecum* seeking to have FaceBook, which is not a party to the criminal action, produce any private emails sent or received by Jane Doe from midnight of May 25, 2014 till 11:59 p.m. of May 26, 2014.

<sup>1</sup> A trial date has been set in May 18, 2015.

FaceBook filed a Motion to Quash the DEFENDANT's *subpoena duces tecum*.

Oral argument on the Motion to Quash was heard on January 22, 2015.

#### ISSUES BEFORE THE COURT

DEFENDANT attached a portion of the transcript of the preliminary hearing showing that Jane Doe testified that she sent a private email on FaceBook to her fiancé soon after the event. DEFENDANT claims he is entitled to know what Jane Doe's prior statements about the event were, since they were close in time to the event. He needs these statements to prepare for trial.

FaceBook takes the position that they are not a party to the action, they are merely a holder of the "electronic communication" that might exist on the Jane Doe's private message portion of her FaceBook page. As such, FaceBook says they are "prohibited" from disclosing the sought after "electronic communication" by the Stored Communications Act [hereafter SCA], since none of the "exceptions" allowing a provider to divulge apply here. 18 U.S.C. §2701 *et seq*, see §2702(a)-(b). Further, FaceBook asserts that the DEFENDANT is able to get the records he seeks by other means - he can subpoena the records from the account holder, Jane Doe, or the recipient of the message.

The People could obtain the records sought by the instant *subpoena duces tecum*, and any additional records that probable cause would support, by having the investigating agency or a DA inspector seek a search warrant for those records. The People took no position at oral argument, however, and filed no memorandum or points and authorities.

#### ANALYSIS

##### 1. CONSTITUTIONAL ARGUMENT RE: DUE PROCESS

DEFENDANT contends that he has a constitutional, federal due process right to prepare his defense. The information sought is necessary to prepare for his defense. To the extent that

the SCA interferes with that right, he claims the statute is unconstitutional.<sup>2</sup> The California Supreme Court seems to have determined otherwise.

In *People v Martinez* (2007) 47 Cal.4<sup>th</sup> 399, the defendant was convicted of first-degree murder of a mother and attempted murder of her child; he was sentenced to death. Before preliminary hearing and trial, the defendant had requested the juvenile court to allow him to inspect the juvenile dependency case file of the minor victim. The juvenile court reviewed the file *in camera* and ordered some psychological assessments of the minor be disclosed; while other records were not. *Martinez* appealed and requested full access to the dependency file. The California Supreme Court affirmed the judgment in all respects.

Among other things, *Martinez* appealed from the denial of pre-trial discovery of the dependency files of the minor victim, asserting it was a violation of his right to confrontation under the Sixth and Fourteenth Amendments. Further, *Martinez* sought a post-conviction right to personally review the files. The *Martinez* court cited to the plurality opinion in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, where the U.S. Supreme Court interpreted the right to confrontation as a trial right. “Nothing in the case law supports...a view” that the confrontation clause creates a constitutionally compelled right to discovery. *Pennsylvania v. Ritchie* at p. 52-54.

Additionally, the *Martinez* court noted that, “we have rejected claims that the Sixth Amendment right of confrontation extends to requiring the granting of pretrial discovery motions” and concluded that the defendant did not have the right to pre-trial or post-trial review the file of the minor victim, as the juvenile and trial courts’ *in camera* review found no additional “material” evidence to disclose. *People v. Martinez*, at p.454, fn.13.

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<sup>2</sup> The SCA was initially passed in 1986. At oral argument, both counsel seemed to agree that there is no binding precedent on the issue before this court. From this, the court is concluding that neither has any court declared the statute unconstitutional for the reasons presented in this case.

*People v. Martinez* and *Pennsylvania v. Ritchie* are distinguishable from the instant case in that, here the government is not the holder of any of the records sought. Rather, the holder of the records is the victim Jane Doe as account holder/customer of FaceBook, or her fiancé/boyfriend as receiver of the FaceBook email.

## 2. ON WHOM SHOULD THIS SUBPOENA DUCES TECUM BE SERVED?

FaceBook contends that as non-parties to this criminal action, they are prohibited by federal law, namely, the SCA, from turning over the “electronic communication” unless one of the SCA’s exceptions apply. A *subpoena duces tecum* is not one of the legal exceptions to the prohibition from divulging “electronic communications.” 18 U.S.C. §2702(a), (b).

As FaceBook points out, the DEFENDANT has a remedy, namely, to serve a subpoena duces tecum on either Jane Doe (the FaceBook customer and sender of the private FaceBook emails sought), or her fiancé/boyfriend (the receiver of the private FaceBook emails sought).

The DEFENDANT relies on *Vela v. Superior Court* (1989) 208 Cal.App.3d 141, 148, for the proposition that the trial court can compel discovery of statements of witnesses about the issues at trial. But *Vela*, like *People v. Martinez*, and *Pennsylvania v. Ritchie*, is a case where the records are in possession of the government, not a third party. The court finds *Vela* is factually distinguishable and not binding in this case.

## 3. IS FACEBOOK BOUND BY 18 U.S.C. §2702?

Is FaceBook prohibited from divulging electronic communications by the SCA? Seemingly it is since it is an email provider, and as such would be considered an “electronic communication service.” FaceBook is similarly situated to both AT&T and Google, which have been held to be bound by the SCA prohibition.



“The Ninth Circuit has held that wireless communications providers such as AT&T are properly classified as an ‘electronic communication service.’” *Quon v. ArchWireless Operating Co., Inc.*, 529 F.3d 892, 900, (9<sup>th</sup> Cir., 2008) *reversed on other grounds by City of Ontario, Cal. v. Quon*, 560 U.S. 746.

In a federal case between civil litigants in employment contract dispute, one party filed a subpoena duces tecum on AT&T seeking text messages of opponent. The court noted,

“While the SCA prohibits AT&T from disclosing the content of any text messages to Defendants pursuant to a subpoena, the SCA does not prevent Defendants from obtaining this information through other means... [D]ocuments reflecting the content of Plaintiff’s text messages are within his “control” because he has ‘the legal right to obtain these documents on demand from AT&T.’ [Citations.] Because Plaintiff is the ‘originator’ of his text messages, he may request copies of these messages from AT&T consistent with the SCA.”

*Mintz v. Bartelstein* (2012) 885 F.Supp.2d 987, 994.

In *Negro v. Superior Court* (2014) 230 Cal.App.4<sup>th</sup> 879, 888, plaintiff filed a case in Florida charging numerous employees’ with breach of duty and engaging in unfair competition with plaintiff. In Florida, the plaintiff sought the defendant’s emails from a Google Gmail domain. After a Florida court proceeding, the plaintiff filed an *subpoena duces tecum* in a California court. Google moved to quash the subpoena on grounds that SCA prohibited them to divulge contents of electronic communication pursuant to a subpoena. The California trial court, denied Google’s motion to quash, and ordered by “judicial decree of user consent” that Google produce the records and deliver them to a third party for review. Google filed a motion seeking a new order directing the email account holder to consent to allow Gmail to produce the email so that Google would not violate the SCA. At that point, the account holder petitioned for writ of mandate to California court of appeal, arguing he had not consented at all.

The California Court of Appeal addressed the account holder's petition for writ of mandate, and stated, "[I]nsofar as any state law requires a person to violate federal law, it is preempted and unenforceable... Therefore California's discovery laws cannot be enforced in a way that compels Google to make disclosures violating the Act." *Negro v. Superior Court* at p. 888-889. The Court of Appeal went so far as to say that for the trial court to direct Google to violate a federal law was a manifest abuse of discretion. *Id.* at p. 893.

Under the federal SCA, "electronic communication services" shall not knowingly divulge to any person ... the contents of a communication while in electronic storage of that service (18 U.S.C. §2702(a)(1)) unless one of the specific exceptions in 18 U.S.C. §2702(b) apply.

It appears that §2702 lacks any language that explicitly authorizes a service provider to divulge the contents of a communication pursuant to a subpoena or court order. *Viacom International Inc. v. Youtube, Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008).

#### SUMMARY

The DEFENDANT has other means to obtain the records sought. The DEFENDANT to date, has neither expended nor exhausted any attempt to serve a subpoena duces tecum on either the sender or intended recipient of the email messages.

Therefore, the Court declines to declare the SCA unconstitutional.

To order FaceBook to violate the SCA would be a manifest abuse of discretion.

Non-party FaceBook's MOTION TO QUASH IS GRANTED.

DATE: February 10, 2015

  
HON. MICHAEL J. GAFFEY

# EXHIBIT E

THE STATE OF TEXAS                    §                    IN THE 291<sup>st</sup> JUDICIAL  
VS.    §                    DISTRICT COURT  
Antonio Herrera                         §                    DALLAS COUNTY, TEXAS

**TRIAL COURT'S ORDER AND FINDINGS OF FACT  
ON DEFENDANT'S REQUEST FOR A SUBPOENA DUCES TECUM**

The Court having considered the Defendant's request for a subpoena duces tecum and the Movant, Facebook's motion to quash the subpoena, now makes the following ruling and findings:

1. The Court finds the Defendant subpoenaed both subscriber content and non-content records from Facebook via a subpoena duces tecum citing an exception to the Stored Communications Act relating to allegations of sexual abuse. 18 U.S.C. 2702(b)(6). Facebook, by and through their attorney of record, filed a motion to quash the subpoena.
2. The Court finds that the exception to the Stored Communications Act cited by the Defendant in his subpoena does not support the request for the records. Section 18 U.S.C. 2702 (b)(6), the exception upon which the Defendant relied, states that the provider may divulge contents of a communication to the National Center for Missing Children and Exploited Children in connection with a report submitted thereto under section 2258A of the Act.
3. The Court further finds that the Stored Communications Act permits only governmental entities to obtain subscriber content via a warrant. The Defendant, a non-governmental entity, requested both content and non-content subscriber records via a subpoena duces tecum. Accordingly, the Court finds that the Defendant is not entitled to the content of the subpoenaed information based on Stored Communication Act. *See* 18 U.S.C. 2702 generally.
4. The Court finds, however, that the Defendant would be entitled to the requested non-content subscriber records. *See State v. Harrison*, 2014 WL 2466369, \*3 (Tex. App.-Ft. Worth, 2014); 18 U.S.C. §2702(c)(6) (holding that a provider covered by the Stored Communications Act may disclose non-content records to nongovernmental entities without restriction).

5. Accordingly, the Court concludes that the Defendant is entitled to the requested non-content subscriber information only. The Court hereby grants the Movant, Facebook's motion to quash as it relates to subscriber content information.

**SIGNED** this the 28th day of October, 2014.

/s/

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**JUDGE JENNIFER BALIDO  
291<sup>ST</sup> JUDICIAL DISTRICT COURT  
DALLAS COUNTY, TEXAS**

# EXHIBIT F

IN THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

**FILED**

JUL 06 2010

CLERK OF CIRCUIT COURT #39  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)	)	
	)	
Vs.	)	
	)	No. 08 CF 2781
	)	
BRYAN POUR ,	)	
	)	
Defendant.	)	

**ORDER**

The matter has been presented to the Court on a Motion to Compel Compliance with Subpoena as filed by defendant herein and as directed to Facebook Inc.. Defendant is represented by attorney Watkins, the State of Illinois by attorney Vucich, and Facebook Inc. by attorney Gossman. In response to the motion, attorney Gossman filed an objection. Hearing was held on these matters, arguments presented, case law and statutes cited, additional briefs were submitted and the court held the matter sub judice. The court being fully advised in the premises and having considered the matter, denies the Motion to Compel.

The Court agrees with the contentions of Facebook as submitted by attorney Gossman and finds additional factors in reaching this conclusion.

The disclosure by Facebook is barred under federal law. The Court finds that the sections of the U.S. Code referred to as the Electronic Communications Privacy Act do not permit respondent to disclose the requested information.

The request would put an undue burden upon respondent. Facebook is not a party to this proceeding and it appears that substantial effort would be required to search for data identified with the approximately twenty-three individuals listed.

The request is vague and overly broad in that specific identifiers of these individuals are not given, nor is the means of locating or identifying them. Their relationship to the case is

not obvious and their substantive knowledge is speculative. The request asks for complete "profiles" extending for months and seeks "any and all" correspondence exchanged between these listed individuals and any and all other parties.. What part of that, if any, that would be relevant and material is unknown. No explicit claim has been asserted. There is no discernible basis to demand these individuals' communications to "all others".

The request would appear to place an obligation upon respondent to create or produce documents or material which do not currently exist in that format. In almost all cases, the burden to produce via subpoena is for material in a form as it exists. It is not generally required of a respondent to create material in a form which burdens them to produce documents, formats, or summaries in a manner not common to their usage or storage.

The court is further concerned with questions of individual privacy. Facebook may have access to requested information, but are they entitled to disclose it? No individual has apparently consented to disclosure. Is there an issue of bailment? Even if they were permitted to disclose, the court should carefully weigh privacy interests of the parties, their expectation of privacy, and the broad intrusiveness of the request. In doing so, the court finds that this request to Facebook is overly broad, burdensome, intrusive, speculative, contrary to federal law and contrary to public policy.

DATE: 1 July 2010



JUDGE



# EXHIBIT G



TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

District Court Department  
PLYMOUTH DIVISION  
Office of the Clerk-Magistrate  
Plymouth, Massachusetts 02360-8098  
Tel: (508) 747-8400  
Fax: (508) 830-8303

PHILIP J. MOUJER  
ACTING CLERK-MAGISTRATE

JOHN D. FITZSIMMONS  
FIRST ASSISTANT CLERK-MAGISTRATE

MARGARET WIKSTEN  
ASSISTANT CLERK-MAGISTRATE

LUCY A. CANAVAN  
ASSISTANT CLERK-MAGISTRATE

EDWARD J. GRIMLEY, JR.  
ASSISTANT CLERK-MAGISTRATE

FAX COVER SHEET

Date: September 20, 2011

To: \_\_\_\_\_

Organization: Foley Hoag

From: \_\_\_\_\_

Number of pages including cover sheet: \_\_\_\_\_

If you do not receive all the pages, please call 508-747-8400 as soon as possible.

Comments:

Shaun McCarthy

## COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

PLYMOUTH DISTRICT COURT  
DOCKET NO. 1059CR2265

COMMONWEALTH

v.

SHAUN MCCARTHY

MEMORANDUM AND ORDER  
ON MOTION TO QUASH SUBPOENA

The defendant is charged in this case with aggravated assault and battery with a dangerous weapon, in violation of G. L. c. 265, § 15A(c). The defendant is alleged to have hit Jared Smith in the head with a fire extinguisher, seriously injuring Mr. Smith. The defendant contends that after the complaint issued in this case, Mr. Smith "began to send statements to the Defendant on his Facebook account.<sup>1</sup> The statements at issue "appear to come from the Facebook account of [Jared Smith]." The defendant printed individual screen "snapshots" of some or all of the Facebook postings and communications.

I. Relevant Procedural History.

The court (Gilligan, J.) held a limited evidentiary hearing in this case on March 2, 2011, in order to compel Mr. Smith to provide his date of birth. Mr. Smith testified at that hearing. Defendant's counsel represents in his Affidavit In Support Of Defendant's Motion, Pursuant To Mass. R. Crim. P. 48, That This Court Enter An Order For Sanctions Against Facebook, Inc. ("Bergeron Affidavit") that at the hearing, Mr. Smith "disavowed the statements, referenced he could not have authored the statements from the hospital, and that the account was closed."

On March 31, 2011, the defendant filed a motion for an order directing Facebook, Inc. ("Facebook") to produce Mr. Smith's User Profile Information, including the account holder's identity, information shared on the account, and the user's choice of privacy settings. The court (Hand, J.) allowed the motion on April 6, 2011, and ordered the keeper of records for Facebook to produce certified copies of User Profile Information, "including public and private notes, private messages, status updates and responses, and wall postings and responses, of Jared Smith, DOB 8-2-89, from July 13, 2010 through present." Notice of the motion had not been given to Facebook or to Mr. Smith.

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<sup>1</sup>These statements, detailed in the Memorandum Of Law In Support Of Defendant's Motion, Pursuant To Mass. R. Crim. P. 48, That Facebook, Inc., Be Sanctioned, pp. 4-5, are set out in note 7, below.

Commonwealth v. Shaun McCarthy, Docket No. 1059CR2265

On April 29, 2011, counsel for Facebook responded by letter to defense counsel, advising counsel that Facebook objected to the subpoena for records of Mr. Smith's User Profile Information on the grounds that (1) the information sought is protected under the Stored Communications and Privacy Act ("SCA" or "statute"), 18 U.S.C. § 2701, *et seq.*; (2) a warrant is required to obtain the information sought; (3) the order under which the subpoena issued was made without Facebook's having had an opportunity to be heard; (4) the information sought could be obtained by obtaining a search warrant, or by an order directing the user to provide the information directly; and (5) because the contents of any Facebook communication could be authenticated by other means.

Facebook did not produce any documents in response to the subpoena.

On June 22, 2011, the defendant moved for sanctions against Facebook.

On July 1, 2011, Facebook filed a motion to quash the subpoena, an opposition to the defendant's motion for sanctions against it, and a cross-motion for sanctions against the defendant. On July 19, 2011, the defendant filed an opposition to the cross-motion for sanctions; Facebook filed a reply on July 25, 2011.

The motions to compel and to quash, and the cross-motions for sanctions, were heard on July 26, 2011.

## II. Analysis.

### A. Effect of Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.*

The SCA restricts the freedom of "providers" of "electronic communication service[s]" ("ECS")<sup>2</sup> and "remote computing service[s]" ("RCS")<sup>3</sup> to divulge or disclose to others the contents of communications stored, carried or maintained by or on those services. *See* 18 U.S.C. §§ 2702(a), 2703(a), (b); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 971-972 (C.D. Cal. 2010). It likewise restricts the ability of such providers to divulge or disclose "a record or other information pertaining to a subscriber or to a customer of such service[s]." 18 U.S.C. §§

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<sup>2</sup>For the purposes of the statute, "'electronic communication service' means any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). "'[E]lectronic communication' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce . . ." 18 U.S.C. § 2510(12).

<sup>3</sup>"[T]he term 'remote computing service' means the provision to the public of computer storage or processing services by means of an electronic communications system." *Id.*, § 2711(2). "Electronic communications system," in turn, is defined as "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications." *Id.*, § 2510(14).

2702(3), 2703(c). The statute limits both “the government’s right to compel providers to disclose information in their possession about their customers and subscribers,” *Crispin*, citing 18 U.S.C. § 2703, and “the right of an Internet Service Provider (‘ISP’) to disclose information about customers and subscribers . . . voluntarily.” *Id.*, citing 18 U.S.C. § 2702.

Much of Facebook’s argument depends on its status as a “provider” subject to the terms of the SCA. The court has not taken any evidence on this point, but for the purposes of this motion, the defendant appears to have conceded that the SCA does apply to Facebook. In considering the motions at issue here, the court has assumed, without being asked to decide, that the SCA does apply to Facebook as a “provider” of both ECS and RCS.

1. Voluntary disclosure of content of communications.

Section 2702 of the statute prohibits a provider from divulging to any person or entity “the contents<sup>4</sup> of a communication.” 18 U.S.C. § 2702(a)(1)(ECS), § 2702(a)(2)(RCS). That general prohibition on disclosure is, however, subject to a set of enumerated exceptions. *See id.*, § 2702(b)(1)-(8). Among these exceptions is § 2702(b)(1), permitting a provider of ECS or RCS to disclose the content of a communication “to an addressee or intended recipient of such communication,” and § 2702(b)(3), allowing the provider to divulge the content of a communication “with the lawful consent of the originator *or* an addressee *or* intended recipient<sup>5</sup> of such communication, *or* the subscriber in the case of remote computing service.” *See id.* (emphasis added). The statute does not prohibit Facebook, if given “lawful consent,” from divulging to the defendant the contents of any communication for addressed to the defendant, or

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<sup>4</sup> “[C]ontents”, when used with respect to any . . . electronic communication, includes any information concerning the substance, purport, or meaning of that communication.” *Id.*, § 2510.

<sup>5</sup> The terms “addressee,” “intended recipient” and “originator” are not defined for the purposes of the statute. The court gives them their plain meanings.

Commonwealth v. Shaun McCarthy, Docket No. 1059CR2265

which the defendant was intended to receive.<sup>6</sup> Likewise, the statute permits Facebook to release the content of a communication if provided with the consent of the “originator”<sup>7</sup> of that communication.<sup>8</sup>

2. Voluntary disclosure of non-content information

While the SCA forbids a provider of ECS or RCS to disclose “a record or other information pertaining to a subscriber of such service” to a “governmental entity,” *id.*, § 2703(a)(3), it permits, without further restriction, the provider’s voluntary disclosure of this non-content information “with the lawful consent of the customer or subscriber,” *id.*, § 2703(c)(2), and separately, “to any person other than a governmental entity.” *Id.*, § 2702(c)(6). The SCA does not prohibit Facebook from disclosing non-content subscriber information to the defendant.

3. Compelled disclosure of content and non-content information

Section 2703 of the statute addresses “required disclosure of customer communications or records.” Under this section, only a “governmental entity”<sup>9</sup> may “require” disclosure of the

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<sup>6</sup>To the court’s knowledge, the defendant has not yet provided Facebook with “lawful consent” for disclosure to him of the content of any communications addressed to him or which he was the intended recipient. Provided with that information, Facebook “may” release the content of such communications to the defendant. Although Facebook indicates its preference to have the consent of both originator and intended recipient of a given communication before disclosing such a communication, the statute does not appear to require this belt-and-suspenders approach.

<sup>7</sup>This term is not defined for the purposes of the statute. The court notes, however, that in opting not to use terms like “user,” defined as “any person or entity who – (A) uses an electronic communication service; and (B) is duly authorized by the provider of such service to engage in such use,” 18 U.S.C. § 2510(13), the statute’s drafters may have intended to allow a provider to disclose content with the consent of the person from whose account the communication began, regardless of whether that person was the actual author or sender of the communication.

<sup>8</sup>The defendant has likewise not obtained Mr. Smith’s “lawful consent” to Facebook’s release of the content of any messages originating with him, or, with respect to RCS, coming from an account or service for which he was or is the subscriber. While Mr. Smith may not be willing provide such consent on a voluntary basis, the defendant is able to seek a court order compelling Mr. Smith to authorize release of the information. See, e.g., *Commonwealth v. Burgess*, 426 Mass. 206 (1997)(affirming Superior Court order compelling defendants in insurance fraud prosecution to execute form authorizing release of defendants’ IRS tax records).

<sup>9</sup> “[T]he term ‘governmental entity’ means a department or agency of the United States or any State or political subdivision thereof.” 18 U.S.C. § 2711(4).

Commonwealth v. Shaun McCarthy, Docket No. 1059CR2265

content of communications or of non-content information. As neither the defendant nor this court is a "governmental agency" as that term is defined for the purposes of the statute, the terms of the statute do not permit Facebook to comply with this court's order to produce the records that the defendant seeks.

B. Availability of information from sources other than Facebook

Facebook argues that the information the defendant seeks from Facebook is available from Mr. Smith. Although the court accepts Facebook's representation that Mr. Smith's account "appears to be active," the court has no way of determining the significance of that fact. While the court presumes that the user of an "active" account is able to obtain at least some current non-content information about his or her own account, that fact has not been established here. The court is completely without a basis to determine whether past information – whether the information includes the content of communications or is of the non-content variety – is archived in some way by Facebook; if so, the court does not have any sense of whether a user with an active account could access past user settings, messages, notes, postings, or any other information implicating the user's individual account. On the information available to the court, Facebook's argument that it should be excused from producing the information sought by the defendant on the grounds that that information is available from other sources is not compelling.

Likewise, Facebook's argument that providing the requested information would be unduly burdensome is not especially persuasive. The time frame identified by the defendant is limited. Given that the SCA prohibits disclosure of the content of Mr. Smith's communications without the consent of the intended recipient of each communication, or of Mr. Smith, it is reasonable to assume that the defendant intends to limit any request for content to those communications between himself and Mr. Smith, and perhaps with the few other addressees of Mr. Smith's communications who could be persuaded to provide consent for disclosure of the content, or whom the defendant could persuade the court to order to provide such consent. The non-content information would likely be limited to that maintained for Mr. Smith's account. The court has difficulty crediting any argument by Facebook that disclosure on this scale would be unreasonably burdensome.

C. Defendant's constitutional argument.

The defendant's argument that the Sixth and Fourteenth Amendments to the United States Constitution, and Article XII of the Massachusetts Declaration of Rights, demand that Facebook comply with the court's order to produce the information at issue is not, at this point, necessary to decide.

As the defendant makes clear, his challenge in this case is not the facial constitutionality of the SCA, but rather that Facebook's failure to comply with this court's order deprives the defendant of constitutional rights. Facebook is not permitted to divulge the information at issue in response to this court's order. It is permitted, however, to disclose the content of the subject communications to the defendant if provided with the consent of the addressee or intended recipient of each communication, and/or the consent of the originator of the communication. It is likewise permitted to release account and other information with the consent of the customer or

Commonwealth v. Shaun McCarthy, Docket No. 1059CR2265

account holder. To this point, the defendant has not pursued the routes available under the SCA to permit Facebook to provide the information sought. Because Facebook has left open the possibility that it will provide the defendant with the information he seeks if the defendant provides the necessary consent, the court cannot say that Facebook is denying the defendant access to exculpatory information, or otherwise acting in a way that violates the defendant's rights. If, provided with the lawful consent required under the statute, Facebook still declines to produce the information it is permitted to disclose or divulge, the defendant's argument would become significantly more persuasive.

D. Facebook's ability to authenticate records.

Facebook's claim that it is not the appropriate party to authenticate the records sought by the defendant is questionable. Given Mr. Smith's testimony denying that he sent any of the messages, and stating that the account was "closed" at the time the messages appear to have been sent, it is not likely that Mr. Smith will authenticate any of the information at issue. Even if that were not the case, at least some of the messages are threats,<sup>10</sup> making it likely that the defendant

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<sup>10</sup>"The statements from the Facebook account of Jared Smith to the Defendant's Facebook account include:

- a. "so you tryin to meet up soon or what mafucka;"
- b. "i was deemed a menasice to society when I waz 16 . . . don't play cards w/me . . . but you damn wrong to think I ain't gunna catch you alone bitch;"
- c. "best believe ive got new heat since 3<sup>rd</sup> home;"
- d. "im coming for you and the day I find your is the day I ern my 2<sup>nd</sup> tear bitch;"
- e. "i don't care what you have to say . . . no matter what, when I catch you . . . you fuckin endin kid;"
- f. "i boen to jail . . . ive been in an gang I sell drugs like it what im made for . . . best believe I got a brandy new 39 with ny name on it . . . and act like I aint comin to you bitch weither you fucked up or w.e. or made a mistake or if I was out of line . . . you just so happen to fuck with all the hood rats, guns, drugs, and people on my side . . . you a dead man white boy . . . go ahead and print this shit . . . i was sponse to go to jail for 5 years back in '06 . . . bitch I was out in '07 . . . that was my first murder . . . you the second mafucka;"
- g. "small fee and I can make it so all this don't go to supreme court."

Commonwealth v. Shaun McCarthy, Docket No. 1059CR2265



has and would exercise a privilege against self-incrimination. Mr. Smith is unlikely to be willing to authenticate any of the information in question on a voluntary basis; the court is unlikely to be in a position to require him to do so involuntarily.

The defendant presumably could testify that he received certain messages through his Facebook account, and that each message was attributed to a particular sender. That testimony, however, would not render the information admissible. See *Commonwealth v. Williams*, 456 Mass. 857 (2010) (“Analogizing a Myspace Web page to a telephone call, a witness’s testimony that he or she has received an incoming call from a person claiming to be ‘A,’ without more, is insufficient evidence to admit the call as a conversation with ‘A.’” (quoting *Commonwealth v. Hartford*, 346 Mass. 482, 488 (1963))).<sup>11</sup>

E. Dwyer concerns.

The court erred in hearing the defendant’s motion for production of records without notice to Facebook or to Mr. Smith. The issue of notice as to Facebook is, at this point, moot. Mr. Smith, however, is entitled to be heard on the defendant’s motion for production of the Facebook records.

F. Contempt as to Facebook.

The motion for contempt, and for sanctions, against Facebook and/or its counsel is denied.

G. Contempt as to the defendant.

The motion for contempt, and for sanctions, against the defendant and/or his counsel is denied.

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Bergeron Affidavit, ¶ 8.

<sup>11</sup>Facebook’s argument that it is unable to authenticate the “provenance” of particular communications is certainly correct to the extent that Facebook contends that it cannot prove that Mr. Smith, and not another typist, was responsible for composing and transmitting particular communications. What the court presumes that Facebook could do, however, is, for example, provide evidence on points including whether a given message was sent from a given account, or whether a given account was capable of being used to send or receive communications on a particular date.

Commonwealth v. Shaun McCarthy, Docket No. 1059CR2265

III Order.

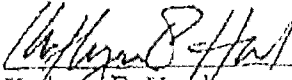
The motion to quash the subpoena is ALLOWED. The motion is, however, allowed without prejudice to:

- A. the defendant's making further efforts, consistent with the applicable law and rules, including the SCA, to request that Facebook voluntarily produce the content of any communication addressed to or intended to be received by the defendant;
- B. the defendant's moving to compel Mr. Smith and/or other individuals to authorize Facebook to release the substance of communications from his/her/their Facebook account(s), and/or information relating to that/those account(s); or,
- C. the defendant's taking any other steps, consistent with the applicable law and rules, to obtain from Facebook the information sought through the order and subpoena at issue.

Both the defendant's and Facebook's motions for contempt and sanctions are DENIED.

So ordered.

DATED: September 13, 2011

  
Kathryn E. Hand  
Associate Justice

Commonwealth v. Shaun McCarthy, Docket No. 10S9CR2265

INTERVENOR'S  
EXHIBIT J

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FILED  
Clerk of the Superior Court  
APR 23 2017  
By: A. Fitzgerald, Deputy

Attorneys for Defendant  
LANCE TOUCHSTONE

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff,	)	Case No.: SCD268262
	)	
vs.	)	<b>OPPOSITION TO FACEBOOK'S MOTION TO QUASH SUBPOENA DUCES TECUM; POINTS AND AUTHORITIES IN SUPPORT OF SDT</b>
LANCE TOUCHSTONE,	)	
	)	
Defendant.	)	Date: April 27, 2017
	)	Time: 9 a.m.
	)	Dept.: 11
	)	

Defendant Lance Touchstone, through counsel, seeks enforcement of the Subpoena Duces Tecum issued as an Order by this Court on April 7, 2017. The Motion to Quash filed by counsel for Facebook, Inc. relies on the Stored Communications Act which prohibits-with numerous exceptions and authorizations-the disclosure of certain electronic communications. However this federal law does not trump Mr. Touchstone's constitutional and fundamental rights to due process and a fair trial, which prevail in a conflict with statutory law. Additionally, there are no remaining alternative methods for defense counsel to obtain this exculpatory, material, relevant evidence. Without alternatives for obtaining this constitutionally fundamental discovery, Mr. Touchstone requests that the Court enforce the subpoena and order Facebook to comply with the Order.

1 STATEMENT OF FACTS

2 In early August 2016, Lance Touchstone drove from his home in Pope Valley,  
3 California, to San Diego, California, to visit his sister Rebecca. When he arrived in San  
4 Diego, Mr. Touchstone learned that Rebecca's boyfriend, Jeffrey Renteria, had moved into  
5 her apartment. Over the next several days, Mr. Touchstone started to observe odd behavior  
6 by Mr. Renteria. He grew concerned for Rebecca and his own safety on August 8, 2016,  
7 when he noticed that Rebecca's personal guns and ammunition were missing from the  
8 apartment. Later that same day, as Mr. Touchstone and his sister attempted to contact Mr.  
9 Renteria regarding the missing firearms, Mr. Renteria made threatening statements to harm  
10 Mr. Touchstone and Rebecca. Mr. Touchstone and his sister were both concerned, alarmed,  
and afraid.

11 Later that day, while Mr. Touchstone and Rebecca were sitting on the living room  
12 sofa, Mr. Renteria burst through the front door and charged at them. Mr. Touchstone was  
13 armed with his personal handgun at the time and fired three to four times at Mr. Renteria.

14 Mr. Renteria fled to the street and was assisted by neighbors and. He was hit three  
15 times - once through the torso and once in each arm. Mr. Touchstone set aside his weapon,  
16 called 911 to report the incident, and was ultimately arrested for the assault. He was  
17 compliant and cooperative with officers throughout their investigation, giving a detailed  
18 explanation of the day's events and his efforts to defend himself against Mr. Renteria.

19 Since the shooting incident, Mr. Renteria has been extremely active on his personal  
20 Facebook account. He posted updates of his physical recovery from the hospital, requesting  
21 personal messages from people over the Facebook messaging system. He posted updates of  
22 court hearings in this case, seeking community involvement at the preliminary hearing. He  
23 created a GoFundMe.com page and posted it on Facebook, soliciting money for his  
24 medical care. Later, as Mr. Renteria continued a romantic relationship with Rebecca  
25 Touchstone, he joked about killing her on his Facebook page. He posted about his use of  
26 drugs and the impact drugs have on his mental wellbeing. He posted about the use of guns  
and committing robbery, describing in detail his desire to rob and kill people.

1 These posts were made on the public portion of Mr. Renteria's Facebook page,  
2 which are visible to all users. The above summary does not include any private posts,  
3 photos, links, notes, or user-to-user messages, as those records are unavailable to the public  
4 and not available or known to defense counsel.

5 **PROCEDURAL BACKGROUND**

6 On February 28, 2017, defense counsel mailed a Subpoena Duces Tecum ("SDT")  
7 to Facebook, Inc. ("Facebook") seeking the stored contents of Mr. Renteria's personal  
8 Facebook page. (Exhibit A to Facebook's Motion to Quash) Hearing no response in two  
9 weeks, and anticipating an error in the mailing, defense counsel researched alternative  
10 means to obtain the requested records from Facebook. On March 16, 2017, defense counsel  
11 obtained an SDT signed by the Honorable David Danielsen of this Court, which included  
12 orders to preserve the requested content and comply with the SDT. (Exhibit C to  
13 Facebook's Motion to Quash) The Court signed the SDT after reading defense counsel's  
14 declaration describing the relevant, exculpatory, and material nature of the records sought.  
(See Defense Counsel's Declaration in Opposition to Motion to Quash)

15 The Court-issued SDT was received by Facebook on March 20, 2017, and triggered  
16 an immediate response. (Exhibit B to Facebook's Motion to Quash) Facebook asserted  
17 their position in writing that the Stored Communications Act ("SCA") at 18 U.S.C. §§  
18 2701 *et seq.* prevents defense counsel from obtaining the requested records, and suggested  
19 that defense counsel either (1) obtain the records directly from Mr. Renteria, or (2) request  
20 that the prosecution issue a search warrant to obtain the records sought.

21 Defense counsel had sought to obtain these records from the prosecution, informally  
22 requesting the records several times and then running a Motion to Compel before the  
23 Honorable Judge Meza on March 10, 2017. (Motion to Compel filed in the instant case on  
24 March 8, 2017) The motion was denied, as Judge Meza found no authority to declare the  
25 prosecution in "constructive possession" of the requested records. Additionally, Mr.  
26 Renteria has been unwilling to meet with defense counsel and cannot not be located by  
27 defense investigators at his known addresses. (See Defense Counsel's Declaration in  
28 Opposition to Motion to Quash)

1 POINTS AND AUTHORITIES

2 Documents within the custody of a third party must be disclosed where a criminal  
3 defendant issues an SDT for the information and establishes a plausible justification as to  
4 why the information is relevant to the defense. *People v. Superior Court (Barrett)* (2000)  
5 80 Cal.App.4th 1305. The ability to issue SDTs to prepare a defense is of fundamental  
6 importance; its Constitutional dimension precludes the mechanical application of  
7 exclusionary rules that would operate to deprive a criminal defendant of his ability to  
8 prepare and present a defense. *United States v. Nixon* (1974) 418 U.S. 683; *Pennsylvania v.*  
9 *Ritchie* (1987) 480 U.S. 39; *Rubio v. Superior Court* (1988) 202 Cal.App.3d 1343; *Delaney*  
10 *v. Superior Court* (1990) 50 Cal.3d 785. Further, a statute cannot lawfully foreclose a  
11 criminal defendant from obtaining information while simultaneously providing an avenue  
of discovery for law enforcement. *Wardius v. Oregon* (1973) 412 U.S. 470.

12 Here, Facebook Inc. should be ordered to disclose the information that was  
13 requested pursuant to the Court’s SDT. The Court and Mr. Touchstone both have lawfully  
14 issued subpoenas for information that is within the custody and control of Facebook. The  
15 foundation of the SDT is a powerful and plausible justification, asserted by Mr.  
16 Touchstone, as to why the information is relevant to his defense. Applying the SCA in a  
17 manner that forecloses Mr. Touchstone from accessing this relevant information violates  
18 his Constitutional rights; thus Facebook’s Motion to Quash should be denied and Facebook  
19 should be ordered to disclose the requested information.

20 **I. TO THE EXTENT THAT THE SCA INFRINGES ON DUE PROCESS**  
21 **RIGHTS TO A FAIR TRIAL, THAT PORTION OF THE ACT SHOULD BE**  
22 **PREEMPTED BY THE CONSTITUTIONAL DUE PROCESS RIGHTS OF**  
23 **THE ACCUSED, AND FACEBOOK SHOULD BE ORDERD TO PRODUCE.**

24 Laws cannot not be applied in a manner that will deprive a criminal defendant of his  
25 right to due process. *Chambers v. Mississippi* (1972) 410 U.S. 284. In *Chambers v.*  
26 *Mississippi*, the United States Supreme Court addressed the question of whether long-  
27 standing evidentiary rules could act as a bar to evidence that was relevant to the defense.  
28 *Id.* at 294. There, the trial court prevented the defendant from cross-examining an  
individual who had previously admitted committing the crime that the defendant was  
charged with. *Id.* at 291-292. The trial court then precluded the defendant from calling

1 witnesses to the individual's confessions who could also have established facts significant  
2 to the defense. *Id.* at 292-294. Finding that the trial court erred, the United States Supreme  
3 Court determined that the trial court's rulings infringed the defendant's due process. For  
4 the Court, "[t]he right of an accused in a criminal trial to due process is, in essence, the  
5 right to a fair opportunity to defense against the State's accusations. The rights to confront  
6 and cross examine witnesses and to call witnesses in one's on behalf have long been  
7 recognized as essential to due process." *Id.* at 294. The Court concluded that Constitutional  
8 rights relating to determinations of guilt were paramount and found that the exclusion  
9 violated the defendant's due process. Specifically, according to the Court, "[f]ew rights are  
10 more fundamental than that of an accused to present witnesses in his own defense... in  
11 these circumstances where constitutional rights directly affecting the ascertainment of guilt  
12 are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of  
13 justice." *Id.* at 302.

14 A generalized interest in confidentiality cannot lawfully preclude a defendant from  
15 issuing an SDT and receiving evidence relevant to a criminal trial. *Nixon, supra*, 418 U.S.  
16 at 713. In *United States v. Nixon*, the Special Prosecutor issued a subpoena to the President  
17 that requested the production of tapes, transcripts, and other writings that were relevant to  
18 the prosecution of seven defendants who were charged and indicted with conspiracy and  
19 obstruction. *Id.* at 688. In response to the subpoena, counsel for the President filed a motion  
20 to quash and claimed that the items were privileged. *Id.* at 688. In deciding the matter, the  
21 Court addressed the question of whether a valid claim of privilege foreclosed the disclosure  
22 of evidence relevant to a criminal case. *Id.* at 703.

23 First, the Court noted the importance of the privilege: "The privilege is fundamental  
24 to the operation of Government and inextricably rooted in the separation of powers under  
25 the Constitution." *Id.* at 708. The Court then addressed the importance of fact-gathering to  
26 the criminal justice system. According to the Court, "[t]he need to develop all relevant facts  
27 in the adversary system is both fundamental and comprehensive... To ensure that justice is  
28 done, it is imperative to the function of courts that compulsory process be available for the  
production of evidence needed either by the prosecution or by the defense." *Id.* at 709. The



1 Court determined that the production of evidence implicates the Constitutional rights of  
2 individuals who are charged with crimes. Specifically, the Court found that a trial court  
3 must strive to insure that all relevant and admissible evidence is produced so to protect the  
4 Constitutional guarantees of the Fifth and Sixth Amendment. *Id.* at 711. The Court  
5 concluded that the preclusion of relevant evidence in a criminal proceeding, because of a  
6 general claim of confidentiality, endangers the fairness of the criminal adjudication process  
7 and is unacceptable. *Id.* at 712-713. Holding that the documents must be produced for in-  
8 camera review pursuant to the subpoena, the Court wrote: "When the ground for asserting  
9 privilege as to subpoenaed materials sought for use in a criminal trial is based only on the  
10 generalized interest in confidentiality, it cannot prevail over the fundamental demands of  
11 due process of law in the fair administration of criminal justice. The generalized assertion  
12 of privilege must yield to the demonstrated, specific need for evidence in a pending  
13 criminal trial." *Id.* at 713.

13 Relevant information must be disclosed pursuant to a defendant's SDT even if the  
14 information is deemed private and disclosure is forbidden by statute. *Ritchie, supra*, 480  
15 U.S. at 58. In *Pennsylvania v. Ritchie*, the United States Supreme Court addressed the  
16 question of whether a criminal defendant could issue an SDT to compel the production of  
17 statutorily private records. *Id.* at 42-43. There, the defendant, who was accused of  
18 molesting a child, issued an SDT and attempted to retrieve child investigative records that  
19 he believed to be relevant to his defense. *Id.* at 43. The third party maintaining the records  
20 refused to disclose them, citing a Pennsylvania state law that foreclosed disclosure unless  
21 pursuant to expressly enumerated exceptions. *Id.* at 43-44. The Court determined that the  
22 state's interest in confidentiality must be considered within a framework that also affords  
23 due process to a defendant. The Court ultimately held that, even though disclosure is  
24 proscribed by statute, a criminal defendant is entitled to a limited disclosure of the records  
25 for review by a trial court. *Id.* at 60-61.

25 In *Rubio v. Superior Court*, the Fourth District for the California Appeal addressed  
26 the importance of United States Supreme Court precedent involving the due process right  
27 of defendants to subpoena information for use at a criminal trial. There, the Court held that  
28

1 a criminal defendant may compel the disclosure of privileged material even if the third  
2 parties are validly exercising the privilege. *Rubio, supra*, 202 Cal.App.3d at 1350. In  
3 *Rubio*, the defendant issued an SDT to a third party that requested the disclosure of a video  
4 tape of the third party engaged in sexual conduct with his wife. *Id.* at 1346-1347. The third  
5 party claimed privilege and moved to quash the subpoena. *Id.* at 1347. Though determining  
6 that the video tape was protected by both the marital privilege, which by its language  
7 precluded disclosure, and the third party's right to privacy as guaranteed by federal and  
8 state Constitutions, the Court found that the defendant's rights were sufficiently compelling  
9 to require disclosure of the video tape to the trial court for an in-camera review in order to  
determine relevance. *Id.* at 1350.

10 A criminal defendant may compel the disclosure of information by SDT even if  
11 there is a Constitutional proscription against revealing the information. *Delaney, supra*, 50  
12 Cal.3d at 808. In *Delaney v. Superior Court*, the California Supreme Court held that a  
13 criminal defendant could compel the production of information that is protected by the  
14 California Constitution's shield law by showing a reasonable possibility that the  
15 information will be materially significant to his defense. *Id.* at 808. There, the defendant  
16 issued a subpoena in order to elicit testimony from two reporters who were witness to his  
17 arrest and who could attest to information that was beneficial to his case. *Id.* at 793-794.  
18 The reporters moved to quash the subpoenas pursuant to the shield law. *Id.* at 794. The  
19 Court first determined that the information was, in fact, protected by the California  
20 Constitution. *Id.* at 798-805. Because the Constitutional guarantees that are afforded to  
21 criminal defendants are of paramount importance, the Court found that defendants may  
22 compel disclosure of information even if protected by the shield law. According to the  
23 Court, "[t]he shield law's protection is overcome in a criminal proceeding on a showing  
24 that nondisclosure would deprive the defendant of his federal constitutional right to a fair  
25 trial... the principle is beyond question." *Id.* at 805. Citing to prior precedent, the Court  
26 acknowledged the important role discovery plays in ensuring a fair trial. "Allowing an  
27 accused the right to discover," the Court wrote, "is based on the fundamental proposition  
28 that he is entitled to a fair trial and an intelligent defense in light of all relevant and

1 reasonably accessible information.” *Id.* at 808. The Court explicated the import of the  
2 Constitutional protections further, stating that “[a] criminal defendant’s constitutional right  
3 to compulsory process was intended to permit him to request governmental assistance in  
4 obtaining likely helpful evidence, not just evidence that he can show beforehand will go to  
5 the heart of his case.” *Id.* The Court held that, even in spite of the shield law’s  
6 Constitutional status, a defendant is entitled to compel the production of protected  
7 information where he can demonstrate that it has a reasonable possibility of assisting the  
8 defense. *Id.*

9 Here, Facebook seeks to avoid the disclosure of information within its possession by  
10 invoking the ostensible protection of the SCA. As demonstrated by the aforementioned  
11 authorities, rules, statutes, and even Constitutional safeguards cannot be applied in a  
12 manner that foreclose a defendant from obtaining information that is relevant to his defense  
13 (For a demonstration of the relevance, materiality, and import of the requested records,  
14 please refer to Defense Counsel’s Declaration in Opposition to Facebook’s Motion to  
15 Quash). Interpreting the SCA to bar disclosure and preclude compliance with the Court’s  
16 SDT will violate Mr. Touchstone’s Fifth, Sixth, and Fourteenth Amendment. Thus Mr.  
17 Touchstone asks the Court to deny Facebook’s motion to quash and compel Facebook to  
18 comply with the subpoena.

19 It should be noted that this precise issue is currently pending review by the  
20 California Supreme Court; the favorable case cited by Facebook counsel, *Facebook, Inc. v.*  
21 *Superior Court*, 120 Cal. Rptr.3d 433, was superseded by a grant of review by the  
22 California Supreme Court on December 16, 2015. The Court has not yet ruled on that case  
23 but continues to order briefing from parties on the matter. *Facebook Inc. v. Superior Court*  
24 (2015) 195 Cal.Rptr.3d 789. With no ruling in sight, trial courts are in the unenviable  
25 position of ruling in specific cases without explicit guidance to this particular issue. It is  
26 defense counsel’s position that the due process implications of precluding Mr. Touchstone  
27 from obtaining this necessary discovery is an infringement of his constitutional rights and  
28 results in the deprivation of a fair trial for Mr. Touchstone.

1 II. THE COURT SHOULD ORDER PRODUCTION OF THE REQUESTED  
2 RECORDS BECAUSE DUE PROCESS REQUIRES EQUAL OPPORTUNITY  
3 TO DISCOVER RELEVANT INFORMATION TO BOTH PROSECUTION  
4 AND DEFENSE.

5 A statute cannot lawfully prohibit a defendant from learning information while  
6 simultaneously providing a discovery avenue for the prosecutor. *Wardius, supra*, 412 U.S.  
7 at 475-479. In *Wardius v. Oregon*, the United States Supreme Court held that a statute runs  
8 afoul of the Fourteenth Amendment's Due Process Clause where the statute provides the  
9 prosecutor a means of discovery without affording the same opportunity to the defendant.  
10 *Id.* at 474-475. There, an Oregon discovery statute granted prosecutors the right to learn  
11 details the defense while, at the same time, did not provide that the defendant with the  
12 authority to request information from the prosecutor. *Id.* at 471-473. The Court determined  
13 that due process forbids the uneven nature of such a discovery procedure. According to the  
14 Court, "[a]lthough the Due Process Clause has little to say regarding the amount of  
15 discovery which the parties must be afforded, it does speak to the balance of forces  
16 between the accused and his accuser." *Id.* at 474. The Court ultimately ruled that the  
17 discovery statute was unconstitutional because it granted the prosecutor a means of  
18 discovery but offered no such means to the defense. *Id.* at 475-479.

19 In *Evans v. Superior Court*, the California Supreme Court similarly found that a  
20 statute runs afoul of the Constitution where it grants the prosecutor a means of discovery  
21 but does not afford a defendant the same opportunity. *Evans v. Superior Court* (1974) 11  
22 Cal.3d 617. There, the defendant petitioned the trial court for an opportunity to conduct a  
23 lineup procedure in order to gather information that would aid the defense. *Id.* at 621. The  
24 trial court, though noting the inherent fairness with such a request, denied the motion  
25 because it believed that it lacked the discretion and authority to grant such an opportunity  
26 to the defense. *Id.* The California Supreme Court disagreed with the trial court, and  
27 determined that due process required that a defendant be granted the same opportunity to  
28 acquire information as is afforded the prosecutor. Specifically, the Court found, "[b]ecause  
the People are in a position to compel a lineup and utilize what favorable evidence is  
derived therefrom, fairness requires that the accused be given a reciprocal right to discover  
and utilize contrary evidence." *Id.* at 623.

1 Here, applying the SCA in a manner that proscribes a defendant from obtaining the  
2 contents of an individual's Facebook account by way of SDT violates the reciprocity  
3 principles of due process. According to Facebook's argument, the SCA forbids the  
4 disclosure of account contents to defense counsel via an SDT, but provides for the  
5 acquisition of account contents through the execution of a search warrant sought by the  
6 prosecution. Because the terms of the SCA provide an avenue for the prosecutor to learn of  
7 information and obtain evidence, interpreting the Act to preclude a defendant from  
8 obtaining the information violates due process as interpreted and applied by *Wardius* and  
9 *Evans*. As such, the defense is asking the court to deny Facebook's motion to quash the  
10 SDT and order Facebook to comply with the subpoena.

11 **III. MR. TOUCHSTONE HAS A PLAUSIBLE JUSTIFICATION FOR THE**  
12 **REQUEST OF DOCUMENTS IN THE SDT, THUS THE SDT SHOULD BE**  
13 **ENFORCED AND FACEBOOK ORDERED TO COMPLY.**

14 When a third party moves to quash An SDT, the defendant who issued the SDT is  
15 entitled to an order that compels the third party to turn over the documents where he can  
16 establish that he has a plausible justification for requesting the documents. *Barrett, supra*,  
17 80 Cal.App.4th at 1320. In *People v. Superior Court (Barrett)*, the Fourth District for the  
18 California Court of Appeal addressed the procedure and standard applied to documents  
19 requested pursuant to an SDT. *Id.* at 1320-1321. The Court held that the defendant must  
20 establish that the subpoenaed material is relevant, as supported by plausible justification.  
21 *Id.* at 1320.

22 In *Pacific Lighting Leasing Co. v. Superior Court*, the Second District for the  
23 California Court of Appeal defined the standard that a defendant must meet when faced  
24 with a motion to quash that claims a third party privilege. *Pacific Lighting Leasing Co. v.*  
25 *Superior Court* (1976) 60 Cal.App.3d 552. There, the defendants issued an SDT for  
26 documents that were within the control of a third party. The third party objected, and  
27 claimed Constitutional privilege. *Id.* at 554-556. The Court distinguished the ordinary  
28 predicate for ordering compliance from that when an objection of privilege is proffered,  
and determined that the defendant could overcome this objection by establishing that there  
is a plausible justification for the disclosure of the items subject to the SDT. Specifically,

1 for the Court, “[t]hough ordinarily a criminal defendant may be entitled to pretrial  
2 knowledge where it appears reasonable that such knowledge will assist him in preparing  
3 his defense, the protection of the witness’s constitutional rights requires that the plausible  
4 justification for inspection be so substantiated as to make the seizure constitutionally  
5 reasonable.” *Id.* at 567.

6 Here, the Court issued an SDT for information that is in the possession of Facebook  
7 after careful review of defense counsel’s declaration in support of the SDT. Thus Mr.  
8 Touchstone has already established a plausible justification as to the relevance of the  
9 records for his defense. For a review of the specific plausible justification establishing Mr.  
10 Touchstone’s right to compel the disclosure of documents, see Defense Counsel’s  
11 Declaration in Opposition to Motion to Quash.

12 Further, the requested records in the SDT are not overbroad or “fishing,” as argued  
13 by Facebook counsel. The SDT uses identical language as Facebook’s own page,  
14 “Information for Law Enforcement Authorities,”  
15 <https://www.facebook.com/safety/groups/law/guidelines> (attached as Exhibit A to Defense  
16 Counsel’s Declaration), which describes the appropriate process to obtain these exact  
17 records. The SDT seeks the same records sought by search warrants routinely issued by  
18 this Court and uses Facebook’s own language taken from their guide to obtain the records.  
19 The SDT is narrowly tailored to request the records of a single user who has demonstrated  
20 the precise relevance of the records in public posts to his page. The requested records are  
21 routinely sought by the Court via search warrant, not unduly burdensome to Facebook, and  
22 are sought based on specific, articulable cause.

23 **IV. ALTERNATIVE METHODS TO PROCURE THE REQUESTED RECORDS  
24 ARE UNAVAILABLE, AS JEFFREY RENTERIA IS UNCOOPERATIVE  
25 AND THE PROSECUTION HAS NOT AGREED OR BEEN ORDERED TO  
26 OBTAIN THE RECORDS VIA SEARCH WARRANT.**

27 Jeffrey Renteria is an uncooperative party in this action. From the onset of the case,  
28 he expressed an unwillingness to meet with defense counsel. Defense investigators have  
sought Mr. Renteria for subpoena purposes at his last known addresses, to no avail. It is  
possible that Mr. Renteria is homeless in or around the Ocean Beach neighborhood of San  
Diego, but defense investigators have been unable to locate him. Further, he was unwilling

1 to agree to the release of his own medical records to prove that he was actually shot on  
2 August 8, 2016. He would not give the prosecution permission to release his medical  
3 records and would not attend the Court hearing to address the release of his records. The  
4 Court, in Mr. Renteria's absence, ordered the records released to defense counsel.

5 Defense counsel has additionally obtained police reports and probation records for  
6 Mr. Renteria. These records depict Mr. Renteria as routinely uncooperative and combative  
7 with law enforcement, resorting to manipulative communication tactics and physical  
8 violence when asked to comply. Given his combative nature and lack of cooperation in  
9 these proceedings, defense counsel has strong reservations with his ability or willingness to  
10 comply with any SDT or Court Order to personally produce his own Facebook records. If  
11 the records are destroyed or deleted by a user upon notice of subpoena or court order, they  
12 cannot later be retrieved or recovered without preservation by Facebook. Mr. Renteria  
13 cannot be found to serve a subpoena upon and, if he were so served, there is real and grave  
14 danger that the sought records will be destroyed instead of preserved pursuant to the order.

15 As discussed above, defense counsel initially sought these records from the  
16 prosecution, who has the power and authority to obtain and execute search warrants upon  
17 Facebook through the court. The prosecution refused to obtain the records in this manner,  
18 despite the due process and *Brady* implications. Defense counsel sought an Order to  
19 compel the prosecution to obtain these records, to no avail. The Court, finding no explicit  
20 authority to do so, would not order the prosecution to produce the sought records.

21 Thus, the alternative methods of production recommended by Facebook are not  
22 available to defense counsel in this case. The remaining option is for this court to enforce  
23 the SDT issued by the Honorable Judge Danielsen on March 7, 2017, and order Facebook  
24 to comply with that SDT.

25 //

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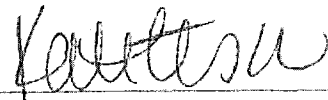
29 ///

1 CONCLUSION

2 Without Facebook's production of the subpoenaed records, Mr. Touchstone cannot  
3 receive the full and fair hearing to which he is entitled under the law. Defense counsel  
4 cannot adequately prepare for a trial without knowing the breadth and extent of  
5 discoverable information relating to the complaining witness, Jeffrey Renteria, most  
6 specifically as it relates to his character and propensity for violence, as well as any/all  
7 statements he has made regarding the shooting incident. The prosecution has refused to  
8 produce these records, Mr. Renteria has not been found to produce the records, and  
9 Facebook has asked the Court to support their refusal to produce the records as well. Mr.  
10 Touchstone's due process rights rely on these records and he accordingly requests that the  
11 Court demand compliance with the SDT.

12 Dated: April 21, 2017

Respectfully Submitted,  
MEGAN MARCOTTE, Chief Deputy  
Office of the Alternate Public Defender

15  
16 By:   
17 KATE TESCH  
18 Deputy Alternate Public Defender

19 Attorneys for Defendant  
20 LANCE TOUCHSTONE  
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INTERVENOR'S  
EXHIBIT K

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F I L E D  
Clerk of the Superior Court

APR 21 2017

By: A. Fitzgerald, Deputy

Attorneys for Defendant  
LANCE TOUCHSTONE

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO**

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff,

vs.

LANCE TOUCHSTONE,

Defendant.

Case No.: SCD268262

**REQUEST TO SEAL AND REDACT  
PORTIONS OF DEFENSE COUNSEL'S  
DECLARATION IN OPPOSITION TO  
FACEBOOK'S MOTION TO QUASH;  
POINTS AND AUTHORITIES**

On March 16, 2017, this Court issued a subpoena duces tecum for the production of documents within Facebook Inc.'s control. On April 6, 2017, Facebook filed a motion to quash the subpoena. Defense counsel now seeks to file a motion to compel Facebook's compliance with the subpoena. In support of that motion, defense counsel has filed a declaration in order to establish the legal basis for the order to compel. Because the declaration contains defense strategy, work product, confidential witness records, and confidential communications, defense counsel requests that the Court order the declaration to be redacted and sealed in part, permitting defense counsel to serve the interested parties with a redacted copy of the declaration.

Where a party is moving to quash a subpoena duces tecum that is issued by the defendant, the defendant is entitled to have the basis for his request, to compel compliance with the subpoena duces tecum, protected from disclosure. *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305. In *People v. Superior Court (Barrett)*, the Fourth District for the California Court of Appeal addressed the procedure by which a defendant may obtain items pursuant to a subpoena duces tecum even in the face of a motion to quash. *Id.* at 1302. After articulating the appropriate procedure, the Court found that

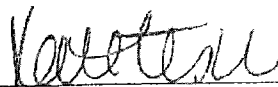
1 the defendant can properly make a motion, which justifies his request, in a shroud of secrecy.  
2 Specifically, the Court found that a motion to compel the disclosure implicates both a defendant's Fifth  
3 and Sixth Amendment rights. *Id.* at 1321. According to the Court, "At this investigatory stage of the  
4 proceedings, it would be inappropriate to give [the defendant] the Hobson's choice of going forth with  
5 the discovery efforts and revealing possible defense strategies and work product to the prosecution, or  
6 refraining from pursuing these discovery materials to protect his constitutional rights and prevent  
7 undesirable disclosures to his adversary." *Id.*

8 Here, as is established by Defense Counsel's declaration in support of the order to seal and  
9 redact, the Court should grant Mr. Touchstone's request so to protect his Fifth and Sixth Amendment  
10 rights, and permit Defense Counsel to file a sealed version of the declaration with redaction versions  
11 supplied to interested parties.

12 Dated: April 21, 2017

Respectfully Submitted,

MEGAN MARCOTTE, Chief Deputy  
Office of the Alternate Public Defender

13  
14 By:   
15 KATE TESCH  
16 Deputy Alternate Public Defender

17 Attorneys for Defendant  
18 LANCE TOUCHSTONE  
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FILED  
Clerk of the Superior Court

APR 21 2017

By: A. Fitzgerald, Deputy

5 Attorneys for Defendant  
6 LANCE TOUCHSTONE

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO

9  
10 THE PEOPLE OF THE STATE OF  
CALIFORNIA,

11 Plaintiff,

12 vs.

13 LANCE TOUCHSTONE,

14 Defendant.

15 Case No.: SCD268262

16 DEFENSE COUNSEL'S  
DECLARATION IN SUPPORT OF  
ORDER TO SEAL AND REDACT


17  
18 I, Kate Tesch, declare:

- 19 1. The Office of the Alternate Public Defender is the attorney of record for defendant Lance Touchstone in the above-captioned case.
  - 20 2. I am a Deputy Alternate Public Defender employed by the Office of the Alternate Public Defender and assigned to represent Mr. Touchstone.
  - 21 3. Mr. Touchstone has entered a not guilty plea to the charges on the Information and entered a complete denial as to any and all allegations relating thereto.
  - 22 4. The trial is currently set for June 5, 2017, in San Diego Central Superior Court, whereby Mr. Touchstone faces twenty-two years in state prison as a maximum punishment.
  - 23 5. In order to adequately prepare a defense, Mr. Touchstone needs specific documents that are within the custody of Facebook, Inc.
- 24  
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- 1 6. In order to obtain those documents over the objection of Facebook, defense counsel
- 2 submitted a Declaration in Opposition to Facebook's Motion to Quash.
- 3 7. That declaration contains information that is privileged within the meaning of the Fifth
- 4 Amendment, Sixth Amendment, Fourteenth Amendment, work product, and confidential
- 5 to a pertinent witness (Jeffery Renteria).
- 6 8. Inclusion of the information was necessary in order to justify Mr. Touchstone's request
- 7 for the documents over Facebook's objection.
- 8 9. Information within the declaration must remain confidential in order to secure Mr.
- 9 Touchstone's rights, as well as Mr. Renteria's rights.
- 10 10. The redacted declarations are narrowly tailored in order protect Mr. Touchstone and Mr.
- 11 Renteria's rights, and permit interested parties in substantively responding to the papers.
- 12 11. Defense counsel strived to limit redaction and narrowly tailor the declaration so that it can
- 13 allow for as coherent response as possible without jeopardizing Mr. Touchstone's rights.

13 I declare under penalty of perjury that the foregoing is true and correct, except for those matters  
14 stated on information and belief, and I believe those matters to be true.

15 Executed this 21<sup>th</sup> day of April, 2017, in San Diego, California.

17   
18 \_\_\_\_\_  
19 KATE TESCH  
20 Declarant  
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28

**SEALED UNREDACTED DOCUMENT**

**FILED**  
Clerk of the Superior Court

APR 21 2017

**CASE NUMBER:**  
CD268262 People v. Lance Touchstone

By: A. Fitzgerald, Deputy

**THIS DOCUMENT CONTAINS:**

**Confidential and Protected Records and Communications Pertinent to Defense**  
**- Redacted Version to be Produced to Interested Parties -**

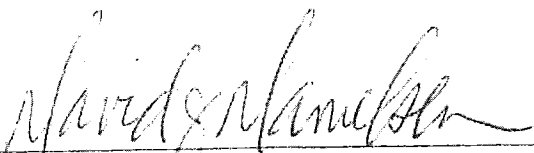
**PURSUANT TO RULE OF COURT 2.550 THIS COURT FINDS:**

- (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.

**AND THEREFORE ORDERS THIS UNREDACTED DOCUMENT TO BE FILED UNDER SEAL, MAINTAINED IN A FILE SEPARATE FROM THE PUBLIC CASE FILE, AND NOT SUBJECT TO PUBLIC INSPECTION EXCEPT UPON ORDER OF THE COURT**

DATED: \_\_\_\_\_

4/21/17

  
\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

INTERVENOR'S  
EXHIBIT L

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5 Attorneys for Defendant  
6 LANCE TOUCHSTONE

FILED  
Clerk of the Superior Court  
APR 21 2017  
By: A. Fitzgerald, Deputy

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO  
9

10 THE PEOPLE OF THE STATE OF  
11 CALIFORNIA,

12 Plaintiff,

13 vs.

14 LANCE TOUCHSTONE,

15 Defendant.  
16  
17

**REDACTED**

Case No.: SCD268262

**DEFENSE COUNSEL'S  
DECLARATION IN OPPOSITION  
TO FACEBOOK'S MOTION TO  
QUASH THE COURT-ORDERED  
SUBPOENA DUCES TECUM**

18 I, Kate Tesch, declare:

- 19 1. The Office of the Alternate Public Defender is the attorney of record for defendant  
20 Lance Touchstone in the above-captioned case.  
21 2. The Office of the Alternate Public Defender was appointed in this matter on  
22 October 20, 2016, when Mr. Touchstone's private counsel requested to be removed  
23 from the case.  
24 3. I am a Deputy Alternate Public Defender employed by the Office of the Alternate  
25 Public Defender and assigned to represent Mr. Touchstone.  
26 4. Mr. Touchstone is charged with violating Penal Code § 664/187 for attempted  
27 murder upon Jeffrey Renteria on August 8, 2016.  
28



- 1 5. At the time of the incident, Mr. Renteria was the boyfriend of Mr. Touchstone's  
2 younger sister, Rebecca Touchstone.
- 3 6. It is alleged that, during this offense, Mr. Touchstone personally used a firearm  
4 within the meaning of Penal Code § 12022.5(a) and personally inflicted great  
5 bodily injury within the meaning of Penal Code § 12022.7(a).
- 6 7. After the preliminary hearing on September 29, 2016, Mr. Touchstone was bound  
7 over and entered a Not Guilty plea to all charges and allegations.
- 8 8. Jury trial is set for June 5, 2017, in San Diego Central Superior Court, whereby Mr.  
9 Touchstone faces twenty-two years in state prison as a maximum punishment.
- 10 9. On March 16, 2017, I went ex parte to request that the Court issue a Subpoena  
11 Duces Tecum for Mr. Renteria's personal Facebook records. (Exhibit A:  
12 Declaration in Support of Court-Ordered Subpoena Duces Tecum to Facebook.)
- 13 10. In response to my declaration and ex parte request, the Honorable David Danielsen  
14 signed and issued a Subpoena Duces Tecum, Order to Attend Court or Provide  
15 Documents. (Exhibit B: Order to Attend Court or Provide Documents)

16 Relevance of Records Sought

- 17 11. Jeffrey Renteria, the complaining witness, has a personal Facebook account that is  
18 in part visible to public at [REDACTED]. (Exhibit C,  
19 screenshot of subject webpage)
- 20 12. Since the date of the incident, Mr. Renteria has posted several times to his personal  
21 account directly referencing the shooting; specifically [REDACTED]  
22 [REDACTED] (Exhibit D, Facebook screenshots)
- 23 13. [REDACTED]  
24 [REDACTED]  
25 [REDACTED]. (Exhibit E)
- 26 14. [REDACTED]  
27 [REDACTED]

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[REDACTED]

[REDACTED] (Exhibit F)

15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Exhibit G)

16. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Exhibit H)

17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Exhibit I)

18. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Exhibit J)

19. [REDACTED]

[REDACTED]

[REDACTED]

20. It is unknown whether additional relevant posts have been made to Mr. Renteria's page that are not visible to the public, or whether additional messages have been sent through the Facebook messaging system that have not been disclosed to defense counsel; for this reason, a complete production by Facebook, Inc. is necessary and required.

1 21. Through this subpoena, Defense counsel seeks to preserve and obtain the stored  
2 contents of Mr. Renteria's personal Facebook page; these records are relevant,  
3 material, exculpatory, and reflect upon the character and propensity for violence of  
4 the prosecution's key witness.

5 22. Defense counsel believes that the contents of Mr. Renteria's complete Facebook  
6 account, including complete timeline posts, photos, phone calls, videos, and  
7 messages, will provide the defense with relevant, exculpatory information that will  
8 assist in preparing and presenting a defense in this case.

9 23. Based on the foregoing recitation of facts and beliefs, the sought content from Mr.  
10 Renteria's Facebook account is relevant because (1) it may contain additional  
11 information that is inconsistent with the information previously provided by Mr.  
12 Renteria to law enforcement and the prosecution as it relates to this case, (2) it may  
13 contain additional information that demonstrates a motivation or character for  
14 dishonesty in this matter, (3) it may contain additional information that  
15 demonstrates a character for violence that is relevant to the self-defense that will be  
16 asserted by defense counsel at trial, and (3) it may contain additional information  
17 that provides exonerating, exculpatory evidence for Mr. Touchstone.

18 24. Based on the foregoing recitation of facts and beliefs, defense counsel has a good  
19 faith belief that the sought records are material to the defense and will assist in the  
20 presentation of the defense at trial.

21 25. A plausible justification has been established for the disclosure and inspection of  
22 the records subject to the subpoena issued by this Court on March 16, 2017.

#### 23 Mr. Renteria's Lack of Cooperation

24 26. In my first communication with the prosecution about this case, I was asked to  
25 contact Mr. Renteria through the District Attorney's Office. As a professional  
26 courtesy, I was initially amenable to this suggestion. (Exhibit K: Email with DDA  
27 Makenzie Harvey)  
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- 27. In one of my many follow up emails to the prosecutor's office on January 18, 2017, I was asked to continue to wait for a meeting with Mr. Renteria. (Exhibit L: Email with DDA Mike Reilly)
- 28. Hearing no response from the prosecution, my defense investigator began a field investigation to locate and interview Mr. Renteria directly; she attempted contact him on two separate occasions in March 2017 at separate known addresses in the Ocean Beach area, leaving her business card at locations twice.
- 29. Ms. Lahaszow has not been able to locate Mr. Renteria and he has not responded to her business cards.
- 30. I sent another email to DDA Mike Reilly on April 5, 2017, requesting that their office coordinate an interview with Mr. Renteria. DDA Reilly responded that he would "let me know," but to date has not responded substantively to my request for an audience with Mr. Renteria. (Exhibit M: Email with DDA Mike Reilly)
- 31. When asked for consent to release his hospital records regarding his injuries from this case, Mr. Renteria refused. (Exhibit L)
- 32. A hearing was held on February 8, 2017, for the Court to order the release of Mr. Renteria's medical records over his objection. At the hearing, the prosecution represented to the Court that Mr. Renteria was notified of the hearing.
- 33. Mr. Renteria did not attend the hearing to personally object to the release of his medical records. The Court ordered the release of medical records, over Mr. Renteria's objection.
- 34. Based on probation records for Mr. Renteria, the defense believes that Mr. Renteria is chronically uncooperative and combative with authority figures. Probation records describe Mr. Renteria in the following manner (Exhibit N):

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 35. For the above reasons, the defense believes that Mr. Renteria is likely to destroy or  
11 delete relevant evidence from his Facebook account, if he is personally served with  
12 a subpoena to produce his own records.

13 36. The prosecution has not produced Mr. Renteria for defense investigation despite  
14 numerous requests, Mr. Renteria has not been found despite defense investigative  
15 efforts to locate him, and his character makes his compliance with any request or  
16 order to personally produce his own records unlikely. Thus, it is defense counsel's  
17 belief that Mr. Renteria is not a viable or reliable source for obtaining the relevant  
18 records sought by the instant SDT.

19 I declare under penalty of perjury that the foregoing is true and correct, except for those  
20 matters stated on information and belief, and I believe those matters to be true.  
21

22 Executed this 21<sup>th</sup> day of April, 2017, in San Diego, California.  
23

24  
25 \_\_\_\_\_  
KATE TESCH  
26 Declarant  
27  
28

# Exhibit A

## SEALED UNREDACTED DOCUMENT

CASE NUMBER:  
CD268262 People v. Lance Touchstone

### THIS DOCUMENT CONTAINS:

Confidential and Protected Records and Communications Pertinent to Defense  
- Redacted Version to be Produced to Interested Parties -

### PURSUANT TO RULE OF COURT 2.550 THIS COURT FINDS:

- (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.

AND THEREFORE ORDERS THIS UNREDACTED DOCUMENT TO BE FILED UNDER SEAL, MAINTAINED IN A FILE SEPARATE FROM THE PUBLIC CASE FILE, AND NOT SUBJECT TO PUBLIC INSPECTION EXCEPT UPON ORDER OF THE COURT

DATED: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

# Exhibit B



ATTORNEY AT LAW  
KATE TESORE  
OFFICE OF THE ALTERNATE PUBLIC DEFENDER  
150 B STREET, SUITE 1200  
SAN DIEGO, CALIFORNIA 92101 3905  
TELEPHONE NO. (619) 440-2934 FAX NO. (619) 440-2955

E-MAIL ADDRESS (OPTIONAL)

ATTORNEY AT LAW NAME: LANCE TOUCHSTONE  
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO  
STREET ADDRESS: 220 WEST BROADWAY  
MAILING ADDRESS:  
CITY AND ZIP CODE: SAN DIEGO 92101

BRANCH NAME:  
CASE NAME:  
THE PEOPLE OF THE STATE OF CA vs. LANCE TOUCHSTONE

CASE NUMBER:  
CD268262

ORDER TO ATTEND COURT OR PROVIDE DOCUMENTS:  
Subpoena Duces Tecum

You must attend court or provide to the court the documents listed below. Follow the orders checked in item 2 below. If you do not, the judge can find you, send you to jail, or issue a warrant for your arrest.

1 To: (name or business) Custodian of Records, Facebook Inc c/o Corporation Services Company, 2730 Gateway Oaks Drive Suite 150N, Sacramento, CA 95833

2 You must follow the court order(s) checked below:

- a.  Attend the hearing  You may be placed on call by contacting the attorney below.
- b.  Attend the hearing *and* bring all items checked in c. below.
- c.  Provide a copy of these items to the court (Do not use this form to obtain Juvenile Court records):  
All records associated with account <https://www.facebook.com/jeffrey.renteria>, including basic subscriber records as well as stored contents of the account including timeline posts, messages, phone calls, photos, videos, location information, and user-input information from account inception to present date.  
 If this box is checked, provide all items listed on the attached sheet labeled "Provide These Items."
- d.  If someone else is responsible for maintaining the items checked in c. above, that person (the Custodian of Records) must also attend the hearing.
- e.  If this box is checked and you deliver all items listed above to the court within 5 days of service of this order, you do not have to attend court if you follow the instructions in item 5.

3 Court Hearing Date: \_\_\_\_\_ The court hearing will be at (name and address of court):  
Date: 04/07/2017 Time: 09:00 am SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO  
Dept: 11 Rm: 220 WEST BROADWAY, SAN DIEGO, CA 92101  
Call the person listed in item 4 below to make sure the hearing date has not changed. If you cannot go to court on this date, you must get permission from the person in item 4. You may be entitled to witness fees, mileage, or both, in the discretion of the court. Ask the person in item 4 after your appearance.

4 The person who has required you to attend court or provide documents is

Name David Danielsen Phone No. \_\_\_\_\_  
Title JUDGE, SAN DIEGO SUPERIOR COURT  
Address 220 WEST BROADWAY  
SAN DIEGO CA 92101  
City State  
Date 3/16/17 Signature David Danielsen

ORDER TO ATTEND COURT OR PROVIDE DOCUMENTS:  
Subpoena/Subpoena Duces Tecum  
(Criminal and Juvenile)

CASE NAME COURT OF THE COUNTY OF SACRAMENTO - FURNISHING	CASE NUMBER CD268262
---	-------------------------


- a Put all items checked in item 2c and your completed *Declaration of Custodian of Records* form in an envelope. (You can ask the person in item 4 where to get this form.) Attach a copy of page 1 of this order to the envelope.
- b Put the envelope inside another envelope. Then, attach a copy of page 1 of this form to the outer envelope or write this information on the outer envelope:
  - (1) Case name
  - (2) Case number
  - (3) Your name
  - (4) Hearing date, time, and department
- c Seal and mail the envelope to the Court Clerk at the address listed in item 3. You must mail these documents to the court within five days of service of this order.
- d If you are the Custodian of Records, you must also mail the person in item 4 a copy of your completed *Declaration of Custodian of Records*.

*The server fills out the section below*  
**Proof of Service of CR-125/JV-525**

- 1 I personally served a copy of this subpoena on  
 Date 3/16/2017 Time: 4:50  a.m.  p.m.  
 Name of the person served: Custodian of Record Facebook Inc., Corporation Services Company  
 At this address: FedEx to 2710 Gateway Oaks Dr. Ste #150N, Sacramento, CA 95833  
 After I served this person, I mailed or delivered a copy of this Proof of Service to the person in item 4 on (date): \_\_\_\_\_  
 Mailed from (city) \_\_\_\_\_
- 2 I received this order for service on (date): \_\_\_\_\_ and was not able to serve (name of person) \_\_\_\_\_  
 after (number of attempts) \_\_\_\_\_ attempts because:  
  - a  The person is not known at this address.
  - b  The person moved and the forwarding address is not known
  - c  There is no such address.
  - d  The address is in a different county.
  - e  I was not able to serve by the hearing date
  - f  Other (explain) \_\_\_\_\_
- 3 Server's name: Pascual Benitez Phone no. (619) 446-2962
- 4 The server (check one)
  - a  is a registered process server.
  - b  is not a registered process server
  - c  is a sheriff, marshal, or constable.
  - d  works for a registered process server
  - e  is exempt from registration under Business and Professional Code section 22350(b)
- 5 Server's address: 450 B St. Ste. 1200, San Diego, CA 92101  
 If server is a registered process server:  
 County of registration: \_\_\_\_\_ Registration no. \_\_\_\_\_

I declare under penalty of perjury under the laws of the State of California that I am at least 18 years old and not involved in this case and the information above is true and correct.

Date: 3/16/2017  
 ▶ Pascual Benitez  
 TYPE OR PRINT NAME OF SERVER

▶   
 SIGNATURE OF SERVER

CENTRAL OFFICE  
430 B Street, Suite 1200  
San Diego, CA 92101  
(619) 446-2900  
FAX (619) 446-2955



EAST COUNTY BRANCH  
250 East Main Street, 8th Fl  
El Cajon, CA 92020  
(619) 441-4890  
FAX (619) 441-4846

NORTH COUNTY BRANCH  
410 S. Melrose Drive, Suite 200  
Vista, CA 92081  
(760) 940-6450  
FAX (760) 940-6462

OFFICE OF THE ALTERNATE PUBLIC DEFENDER

JUVENILE DELINQUENCY  
5530 Overland Street, Ste 104  
San Diego, CA 92123  
(858) 974-5818  
FAX (858) 974-5808

COUNTY OF SAN DIEGO

MEGAN MARCOTTE, CHIEF DEPUTY

SOUTH BAY BRANCH  
305 H Street, Suite 410  
Chula Vista, CA 91910  
(619) 498-2085  
FAX (619) 498-2084

March 16, 2017

Facebook Inc. c/o Corporation Services Company  
2730 Gateway Oaks Drive Suite 150N,  
Sacramento, CA 95833

Dear Custodian of Records:

You have been served by this office with a Subpoena Duces Tecum (SDT), which requires that the custodian of records for your business, or other qualified witness, appear in court at the date and time specified on the attached SDT and produce the business records described.

Statement of Good Cause: Information is present on Facebook servers that presents material, exculpatory evidence in this case. Given the exculpatory (non-“fishing”) nature of the evidence that is confirmed present in Facebook’s possession, this request under the Fifth and Fourteenth Amendments guarantee of Due Process under the United States Constitution would supersede any State (“ECPA”) or Federal (“Stored Communications Act; 18 U.S.C. 2701 et seq.”) statute involving privacy concerns of Facebook users. The information requested in the attached SDT has been tailored specifically for one individual user with a precise and specific timeframe to limit any overbroad or burdensome demands within of the request. Similar business records from Facebook, Inc. are provided to law enforcement and the Office of the District Attorney in numerous similar cases pursuant to valid warrants without objection; the defense in this case is entitled to the same legal cooperation.

Attendance Pursuant to Penal Code §1330: The Superior Court has endorsed this subpoena additionally by requiring your attendance pursuant to Penal Code §1330, in the event that you are unamenable to complying with this subpoena via record production as illustrated below.

You may comply with the SDT, without the necessity of appearing in court, if you follow the instructions set forth below. Records may be provided digitally to further reduce the cost and burden on Facebook Inc. Strict compliance with these instructions is necessary in order to make the subpoenaed records admissible in court and avoid the necessity of a personal appearance by your custodian of records or other qualified witness:

1. Make two (2) complete sets of photo copies of the records described in the SDT;
2. Complete the “Declaration of Custodian of Records” form, which is included with this letter. Be sure that the appropriate boxes are checked and that the CITY, DATE, and SIGNATURE lines are completed at the bottom of the form;
3. Place the second copy of the records and the ORIGINAL of the “Declaration of Custodian of Records” form in a sealed envelope with the following on the outside of the envelope;

CASE TITLE: People vs. Lance Touchstone  
CASE NUMBER: CD268262  
WITNESS: Custodian of Records, Facebook, Inc.  
DATE OF HEARING: 04/07/2017

4. Place the sealed envelope prepared in step 3 inside a second sealed envelope addressed as follows:

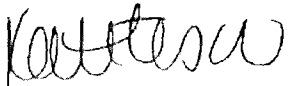
CLERK OF THE SUPERIOR COURT  
220 WEST BROADWAY  
DEPARTMENT 11  
SAN DIEGO, CA 92101

5. Mail, or otherwise deliver to the court, the package prepared in steps 3 and 4.

CAUTION: YOU MUST COMPLY EXACTLY WITH THE FORGOING INSTRUCTION WITHIN FIVE (5) DAYS OF YOUR RECEIPT OF THE SDT, UNLESS YOU MAKE OTHER ARRANGEMENTS WITH THE ATTORNEY WHO ISSUED THE SDT, OR ELSE APPEAR IN COURT WITH THE SUBPOENAED RECORDS ON THE DATE AND TIME INDICATED ON THE SDT.

I genuinely appreciate your cooperation in providing the subpoenaed records. I understand the nature of these requests is sometimes burdensome and have made every effort to limit both the scope and the burdensome nature of this request. If you have any questions regarding the SDT or how to comply with it, please do not hesitate to call me at the Department of the Alternate Public Defender (619-446-2900) or email me at [kate.tesch@sdcountry.ca.gov](mailto:kate.tesch@sdcountry.ca.gov).

Sincerely,



Kate Tesch  
Deputy Alternate Public Defender for  
Lance Touchstone

DECLARATION OF CUSTODIAN OF RECORDS

I, \_\_\_\_\_, declare that I am the custodian of records or other qualified witness for \_\_\_\_\_, and I have the authority to certify the records of the business described in the Subpoena Duces Tecum issued on \_\_\_\_\_, 2017, by the Department of the Alternate Public Defender of the County of San Diego in the matter of:  
The People of the State of California vs. Lance Touchstone

The documents attached to this declaration are true and correct copies of the records of the business described in the Subpoena Duces Tecum and were prepared by the personnel of the business in the ordinary course of the business at or near the time of the act, condition, or event described therein.

a. The records are:

All records associated with account <https://www.facebook.com/jeffrey.renteria>, including basic subscriber records as well as stored contents of the account including timeline posts, messages, phone calls, photos, videos, location information, and user-input information from account inception to present date.

b. They were prepared by \_\_\_\_\_ (e.g.: photocopying, computer reproduction, originals)

The business has none of the records described in the Subpoena Duces Tecum.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at \_\_\_\_\_, California, on \_\_\_\_\_, 2017.

\_\_\_\_\_  
Signature

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

LANCE TOUCHSTONE,

Defendant.

Case No.: SCD268267

ORDER FOR PRESERVATION OF  
STORED ACCOUNT CONTENT

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that all stored content and account information from August 8, 2016, to present be preserved by Facebook, Inc. for 180 days (six (6) months) for the following account: <https://www.facebook.com/jeffrey.renteria>.

The Court orders that Facebook, Inc. shall provide written notice to the Court when such preservation has been completed.

The Court further orders that Facebook, Inc., the District Attorney, and law enforcement NOT disclose this Order directing preservation, as such notification may lead to tampering with or destruction of evidence.

Dated: 3/16/17

  
JUDGE OF SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

LANCE TOUCHSTONE,

Defendant.

)  
)  
) Case No.: SCD268262

)  
) ORDER PURSUANT TO PENAL CODE  
) SECTION 1330 FOR ATTENDANCE  
) AND COMPLIANCE WITH  
) ACCOMPANYING SUBPOENA  
) DUCES TECUM  
)  
)  
)

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that, probable cause being established that the requested records do appear to be in in the custody and control of Facebook Inc., and that the requested documents are material and of exculpatory nature, the Custodian of Records for Facebook Inc. is ordered to appear on April 7, 2017, at 9 a.m. in Department 11 of Central Superior Court, County of San Diego, pursuant to the attached Subpoena Duces Tecum. If the Custodian of Records does comply with the attached Subpoena Duces Tecum and docs provide the documents requested to the court, such personal appearance will not be necessary.

Dated: \_\_\_\_\_

3/16/17

*David J. Samuelson*  
JUDGE OF SUPERIOR COURT

# **Exhibit C-J**



## SEALED UNREDACTED DOCUMENT

CASE NUMBER:  
CD268262 People v. Lance Touchstone

### THIS DOCUMENT CONTAINS:

Confidential and Protected Records and Communications Pertinent to Defense  
- Redacted Version to be Produced to Interested Parties -

### PURSUANT TO RULE OF COURT 2.550 THIS COURT FINDS:

- (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.

AND THEREFORE ORDERS THIS UNREDACTED DOCUMENT TO BE FILED UNDER SEAL, MAINTAINED IN A FILE SEPARATE FROM THE PUBLIC CASE FILE, AND NOT SUBJECT TO PUBLIC INSPECTION EXCEPT UPON ORDER OF THE COURT

DATED: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

# **Exhibit K**

**From:** Harvey, Makenzie [mailto:makenzie.harvey@sdcda.org]  
**Sent:** Monday, October 24, 2016 10:34 AM  
**To:** Tesch, Kate <Kate.Tesch@sdcountry.ca.gov>  
**Subject:** Re: Lance Touchstone

Okay sure sounds good.

What specific witnesses are you looking for? The victim in this case is terrified for his safety. I would prefer to set a meeting up in our office at your convenience (of course affording you privacy) if that is someone you want to talk to.

Thanks!

Sent from my iPhone

On Oct 24, 2016, at 10:25 AM, Tesch, Kate <Kate.Tesch@sdcountry.ca.gov> wrote:

Hi Makenzie:

I have been assigned to the Touchstone case. It looks like we have some discovery already (thank you!), but I wanted to touch base to let you know about the assignment of the case. Any electronic media can be sent to my attention. Can you please send along unredacted witness contact information?

Thanks for your time.

Kate I. Tesch  
Deputy Alternate Public Defender  
Office of the Alternate Public Defender  
450 B Street, Suite 1200  
San Diego, California 92101  
Phone: (619) 446-2934  
Fax: (619) 446-2955

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# Exhibit L

Tesch, Kate

---

**From:** Reilly, Michael <Michael.Reilly@sdccda.org>  
**Sent:** Wednesday, January 18, 2017 7:40 PM  
**To:** Tesch, Kate  
**Subject:** RE: Touchstone

Hey Kate,

Still trying to coordinate that. Considering he wouldn't agree to let me release his medical records today... it might be a challenge. And at this point I don't anticipate any changes to the complaint.

---

Michael Reilly  
Deputy District Attorney  
San Diego District Attorney's Office  
Superior Court  
Tel: (619) 515-8157  
Email: [Michael.Reilly@sdccda.org](mailto:Michael.Reilly@sdccda.org)



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---

**From:** Tesch, Kate [mailto:[Kate.Tesch@sdcounty.ca.gov](mailto:Kate.Tesch@sdcounty.ca.gov)]  
**Sent:** Wednesday, January 18, 2017 7:26 PM  
**To:** Reilly, Michael  
**Subject:** Touchstone

Hey Mike. Any word from the victim on his availability to be interviewed by my office?  
Also, do you anticipate any changes to the complaint before trial? Kate

Kate I. Tesch  
Deputy Alternate Public Defender  
Office of the Alternate Public Defender  
450 B Street, Suite 1200  
San Diego, California 92101  
Phone: (619) 446-2934  
Fax: (619) 446-2955

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# Exhibit M

Tesch, Kate

---

**From:** Reilly, Michael <Michael.Reilly@sdcda.org>  
**Sent:** Wednesday, April 5, 2017 1:46 PM  
**To:** Tesch, Kate  
**Subject:** RE: FYI re: SDT Facebook Hearing 4/7/17

It looks like I just got an email from Facebook about 10 minutes after you emailed me. My DAI is going out to serve Renteria and will ask him if he would like to come in to talk with you. I'll let you know if he agrees or give you a statement if he declines.

---

Michael Reilly  
Deputy District Attorney  
San Diego District Attorney's Office  
Superior Court  
Tel: (619) 515-8157  
Email: [Michael.Reilly@sdcda.org](mailto:Michael.Reilly@sdcda.org)



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---

**From:** Tesch, Kate [<mailto:Kate.Tesch@sdcounty.ca.gov>]  
**Sent:** Wednesday, April 05, 2017 1:31 PM  
**To:** Reilly, Michael  
**Subject:** FYI re: SDT Facebook Hearing 4/7/17

FYI Mike: Facebook has not responded with compliance to the SDT sent last month, so the hearing will be Friday morning. I understand that counsel for FB has reached out to you to no avail, and will likely be trying again to reach you today.

Any word on my requests re: Renteria?

KT

# Exhibit N



# SEALED UNREDACTED DOCUMENT

CASE NUMBER:  
CD268262 People v. Lance Touchstone

THIS DOCUMENT CONTAINS:

Confidential and Protected Records and Communications Pertinent to Defense  
- Redacted Version to be Produced to Interested Parties -

PURSUANT TO RULE OF COURT 2.550 THIS COURT FINDS:

- (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.

AND THEREFORE ORDERS THIS UNREDACTED DOCUMENT TO BE FILED UNDER  
SEAL, MAINTAINED IN A FILE SEPARATE FROM THE PUBLIC CASE FILE, AND NOT  
SUBJECT TO PUBLIC INSPECTION EXCEPT UPON ORDER OF THE COURT

DATED: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

INTERVENOR'S  
EXHIBIT M

1 James G. Snell, State Bar No. 173070  
JSnell@perkinscoie.com  
2 Christian Lee, State Bar No. 301671  
CLee@perkinscoie.com  
3 PERKINS COIE LLP  
3150 Porter Drive  
4 Palo Alto, CA 94304-1212  
Telephone: 650.838.4300  
5 Facsimile: 650.838.4350

6 Attorneys for Non-Party  
Facebook, Inc.  
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN DIEGO

10  
11 THE PEOPLE OF THE STATE OF  
CALIFORNIA,

12 Plaintiff,

13 v.  
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15 LANCE TOUCHSTONE,

16 Defendant.  
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Case No. CD268262

**NON-PARTY FACEBOOK, INC.'S REPLY  
IN SUPPORT OF MOTION TO QUASH  
SUBPOENA DUCES TECUM AND  
VACATE ORDER ALLOWING  
SUBPOENA DUCES TECUM**

Date: April 27, 2017  
Time: 9:00 A.M.  
Dept.: 11  
Judge: Hon. David Danielsen

F I L E D  
Clerk of the Superior Court

APR 27 2017

M. CHARTER, Deputy

FILED

1 I. INTRODUCTION

2 Defendant asks this Court to ignore federal law and compel Facebook, Inc. ("Facebook")  
3 to divulge the content of communications associated with the purported Facebook account  
4 belonging to the victim, even though he can subpoena relevant content from the victim after  
5 providing the victim an opportunity to assert objections or seek the assistance of the prosecution.  
6 In light of these alternatives, the Court need not consider Defendant's constitutional challenge to  
7 the Stored Communications Act, 18 U.S.C. § 2701, *et seq.* ("SCA") and the Court should the  
8 Court should grant Facebook's motion to quash and vacate its prior order.

9 II. ARGUMENT

10 A. The SCA Does Not Infringe on Defendant's Constitutional Rights.

11 1. The Court Should Decline to Consider the Constitutionality of the  
12 SCA Because Defendant Has Other Means of Obtaining the Requested  
13 Content.

14 Even though Defendant admits that he already has multiple Facebook communications  
15 that the victim posted on Facebook, he argues that the SCA somehow infringes on his  
16 constitutional rights because it prohibits him from obtaining those and possibly other  
17 communications content directly from Facebook. Opp'n at 4. But as Defendant acknowledges,  
18 Opp'n at 11-12, the SCA does not prohibit him from seeking the content directly from the  
19 account holder, who owns and has custody and control over the content in his account. *See, e.g.,*  
20 *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1446-47 (2006) (service providers are a  
21 "kind of data bailee," and the SCA "does not render the data wholly unavailable; it only means  
22 that the discovery must be directed to the owner of the data, not the bailee to whom it was  
23 entrusted"); *Juror No. One v. Superior Court*, 206 Cal. App. 4th 854, 864 (2012) (stating that  
24 SCA protection would apply "only as to attempts by the court or real parties in interest to compel  
25 Facebook to disclose the requested information"); *Negro v. Superior Court*, 230 Cal. App. 4th  
26 879, 896 (2014) (the SCA "invest[s] users with the final say regarding disclosure of the contents  
27 of their stored messages"); *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 731 (9th Cir.  
28 2011); *Flagg v. City of Detroit*, 252 F.R.D. 346, 366 (E.D. Mich. 2008) (noting that "it seems

1 apparent” that it would be unlawful for the provider to disclose content in response to a subpoena,  
2 and ordering the issuing party to direct his request to the account holder).

3 Indeed, the principle that criminal defendants should seek stored communications content  
4 directly from the parties to the communications was recently confirmed by the Second Circuit  
5 when it declined to consider a criminal defendant’s constitutional challenge to the SCA. *U.S. v.*  
6 *Pierce*, 785 F.3d 832, 842 (2d Cir. 2015). In *Pierce*, Facebook successfully moved to quash a  
7 criminal defense subpoena seeking the content of a user’s Facebook account. 785 F.3d at 841-42.  
8 The defendant then obtained at least some of the desired content via a private investigator and  
9 used it at trial. On appeal, defendant argued that the SCA violates his Fifth and Sixth  
10 Amendment rights “because it provides a mechanism for the government to obtain stored content  
11 from a provider, without a comparable mechanism for criminal defendants to do so,” noting that  
12 “he had no way of knowing whether or not the Facebook records that he had for [the user] were  
13 complete.” *Id.* at 842. The Second Circuit rejected defendant’s claim, noting that defendant had  
14 obtained some of the information himself and that there were other methods to obtain the desired  
15 content and that he had not issued subpoenas directly to the user or parties to the communications.  
16 *Id.*

17 *Pierce* is instructive in this case. Here as in *Pierce*, Defendant has already obtained a  
18 significant and detailed amount of publicly available content, but he speculates that additional  
19 information *might* be available. Opp’n at 2-3; Defense Counsel’s Declaration in Opposition to  
20 Facebook’s Motion to Quash the Court-Ordered Subpoena Duces Tecum (“Tesch Decl.”), ¶ 20  
21 (“It is unknown whether additional relevant posts . . . are not visible to the public, or whether  
22 additional messages have been sent . . . that have not been disclosed . . .”). Defendant contends  
23 that his investigators cannot locate the user, but the investigator merely left her business card at  
24 two locations for the user to find. *Id.*, ¶ 28. Defendant notes that the victim was in a relationship  
25 with the Defendant’s sister, but presents no information why he cannot obtain the information he  
26 thinks he needs from her or another Facebook friend of Defendant or whether Defendant’s sister  
27 knows where the victim is located. Regardless, if Defendant is unable to locate the victim, he can  
28 seek the assistance of the Court or the People, who will presumably need to have the victim

1 testify at trial, to serve a subpoena. Additionally, Defendant has not attempted to subpoena the  
2 user, based on the speculative belief that the user would be uncooperative. Opp'n at 12  
3 (“[D]efense counsel has strong reservations with [the user’s] ability or willingness to comply with  
4 any [subpoena] or [c]ourt [o]rder to personally produce his own Facebook records.”). But if the  
5 user refuses to respond to a subpoena, Defendant can seek the Court’s assistance to fashion  
6 appropriate discovery orders, whether against the user or against the State’s evidence. In sum,  
7 without a more diligent effort, Defendant has not exhausted other available avenues to obtain the  
8 requested information, and this Court should decline to consider the constitutionality of the SCA.

9 Defendant could also work with the State to obtain a search warrant for the  
10 communications he seeks. While Defendant indicates that this Court has denied his requests to  
11 have the People obtain a search warrant, this process remains open to Defendant if there are  
12 grounds for the People to obtain a warrant.<sup>1</sup> Motion at 7; *see also State v. Counce*, 392 So. 2d  
13 1029, 1031 (Fla. 4th DCA 1981) (acknowledging State’s “duty to disclose to the defense material  
14 that is otherwise unavailable to the defense”).

15 Unlike a subpoena directed to Facebook, a subpoena to the user or a search warrant  
16 directed to Facebook both comport with the SCA.

17 **2. Even If the Court Considers the Constitutional Question, Defendant**  
18 **Has Not Shown that the SCA Infringes on His Constitutional Rights.**

19 “There is no general constitutional right to discovery in a criminal case, and . . . ‘[t]he  
20 Due Process Clause has little to say regarding the amount of discovery which the parties must be  
21 afforded . . . .’” *See, e.g., Facebook, Inc. v. Superior Court (Hunter)*, 240 Cal. App. 4th 203, 215  
22 (2015), *review granted and opinion superseded sub nom. Facebook v. S.C.*, 362 P.3d 430 (Cal.  
23 2015) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977))<sup>2</sup>; *see also Pennsylvania v.*  
24 *Ritchie*, 480 U.S. 39, 54 (1987) (noting that even the Confrontation Clause “only guarantees ‘an  
25 *opportunity* for effective cross examination, not cross examination that is effective in whatever  
26

27 <sup>1</sup> If the People do not have the basis to seek a search warrant, then Defendant’s argument that the  
28 People are able to obtain the discovery by search warrant is inaccurate. Opp’n at 12.

<sup>2</sup> The *Facebook* decision may be cited for persuasive value while it is pending review by the  
California Supreme Court. Cal. Rules of Court, rule 8.1115(e)(1).

1 way, and to whatever extent, the defense might wish.”) (emphasis in original). As explained by  
2 the Court of Appeal in *Facebook*, “[t]he consistent and clear teaching of both United States  
3 Supreme Court and California Supreme Court jurisprudence is that a criminal defendant’s right to  
4 pretrial discovery is limited, and lacks any solid constitutional foundation.” *Facebook*, 240 Cal.  
5 App. 4th at 225. Indeed, as the California Supreme Court has held, the U.S. Supreme Court has  
6 never interpreted the Due Process clause to create a constitutional right to compel disclosure of  
7 evidence from third parties at all, let alone over a statutory prohibition. *People v. Hammon*, 15  
8 Cal. 4th 1117, 1125-27 (1997) (holding that criminal defendant had no constitutional right to  
9 examine privileged psychotherapy records from a third party, even if they were material).  
10 Accordingly, the Court in *Hammon* declined to recognize such a right, as there is “no adequate  
11 justification for taking such a long step in a direction the United States Supreme Court has not  
12 gone.” *Id.* at 1127.

13 The cases cited by Defendant are unavailing because none of them involve a state court  
14 ordering a private party to violate a federal statute. Instead, the cases address (1) disclosure of  
15 information held by the State, rather than by a private nonparty such as Facebook here; (2) state  
16 law privileges or statutes which this Court has authority to interpret and limit, unlike a federal  
17 statute such as the SCA here; or (3) general objections to a subpoena where there is no governing  
18 statute, unlike the SCA here.

19 For example, Defendant relies on *Chambers v. Mississippi*, 410 U.S. 284 (1972), for the  
20 expansive proposition that laws cannot deprive a criminal defendant of his due process rights in  
21 any way. *Chambers*, however, acknowledged that the right to confront and cross-examine a  
22 witness was not absolute, while holding that Mississippi state laws that prevented a party from  
23 cross-examining a hostile witness that the party called because the state declined to call that  
24 witness violated the defendant’s rights. 410 U.S. at 295. Here, the SCA does not prevent  
25 Defendant from cross-examining a witness, it merely limits Defendant’s ability to obtain stored  
26 content from Facebook with a subpoena.

27 Defendant also cites *U.S. v. Nixon* for the proposition that a “generalized interest in  
28 confidentiality” does not preclude a subpoena for relevant evidence, Opp’n at 5-6, but *Nixon* is

1 inapposite because the records here are available to other parties and because Facebook did not  
2 object to producing records based on “generalized interest in confidentiality.” Here, Facebook’s  
3 motion is based on a federal statute, the SCA, which is a specific statute that protects privacy  
4 interests in electronic communications, *see, e.g., U.S. v. Warshak*, 631 F.3d 266, 288 (6th Cir.  
5 2010) (holding that there is a reasonable expectation of privacy in electronic communications and  
6 construing the SCA), and Facebook is merely acting as a data bailee, with the victim or other  
7 persons who were privy to the communications having access and the ability to disclose the  
8 communications.

9 Similarly, Defendant’s reliance on *Pennsylvania v. Ritchie* is misplaced because that case  
10 involved records held only by the State, not a private data bailee like Facebook. 480 U.S. at 42-  
11 43, 60. And in any case, the *Ritchie* Court refused to order production to the defense, noting that  
12 the Confrontation Clause is a right to cross-examine a witness with *questions* at trial, and that it  
13 does not “include the power to require the pretrial disclosure of any and all information that might  
14 be useful in contradicting unfavorable testimony.” *Id.* at 52. *Ritchie* also noted that defense  
15 counsel had no constitutional right to search through the record’s custodian’s files (a child  
16 psychologist’s notes and reports), and that “there is no general constitutional right to discovery in  
17 a criminal case.” *Id.* at 59-60 (quoting *Weatherford*, 429 U.S. at 559).

18 Contrary to Defendant’s argument, *Wardius v. Oregon*, 412 U.S. 470 (1973), does not  
19 support that due process requires exactly equal discovery tools to both the People and the defense.  
20 Opp’n at 9. In *Wardius*, the Supreme Court invalidated a state statute that required the defendant  
21 to disclose the names of his alibi witnesses but did not require the People to do the same. The  
22 Court held that “the Due Process Clause of the Fourteenth Amendment forbids enforcement of  
23 alibi rules unless reciprocal discovery rights are given to criminal defendants.” *Id.* at 472. But  
24 the “discovery” in *Wardius* involved only the disclosure of information already in the  
25 government’s possession, and only if the state required disclosure of alibi witness information  
26 from defendant; the Court did not hold that “discovery rights” meant that defendants must have  
27 the same investigatory powers as the government or that it conferred discovery rights against  
28 nonparties. For example, “the search warrant provisions of Fed. R. Crim. P. 41(b) and the



1 wiretap application provisions of 18 U.S.C. § 2516(a) both provide a means for the government to  
2 obtain evidence without a mechanism for defendants to do so.” *Pierce*, 785 F.3d at 842, n.2. Yet  
3 neither of these provisions have been held to deprive defendants of due process and neither  
4 provision requires the defendant to do something that is not required of the state. For example,  
5 Defendants have never been able to obtain a warrant to search a witness’s house, nor have they  
6 ever been able to use a subpoena to do the same.<sup>3</sup> But here Defendant argues that he should be  
7 able to obtain with a subpoena what the People would need a search warrant to obtain. Cal. Penal  
8 Code § 1546.1(a), (b); *Warshak*, 631 F.3d at 288 (requiring the government to obtain a search  
9 warrant to obtain content).

10 Defendant also cites cases in which courts held that a defendant’s due process rights could  
11 limit a state law or privilege. *Rubio v. Superior Court*, 202 Cal. App. 3d 1343 (Ct. App. 1988)  
12 (state law marital privilege); *Delaney v. Superior Court*, 50 Cal. 3d 785 (1990) (state shield law  
13 for reporters); *Evans v. Superior Court*, 11 Cal. 3d 617 (1974) (state witness lineup procedure).  
14 However, these cases are inapposite because they involve state laws or privileges that this Court  
15 has authority to interpret and limit. In contrast, the SCA is a federal statute that this Court cannot  
16 order Facebook to violate pursuant to the Supremacy Clause. *See* U.S. Const., art. VI. Moreover,  
17 the SCA’s prohibitions are much broader than the privileges cited by Defendant: the SCA covers  
18 *all* communications content regardless of whether they are independently privileged or otherwise  
19 protected for reasons unknown to this Court or the parties.

20 As *Facebook v. Superior Court* and *Hammon* make clear, a criminal defendant does not  
21 have a general constitutional right to discovery, and Defendant has offered no basis for this Court  
22 to depart from precedent to create such a right.

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<sup>3</sup> To the extent the People do obtain exculpatory information from its elective use of one of the  
tools, it is required to share that information with defendant. *See Brady v. Maryland*, 373 U.S. 83  
(1963); *People v. Superior Court*, 61 Cal. 4th 696, 709 (2015) (same).

1           B.       Defendant's Argument that the Standard to Enforce a Subpoena is Merely  
2           "Plausible Justification" is Meritless.

3           Defendant's suggestions that the sole consideration for whether a subpoena should be  
4           enforced is whether the subpoena is supported by "plausible justification," Opp'n at 10-11, is  
5           meritless. For example, the Supreme Court of the United States has held that subpoenas seeking  
6           documents must, at a minimum, satisfy a four-part test in *Nixon* that the documents sought are  
7           relevant, not otherwise procurable, that they are necessary, and not sought for a "fishing  
8           expedition." *Nixon*, 418 U.S. at 699-700. As another example, where - as here - a statute  
9           proscribes enforcement of a subpoena, that statute must necessarily be considered by the Court  
10          when it determines whether to enforce the subpoena. The two cases that Defendant cites to  
11          support his "plausible justification" standard for subpoenas are inapposite because they merely  
12          affirm that a subpoena must seek relevant material, and they do not involve a statute or other rule  
13          that specifically prevents enforcement of the subpoena. *See People v. Superior Court (Barrett)*,  
14          80 Cal. App. 4th 1305, 1320 (Ct. App. 2000) ("Assuming CDC moved to quash a subpoena duces  
15          tecum by [Defendant], the burden would be on Barrett to demonstrate the materials he seeks are  
16          relevant . . . ." (emphasis added)); *Pac. Lighting Leasing Co. v. Superior Court*, 60 Cal. App. 3d  
17          552, 563 (Ct. App. 1976) (concluding generally that "where the *relevant* information is in the  
18          hands of a private party witness . . . [the] private nonparty witness is subject to a subpoena duces  
19          tecum in a criminal case." (emphasis added)).

20          In addition to the SCA, there is also no justification for Defendant's subpoena because  
21          defense counsel concedes that she has no reason to believe that the Facebook account *actually*  
22          contains relevant information. *Tesch Decl.* ¶ 23 ("[The] Facebook account is relevant because (1)  
23          it *may* contain additional information that is inconsistent . . . , (2) it *may* contain additional  
24          information that demonstrates a motivation . . . , (3) it *may* contain additional information that  
25          demonstrates a character . . . , and (3) [sic] it *may* contain additional information that provides  
26          exonerating, exculpatory evidence . . . ." (emphasis added)). This Court should not order  
27          Facebook to violate federal law merely because Defendant speculates there *may* be relevant  
28          information in the Facebook account.

1 III. CONCLUSION

2 For the foregoing reasons, Facebook respectfully requests that the Court grant its motion  
3 to quash Defendant's subpoena and vacate its March 16, 2017 Order.

4 DATED: April 25, 2017

**PERKINS COIE LLP**

5 By:   
6 Christian Lee

7 Attorneys for Non-Party Facebook, Inc.  
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1 PROOF OF SERVICE VIA EMAIL AND U.S. MAIL

2 I am a citizen of the United States and employed in Santa Clara County, California. I am  
3 over the age of eighteen years and not a party to the within-entitled action. My business address  
4 is 3150 Porter Drive, Palo Alto, California 94304-1212. On April 25, 2017, I served the:

5 **NON-PARTY FACEBOOK, INC.'S REPLY IN SUPPORT OF MOTION TO QUASH**  
6 **SUBPOENA DUCES TECUM AND VACATE ORDER ALLOWING SUBPOENA**  
7 **DUCES TECUM**

8 By transmitting a copy of the above-listed document in PDF form via electronic mail to Kate  
9 Tesch and placing a copy in a sealed envelope, postage fully paid, addressed as follows:

10 Kate Tesch  
11 Office of the Alternate Public Defender  
12 450 B Street, Suite 1200  
13 San Diego, CA 92101-3905  
14 [kate.tesch@sdccounty.ca.gov](mailto:kate.tesch@sdccounty.ca.gov)

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

17 Executed on April 25, 2017, at Palo Alto, California.

18   
19 \_\_\_\_\_  
20 Anna Freddie

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

FACEBOOK, INC,  <p align="right">Petitioner,</p> <p align="center">v.</p> THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO,  <p align="right">Respondent.</p>	For Court Use Only
LANCE TOUCHSTONE,  <p align="right">Real Party In Interest.</p>	Supreme Court No.: S245203 Court of Appeal No.: D072171 Superior Court No.: SCD268262

**PROOF OF SERVICE**

I, the undersigned, declare as follows:

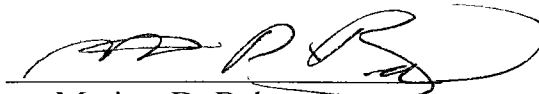
I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On July 25, 2018, a member of our office served a copy of the within Letter of **MOTION TO AUGMENT THE RECORD ON APPEAL AND INTERVERNOR'S EXHIBIT A TO M** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Mail, addressed as follows:

Perkins Coie LLP James G. Snell Christian Lee 3150 Porter Drive Palo Alto, CA 943304 – 1212 <i>Counsels for Facebook, Inc.</i>	San Diego Superior Court Attn: Clerk of the Court c/o Hon. Kenneth K. So, Judge 1100 Union Street, Dept: SD-2004 San Diego, CA 92101
Katherine Tesch Office of the Alternate Public Defender 450 B Street, Suite 1200 San Diego, CA 92101 <i>Counsel for Touchstone</i>	

Michael C. McMahon Office of the Ventura County Public Defender 800 S. Victoria Avenue, Suite 207 Ventura, CA 93009	Law Office of Donald E. Landis, Jr. P.O. Box 221278 Carmel, CA 93922
Dorothy Katherine Bischoff Office of the Public Defender 555 Seventh Street San Francisco, CA 94103- 4732	Stanley H. Chen Horvitz & Levy LLP 3601 West Olive Avenue, 8th Fl Burbank, CA 91505-4681

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 25, 2018 at 330 West Broadway, San Diego, CA 92101.

  
Marites D. Balagtas