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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES

11
12 **PEOPLE OF THE STATE OF CALIFORNIA,**
13
14 Plaintiff,
15 v.
16
17 **MARK LUCIAN FEIGIN**
(DOB: 3/20/1976),
18
19 Defendant.

Case No. BA443892

**PEOPLE'S OPPOSITION TO
DEFENDANT'S MOTION TO SET
ASIDE INFORMATION PURSUANT TO
PENAL CODE SECTION 995**

Date: January 2, 2018
Time: 8:30 a.m.
Dept.: 113

22
23 The People present the following Opposition to Defendant's Motion to Set Aside the
24 Information Pursuant to Penal Code Section 995. This Opposition is based upon the attached
25 Points and Authorities, the transcript and exhibits from the Preliminary Hearing, and any
26 evidence to be presented at the hearing on the motion.

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28 ////

1 STATEMENT OF THE CASE

2 On October 18, 2016, the California Attorney General's Office filed a criminal complaint in
3 Los Angeles County Superior Court charging Defendant with one felony violation of Penal Code
4 section 422(a), Criminal Threats and one misdemeanor violation of Penal Code section 653m(b),
5 Annoying Telephone Calls based on repeated contact Defendant engaged in with the Islamic
6 Center of Southern California. The complaint further alleged a special allegation that the felony
7 offense was a hate crime in violation of Penal Code section 422.75(a).

8 On July 18, 2017, the People filed a First Amended Felony Complaint. The First
9 Amended Complaint changed the date range for the conduct alleged in Count 2.

10 On October 2, 2017, a Preliminary Hearing was held in Department 101 of the Los Angeles
11 Superior Court before the Honorable Ronald S. Coen. At the conclusion of the Preliminary
12 Hearing, Defendant was held to answer on all charges. Defendant was arraigned on the Felony
13 Information on October 16, 2017, where he pled not guilty to all counts.

14 On November 7, 2017, a hearing on Defendant's Motion to Dismiss Pursuant to PC 995
15 was held in Department 113 before the Honorable Bernie LaForteza. At that time, Defendant's
16 Motion to Set Aside the Information Pursuant to Penal Code Section 995 as to Count 1 was
17 denied. A hearing on Defendant's Motion to Set Aside the Information Pursuant to Penal Code
18 Section 995 as to Count 2 was continued until January 2, 2018.

19 STATEMENT OF FACTS

20 Kristin Stangas is the Communications Coordinator for the Islamic Center of Southern
21 California (hereafter "ICSC"). RT 16:7-8. One of her job responsibilities for the ICSC is to
22 monitor the internet which includes Facebook and Twitter. RT 16:14-15

23 Between September 17, 2016 through September 25, 2016, Defendant made several posts
24 to the ICSC's Facebook page. RT 17:8-28, Exhibit 1. ICSC Communication Coordinator Kristin
25 Stangas kept copies of the Facebook posts and produced those to LAPD Det. Ken Bryant. RT
26 17:1-28. A review of the Facebook posts shows the following:

27 On September 17, 2016, in response to a post about an ICSC "Sunset Hike," Defendant
28 posted "THE TERROR HIKE...SOUNDS LIKE FUN." RT 17:8-28, Exhibit 1.

1 On September 18, 2016, in response to an ICSC post about LA Poet Laureate Luis
2 Rodriguez sharing poetry, Defendant posted “THE MORE MUSLIMS WE ALLOW INTO
3 AMERICA THE MORE TERROR WE WILL SEE.” RT 17:8-28, Exhibit 1.

4 On September 24, 2016, Defendant posted “PRACTICING ISLAM CAN SLOW OR
5 EVEN REVERSE THE PROCESS OF HUMAN EVOLUTION.” RT 17:8-28, Exhibit 1.

6 On September 25, 2016, around 4:24 p.m., Defendant posted “Islam is dangerous – fact: the
7 more muslim savages we allow into america – the more terror we will see – this is a face which is
8 undeniable.” RT 17:8-28, Exhibit 1

9 On September 25, 2016, around 5:08 p.m., Defendant posted “Filthy muslim shit has no
10 place in western civilization.” RT 17:8-28, Exhibit 1.

11 On October 19, 2016, Defendant was arrested and interviewed by LAPD. During that
12 interview, Defendant admitted to making the Facebook posts. RT 18:1-7. Defendant further
13 stated he was blocked from the ICSC Facebook page shortly after the posts. RT 55:7-11

14 **I. AN INFORMATION MAY NOT BE SET ASIDE IF THERE IS SOME**
15 **EVIDENCE TO SUPPORT THE MAGISTRATE’S CONCLUSION**

16 In determining a motion brought pursuant to Penal Code section 995, neither the superior
17 court nor the appellate court may reweigh the evidence or substitute its judgment for that of the
18 committing magistrate as to the weight of the evidence or credibility of witnesses. *People v.*
19 *Block* (1971) 6 Cal.3d 239, 245; *People v. Hall* (1971) 3 Cal.3d 992, 996. “ ‘And if there is some
20 evidence in support of the information, the court will not inquire into the sufficiency thereof.’ ”
21 *People v. Block, supra; Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474. Thus, an
22 indictment or information should be set aside only when there is a total absence of evidence to
23 support a necessary element of the offense charged. *People v. Superior Court (Jurado)* (1992) 4
24 Cal.App.4th 1217, 1226; *Somers v. Superior Court* (1973) 32 Cal.App.3d 961, 963.

25 “[A]lthough there must be *some* showing as to the existence of each element of the
26 charged crime [citation] such a showing may be made by means of circumstantial evidence
27 supportive of reasonable inferences on the part of the magistrate.” *Williams v. Superior*
28 *Court* (1969) 71 Cal.2d 1144, 1148. “Every legitimate inference that may be drawn from the

1 evidence must be drawn in favor of the information.” *Rideout v. Superior Court, supra*;
2 *Caughlin v. Superior Court* (1971) 4 Cal.3d 461, 464-465, *cert. den.* 404 U.S. 990; *People v.*
3 *Superior Court (Jurado), supra*. In short, an Information should not be set aside pursuant to
4 Penal Code section 995 if there is some rational ground for assuming the possibility that an
5 offense has been committed and the accused is guilty of it. *People v. Hall, supra*; *Rideout v.*
6 *Superior Court, supra*.

7 **II. THE EVIDENCE PRESENTED AT THE PRELIMINARY HEARING**
8 **ESTABLISHED PROBABLE CAUSE TO HOLD DEFENDANT TO**
9 **ANSWER TO COUNT 2**

10 California Penal Code section 653m(b) states:

11 Every person who, with intent to annoy or harass, makes repeated telephone
12 calls or makes repeated contact by means of an electronic communication device,
13 or makes any combination of calls or contact, to another person is, whether or not
14 conversation ensues from making the telephone call or contact by means of an
15 electronic device, guilty of a misdemeanor. Nothing in this subdivision shall apply
16 to telephone calls or electronic contacts made in good faith or during the ordinary
17 course and scope of business. *PC 653m(b)*.

18 The elements of the crime are as follows:

- 19 1. Specific intent to annoy or harass.
- 20 2. Repeated contact with another person.
- 21 3. By means of an electronic device.

22 In his Motion to Dismiss, Defendant included “good faith” and in the “ordinary scope and
23 course of business” as elements of the crime that the People are required to prove at preliminary
24 hearing. A straight reading of the code section shows that the three (3) elements listed above are
25 all that is required for a person to be found “guilty of a misdemeanor.” Clearly, if the Legislature
26 had wanted “good faith” and “ordinary scope and course of business” to be included in the
27 elements of the crime, then they would have placed those phrases *before* the words “guilty of a
28 misdemeanor.”

As will be shown, the People presented sufficient evidence at the preliminary hearing for
the Defendant to be held to answer for Count 2. Since Defendant’s Motion did not contest that
the People failed to satisfy the use of an electronic device, that element will not be addressed.

1 A. Defendant's Specific Intent was to Annoy and Harass the Islamic Center of
2 Southern California and the Facebook Posts Were Not Made in "Good Faith"

3 Between September 17 – 25, 2016, Defendant posted multiple times to the Facebook page
4 of the ICSC. Defendant's Facebook posts came into evidence at the Preliminary Hearing as
5 People's Exhibit 1. Defendant's posts to the ICSC's Facebook page from Exhibit 1 include:

- 6 • THE TERROR HIKE...SOUNDS LIKE FUN (September 17, 2016)
- 7 • THE MORE MUSLIMS WE ALLOW INTO AMERICA THE MORE TERROR WE
8 WILL SEE. (September 18, 2016)
- 9 • PRACTICING ISLAM CAN SLOW OR EVEN REVERSE THE PROCESS OF HUMAN
10 EVOLUTION. (September 24, 2016)
- 11 • Islam is dangerous – fact: the more muslim savages we allow into america – the more
12 terror we will see – this is a face which is undeniable. (September 25, 2016)
- 13 • Filthy muslim shit has no place in western civilization. (September 25, 2016)

14 A review of the Facebook posts clearly shows the annoying and harassing nature of
15 Defendant's posts. Additionally, the Defendant's posts were found to be so annoying and
16 harassing that ultimately the ICSC blocked the Defendant from being able to post on the ICSC's
17 Facebook page.

18 Defendant argues in his Motion to Dismiss that the posts were made in "good faith" and the
19 burden lay with the People for presenting evidence at the preliminary hearing that the Defendant
20 lacked "good faith" when he made his posts. Defendant has provided no evidence to support this
21 assertion and a review of the cases involving violations of PC 653m(b) would suggest that the
22 burden of disproving "good faith" does not lie with the People.

23 In the case of *People v. Astalis*, the Defendant was charged with a violation of PC 653m(b)
24 for calling, texting and posting on the Facebook page of his ex-wife's friend. *People v. Astalis*
25 (2014) 226 Cal. App. 4th Supp. 1. During his trial, Defendant testified that his contact with the
26 victim was because "he was concerned about the welfare his minor children." *Id. at 3.*
27 Additionally, in the case of *J.J. v. M.F.*, Plaintiff was issued with a mutual restraining order along
28 with Defendant after making repeated calls to Defendant. Plaintiff challenged the issuance of the

1 restraining order against her and explained that the repeated calls to Defendant were because she
2 was “a mother concerned about her child’s health.” *Id. at 15-16.*

3 In both cases, the Defendant came forth and offered a “good faith” explanation for the
4 phone calls. No such explanation has been provided in this case and the burden of such an
5 explanation should not rest with the People. Regardless, People are at a loss as to how “good
6 faith” could possibly apply to the language of any of the Facebook posts shown above. The mere
7 content and nature of the posts establish that they are not made in “good faith” as Defendant
8 would suggest but are meant to annoy and harass.

9 Thus, the People presented sufficient evidence at the preliminary hearing to satisfy the
10 specific intent to annoy or harass in Count 2.

11 **B. Defendant Made Repeated Posts on the ICSC Facebook Page and the Posts**
12 **Were Not Made in the Ordinary Course of Business**

13 First, Defendant argues that the ICSC is a “corporation” and therefore cannot be a victim of
14 PC 653m(b). The case of *People v. Powers* can offer some guidance on this issue. *People v.*
15 *Powers (2011) 193 Cal. App. 4th 158.* In *Powers*, the Defendant was charged with violating PC
16 653m(a), a felony, for repeatedly calling the customer service line of Cold Stone Creamery and
17 leaving annoying and harassing messages. *Id.* While the decision by the Court in *Powers* was
18 focused on the content of the messages left by Defendant and whether they rose to the level of
19 felony conduct under PC 653m(a), the Court did not take issue with the fact that the Defendant
20 was leaving messages on the customer service line of a business as opposed to dealing directly
21 with another person. Similar to *Powers*, in the present case the Defendant left annoying and
22 harassing posts to the ICSC’s Facebook page rather than directing them to a specific individual.
23 Therefore, the Court should conclude that the ICSC’s Facebook page can be a victim of annoying
24 and harassing posts under PC 653m(b) even though it is a “corporation” and not a specific
25 individual.

26 Second, the Defendant argues that even if the Court finds the ICSC Facebook page
27 equivalent to a person for purposes of PC 653m(b), the People failed to prove that the
28 Defendant’s posts were not made in the “ordinary scope and course of business” at preliminary

1 hearing. Similar to “good faith,” the People argue that the burden for proving that Defendant’s
2 the conduct occurred in the “ordinary scope and course of business” would have laid with the
3 Defendant and that it was his responsibility, not the People’s, to present such evidence at
4 preliminary hearing. Regardless, the very nature and content of the Facebook posts by Defendant
5 proves that there was nothing to indicate that he was acting in the ordinary scope and course of
6 business.

7 To begin, we must look at what is Facebook. Facebook is a community where individuals
8 can create pages for themselves, businesses or events and engage with others. Facebook “want[s]
9 people to feel safe when using Facebook....[so they’ve] developed a set of Community
10 Standards.” <http://www.facebook.com/communitystandards>. Facebook does not differentiate
11 between the page of a person or a business. Anyone using Facebook must adhere to their
12 Community Standards.

13 However, not all posts to Facebook will violate their Community Standards. So, to make
14 individuals feel safe while using Facebook, Facebook allows the creator of a page to choose to
15 make it public or private. Facebook further allows for the “ability to customize and control what
16 you use by unfollowing, blocking, and hiding the posts, people, Pages, and applications you don’t
17 want to see.” <http://www.facebook.com/communitystandards>. Individuals using and posting on
18 Facebook have no greater right to access a business’s Facebook page than an individual’s
19 personal Facebook page and, at any time, a user can be blocked or have their posts hidden.

20 Defendant relies on the *Astalis* case to argue that Defendant’s actions were within the
21 ordinary scope and course of business. Such reliance is misguided. Unlike the present in case,
22 the Court in *Astalis* discusses instances where there is a *direct* relationship between the annoying
23 caller and the business entity being contacted. A customer, a businessman involved in a contract
24 or constituent calling his legislator. All of these callers have a *direct* relationship to the
25 person/business they are contacting. Defendant has no direct or even indirect relationship with
26 the Islamic Center. Individuals who seek out religious organizations typically do so out of
27 curiosity and for education and understanding --- that is not what the Defendant did here. In fact,
28 Defendant appears to have gone out of his way to post on the Islamic Center’s Facebook page

1 despite his apparent disgust for their religion. Defendant is not seeking understanding or
2 guidance, instead he is posting in order to annoy and harass those who have beliefs with which he
3 vehemently abhors.

4 In contrast, the ICSC Facebook is open to anyone who wishes to view it and comment,
5 however, that openness to the public on Facebook does not translate into requiring ICSC or its
6 members to sustain repeated harassment from those who wish to mock and disparage their
7 religion. Rather than attempt to engage in discussion or debate, Defendant's posts are cruel and
8 pointedly aimed at dismissing an entire religion and those who practice it. Thus, it is clear that
9 the ICSC's Facebook page is capable of being victimized under PC 653m(b) and the repeated
10 posts by Defendant to the ICSC's Facebook page between September 17-25, 2016, were not in
11 the "ordinary scope and course of business" and therefore, the Court should not set aside Count 2
12 of the Information.

13 **C. Defendant's Facebook Posts Are Not Protected Under the First Amendment**

14 Pen C § 653m, subds. (a), (b), prohibiting annoying and obscene or threatening telephone
15 calls, do not prohibit lawful speech in violation of U.S. Const., 1st Amend., or Cal. Const., art. I,
16 § 2. The protection of innocent individuals from fear, abuse, or annoyance at the hands of
17 persons who employ the telephone, not to communicate, but for other unjustifiable motives, is a
18 compelling government interest. Further, the subdivisions forbid conduct rather than pure speech,
19 and are not directed at particular groups or viewpoints. It is unlikely that a person could engage in
20 the proscribed conduct and still enjoy constitutional protection. *People v. Hernandez (Cal. App.*
21 *2d Dist. June 28, 1991), 231 Cal. App. 3d 1376, 283 Cal. Rptr. 81, 1991 Cal. App. LEXIS 744.*

22 In *People v. Astalis*, the Court determined that the government had a very legitimate in
23 interest in protecting individuals from unwanted online communication. *People v. Astalis (2014)*
24 *116 Cal. App. 4th Supp. 1.* Protecting individuals from unwanted calls and contact in the present
25 version of the statute—which applies to both making repeated telephone calls and making
26 repeated contact by means of electronic communication devices, including sending text messages
27 and leaving messages on the Internet (see Pen. Code, § 653m, subd. (g))—is also a compelling
28 government interest. The government has an important interest in protecting the substantial

1 privacy interests of individuals from being invaded in an intolerable manner. (See Cohen v.
2 California (1971) 403 U.S. 15, 21 [29 L. Ed. 2d 284, 91 S. Ct. 1780].) ““The purpose of [Penal
3 Code] section 653m is to deter people from making harassing [communications] with the intent to
4 annoy and thus, to secure an individual's right to privacy against unwanted intrusion.’ [Citation.]”
5 (People v. Powers (2011) 193 Cal.App.4th 158, 164 [122 Cal. Rptr. 3d 709].” *People v. Astalis*
6 (2014) 116 Cal. App. 4th Supp. 1, 7.

7 The Defendant does not have the right to target the Facebook page of a religious
8 organization to post annoying and harassing messages under the guise of First Amendment
9 protections. Defendant has his own Facebook page and can post whatever he wants within the
10 Community Standards established by Facebook. Nothing is preventing Defendant from freely
11 posting his thoughts on Islam, or any religion, on his own Facebook page. Defendant’s posts on
12 the ICSC’s Facebook page are not protected speech under the First Amendment and therefore,
13 Defendant’s Motion to Set Aside the Information as to Count 2 should be denied.

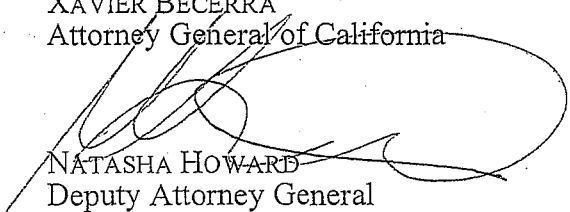
14 **CONCLUSION**

15 The evidence at the preliminary hearing demonstrated probable cause to believe Defendant
16 was properly held to answer on the charges. For the forgoing reasons, the People respectfully
17 request Defendant’s Motion to Set Aside the Information be denied.

18 Date: December 11, 2017

19 Respectfully Submitted,

20 XAVIER BECERRA
21 Attorney General of California

22 
23 NATASHA HOWARD
24 Deputy Attorney General
25 *Attorney for People*

DECLARATION OF SERVICE BY E-MAIL

Case Name: **People v. Mark Lucian Feigin**
Case No.: **BA443892**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General

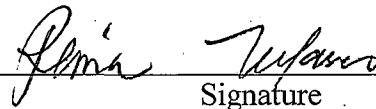
On December 18, 2017, I served the attached **PEOPLE'S OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE INFORMATION PURSUANT TO PENAL CODE SECTION 995** by transmitting a true copy via electronic mail.

Caleb Mason
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 18, 2017, at Los Angeles, California.

Reina Velasco

Declarant



Signature