

Appeal No. 15-15799

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

vs.

SIERRA PACIFIC INDUSTRIES, ET AL.,
Defendants – Appellants.

On Appeal From the United States District Court
for the Eastern District of California, Sacramento

Hon. William B. Shubb

Case No. 2:09-cv-02445-WBS-AC

**APPELLANTS' REPLY IN SUPPORT OF MOTION FOR JUDICIAL
NOTICE OR, IN THE ALTERNATIVE, MOTION TO SUPPLEMENT THE
RECORD ON APPEAL**

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I. INTRODUCTION

The government's opposition to Appellants' Motion for Judicial Notice tracks the rest of its conduct in this matter. As is the case with its refusal to acknowledge gross malfeasance in both the investigation and prosecution of this "corrupt and tainted" matter, the government predictably refuses to acknowledge yet another truth – that @Nostalgist1 is Judge Shubb's Twitter account. Again ignoring that its obligation is "not that it shall win a case, but that justice shall be done," the government preposterously claims that @Nostalgist1 may not be Judge Shubb's account. It does so because it knows Judge Shubb's social media activity regarding this matter violates controlling Canons of Judicial Conduct and 28 U.S.C. § 455(a). It does so because winning here dictates that it now pretend the conduct never occurred. Thus, the government offers an evidence-free hypothesis that the Twitter account might be the work of a hacker. Its diversion is without merit. The evidence establishing @Nostalgist1 as Judge Shubb's Twitter account is beyond compelling. It is obvious. Because the government's argument has no merit, Appellants request that this Court take judicial notice of the requested matters or supplement the record.

II. ARGUMENT

This Court may judicially notice facts "generally known within the trial court's territorial jurisdiction," or facts that "can be accurately and readily

determined from sources whose accuracy cannot reasonably be questioned.” Fed.

R. Evid. 201(b). Here, both conditions are satisfied.

A. Judge Shubb’s Ownership of @Nostalgist1 Can be Accurately and Readily Determined Through Judge Shubb Himself.

The government’s opposition ignores the fact that Judge Shubb is a “source” through which this Court can “accurately and readily determine” that @Nostalgist1 is his Twitter account, that he “follows” the prosecutors’ Twitter account, and that, on April 17, 2015, he tweeted: “Sierra Pacific still liable for Moonlight Fire damages.”¹ If Judge Shubb never did so, as the government hypothesizes – if @Nostalgist1 really were the product of a hacker who somehow knows Judge Shubb’s whereabouts at all times and has real-time access to all of Judge Shubb’s personal video and photographic files – Judge Shubb can readily confirm as much.

If @Nostalgist1 were created by a hacker, Judge Shubb would have made this crime immediately known in order to preserve the integrity of the judicial system. That he has not done so, despite media attention regarding his post-order tweet, is perfectly consistent with what numerous members of the legal community, including an Eastern District of California’s judge, law clerks, and numerous lawyers practicing in its federal court, have long known: Judge Shubb is

¹ If asked, it appears Judge Shubb would be obliged to confirm as much under Canon of Judicial Conduct 3(B)(5) (“A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge’s conduct contravened this Code . . .”).

an active user of social media and operates the @Nostalgist1 Twitter account. This fact has never been a secret. Indeed, it has been an open topic of conversation and interest. For this reason, at least before Appellants' Opening Brief was filed: the President of the Sacramento Federal Bar Association followed @Nostalgist1; the publisher of the widely-read Eastern District of California Blog followed @Nostalgist1; the Eastern District's Chief Judge, Morrison C. England, Jr., follows @Nostalgist1 from his @mcejr Twitter account; Judge England allows @Nostalgist1 to follow him at @mcejr²; Judge Shubb's career law clerk, Breann Moebius, follows @Nostalgist1 from her @BreMoebius Twitter account; @Nostalgist1 follows @BreMoebius; several former law clerks of Judge Shubb follow or followed @Nostalgist1, and @Nostalgist1 follows these former law clerks. (See Supp. Decl. of William R. Warne "Warne Decl." ¶¶ 34-35.) While these connections obliterate the opposition, the issue can accurately be confirmed by asking Judge Shubb himself. Judicial notice is thus appropriate. See Fed. R. Evid. 201(b).

B. The Evidence is Sufficiently Reliable to Warrant Judicial Notice.

The government argues the indicia of reliability associated with the @Nostalgist1 Twitter account is insufficient for this Court to reliably conclude it

² Chief Judge England's Twitter account at @mcejr is unlike Judge Shubb's because Judge England engages in very little activity (Judge England has never posted a Tweet on the account) and never comments on legal cases.

belongs to Judge Shubb. The government's arguments are without merit. Courts have frequently authenticated social media postings through photos, posting activity, linked accounts, content and context, and references known only to the alleged author.³ Federal Rule of Evidence 901 explains that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Subdivision (b)(4) provides "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," can be used to authenticate such postings.

Because Judge Shubb actively uses social media, authentication here is rather simple.⁴ Google searches for @Nostalgist1 tweet, @Nostalgist1 twitter,

³ See, e.g., *Tienda v. Texas*, 358 S.W.3d 633, 637 (Tex. Crim. App. 2012) (finding MySpace web pages sufficiently self-authenticated based on mention of events, pictures, and references to nicknames within those pages); *People v. Valdez*, 135 Cal. Rptr. 3d 628, 632-34 (Cal. Ct. App. 2011) (holding printouts of MySpace web pages, including photograph, were sufficiently authenticated to be admissible); see also *Ligotti v. Garofalo*, 562 F. Supp. 2d 204, 212 n.15 (D.N.H. 2008) (judicially noticing videos on a news web page); *Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 965-66 (C.D. Cal. 2005) (judicially noticing various web pages including Amazon web pages).

⁴ Judge Shubb is the listed owner of the domain name sacramentosolons.com, which hosts a website dedicated to a Sacramento baseball team that played from 1903 to 1960. The site has a copyright notice "© 2003 William B. Shubb." Judge Shubb has a public Instagram page at "@wshubb" that contains numerous photographs of him posing with family at baseball outings, restaurants, social affairs and events he has held within his federal courtroom. Judge Shubb also has at least one more protected Twitter account at @wshubb, a fact which the government concedes. Judge Shubb also maintains an active YouTube channel

@wshubb tweet, wshubb Instagram, wshubb pictures, wshubb, and additional searches (including the names of the individuals and social media accounts described therein) result in the following non-exhaustive connections, postings, photographs, and videos, all of which separately and together provide more than sufficient indicia of reliability showing that @Nostalgist1 is Judge Shubb.

- The header photo for @Nostalgist1 is a photograph of the 2013 “Seersucker Thursday” event, organized by Judge Shubb at Vic’s Ice Cream in Sacramento. Judge Shubb’s upper torso is directly above the baseball. Importantly – and notwithstanding what it claims in its opposition – the government knows this: in this same photograph, standing fifth from the right, wearing sunglasses and a white hat, is none other than AUSA Matthew Segal, counsel of record for the United States on this appeal.⁵ Additionally, in the same photograph, the third person from the right is Judge Kimberly Mueller, who handled portions of the Moonlight Fire matter. Moreover, Judge Shubb’s career law clerk, Breann Moebius, is front and center holding her baby. Finally, according to the website of Carissa Shubb, who is Judge Shubb’s daughter, Carissa Shubb took this photograph – a fact she then confirms by providing the full high-definition photograph on her site. (*See* Warne Decl. ¶ 8, Ex. 3.)
- The profile photo for @Nostalgist1 is a baseball that has the Declaration of Independence emblazoned upon it, a perfect symbol for a self-described “baseball nostalgist.” Of course, the name “@Nostalgist1” is also the

that bears a name very similar to the account at issue here. Entitled “Nostalgist1938,” Judge Shubb’s public YouTube channel includes over fifty close-up videos of Judge Shubb singing nostalgic songs as he plays a ukulele, most of which are linked *directly from* his Twitter account at @Nostalgist1. These online accounts, particularly @Nostalgist1, have for years been enmeshed with other public social media accounts of Judge Shubb’s wife and children. (*See* Warne Decl. ¶¶ 6-36.)

⁵ AUSA Segal clearly knew why he was there, and who he was standing by, yet the government says that the individual in the photograph may be Judge Shubb.

perfect Twitter handle for this self-described nostalgist.⁶

- The majority of the videos on Judge Shubb's YouTube Channel Nostalgist1938 are linked on the @Nostalgist1 Twitter feed. Based on the dates of when @Nostalgist1 tweets the links to those videos, Judge Shubb's practice is to load the videos on YouTube first and then, on the same day or a few days later, link to them from @Nostalgist1 so as to notify his Twitter followers of their existence. (Warne Decl. ¶ 11.) Although the .pdf images of the Twitter feed provided with Appellants' Motion as Attachments 2 and 3 are not active hyperlinks, the videos can all be found at Judge Shubb's "Nostalgist1938" YouTube channel.⁷
- On July 2, 2015, @Nostalgist1 re-tweeted a link to a speech by Judge Shubb's daughter Alisa Shubb;
- Alisa Shubb (@AlisaShubb on Twitter), who is Judge Shubb's daughter,⁸ both follows and is followed by @Nostalgist1;
- Carissa Shubb (@flrdelis on Twitter), who also is Judge Shubb's daughter, both follows and is followed by @Nostalgist1. Carissa Shubb also maintains an Instagram account "flrdelis" and, on April 27, 2014, posted a photograph of herself and Judge Shubb, stating "pre-race selfie with sister and dad";

⁶ Judge Shubb gave an interview for a KVIE public television baseball documentary. His bio for the documentary lists him as "Baseball Nostalgist/Dist. Court Judge." (See Warne Decl. ¶ 7; *The Golden Game*, KVIE Public Television, http://www.kvie.org/programs/kvie/viewfinder/golden_game/ (last visited Nov. 25, 2015).)

⁷ On July 27, 2014, @Nostalgist1 tweeted, "Now, to honor America, please rise and remove your caps as @Nostalgist1 plays our National Anthem on the ukulele." The post provides a link to Judge Shubb's YouTube channel where he plays the national anthem on the ukulele. Although this particular video does not show Judge Shubb's face, confirming that @Nostalgist1 is Judge Shubb is easily accomplished by simply listing and by also comparing it to the surrounding videos.

⁸ (See also Warne Decl. ¶¶ 4, 21; *Shubb Family Tree*, Shubb Family Tree Official Website, <http://lchr.org/a/38/jo/photos8.html> (last visited Nov. 25, 2015) (displaying photos captioned "Shubb Family Tree," with photographs of Judge Shubb, his wife and daughters, captioned with their names).)

- Sandy Shubb (@SandyShubb on Twitter), who is Judge Shubb's wife, both follows and is followed by @Nostalgist1;
- Vicki Shubb (@twostp4fun on Twitter), who also is Judge Shubb's daughter, both follows and is followed by @Nostalgist1;
- @flrdelis both follows and is followed by @SandyShubb and @AlisaShubb;
- Sandy Shubb both follows and is followed by @AlisaShubb and @flrdelis;⁹
- On August 5, 2015, @SandyShubb tweeted a photograph of her, Judge Shubb, and Ray Fosse at the Oakland Coliseum; the same photograph was also posted on the same day on the @wshubb Instagram account;
- Breann Moebius is Judge Shubb's career law clerk.¹⁰ The Twitter account at @BreMoebius both follows and is followed by @Nostalgist1;
- @BreMoebius both follows and is followed by Chief Judge Morrison England's Twitter account (@mcejr), which in turn also follows @Nostalgist1;
- On July 5, 2015, @Nostalgist1 posted a photograph of Judge Shubb's wife in a restaurant with the caption: "Sand Dabs, Fried Oysters, and Clam Chowder at Spenger's in Berkeley after" Also on July 5, 2015, the @wshubb Instagram account posted the same photograph, along with the caption: "Spenger's Fresh Fish Grotto Sand dabs, fried oysters, and clam chowder after the @athletics game";
- On July 19, 2015, @Nostalgist1 tweeted a photograph of family on the train on the way to an Oakland A's baseball game with the following heading: "Taking the @Amtrak train on the @CapitolCorridor to the @Athletics game at the O.co Coliseum." The same photograph was posted on July 19,

⁹@wshubb does not follow @SandyShubb, nor does @SandyShubb follow @wshubb. Thus, it appears that Sandy Shubb limits her social media relationship to Judge Shubb's @Nostalgist1 account.

¹⁰(See Appellants' Mot. For Judicial Notice, Attach. 1.)

2015, to the @wshubb Instagram account with the following caption:
“Amtrak Taking the train to the A’s game.”

- At least two other former law clerks for Judge Shubb have Twitter accounts that follow and are followed by @Nostalgist1. (Warne Decl. ¶¶ 34-35.)

These examples are just some among many examples provided in the Warne Declaration, all of which are appropriately considered under Rule 901. Together, they overwhelmingly confirm that @Nostalgist1 is Judge Shubb’s account.¹¹

Notwithstanding the broad and pervasive indicia of reliability connecting Judge Shubb to @Nostalgist1, the government’s argument essentially attempts to lure this Court into peering through a gift-wrap tube, arguing “the blurry photograph” of 27 people on @Nostalgist1 is insufficient to connect Judge Shubb to @Nostalgist1. But reviewing everything available to this Court reveals an entirely different picture.¹² Indeed, the broad and connected assemblage of judicially noticeable social media accounts and postings is more than sufficient to “support a [factfinder or this Court] in the belief that the documents are what [Appellants] say[] they are.” *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.

¹¹ Defendants request that this Court review the printouts of the social media accounts attached to the concurrently filed Declaration. That review will further buttress what is plainly laid out in this brief.

¹² Were the government’s hypothesis correct, a senior U.S. District Court judge is being stalked and his personal computers and mobile devices have all been hacked and his identity has been so thoroughly hijacked that those closest to him have been fooled for years. This would undoubtedly constitute an emergency requiring action by the FBI and/or U.S. Marshals. With such resources, the government could easily have proven in its opposition @Nostalgist1 is counterfeit.

Supp. 2d 1146, 1154 (C.D. Cal. 2002) (finding a declaration sufficient to establish the authenticity of webpage printouts where they contained dates of printing and web addresses of the documents).

C. This Court has Inherent Authority to Supplement the Record.

“Inherent authority” connotes this Court’s broad discretion to fashion appropriate remedies for situations such as these. These are the very “extraordinary circumstances” that dictate supplementation of an appellate record. Where the trial court is engaged in conduct immediately following the issuance of the appealed-from order, inclusion of that conduct in the record is not an unauthorized augmentation but, rather, “reflects what actually occurred in the district court.” *Townsend v. Columbia Operations*, 667 F.2d 844, 849 (9th Cir. 1982) (holding that under Federal Rule of Appellate Procedure 10(e), record on appeal was properly augmented to include documents that were previously before the trial court, but that had not been filed.)

Pursuant to their inherent equitable powers, the federal courts of appeal have the discretion to supplement the record on appeal as justice requires. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (recognizing the court’s inherent authority to supplement the record in extraordinary cases).

III. CONCLUSION

The government's opposition is a continuation of the gross misconduct that drove this litigation and necessitated this appeal. Among other things, the government states, "The header photo is a picture of a large group of people, only one of whom *may be* Judge Shubb." The government states this even though one of the government's attorneys of record posed with Judge Shubb in this very photograph. Appellants do not seek judicial notice of the truth of the statements in social media. Indeed, Judge Shubb's April 17, 2015, Tweet was demonstrably false. But there is no reasonable dispute that @Nostalgist1 is Judge Shubb's account. The fact is well known in the legal community, and can readily be confirmed by Judge Shubb and by the account's connection with others, including members of his family, a judge in the district, and by Judge Shubb's use of Nostalgist1 in relation to other accounts wherein his identity is specifically revealed. All evidence supports this conclusion and the government has provided no contrary evidence. Accordingly, Appellants respectfully request that their Motion be granted in full and that the Court deny the government's request to strike any portion of Appellants' briefing.

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U.S.D.C. Case No. 2:09-cv-02445-WBS-AC

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