

SATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff,

Case No. 11-781-CZ
Hon. Clinton Canady III

v.

JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, and JOHN
DOE4, unknown individuals,

Defendant.

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**DEFENDANT JOHN DOE NUMBER 1'S SUPPLEMENTAL BRIEF ADDRESSING NEWLY
RAISED ISSUES REGARDING THE EXPECTATION OF PRIVACY BASED UPON THE
TERMS OF SERVICE WITH BLOG HOST FORUM**

On September 23, 2011, Plaintiff filed its Supplemental Brief Opposing John Doe 1's Motion to Quash the Subpoena issued to the internet blog host site Weebly, Inc. ("Weebly"). In its brief, Plaintiff argues that Doe Defendant Number 1 had no reasonable expectation of privacy regarding his user identity based upon the terms of service contained on Weebly's web host forum. (*Plaintiff's Supplemental Brief In Support, pp. 1-2; See also Exhibit A*) In addition to being legally unsupported, Plaintiff's argument is also contradicted by the written acknowledgment and apology issued by its CEO David Rusenko following the inadvertent release of the customer account information.

Hi John,

I apologize in taking some time to get back to you -- I wanted to make sure to fully research the situation and get fully informed before replying.

I'm deeply sorry that we messed things up here. The explanation is somewhat simple, although unfortunate. First, although we get subpoenas fairly often, they are usually routine. They are usually handled by me: I check the subpoena for validity and notify that user before sending over the requested information, but we have never encountered a user that was going to quash the subpoena, so this is our first experience here and we didn't do so well.

Second, and most unfortunately, there was a communications slip-up that caused the information to be sent even though you had communicated with Richard. Richard took a week of vacation while we received the subpoena again. It was handled by me, and I wasn't aware of any of the communications between you and Richard, since he was out of the office.

We take user privacy very seriously and have been some of the strongest supporters, legally, of our users in the past. Unfortunately, we didn't do everything we could have this time and we are taking a few steps to make sure that doesn't happen again.

First, we are formalizing our policy organization-wide and ensuring that everybody that deals with subpoenas is familiar with our exact procedure. We are also requiring that anybody who is notified of a Motion to Quash place an account note on the account so that this type of communications slip-up won't happen again.

I'm sorry that we didn't do everything we could have to support our user in this case. Please let me know if there is anything we can do to help at this point in time. (Exhibit 1; Weebly Apology Dated September 14, 2011)

Furthermore, the issue in this case is whether the law *should* require disclosure and whether the legal process should be enforced. Moreover, no evidence in the record establishes that the statements about Plaintiff are false or otherwise actionable, and nothing in Weebly's terms of service purport to commit Weebly to release information just because someone claims that something false has been

published in the comment section, has filed a lawsuit on that theory, and has obtained a subpoena. Consequently, the argument based on the Weebly's Terms of Service fails on its own terms.

The arguments presented by Plaintiff should also be rejected as a matter of public policy. The conditions set forth in Weebly's terms of services are similar to policies set forth by a wide variety of other companies that host Internet content authored by others. (i.e. Google, Facebook or Yahoo; AOL Comcast, etc.) The reason that such companies have created such policies is for two essential reasons (1) so that users will not be surprised when the companies exercise their discretion to remove objectionable material pursuant to under 47 U.S.C. § 230, and (2) so that the companies can comply with legitimate subpoenas and other forms of legal process which have not been challenged out of fear of being sued for breach of contract. However, if the law provided that posters who use the services of companies are subject to having their identifying information revealed without any opportunity for notice or opportunity to argue about whether a sufficient showing of wrongdoing has been made, the result would create the same "chilling effect" as set forth in *Doe v Cahill*, 884 A 2d 451 (Del 2005), the Arizona Court of Appeals in *Mobilisa v Doe*, 170 P 3d 712 (Ariz App Div. 1 2007). For those same reasons, Weebly's CEO admitted that customer privacy a "serious concern" and that their normal procedure is to "notify that user before sending over the requested information." (Exhibit 1)

Weebly's terms of service also contain the same sort of provisions protecting the rights of potential third-parties such as Plaintiff to be free from any unlawful, illegal, libelous, and/or defamatory content. Furthermore, Weebly also monitors the contents of the blog posting to ensure that there is no unlawful, illegal, libelous, and/or defamatory content conducted via its network and explicitly reserves the right to disclose the source of the offending content. (Exhibit 1, Section 8) Similar terms and conditions exist with several of the other internet forum providers. For example,

Yahoo's Terms of Service forbids the posting of defamatory content, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>, ¶ (a), and its privacy policy allows Yahoo to release information "when . . . [w]e respond to subpoenas, court orders, or legal process." <http://info.yahoo.com/privacy/us/yahoo/>. Nevertheless, it was subpoenas to Yahoo! that were at issue in *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), as well as in *Highfields Capital Mgmt v Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005), and *Krinsky v Doe* 6, 72 Cal Rptr.3d 231 (Cal App. 2008).¹ Similarly, the Terms of Service for Independent Newspapers, Inc. ("INI"), forbid the posting of any material that is "knowingly false and/or defamatory" or even "inaccurate," <http://newsblog.info/policies/disclaimer>, and further require posters to take a pledge not to engage in "personal attacks" and to keep comments "within the bounds of fair play and civility." http://www.newszap.com/about_us.htm, at ¶ 17. When posters violate that pledge, INI "reserves the right to . . . [r]eveil the true identity of the abuser . . . at its sole discretion and without the need for any further notice." *Id.* ¶ 32. INI's Privacy Policy also provides, "Individuals posting libelous or defamatory comments are not welcome at this site and are granted no right to anonymity should a court of law seek a poster's identity." *Id.* ¶ 24. Yet it was subpoenas to INI that were at issue in both *Independent Newspapers v Brodie*, 966 A 2d 432 (Md. 2009) and *Doe v Cahill*.

Moreover, AOL's Terms of Service state that users may "[n]ot post content that . . . is . . . defamatory, libelous, deceptive . . . or tortious," <http://legal.aol.com/terms-of-service/full-terms/>, and its privacy policy provides that identifying information "may be accessed and disclosed in response to lawful governmental requests or legal process (for example, a court order, search warrant or subpoena)," <http://privacy.aol.com/privacy-policy/>, yet it was a subpoena to AOL that produced

¹In citing online terms and privacy policies of the various companies, Doe Defendant Number 1 acknowledges that such terms change over time and may have been subtly different when the cases were decided.

Melvin v. Doe, 575 Pa. 264, 836 A.2d 42 (2003). Although these decisions often do not expressly address the argument that the anonymous users have a lesser expectation of privacy because their ISP's forbid tortious conduct and allow for disclosure in response to subpoena, each decision would be wrong if the Plaintiff's argument to this Court were right. Accordingly, the Court should expressly reject the argument based on the Terms of Service as set forth by Plaintiff.

Dated: September 28, 2011

/s/ John T. Hermann

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PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

JOHN T. HERMANN, being first duly sworn, deposes and says that on September 28, 2011, he served via U.S. Mail a copy of Defendant John Doe 1's Supplemental Brief Addressing Newly Raised Issues Regarding the Expectation of Privacy Based on the Terms of Service with the Blog Host Forum.

Dated: September 28, 2011

/s/ John T. Hermann

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