

STATE 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.

MICHAEL P. COAKLEY (P34578)
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**SUPPLEMENTAL MOTION IN SUPPORT OF JOHN DOE 1'S MOTION TO QUASH
SUBPOENA AND/OR FOR PROTECTIVE ORDER**

On August 5, 2011, Defendant John Doe Number 1 filed the instant Motion to Quash the Subpoena issued to the weblog host Weebly, Inc. ("Weebly"). In its motion which was served upon Plaintiffs, Defendant sought to quash the subpoena or in the alternative seek the issuance of a protective order pursuant to MCR 2.302(C) which provides in pertinent part:

On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition, after being sealed, be opened only by order of the court;
- (7) that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment;
- (8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

On August 5, 2011, counsel for John Doe Number 1 served a copy of the Motion to Quash on Richard Huffaker at Weebly and requested that they hold off on producing the requested information until further notice from the court. (Exhibit 1) On August 9, 2011, Mr. Huffaker confirmed that he had received the Motion to Quash and confirmed that he considered the subpoena (sic) squashed. (Exhibit 1)

On August 10, 2011, counsel for John Doe Number 1 provided Mr. Huffaker with further information regarding California's Anti-Slapp statute. In the correspondence, counsel did not claim to offer any legal advice as to what Weebly was required to do but offered information as to the application of the Anti-Slapp statute and actions that could be taken if Cooley had, in fact, filed a separate action in California to enforce the out of state subpoena.¹ (Exhibit 2)

Although I am not your lawyer and cannot give you legal advice. A Michigan subpoena is not valid outside of the territorial Jurisdiction. Moreover, the Motion to Quash stops any enforcement action on the subpoena. Cooley's lawyers can; however, seek to enforce the Michigan subpoena by filing a separate action in

¹ As of the date that the motion was filed, Plaintiff's refused to provide Defendant John Doe Number 1 with copies of the subpoenas. Accordingly, John Doe Number 1 was not whether Plaintiff was attempting to enforce a Michigan subpoena in California or whether they had taken additional measures to institute an action in California to enforce the out of state subpoena

California attaching the Michigan subpoena and seeking to issue a new subpoena out of California based on the newly filed California Case. The problem for them however is that if they file an action in California, they would subject themselves to California's Anti-Slapp statute as set forth in California Code of Civil Procedure - Section 1987.2. The act was recently amended to apply to situations where the original subpoenas were issued out of state but where a subsequent filing in California was used to try and obtain jurisdiction over the web host provider. The California anti-SLAPP statute gives the target or host provider the ability to file a motion to strike (i.e., to dismiss) a complaint brought for engaging in protected speech. Furthermore, there are prohibitions on the ability to obtain discovery where there is a motion to strike the suit under the Anti-SLAPP statute and Section 425.18 allows the target or web host the ability to bring a subsequent action against the party bringing the suit if the SLAPP action is dismissed. If efforts to successfully quash a California identity-seeking subpoena that relates to a lawsuit filed in another state, the court "shall" award all reasonable expenses incurred in making your motion - including attorneys' fees. (Exhibit 2)

In addition, counsel for John Doe encouraged Mr. Huffaker to contact the Electronic Frontier Foundation (a advocacy organization for electronic privacy rights) for further assistance in determining their legal obligations and/or rights. (Exhibit 2) As an additional follow up measure, I had a representative of the Electronic Frontier Foundation ("EFF") contact Mr. Huffaker to discuss the application of California's Anti-Slapp statute. (Exhibit 3) EFF representative Corynne McSherry confirmed that California Code of Civil Procedure - Section 1987.2 was recently amended (with the help of the EFF) so as to apply to civil actions initiated to enforce out of state subpoenas. (Exhibit 3)

On August 10, Plaintiff's counsel provided counsel for John Doe number 1 copies of the subpoenas that were issued and served upon Weebly. (Exhibit 4) In addition to the Michigan Subpoena, Plaintiff initiated filed separate action in California for the purpose of enforcing an out of state subpoena. The California subpoena attached and identified the Michigan subpoena and clearly referenced it as "AN ACTION PENDING OUTSIDE CALIFORNIA." (Exhibit 4) The Subpoena further identifies that the court in which the action is currently pending is in Ingham County Circuit Court located in the State of Michigan at 313 West Kalamazoo P. O.

Box 40771Lansing. M148901-7971. (Exhibit 4) According to the both the Michigan and California Subpoena's the deadline for production was August 25, 2011. (Exhibit 4)

On August 11, 2011, counsel for John Doe Number 1 contacted counsel for Plaintiff's and informed them of his intention to file a motion to dismiss the California subpoena pursuant to California Code of Civil Procedure – Section 1987.2. (Exhibit 5) Notwithstanding Weebly's prior written assurance that they would not release the subpoenaed information Weebly representative David Rusenko e-mailed the responsive materials to Plaintiff's attorneys on August 17, 2011. (Exhibit 6) On August 25, 2011, counsel for John Doe Number 1 informed Plaintiff's counsel that an alternative basis for relief in the original motion was to obtain a protective order over any documents that were released and/or obtained. (Exhibit 7) In addition, counsel for John Doe Number 1 sought the immediate return of the documents that were wrongfully acquired. (Exhibit 7) After obtaining, the information that was wrongfully acquired and receiving counsel's demand for the return of the information, Plaintiff's counsel then utilized the information as basis for identifying the actual named individual identified in Plaintiffs First amended complaint (attached hereto as exhibit 8) which was associated with certain hotmail accounts (i.e. rockstar05@hotmail.ca ; asyed5@hotmail.com) that were revealed in the information that was wrongfully acquired from Weebly.

MCR 2.302(C)(7) address the issue of documents and/or information that is inadvertently produced and provides in pertinent part:

(7) Information Inadvertently Produced. If information that is subject to a claim of privilege or of protection as trial-preparation material is produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the

claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

In the present case it clearly evident that the information that was released to Plaintiff's counsel was done so inadvertently. In prior written correspondence Weebly representatives provided John Doe number 1's attorney's a cut-off date of August 22, 2011, to file an appropriate Motion to Quash. On August 5, 2011, Mr. Huffaker acknowledged receipt of the Motion and assured counsel that the subpoena would be (sic) squashed. Without any further notification or instruction (and prior to both the motion filing deadline and subpoena deadline) Weebly inadvertently disclosed private information about one of its blog host subscribers. After receiving written notification that they were in possession of information that had inadvertently been disclosed, Plaintiff's counsel had an obligation to appropriate precautionary to determine the proper usage of the information. Rather than seek permission or guidance from the court, Plaintiff's counsel blatantly disregarded the court rules and chose to sneak and peak in order to find out the name and identity of the John Doe Defendant before he/she could seek to challenge the underlying basis of the subpoena either in Michigan or in California. Accordingly, Defendant John Doe request that the court enter an order compelling the Plaintiffs to return all copies of the information that was inadvertently produced and restrict all use and/or reference to any information contained therein nun pro tunc until such time as the court can make a proper determination as to the legitimacy of the underlying subpoena.

Dated: September 2, 2011

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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 2, 2011, he served via U.S. Mail a copy of Defendant John Doe 1's Supplemental Brief In Support of his Motion to Quash and/or in the Alternative for Issuance of a Protective Order.

Dated: September 2, 2011

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