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16 Attorneys for Plaintiffs Mark and Rhonda Lesher

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

MARK AND RHONDA LESHER,

Plaintiffs,

vs.

JOHN AND/OR JANE DOES 1-178,
Defendants.

Case No. 109CV134190

**DECLARATION OF WILLIAM
PIERATT DEMOND IN SUPPORT
OF PLAINTIFFS' OPPOSITION TO
TOPIX LLC'S MOTION TO QUASH
AND FOR PROTECTIVE ORDER**

DATE: March 27, 2009
TIME: 9:00 a.m.
DEPT: 22

1 **DECLARATION OF WILLIAM PIERATT DEMOND**

2 I, William Pieratt Demond, declare and state as follows:

3 1. I am an attorney admitted to appear before all courts of the State of Texas, the
4 Northern District Court of Texas, all courts of the State of New York, all courts of the District of
5 Columbia, and I am the counsel of record in this matter for Plaintiffs Mark and Rhonda Leshner. I
6 have also applied to appear *pro hac vice* before this Court and my application is presently pending.
7 I make this declaration of my own personal knowledge in support of Plaintiffs’ opposition to Topix
8 LLC’s motion to quash. If called upon to testify, I would and could competently testify to the facts
9 herein.

10 2. On October 7, 2008, I sent Topix LLC (“Topix”) a “preservation” letter in anticipation
11 of the present lawsuit and subpoena. A true and correct copy of this letter is attached hereto as
12 Exhibit 1. As is shown, Plaintiffs’ letter requested the preservation of both electronically stored
13 information (“ESI”) and tangible documents.

14 3. After receiving the letter, Topix’s counsel, Phillip Keating, contacted me by telephone
15 and informed me that Topix preserves the information we requested as a matter of policy. At that
16 time, I discussed the case with Mr. Keating and disclosed the facts of the case to him. More
17 specifically, I told him that hundreds (if not thousands) of defamatory posts regarding the Plaintiffs
18 had been made by anonymous individuals and that Plaintiffs would be seeking to identify those
19 individuals using data in Topix’s possession. At that time, I did not know how many posts were
20 defamatory as my office had only recently begun analyzing them; we felt that before doing so, it
21 would be in the Plaintiffs’ best interests to both issue a preservation letter and ascertain what
22 information Topix required in order to identify the posters in question.

23 4. Mr. Keating explained what data was available, what information a subpoena to Topix
24 should include, and what information Topix specifically required in order to identify the posters
25 via their Internet Protocol (“IP”) address. In particular, Mr. Keating asked that Plaintiffs’
26 subpoena identify each individual post by thread, post number, screenname, date, and a
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1 representative portion of the post itself. He emphasized that this was necessary so that Topix did
2 not accidentally provide information concerning posts in which we had no interest.

3 5. Based on, *inter alia*, Mr. Keating's assurances that the identifying information for the
4 defamatory posts was available from Topix, Plaintiffs embarked on an exhaustive effort to identify
5 and organize each defamatory posting with the information Mr. Keating requested. This
6 culminated in the Plaintiffs filing suit in Tarrant County, Texas against 178 John and/or Jane Doe
7 defendants on February 3, 2009. Immediately thereafter, Plaintiffs 1) obtained an order from the
8 District court for a letter rogatory, 2) obtained a letter rogatory from the District clerk, and 3) sent
9 the letter rogatory along with a copy of the subpoena and petition to Gordon Gray, our local
10 counsel in California. A true and correct copy of the Order from the Texas District court for a
11 letter rogatory is attached hereto as Exhibit 2.

12 6. Subsequently, the California subpoena that is the subject of this motion was issued by
13 the Santa Clara County Court and served on Topix the same day, February 5, 2009. Pursuant to
14 Mr. Keating's request, Plaintiffs endeavored to identify each post for which they sought
15 information with exacting particularity. More specifically, each post was identified, per Topix's
16 request, by thread, post number, screenname, date and a representative portion of the post itself.
17 Moreover, a CD containing an Excel file and PDF file with this information was also served with
18 the subpoena in order to facilitate Topix's review and acquisition of the pertinent records.

19 7. On February 12, 2009, Mr. Keating contacted me by phone and confirmed that Topix
20 had the information requested in the subpoena except for the number of hits per thread named in
21 the subpoena. However, he said that it would require approximately 285 hours to produce the data
22 from Topix's electronic files and stated that the California Evidence code sets the rate for such
23 clerical work at \$24/hour. I offered to acquire bonded contract workers to expedite the production,
24 but Mr. Keating indicated that his client would not be interested in that option and preferred to
25 have an employee examine the records. Accordingly, I sent Mr. Keating a letter confirming our
26 conversation on February 17, 2009 and a check for \$6,840. A true and correct copy of my
27 February 17 letter is attached hereto as Exhibit 3.

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1 8. On February 18, 2009, I had a conversation with Mr. Keating and David Franklin at
2 Pietragallo. During the course of that conversation, they requested that I extend their opportunity
3 to object to our subpoena an additional week. I agreed to do so. A true and correct copy of my
4 letter dated February 18 reflecting this agreement is attached hereto as Exhibit 4. David Franklin
5 also offered me the opportunity to talk with Topix’s IT professionals in an attempt to discern how
6 we could negotiate a deal that was acceptable to both parties.

7 9. The next day, I spoke with Mr. Keating around 5 or 6pm. He indicated that he had
8 received my email but that a conference call with their IT people was not acceptable to his client.

9 10. On February 24, I sent an email to Mr. Keating regarding all the various alternatives
10 that we would accept from Topix to make compliance with the subpoena less burdensome. A true
11 and correct copy of this email is attached hereto as Exhibit 5.

12 11. A true and correct copy of Mr. Keating’s February 25, 2009 response email is attached
13 hereto as Exhibit 6. It is important to note that Topix’s motion to quash was filed several hours
14 later that same day. Mr. Keating’s email claimed its employees had too many other job
15 responsibilities to comply with the subpoena. Mr. Keating then indicated that “a large majority” of
16 the defamatory posts appeared to have been made by a single person. Mr. Keating asked that the
17 subpoena be limited only to posts that were defamatory in nature. I insisted that each and every
18 post attached to the subpoena at issue is defamatory in nature under Texas law and invited him to
19 identify posts that were of concern.

20 12. In the event that any posts are not defamatory, it is the result of an oversight on my
21 part; my office has spent a considerable amount of time poring over thousands of posts and we
22 have made every effort to ensure each and every post we requested was defamatory under Texas
23 law. A true and correct copy of an affidavit attesting to this process executed by my paralegal,
24 Andrea Zepeda, is attached hereto as Exhibit 7. These efforts were exhaustive and included no
25 fewer than 8 independent confirmations within our office. While we believe our endeavors to have
26 been properly guided, we cannot represent that we are infallible and/or that we have not potentially
27 made a mistake somewhere in our 365 page pleading.

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1 13. However, we have expressly asked Topix to identify any posts that they consider to be
2 outside the scope of defamation and they failed to do so prior to filing their Motion to Quash.
3 Further, no Defendant has served my office with any objection pertaining to any post included in
4 our petition and/or subpoena.

5 14. On March 4, 2009, Mr. Keating, my local counsel Gordon Gray, and I participated in a
6 telephonic meeting of counsel to “meet and confer” regarding Topix’s motion to quash. A true and
7 correct copy of Mr. Gray’s letter confirming the results of that meeting is attached hereto as
8 Exhibit 8. In particular, during that meeting, Mr. Keating was asked what, if any, information
9 Topix was willing to provide in response to Plaintiffs’ subpoena. Mr. Keating said he did not
10 know because Topix takes the position that some of the posts identified are not defamatory. Mr.
11 Keating indicated that he had not reviewed all of the posts in the subpoena to determine whether
12 they were or were not defamatory. Mr. Keating did confirm that a review and/or sample of the
13 posts by Topix indicated that one individual had made roughly 90% of the posts. Mr. Keating then
14 agreed that he and/or Topix would review all of the posts listed in the subpoena and provide a list
15 of the posts for which it would agree to provide the information requested therein by March 12,
16 2009. Topix has not provided this list as agreed.

17 15. Mr. Keating contacted me by email on March 9, 2009 to indicate that his client was no
18 longer interested in complying with the agreement reached by all parties in the conference call on
19 March 4, 2009. A true and correct copy of this email is attached hereto as Exhibit 9.

20 16. Mr. Keating contacted me by email on March 10, 2009 to indicate that Topix would be
21 willing to provide the information requested in the subpoena concerning the apparently single
22 individual who made a “substantial” number of the posts identified in the subpoena in exchange for
23 \$5,000. On March 11, 2009, Mr. Keating emailed me a signed copy of the same offer. However,
24 Topix now demands, as a condition of this production, that no further subpoenas be served on
25 Topix seeking the identity of the remainder of the posters. A true and correct copy of Mr.
26 Keating’s letter is attached hereto as Exhibit 10.

1 17. I sent a request for clarification as to how many posts would be tied to the single
2 individual and a counter-offer regarding subsequent subpoenas on March 12, 2009. A true and
3 correct copy of my letter is attached hereto as Exhibit 11. At present, I have received no response
4 to my letter.

5 18. Furthermore, I attest that true and correct copies of the following documents are
6 attached as exhibits hereto:

- 7 a. Exhibit 12 – Chris Tolles’ statement made on blog.topix.com, dated Jan. 8, 2008;
- 8 b. Exhibit 13 – Chris Tolles’ statements made during a powerpoint presentation at
9 SXSXW in 2007;
- 10 c. Exhibit 14 – Plaintiffs’ notice posted to McKinney, TX forum on Topix, Feb. 4,
11 2009;
- 12 d. Exhibit 15 – Plaintiffs’ notice posted to Avery, TX forum on Topix, Feb. 4, 2009;
- 13 e. Exhibit 16 – Plaintiffs’ notice posted to Clarksville, TX forum on Topix, Feb. 4,
14 2009;
- 15 f. Exhibit 17 – Plaintiffs’ notice posted to pg. 604 of “Attorney Arrested on Sexual
16 Assault Charges” thread, Feb. 4, 2009;
- 17 g. Exhibit 18 – Repost of notice to Texarkana, TX forum by defendant “Hellcat”, Feb.
18 4, 2009;
- 19 h. Exhibit 19 – Screenshot of Dallas/Fort Worth Fox news affiliate webpage with link
20 to video story and Plaintiffs’ petition online;
- 21 i. Exhibit 20 – Screenshots of banner posted by Topix management on Topix
22 homepage with links to relevant posts;
- 23 j. Exhibit 21 – Printout of first page from thread started on this topic by “Top Ex Ed”
24 under the link “Tell Everyone What You Think”;
- 25 k. Exhibit 22 – Affidavit of Mark Leshner, submitted with the original petition;
- 26 l. Exhibit 23 – Affidavit of Rhonda Leshner, submitted with the original petition;
- 27 m. Exhibit 24 – Affidavit of Katrina Fourn, submitted with the original petition;

1 n. Exhibit 25 – Plaintiffs’ Original Petition, filed with the Tarrant County District
2 Court on February 3rd, 2009, styled “Mark and Rhonda Leshner v. John and Jane
3 Does 1-178.”

4 I declare under penalty of perjury under the laws of the State of California that the
5 foregoing is true and correct. This declaration was executed on March 13, 2009 in Austin, Texas.

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7 William Pieratt Demond
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, Gordon E. Gray III, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address Gray Law Firm, 4401 N. Atlantic Ave., Suite 233, Long Beach, CA 90807.

On March 13, 2009, I served the foregoing document(s) described as **DECLARATION OF WILLIAM PIERATT DEMOND IN SUPPORT OF PLAINTIFFS’ OPPOSITION TO TOPIX LLC’S MOTION TO QUASH AND FOR PROTECTIVE ORDER** on interested parties in this action as follows:

Ms. Joy L. Durand
REED SMITH LLP
P.O. Box 7936
San Francisco, CA 94120-7936

BY OVERNIGHT DELIVERY: The papers were deposited in an envelope or package designated by the express service carrier; in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to received documents on its behalf; with delivery fees paid or provided for; addressed to the address last shown by that person on any document filed in the action (or to his or her residence) [CCP §1013(c)]

STATE I declare under penalty of perjury that the above is true and correct.

Executed on March 13, 2009, at Long Beach, California.

Gordon E. Gray III

EXHIBIT LIST

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1. Preservation Letter from William Pieratt Demond to Topix
2. Order for Letter Rogatory from Texas Court
3. Letter and Check from William Pieratt Demond to Philip Keating (dated Feb. 17, 2009)
4. Letter from William Pieratt Demond to Philip Keating (dated Feb. 18, 2009)
5. Email from William Pieratt Demond to Phillip Keating (dated Feb. 24, 2009)
6. Email from Philip Keating to William Pieratt Demond (dated Feb. 25, 2009)
7. Affidavit of Andrea Zepeda
8. Letter from Gordon Gray to Philip Keating (dated Mar. 5, 2009)
9. Email from Philip Keating to William Pieratt Demond (dated Mar. 9, 2009)
10. Letter from Philip Keating to William Pieratt Demond (dated Mar. 11, 2009)
11. Letter from William Pieratt Demond to Philip Keating (dated Mar. 12, 2009)
12. Chris Tolles’ statement made on blog.topix.com (dated Jan. 8, 2008)
13. Chris Tolles’ statements made during a powerpoint presentation at SXSW in 2007
14. Plaintiffs’ notice posted to McKinney, TX forum on Topix, Feb. 4, 2009
15. Plaintiffs’ notice posted to Avery, TX forum on Topix, Feb. 4, 2009
16. Plaintiffs’ notice posted to Clarksville, TX forum on Topix, Feb. 4, 2009
17. Plaintiffs’ notice posted to pg. 604 of “Attorney Arrested on Sexual Assault Charges” thread, Feb. 4, 2009
18. Repost of notice to Texarkana, TX forum by defendant “Hellcat”, Feb. 4, 2009;
19. Screenshot of Dallas/Fort Worth Fox news affiliate webpage with link to video story and Plaintiffs’ petition online;
20. Screenshots of banner posted by Topix management on Topix homepage with links to relevant posts;
21. Printout of first page from thread started about the Texas lawsuit by “Top Ex Ed” under the link “Tell Everyone What You Think”;

- 1 22. Affidavit of Mark Lesher, submitted with the original petition;
- 2 23. Affidavit of Rhonda Lesher, submitted with the original petition;
- 3 24. Affidavit of Katrina Fourd, submitted with the original petition;
- 4 25. Plaintiffs' Original Petition, filed with the Tarrant County District Court on Feb. 3,
- 5 2009, styled "Mark and Rhonda Lesher v. John and Jane Does 1-178."
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