

FILED

COMMONWEALTH OF KENTUCKY  
MADISON CIRCUIT COURT  
DIVISION II  
CIVIL ACTION NUMBER 08-CI-1296

APR 15 2009

3:40 P.M.  
MADISON CIRCUIT COURT  
LINDA SPURLOCK GATES, CLERK

KYMBERLY CLEM

PLAINTIFF

VS.

RESPONSE TO MOTION TO QUASH SUBPOENA

AN UNKNOWN PERSON posting on the  
Richmond Register website as "l2bme"

DEFENDANT

COPY

\*\*\*\*\*

COMES the Plaintiff, Kymberly Clem, by counsel and for her response to  
Newspaper Holdings Inc.'s (hereinafter NHI) Motion to Quash Subpoena states as  
follows:

KRS 421.100 Does Not Apply To Internet Posts

KRS 421.100 applies to "information obtained or procured ... and published in a  
newspaper or by a radio or television broadcasting station" not to anonymous defamatory  
fabrications posted on internet message boards. The post which is the subject matter of  
this lawsuit was neither obtained nor procured by any agent or employee of NHI. In fact,  
at the time it was posted NHI would have had no knowledge who posted it, the credibility  
of the content, or the credibility of the individual responsible.

Further, the service used to host message boards by NHI is Groupee.com.  
Groupee.com specifically notes in its terms of service "Groupee does not control the  
Content posted by users on the service and, as such, does not guarantee the accuracy,

integrity or quality of such Content.” (Groupee.com Terms of Service are attached hereto as Exhibit “A”). This is a very different circumstance than that protected by KRS 421.100. Newspapers, radio and television broadcasting stations DO control the content they put in print or on the airwaves. Newspapers, radio and television broadcasting stations DO presumably know the sources of their information, but choose to protect the identity.

NHI is asking this Court to expand the law in a way that was not intended by the legislature. If the legislature wished to protect identities of internet posters under these circumstances, it has had ample time to act, and has not.

KRS 421.100 is intended to protect the anonymous sources of news content. It is beyond a stretch to suggest the legislature intended to protect the right of citizens to libel one another anonymously. While NHI is correct in stating truth is a defense to a claim for libel, that is wholly irrelevant to the matter at hand. In fact, in order to adjudicate that matter, the Court must allow the Plaintiff to conduct appropriate discovery.

#### The First Amendment Protects Opinion, Not Defamation or Libel

August 13, 2008 l2bme posted the following regarding the Plaintiff in response to a Richmond Register story:

*Actually this is not how it happened at all. This girl flashed a woman her private parts after she heard hear (sic) talking about how short her dress was. This women (sic) had children with her and they saw everything. That is why the security guard escorted her out.*

Falsely accusing someone of lewd, vulgar conduct in the presence of children is not constitutionally protected free speech. The plaintiff concedes l2bme had every right to express an opinion regarding her choice of dress, but that is not what l2bme did. Not one word of this post is opinion. l2bme advocates for nothing and does not dissent against anything. What l2bme does do is publicly accuse the Plaintiff of a crime. The conduct described by l2bme could constitute First Degree Indecent Exposure, KRS 510.148.

NHI cites a Delaware Supreme Court Case, *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), however, that case distinguishes constitutionally protected opinion from defamation. *Doe* involved the job performance of a local City Councilman and described him as a “paranoid” and a “divisive impediment” stated that he had “character flaws”, “mental deterioration” and that he was “a prime example of failed leadership.” These are opinions regarding a public figure. If the internet poster accused the Councilman of intentionally exposing his genitals to small children at a particular place and at a particular time, the case would be much different.

The Delaware Supreme Court holding has no application to this case, but even if it did, the Court did not hold that personal information could not be disclosed. The Delaware Court simply determined what conditions should be satisfied prior to disclosure. NHI also cites *Independent Newspapers, Inc. v. Brodie*, 2009 WL 484956 (Md. 2009), but the Maryland court reached a similar conclusion that is not controlling.

Perhaps most importantly, l2bme had no reasonable expectation of anonymity. In order to post on the Groupee.com website, l2bme was required to agree to the Groupee.com Terms of Service, which included the conditions that no defamatory or libelous material be posted. As part of the terms of service, l2bme also consented to the

Groupee Privacy Policy (attached hereto as Exhibit "B"). That policy states personal information will be shared if:


- *We respond to subpoenas, court orders, or legal process, or to establish or exercise our legal rights or defend against legal claims.*

Based upon the privacy policy personal information is subject to disclosure in response to a subpoena. That is precisely what has now taken place and l2bme was placed on notice that he or she would not remain anonymous. l2bme willingly agreed to these terms.

Based on the foregoing, the Plaintiff prays the Court will overrule NHI's Motion to Quash.

Respectfully submitted,

BROWNE LAW OFFICE, PSC



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ATTORNEY FOR PLAINTIFF

## Groupee.com Terms of Service

Last Updated August 12, 2008

### 1.0 Acceptance of Terms

Groupee, Inc. ("Groupee") provides its services on Groupee.com (and all Groupee.com sub-domains) subject to the following Terms of Service ("TOS"), which may be updated by us from time to time without notice to you. You can review the most current version of the TOS at any time at: [http://www.groupee-inc.com/docs/groupee\\_tos.html](http://www.groupee-inc.com/docs/groupee_tos.html).

### 2.0 Description of Service

Groupee.com is a music-focused service ("Service"), through which writers, fans, artists, labels, venues, and other interested parties may post content, share information, interact with each other, and discover, play, or promote music. It is also a source of content created by Groupee. Groupee may add other services to enhance the overall experience for music fans, to include the sale of music to fans, as well as services to enhance the careers of musicians and/or others in the music business.

The Service includes: personal sites controlled by users (for example, [bob.user.groupee.com](http://bob.user.groupee.com)), group sites also controlled by users (for example, [mygroup.group.groupee.com](http://mygroup.group.groupee.com)), band sites ("Band Site") which may be registered by users representing bands (for example, [myband.groupee.com](http://myband.groupee.com)), label sites ("Label Site"), and venue sites.

Band Sites may exist on Groupee prior to registration by a representative of the band; in such cases, there is no actual control of the sites by any users, but information about the band will be displayed, as well as as related content and forums.

No music will be played on the Service unless it has been uploaded to the Service by an artist or entity that owns the music, or unless uploaded by Groupee itself with the consent of such artists/entities.

### 3.0 Your Account

You are responsible for providing full and accurate information about yourself when registering or updating your registration account in the future. You must be at least 16 years of age to use the Service.

### 4.0 User Content and Sites

You understand that all content ("Content") posted on the Service, including information, data, text, software, audio/music, sounds, photographs, graphics, video, messages, tags, or other materials, whether posted publicly or to private groups, are the sole responsibility of the person from which the Content originated. You, and not Groupee, are entirely responsible for all Content that you post on the Service. Groupee does not control the Content posted by users on the Service and, as such, does not guarantee the accuracy, integrity, or quality of such Content. You understand that, by using the Service, you may be exposed to Content that is offensive, indecent, or objectionable. Under no circumstances will Groupee be liable in any way for any Content or any loss or damage of any kind incurred as a result of the use of any Content transmitted or displayed on the Service.

You acknowledge that Groupee may or may not pre-screen Content, but that Groupee shall have the right, but not the obligation, at its sole discretion, to pre-screen, refuse, temporarily or permanently disable, or move any Content on the Service. Without limiting the foregoing, Groupee shall have the right to remove any Content that violates the TOS or is otherwise objectionable (at Groupee's sole discretion). You agree that you must evaluate, and bear all risks associated with, the use of any Content, including any reliance on the accuracy, completeness, or usefulness of such Content.

Groupee reserves the right to delete Content, entire sites, and groups at any time, for any reason without notice. Groupee also reserves the right to re-assign ownership of Services for any reason, at its sole discretion.

**EXHIBIT**

**A**

Groupee reserves the right to place advertising of any kind on any/all web pages and/or emails served by the Service.

### 5.0 Digital Music Promotion and Broadcast - For Artists and Labels

Music files may only be uploaded/posted to the Service by administrators of Band Sites on Groupee, Label Sites on Groupee, or by Groupee itself.

For music files that you upload to Groupee, you, as an artist representative ("Artist Rep"), agree that:

1. You, or a party you legally represent, have copyright ownership of the works that you upload to the Service.
2. You are uploading to the Service for the purpose of promoting your music.
3. You own/control music publishing rights and are waiving all music publishing royalties that might otherwise be associated with playing the music, or you have received permission to waive such royalties from the music publisher. You, and not Groupee, assume any music publishing royalty fees that may apply.
4. You grant Groupee a non-exclusive, royalty-free license (including the right to sub-license for all purposes related to the Service) to make your music files available on the Service via streaming over the internet (or other devices supported by the Service), and also via user download, if you elect to permit such downloads. Users of the Service may also play your music files through their own playlists on the Service.
5. The songs you upload are for Band Sites that you control and, as such, are for your own promotional use.
6. Users of the Service who play your songs are covered under this license, so long as they play the songs directly through the Service and do not move, illegally download, or transfer your music files to another source.
7. The Service is not a radio station or broadcast entity, but rather a platform for you to promote your own music. You control what you upload and understand that others may play your music directly through the Service royalty-free.
8. Such files will remain available on the Service until you delete the files yourself on the Service.

For music files that you upload to Groupee, Groupee agrees that:

1. It assumes no copyright/ownership interest in the music files, unless Groupee itself already had such rights.
2. It may not sell any music files unless explicitly authorized to do so by Artist Rep via a separate agreement.
3. Artist Reps will be able to delete from the Service any music files that they upload, as well as control, on a song-by-song basis, whether the songs are to be available as free downloads to users.

### 6.0 Member Conduct

You agree not to use the Service to:

- Post Content that contains nudity, is unlawful, harmful, threatening, abusive, harassing, tortuous, defamatory, pornographic, extremely violent, vulgar, obscene, libelous, invasive of another's privacy, or hateful.
- Impersonate any person or entity, or otherwise misrepresent your affiliation with another person or entity.
- Post confidential information.
- Post Content that infringes any patent, trademark, trade secret, copyright, or other proprietary rights of any party.
- Post unsolicited or unauthorized advertising or promotional materials.
- Post Content that contains software viruses or that is intended to harm the functionality of any computer software or hardware.
- Intentionally or unintentionally violate any applicable local, state, national, or international laws.
- Provide material support or resources to any organization designated by the United States government as a foreign terrorist organization, pursuant to Section 219 of the Immigration and Nationality Act.
- Harass other users.
- Act in a manner that negatively impacts the ability of other people to use the Network.

## 7.0 Copyright Policy

You may not post, distribute, or reproduce in any way any copyrighted material, trademarks, or other proprietary information that you do not personally own without obtaining prior written consent of the owner of such proprietary rights.

See Section 19.0 for information about how to report a copyright violation to Groupee.

## 8.0 Privacy

Registration information, and other data collected about you, is subject to our corporate Privacy Policy, which is available for review online at <http://www.groupee-inc.com/docs/GroupeePrivacyPolicy.html>. You understand that, through your usage of the Service, you consent to that policy.

## 9.0 Indemnity

You agree to indemnify and hold Groupee and its subsidiaries, affiliates, officers, agents, employees, partners, and licensors harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of Content you submit or post through the Service, your use of the Service, your connection to the Service, your violation of the TOS, or your violation of any rights of another person or entity.

## 10.0 No Resale of Service

You agree not to reproduce, duplicate, copy, sell, trade, resell, or exploit for any commercial purpose, any aspect of the Service.

## 11.0 General Practices

You acknowledge and agree that Groupee may access, preserve, and disclose your account information and Content, if required to do so by law or in a good faith belief that such access, preservation, or disclosure is necessary to comply with legal process, enforce the TOS, respond to claims that any Content violates the rights of third parties, respond to your requests for customer support, or protect rights, property, or personal safety of Service users and/or the general public.

## 12.0 Cancellation

If you wish to cancel your account, please contact us by email at: [cancelgroupee@groupee.com](mailto:cancelgroupee@groupee.com). You must send this email from your Groupee email account of record and you must include your Groupee ID, in order for us to process your request. Cancellation requests will generally be processed within 8 weeks. There may not be any written confirmation of the cancellation. In addition, we may refuse to process such requests, at our discretion, if we cannot verify proper ownership of the account. When we cancel your account, we will remove your account profile and all access to your personal Service but any content you created on groups/band Services you created may remain.

## 13.0 Service Modifications

Groupee reserves the right to modify, discontinue (temporarily or permanently) the Service at any time, without notice. You agree that Groupee shall not be liable to you or to any third party for any Service modification, suspension, or discontinuance.

## 14.0 Termination

You agree that Groupee may immediately terminate your account for any reason, without notice. Termination may mean that you can no longer access the Service and that all content/information that you posted to the Service may be permanently deleted. Causes for termination may include (but are not limited to) (a) breaches or violations of this TOS, (b) a request from you, (c) requests by government authorities, (d) extended periods of inactivity, and/or (e) engagement by you in activities deemed by Groupee to be fraudulent, illegal, or inappropriate. You agree that all termination for cause shall be made at Groupee's sole discretion and that Groupee shall not be liable to you or any third party for termination of your account.

## 15.0 Advertisers and Other Third Parties

You acknowledge that any dealings that you have with advertisers on the Service are solely between you and the advertisers. You agree that Groupee shall not be responsible or liable for any loss or damage of any sort incurred as the result of any such dealings or as the result of the presence of such advertisers on the Service.

Groupee may also display some content on the Service that has been provided by third parties. Such content may include artist/hand information and discographies, as well as concert data. Groupee makes no guarantees about the accuracy of such data and assumes no liability for any inaccuracies that may appear.

## 16.0 Groupee's Proprietary Rights

Groupee owns and retains all proprietary rights in the Service. The Service contains copyrighted material, trademarks, and other proprietary information of Groupee and its licensors. Except for information that is in the public domain, you may not copy, sell, or in any way distribute such proprietary information, without express written consent by Groupee.

## 17.0 Disclaimer of Warranties

CUSTOMER ACKNOWLEDGES THAT THE SERVICE IS PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. GROUPEE DOES NOT MAKE ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO THE PERFORMANCE OF THE SERVICE, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT OR ANY IMPLIED WARRANTY ARISING BY USAGE OF TRADE, COURSE OF DEALING OR COURSE OF PERFORMANCE. GROUPEE MAKES NO REPRESENTATIONS OR WARRANTIES WHATSOEVER THAT THE SERVICE WILL BE UNINTERRUPTED, ALWAYS ACCESSIBLE, FREE OF HARMFUL COMPONENTS, ACCURATE OR ERROR-FREE; NOR DOES GROUPEE MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED BY THE USE OF THE SERVICE AS TO THE ACCURACY OR RELIABILITY OF ANY INFORMATION OBTAINED THROUGH THE USE OF THE SERVICE OR THAT DEFECTS IN THE SERVICE WILL BE CORRECTED. ANY MATERIAL DOWNLOADED OR OTHERWISE OBTAINED THROUGH THE SERVICE IS ACCESSED AT YOUR OWN DISCRETION AND RISK AND YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR COMPUTER SYSTEM OR LOSS OF DATA THAT RESULTS FROM THE DOWNLOAD OF SUCH MATERIAL. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM GROUPEE OR THROUGH THE SERVICE SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THE TOS. SOME JURISDICTIONS MAY ALLOW FOR THE EXCLUSION OF CERTAIN WARRANTIES, SO SOME OF THE EXCLUSIONS ABOVE MAY NOT APPLY TO YOU.

## 18.0 Limitation of Liability

IN NO EVENT SHALL GROUPEE BE LIABLE TO YOU OR ANY THIRD PARTY FOR ANY INDIRECT, CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, SPECIAL OR PUNITIVE DAMAGES, INCLUDING LOST PROFIT DAMAGES ARISING FROM YOUR USE OF THE SERVICE (OR YOUR INABILITY TO USE THE SERVICE), EVEN IF GROUPEE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, GROUPEE'S LIABILITY TO YOU FOR ANY CAUSE WHATSOEVER, AND REGARDLESS OF THE FORM OF THE ACTION, WILL AT ALL TIMES BE LIMITED TO THE AMOUNT PAID, IF ANY, BY YOU TO GROUPEE FOR THE SERVICE DURING THE TERM OF MEMBERSHIP.

## 19.0 Copyright or Intellectual Property Infringement

Groupee has filed a designation of an agent with the United States Copyright Office to receive notifications of copyright infringement (please see <http://www.copyright.gov/onlinesp/agents/groupee.pdf>). Valid notifications provided to Groupee of copyright infringement must be sent via certified mail to Groupee and include the following:

- A physical signature of a person authorized to act on behalf of the owner of an exclusive right that has allegedly been infringed;
- Identification of the copyrighted work or a list of the copyrighted works claimed to have been infringed;
- Identification of the allegedly infringing material and information reasonably sufficient to permit us to locate the material;



- Contact information for the complaining party, such as an address, telephone number, and, if available, email address;
- A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;
- A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

If such notifications do not include the aforementioned, notification is deemed invalid.

Please send all infringement claims to the following address:

Groupee, Inc.  
ATTN: Copyright Violation Agent  
1904 3rd Avenue, Suite 525  
Seattle, WA 98101 USA

## 20.0 General Information

The TOS is governed by the laws of the State of Washington. You and Groupee agree to submit to the personal and exclusive jurisdiction of the courts located within King County, Washington.

The failure of Groupee to exercise or enforce any right or provision of the TOS shall not constitute a waiver of such right or provision. If any provision of the TOS is found by a court of competent jurisdiction to be invalid, the parties nevertheless agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and the other provisions of the TOS remain in full force and effect.

You agree that your Groupee account is non-transferable and any rights to your Groupee account or contents terminate upon your death.

You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Service or TOS must be filed within one year after such claim or cause of action arose, or be forever barred.

The section titles in the TOS are for convenience and have no legal or contractual effect.

## Groupee Privacy Policy

Last Updated: April 14, 2008

This Privacy Policy ("Policy") applies to all products, services, and websites operated by Groupee, Inc. ("Groupee").

Groupee is registered with the U.S. Department of Commerce's Safe Harbor Program. This means that we comply with the Safe Harbor principles of Notice, Choice, Onward Transfer, Security, Data Integrity, Access, and Enforcement.

### Information That We Collect

#### Information That You Provide Us

When you sign up for a Groupee account or a service operated by Groupee, we store all information that you provide to us. This may include personal information like email addresses, your name, passwords, phone numbers, birth date, gender, and address information. For services that require payment, we also collect credit card information, which is stored in encrypted form on secure servers. Once you register and sign in to one of our services, you are not anonymous to us.

In addition, we collect and store information based on the services that you are using. For instance, we would store the names of communities and channels that you join, the people that you mark as your buddies, content that you watch, etc.

#### Browser Cookies

When you use a Groupee service, we may store certain information in browser cookies. These cookies identify your browser and allow us to enhance your online experience. Most browsers are configured to accept cookies, but you may change your browser's settings so that you are informed every time a cookie is set, or to prevent cookies from being set at all. Please note, however, that many Groupee features do not function properly if cookies are disabled.

Advertisers or other third parties do not have access to Groupee's cookies. However, such advertisers may set their own cookies. Such cookies are subject to the advertisers' own privacy policies, not this Policy.

#### Visit Information Via Server Logs

Groupee records information on our server logs from your browser, including your IP address, cookie information, and page request.

#### User Communications

Any email or written correspondence that you send us may be stored.

#### Transaction Records

Data from any monetary transaction taking place via Groupee's service may be stored.

### Uses of Collected Information

Groupee uses collected information to enhance your experience online, authenticate you when you sign in, send notifications, fulfill your requests for services, contact you, customize the advertising or content that you see, and provide anonymous reporting for internal and external clients.

### Information Sharing

Groupee does not share personal information with other individuals, organizations, or companies outside of Groupee, unless we have your consent or unless:

- We are working with trusted partners who agree to abide by the rules of this Policy and have signed a confidentiality agreement.
- We respond to subpoenas, court orders, or legal process, or to establish or exercise our legal rights or defend

**EXHIBIT**

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against legal claims.

- We believe it is necessary to share information in order to investigate, prevent, or take action regarding illegal activities, suspected fraud, or potential threats to the physical safety of any person.
- If Groupee is involved in a merger, acquisition, or any form of sale of some or all of its assets, we will provide notice before personal information is transferred and becomes subject to a different privacy policy.

Note that we may share certain aggregated, non personal information, such as demographic information, browser type, and usage statistics. In such cases, the information does not identify you personally.

In addition, for our eve community service, certain personal profile information is shared with community administrators. When you join eve communities, your email address and the specific profile information requested by particular communities will be shared with the administrators of those communities.

While Groupee does not provide any personal information to advertisers, it is possible that, if you view a certain ad, it may have been delivered to you based on targeting demographic criteria (for example, men who are between 18-24 years of age). Please note that in such situations, the advertiser does not know any specific personal information about you. You understand, however, that the advertiser will make the assumption that you meet its particular targeting criteria.

### **Data Integrity**

Groupee processes personal information only for the purposes for which it was collected and in accordance with the Policy. We review our data collection, storage, and processing practices to ensure that we only collect, store, and process the personal information needed to provide our services. We depend on our users to update or correct their own personal information.

### **Enforcement**

Groupee periodically reviews its compliance with the Policy. If you have questions or concerns, please contact us at: Groupee, Inc., ATTN: Groupee Privacy Administrator, 1904 Third Avenue, Suite 525 Seattle, WA 98101, USA. If you contact us at this address with your concerns/questions, we will respond. Groupee will also cooperate with the appropriate regulatory authorities to resolve any complaints regarding the transfer of personal information that cannot be resolved between Groupee and you.

### **Confidentiality and Security**

Groupee restricts access to personal information to Groupee employees, contractors, and agents who need to access the information in order to operate, sustain, improve, or repair our services. These individuals are bound to confidentiality agreements and may be subject to discipline, including termination and criminal prosecution, if they fail to meet these obligations.

We take appropriate security measures to protect your information. These measures include physical, electronic, and procedural safeguards, as well as software/system security reviews.

### **Updating Your Personal Information**

You can edit your Groupee Account information at any time online. You will need to sign in to edit your account information. You may also request to have your account deleted entirely. Please note, however, that requests for account deletion may take up to 30 days to process and archived versions of your information may remain in our system after deletion.

### **Changes to This Policy**

Groupee may revise this Policy in the future. We will notify you about significant changes in the way we treat personal information by sending a notice to the primary email address on your Groupee account or by placing a note on Groupee.com.

### Questions/Comments

If you have any questions or comments regarding Groupee's Privacy Policy, please contact us at:

Groupee, Inc.  
Groupee Privacy Administrator  
1904 Third Avenue, Suite 525  
Seattle, WA 98101 USA