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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

File By Fax

MARK AND RHONDA LESHER,

Plaintiffs,

vs.

JOHN AND/OR JANE DOES 1-178,

Defendants.

No.: 109CV134190

NON-PARTY TOPIX, LLC'S REPLY IN SUPPORT OF MOTION TO QUASH PLAINTIFFS' DEPOSITION SUBPOENA FOR THE PRODUCTION OF BUSINESS RECORDS, OR IN THE ALTERNATIVE FOR A PROTECTIVE ORDER

Date: March 27, 2009
Time: 9:00 a.m.
Place: Dept. 22

I. INTRODUCTION

Non-party, Topix, LLC ("Topix") hereby responds to Plaintiffs' Opposition to Motion to Quash Subpoena for Production of Business Records, or in the Alternative for a Protective Order as follows:

II. ARGUMENT

A. Topix has Standing

Plaintiffs have alleged that Topix lacks standing to challenge the subpoena upon First Amendment grounds. (Plaintiff's Memo at 2). This argument is contrary to the established law. In *Baker v. Carr*, the U.S. Supreme Court noted that the gist of the question of standing revolves around whether the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. 369 U.S. 186, 204 (1962). In *NAACP v. Alabama*, Alabama was requesting the names of the members of the local NAACP. 357 U.S. 449 (1958). In that case, the court held that if members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. *Id.* at 459.

In *In re Subpoena Duces Tecum to America Online, Inc.* (Jan. 31, 2000, No. 40570) 52 Va. Cir. 26 [2000 WL 1210372] (Va. Cir. Ct. 2000), the plaintiff sought to discover the identities of an ISP's subscribers so that it could properly name them in its Indiana lawsuit. The federal district court allowed America Online, Inc. to assert the First Amendment rights of the John Doe defendants, because compelling disclosure would harm AOL as well as those it was trying to protect. "If AOL did not uphold the confidentiality of its subscribers, as it has contracted to do, absent extraordinary circumstances ... one could reasonably predict that AOL subscribers would look to AOL's competitors for anonymity. As such, the subpoena duces tecum at issue potentially could have an oppressive effect on AOL." (rev'd on other grounds). *See also. In re Verizon Internet Services* (D.D.C.2003) 257 F.Supp.2d 244 (D.C.C. 2003) (rev'd on another grounds).

The ability to protect the anonymity of its posters is crucial to the business of Topix. Users of

Topix rely on the fact that they have the ability to put forth ideas, cause debate and comment on issues of concern in their community, without the threat that their identities will be revealed. As was noted in *In re Subpoena Duces Tecum to America Online, Inc.*, without the assurances that Topix will protect their identities, users will cease to utilize their forums. This is best evidenced by the comments seen when users become aware that user identities might be revealed. (*See* Exhibit A to the Declaration of Philip P. Keating "Keating Decl."). Topix's ability to protect their user's anonymity is critical not only to their business but also to protect free speech. Only when people can speak their minds without the threat that they will be ousted will potentially unpopular views be voiced and better discussion had.

Further, Texas courts allow any person "from whom discovery is sought, and any other person affected by the discovery request" to move for a protective order. *In Re: Does 1*-10, 242 S.W.3d 805 (Tex.App.-Texarkana 2007) *citing* Tex.R.Civ.P.192.6(a). Lastly, Topix has standing because Plaintiffs have indicated that they may become a party to the present litigation, by stating, "Here, Topix is not **yet** a Defendant." (Plaintiff's Memo at 10). Accordingly, Topix has standing in this matter.

B. The First Amendment Right to Anonymous Speech is Not Absolute

Topix would agree that defamatory speech is not protected by the Constitution. To argue otherwise would be to disregard the long line of cases concerning defamation. However, the Plaintiffs are mistaken in their belief that the postings, as listed in their Subpoena for Production of Records, (see Exhibit A to Topix's Motion to Quash) are defamatory. Rather, Topix argues that the posts which the Plaintiffs want the identities revealed are not defamatory, but merely fall into the category of crude, satirical hyperbole which, while reflecting the immaturity of the speaker, constitute protected opinion under the First Amendment. *See. Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (2008). In *Krinsky*, the Plaintiff was a corporate officer who was referred to on a financial

message board as a woman with fat thighs, a fake medical degree, queefs and has poor feminine hygiene. *Id.* The Court in *Krinsky* noted,

> "When a defamation action arises from debate or criticism that has become heated and caustic, as often occurs when speakers use Internet chat rooms or message boards, a key issue before the court is whether the statements constitute fact or opinion. In some cases, the communication may amount to "mixed opinion." Pure opinion occurs when the defendant makes a comment or opinion based on facts which are set forth in the [publication] or which are otherwise known or available to the reader or listener as a member of the public. Mixed expression of opinion occurs when an opinion or comment is made which is based upon facts regarding the plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication." *Id.* at 247-248.

The *Krinsky* court further stated that "A reasonable reader of this diatribe would not comprehend the harsh language and belligerent tone as anything more than an irrational, vituperative expression of contempt..." and further stated that, "juvenile name-calling cannot reasonably be read as stating actual facts." *Id.* at 249; see also *Rocker Management LLC v. John Does 1 Through 20,* (N.D.Cal. May 29, 2003, No. 03-MC-33) 2003 U.S.Dist. Lexis 16277, 2003 WL 22149380 [vulgar, hyperbolic chat-room messages replete with grammar and spelling errors convey statements of opinion].

The Plaintiffs along with Robert McCarver were charged, twice indicted and ultimately tried for various sexual and other offenses. The postings that the Plaintiffs' want revealed involve numerous matters of a sexual nature, child abuse and selling of drugs, it is therefore important for this Court to understand the facts of the underlying case as revealed by the victim, Shannon Coyel. (See Exhibit B to Keating Decl.). The facts of the Plaintiffs' criminal case as described by the victim, Shannon Coyel, reveal that she was having an extramarital affair with Robert McCarver.

(Exhibit B at pg 7 line 12-14). Ms. Coyel revealed in her testimony that she had come to stay with Robert McCarver at the residence of the Leshers on July 24, 2007. (Exhibit B at pg 8 line 21-23). Ms. Coyel describes that on the night of July 26, 2007 she was complaining of a headache. (Exhibit B at pg 10 line 3-4). Mark Lesher offered to give her an aspirin or something to take for the headache. (Exhibit B at pg 10 line 4-6). Without looking at the pill she ingested it, but rather than make her feel better, it made her feel dizzy and faint. (Exhibit B at pg 10 line 7-12). She decided to go to the bedroom and lay down. (Exhibit B at pg 10 line 13-14). When she woke up she found herself unable to move and noticed that she didn't have any clothes on and that Rhonda Lesher was between her legs with her tongue in her vagina. (Exhibit B at pg 11 line 6-12). She described Rhonda's actions between her legs as being very rough and involved biting. (Exhibit B at pg 11 line 15-17). During this time she looked around the room and noticed that Mark Lesher and Robert McCarver were standing over in the corner, naked, playing with themselves. (Exhibit B at pg 12 line 5-11). After Rhonda finished with her actions, Ms. Coyel stated that Mark Lesher got on top of her and stuck his penis inside of her. (Exhibit B at pg 12 line 13-15). When he was through he got off and got onto Rhonda and that's when Robert McCarver got on top of her. (Exhibit B at pg 12 line 15-17). Afterwards, once she started to feel better she made an attempt to leave the property but was not allowed. (Exhibit B at pg. 14 line 16 – pg. 15 line 3).

In addition to the facts of the underlying sexual assault charges, Ms. Coyel revealed a lot of other background information during her trial testimony. She revealed that Robert McCarver had been in the past supplied with pills by Mark Lesher. (Exhibit B at pg 30 line 6-8). Further, she revealed that she had purchased pills directly from Mark Lesher. (Exhibit B at pg 33 line 9-14). In addition, she revealed that she had been sexually assaulted by her father during her childhood. (Exhibit B at pg 18 line 18-21). Ms. Coyel also revealed that her father filed an intervention in an attempt to get her children. (Exhibit B at pg 47 line 13-25). She revealed that Mark Lesher got her

father a lawyer to assist in his ability to get custody of her children and that Rhonda Lesher testified against her during the November child-custody proceeding. (Exhibit B at pg 58 line 21 – pg 59 line 9 & at pg 56 line 7-9). In addition, as a matter of further background, according to the Red River District Attorney's office, Robert McCarver gave a statement to law enforcement implicating Mark Lesher in the sale of drugs. (*See* Declaration of Philip P. Keating ("Keating Decl." ¶ 9.)

These sexual and drug charges came to light when Ms. Coyel made the decision to press charges. These facts were ultimately presented to a grand jury and, after indictments were secured, led to the arrest of the Plaintiffs and Robert McCarver. This indictment caused a media frenzy in the Plaintiffs' communities. Newspaper articles were written regarding the allegations, public statements were made by those involved and ultimately the community began to speak up about the charges. (see Exhibit C to the Keating Decl.). This outrage and concern ended up spilling over into news forums run by Topix, where people noted their opinions of the parties involved. (see Exhibit A to Topix's Motion to Quash). To be fair, not only were the Leshers topics of debate in these forums and in related articles, but so were the victim and even the district attorney. (see Exhibit A & C to the Keating Decl.). The media frenzy around this case was so extreme, that in order to provide a fair trial to the Plaintiffs and Robert McCarver, it was determined that the entire trial needed to be transferred to an entirely different community. (see Exhibit C to the Keating Decl.).

The facts surrounding the criminal trial were heavily publicized during the pendency of the case and widely known in the community. In fact, they were so widely discussed and known that the Court ordered that the trial had to be transferred to a different venue to ensure a fair trial to the Plaintiffs and Robert McCarver.

Only with this background is the court able to make a fully informed determination as to whether the comments requested by the Plaintiffs are truly independent factual statements or those of pure opinion. *See Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (2008). It is clear, based on the

testimony of Ms. Coyel and the newspaper coverage of the Plaintiffs' criminal case that the comments requested by the Plaintiffs were widely known in the community and not statements of fact.

Due to the widely publicized nature of the Plaintiffs' criminal case, Topix would argue that the statements made in the requested posts are pure opinions which are based on facts set forth in the numerous articles and which were otherwise known or available to the reader or listener as a member of the public. In addition, it is essential that Plaintiffs must establish prima facie evidence as to each post, because each post is a potential separate count, potential separate poster and most importantly a potential innocent poster. Topix would argue that the posts are pure opinion and not defamatory. The *Krinsky* case involved only comments appearing on financial message boards, albeit heated, they were less likely known in the general community then those surrounding the Plaintiffs. The court determined that the poster's identity should not be revealed. Likewise the court should not require Topix to reveal the identities of the requested posters.

C. The Court Should Not Disregard Topix's Arguments Concerning Undue Burden

Plaintiffs argue that their subpoena seeks identifying information...in Topix's possession regarding defamatory posts by anonymous individuals...[T]he information sought is clearly relevant to the present case. (Plaintiffs' Memo at 12). Topix disagrees that the information requested is relevant because the posts are not defamatory. Plaintiffs' counsel strengthens Topix's argument when Mr. Demond admits in the event that any posts are not defamatory; it is the result of an oversight on my part. (See Demond Declaration ¶ 12). If even one post is not defamatory then the subpoena is overly broad. The effect of revealing a non-defamatory poster's identity, because Plaintiff mistakenly included a non-defamatory post, would have a chilling effect on speech. At a minimum, the court should strike all posts that are not defamatory to cure the overly broad aspect of the subpoena. As an example, Topix directs the Court to the Plaintiff's attachment to Subpoena for

Production of Records, thread No.9 titled "Attorney arrested on sexual assault charges;" specifically post No. 84 and Topix would like to advise the Court that the Plaintiffs are requesting the identity of Ohooooooooo for posting "Wonder Why?" (see Exhibit A to Topix's Motion to Quash). Topix reiterates that this request is overly broad, as evidenced above and asks court to protect the identity of the anonymous posters by quashing the subpoena.

Next, Plaintiff argues that the subpoena is not unduly burdensome. (Plaintiffs Memo at 13-14). Plaintiffs attempt to distinguish *Calcor Space Facility, Inc. v. Sup.Ct. (Thiem Industries, Inc.),* 53 Cal. App. 4th 216 (1997) based on the fact that their demand is stated in 3 paragraphs. (Plaintiffs' Memo 13). The Plaintiffs fail to acknowledge that their attachment to their subpoena is well over 100 pages and attempt to lessen the amount requested by indicating they provided what Topix requested. This is simply not true. In order to obtain records from Topix, the requestor must be specific, in that, they need to provide the thread and post number. Topix does not require the specific text of the post, as that would be a waste of time. (Decl. of Keating, ¶ 5) The thread and a post number are sufficient to locate the requested thread and is all that is ever required of requesting parties.

Plaintiffs maintain that it is not unduly burdensome for a company to require one of its employees to spend over seven weeks retrieving the requested information. Plaintiffs further indicate that they were willing to compensate Topix at the California Statutory Rate of $24 and presented a check for $6,840. (Plaintiffs' Memo 13). The very fact that fulfilling this request would take one person seven weeks to complete is the best evidence that this request is unduly burdensome. Plaintiffs enforce this argument by indicating that Topix should hire an employee to fulfill this obligation. (Plaintiffs' Memo 13). The mere fact that a company would be required to hire someone for the purpose of satisfying a non-party discovery request, should demonstrate how over-the-top and unduly burdensome Plaintiffs' request is on Topix.

Lastly, Plaintiffs did not provide actual notice to Topix of the individuals and the threads requested in Plaintiffs' preservation letter. (See Decl of Demond, Exhibit 1 to Plaintiff's Opposition). In fact, Mr. Demond's preservation letter only provides one thread and then makes a blanket request for all threads throughout Topix's forums which name five separate people. (See Decl of Demond, Exhibit 1 to Plaintiff's Opposition). There is no indication that Plaintiffs would be seeking the identifying information of over 800 posts, which appear in 82 separate forums. Further, Topix did not require Plaintiffs to painstakingly compile their information. Regardless, Plaintiffs would have been required to review the posts anyway in order to file their Petition for discovery to the Texas Court, which they did do, as evidenced in their Petition. (See Decl of Demond, Exhibit 25 to Plaintiff's Opposition). Accordingly, Plaintiffs' argument that Topix's arguments are vitiated by its own conduct is without merit.

D. Topix Has Not Failed To Fulfill Its Obligations To "Meet And Confer" Regarding The Subpoena And This Motion

Plaintiffs' argument that Topix has made no effort to informally resolve the issues regarding this subpoena and this motion is also not factually correct and surprisingly stated. (Plaintiffs' Memo 15). Topix made an offer to resolve that was not accepted by the Plaintiff. How Plaintiffs' can state that each offer made was unilaterally rescinded is beyond understanding and in fact, not true. Once Topix was made aware of the scope of Plaintiffs' request, it immediately made Plaintiffs' counsel aware of the necessary expenses involved. Any discussions about the money required to fulfill the request was made preliminarily at the beginning while counsel for the Plaintiffs was determining whether his client would agree to forward the money. Counsel for the Plaintiff was well aware that when discussions were had about the expense required, this was done without a full review of the request. There would have been no reason for Topix to incur the expense of its lawyers to review the substance of this request if Plaintiffs were not going to agree to compensate Topix. Once Topix was

made aware that Plaintiffs would forward the necessary money, Mr. Demond was aware that the Subpoena would then be reviewed. Once reviewed, it was determined that the Subpoena requested identifying information of non-defamatory posts. (Decl. of Keating, ¶ 7)

Further, counsel for the Plaintiffs and counsel for Topix had numerous conversations in an attempt to come to some sort of resolution. At all times, the financial burden to Topix was of primary importance, whether through the production of the posts or through legal fees. To say that Topix has made no effort is completely inaccurate. Topix has requested Plaintiffs to review their request and to delete those posts which are not defamatory. Plaintiffs have refused to review their subpoena and delete even one post. Every attempt at discussing how the posts are not defamatory has been immediately rejected and the Plaintiffs have refused to accept even the most remote comments listed in their Subpoena request as not defamatory. Topix acted in good faith in every attempt at resolving this matter without requiring the courts attention and time. (Decl. of Keating, ¶ 8). Accordingly, Topix has fulfilled its obligation to "meet and confer."

III. CONCLUSION

For the arguments set forth above, the Court should grant Topix LLC's motion to quash Plaintiffs' Subpoena.

DATED: March 20, 2009.

REED SMITH LLP

By Joy Durand
Joy L. Durand
Attorneys for Non-Party Topix LLC

Mark and Rhonda Lesher v. John and/or Jane Does 1-178
State of California County of Santa Clara No. 109 CV 134190

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, Two Embarcadero Center, Suite 2000, San Francisco, CA 94111-3922. On March 20, 2009, I served the following document(s) by the method indicated below:

Non-Party Topix, LLC's Reply In Support Of Motion To Quash Plaintiffs' Deposition Subpoena For The Production Of Business Records, Or In The Alternative For A Protective Order

Declaration of Philip P. Keating In Support Of Non-Party Topix, LLC's Reply In Support Of Motion To Quash Plaintiffs' Deposition Subpoena For The Production Of Business Records, Or In The Alternative For A Protective Order

☐ by transmitting via facsimile on this date from fax number +1 415 391 8269 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

☐ by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

☒ by transmitting via email to the parties at the email addresses listed below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 20, 2009, at San Francisco, California.

Camille A. Hunt

Camille A. Hunt