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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
10/05/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

In the Matter of the Subpoena Issued to Weebly, Inc. in:

BETHANY SHERMAN, an individual, and OG ANALYTICAL, an Oregon limited liability company,
Plaintiffs,

vs.

DOES 1 through 10, inclusive,

Defendants.

Case No. CGC-18-569429

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM AND FOR MONETARY SANCTIONS

DATE: November 9, 2018
TIME: 9:00a.m.
DEPT: 302

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This motion to quash is made on behalf of Doe(s) under the California Civil Procedure Code § 1987.1(b)(5), which allows "[a] person whose personally identifying information, as defined in subdivision (b) of Section 1798.79.8 of the Civil Code, is sought in connection with an underlying action involving that person's exercise of free speech rights" to challenge the issuance of a subpoena duces tecum and CCP § 1987.2. Under CCP § 1987.1, a court may quash a subpoena and "make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." For the reasons set forth below, Doe(s) motion to quash plaintiff's subpoena to Weebly, Inc. should be granted.

STATEMENT OF FACTS

This motion seeks to quash a subpoena duces tecum directed towards Weebly, Inc., for the discovery of the anonymous identity of the "creator of the webpage at "eugeneantifa.weebly.com" ("website") as well as identifying information related to visitors of the website. Brinson Decl. ¶7, Exhibit B. The subpoena stems from a lawsuit filed by Bethany Sherman, an apparent neo-Nazi/white-nationalist resident of Oregon and Oregon limited liability company, "OG Analytical." The lawsuit alleges three claims: 1) defamation; 2) violation of plaintiffs' right to privacy; and 3) intentional interference with prospective economic relations.

Plaintiff Bethany Sherman is a resident of Oregon and the owner/operator of Plaintiff OG Analytical, an Oregon LLC that provides "laboratory testing services to cannabis growers and producers in Oregon." Complaint ¶ 1-2.

On November 23, 2017, an anonymous author or authors posted a story to the website that effectively exposed Sherman as a neo-Nazi. Because plaintiffs failed to attach a reference to this article in their complaint, a copy is attached as Exhibit A. Brinson Decl. ¶ 6. The article claims to outline the extent of involvement of both Sherman and her boyfriend, Matthew Combs, in neo-Nazi organizations and their affinity for white-supremacist/Nazi ideology. The author(s) of the article posted several, nonprivileged, screenshots of conversations of Combs and Sherman apparently expressing their support for, or involvement in, neo-Nazi/white-supremacist organizations and ideals. The information revealed on the website is from three primary sources: 1) The website of OG Analytical, 2) Twitter, 3) and messages (that were made public prior to the publishing of the article) leaked from an invited participant to the server known as Discord, that outlines the blatant affinity of plaintiff Sherman, her boyfriend, and her friends for white-supremacism/Nazism and white-supremacist/neo-Nazi organizations.

It is no secret that most people deplore Nazism, White-Nationalism, etc. The fact that, once Sherman was exposed as a neo-Nazi, plaintiffs lost business and were subject to a boycott should not be surprising to plaintiffs. Nothing posted on the website at issue is actionable—people simply do not like Nazis and do not want to be affiliated with them or their racist ideology.

A. Before a Subpoena to Identify an Anonymous Internet Speaker May Be Enforced, the First Amendment Requires Plaintiffs to Identify Allegedly Actionable Speech and Produce Sufficient Evidence to State a Prima Facie Cause of Action; and, if Both Requirements are Met, the Court Must Balance the Anonymous Speakers' First Amendment Right to Speak Anonymously with the Prima Facie Case.

The subpoena requested by plaintiffs, if upheld, would violate the First Amendment right of Doe(s) to engage in anonymous speech. The U.S. Supreme Court has consistently protected the right of individuals and groups to engage in anonymous political speech. E.g., *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995). Courts in California have also upheld this right. *See e.g., Krinsky v. Doe 6*, 159 Cal. App.4th 1154, 1164 (Cal. App. 2008); *Rancho Publications v. Superior Court*, 68 Cal. App.4th 1538, 1548 (Cal. App. 1999) (holding that the California Constitution also protects the right to anonymous political speech).

In *Krinsky*, the California Court of Appeals noted the reasons as to why anonymous speech, especially on the internet, is important and why people may want to engage in anonymous political speech:

> The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers' identities, the online forum allows individuals of economic, political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field.

159 Cal. App.4th at 1162.

While private parties, especially those with enough time and resources, may ultimately determine the identity of an anonymous speaker, as Doe(s) appear to have

done relative to Sherman's anonymous online personalities, such identification does not necessarily require state action and, is therefore, not subject to the constitutional limits on state action under the First Amendment. In contrast, a court order, such as a subpoena, is a state action and is, therefore, subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelly v. Kraemer*, 334 U.S. 1 (1948).

The subpoena, requested by plaintiffs, seeing to compel the production of the identities of the "Does," would compromise the exercise of the Does' fundamental rights. Such a subpoena "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). If identified, the fundamental rights of speakers engaged in protected speech may be subject to forms of private retribution following court-ordered disclosures. *NAACP* at 462-463. Indeed, neo-Nazis, white-nationalists, etc. have a long history of violently attacking those they identify as "anti-fascists" as well as others for whom there is no future in their whites-only dystopia. According to a recent report prepared for Congress by the Government Accountability Office, far-right groups (the majority of which are affiliated with some form of neo-Nazi, white-supremacist, or white separatist ideology) were responsible for 73% of the "85 violent extremist incidents that resulted in death since September 12, 2001." United States Government Accountability Office Report to Congressional Requesters, *Countering Violent Extremism: Actions Needed to Define Strategy and Assess Progress of Federal Efforts*, GAO-17-300, p. 4 (April 2017).

To overcome the scrutiny required to disclose the identities of individuals engaging in protected speech, there must be a showing of a "subordinating interest which is compelling" where such compelled disclosure threatens to significantly impair the fundamental rights of individuals. *Bates*, 361 U.S. at 524; *NAACP v. Alabama* at 463. Because anonymous actors engaged in protected political speech possess a First Amendment right to remain anonymous, plaintiffs, like the government, must prove a compelling interest in such identification. *McIntyre* at 347. Because, as noted below, there are is no actionable speech identified by plaintiffs, plaintiffs completely failed to present a prima facie case for defamation, and no compelling interest to disclose the identities of Doe(s) has been demonstrated by plaintiffs, an order compelling the production of identities would grossly infringe on the First Amendment rights of Doe(s).

B. Plaintiffs Have Not Met the Requirements for Identifying an Anonymous Defendant.

1. Plaintiffs Failed to Identify Actionable Words.

"[It] is necessary to require that a plaintiff seeking to discover the identity of an anonymous speaker first clearly specify the statements claimed to be actionable, state the actionable meanings assertedly conveyed by them, and set forth, if necessary, evidence sufficient to sustain a finding that the statements were capable of conveying those meanings." *Glassdoor Inc. v. Superior Court*, 215 Cal. Rptr. 3d 365, at 635 (Cal. App. 6th Dist. 2017).

The court in *Glassdoor* specifically noted that "the words constituting an alleged libel must be specifically identified if not pleaded verbatim, in the complaint." *Glassdoor, Inc.* at *634. See also ZL Techs., Inc. v. Does 1-7*, 220 Cal. App. 5th 603, at 616

(Cal. App. 1st Dist. 2017). Plaintiffs in this case have not identified any allegedly defamatory statement(s) with the specificity required under established case law. Plaintiff also failed to attach the article at issue in which the alleged defamatory statements occurred. If there were concerns that further publication of the article would constitute a form of defamation in itself, plaintiff could have attached the article under seal.

A defamatory statement "must contain a provable falsehood." *ZL Techs* at 624. If it does not, the statement is mere opinion and is generally constitutionally protected. *Id.* Courts have recognized that the distinction between fact and opinion is not absolute and that some opinions contain implicit reference to a factual assertion. *Id.* Assuming the statements noted in plaintiffs' complaint include falsifiable elements (e.g., plaintiff is/is not a neo-Nazi, does/ does not socialize with neo-Nazi's, does/does not actively participate in neo-Nazi or white-supremacist organizations/message boards, etc.), it is on the burden of the plaintiffs, in this situation, to show falsity. *ZL Techs* at 631.

While a plaintiff is not normally required to show falsity in its pleadings, "[w]hen the speech involves a matter of public concern…a private-figure plaintiff must prove the falsity of the offensive speech." *Id.* In this case, the allegedly defamatory speech is a matter of public concern. As the complaint alludes, the author(s) of the article are concerned about the safety of individuals in their community given the violent history of white supremacists and Nazis in the U.S. and elsewhere. Complaint ¶ 8.

Even if the court determines that the statements are not a matter of public concern, when a defamation action involves the disclosure of the identities of

anonymous individuals engaged in speech implicating their First Amendment rights, the question for the court is "whether there is reason to believe the lawsuit has sufficient merit to require the unmasking of the Doe defendants in the face of First Amendment and privacy rights."[1] *ZL Techs.* at 632. The court in *ZL Techs* ultimately concluded that, "whether or not the defendant bears the burden of proving falsity in a particular action, the constitutional protections weigh in favor of requiring the plaintiff to make a prima facie evidentiary showing of the elements of defamation, including falsity, before disclosure of a defendant's identity can be compelled." *ZL Techs.* at 633.

Of import to the instant case, the court in *ZL Techs* noted the importance of this merit requirement because "there is reason to believe that [at least some] defamation plaintiffs bring suit merely to unmask the identities of anonymous critics," with "the primary goal being to silence John Doe and others like him." *ZL Techs* at 632, citing *Doe v. Cahill* (Del. 2005) 884 A.2d 451 at 457. The Court in *ZL Techs* went on to explain that "[s]ome minimal precautions should be undertaken to protect the right of a speaker to put ideas into the public marketplace without fear or harassment or retaliation." *ZL Techs* at 633. Such precautions should be taken in this case.

The complaint alleges the following "defamatory" statements: 1) "that Sherman was a neo-nazi…"; 2) who operated a "white supremacist Twitter account"; 3) that she believed in "the 'Jewish conspiracy' at the heart of neo-Nazi ideology"; "and that she

[1] Courts also give weight "to an anonymous speaker's right to protect his or her privacy interest, which is safeguarded by [the California] constitution. (Cal. Const., art. I, § 1.). 'This express right is broader than the implied federal right to privacy [citation omitted].' The California privacy right 'protects the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret,' and 'limites what courts can compel through civil discovery.'" *ZL Techs* at 632 (*citing Digital Music News LLC v. Superior Court* (2014) 226 Cal.App.4th 216, 228.

'acts 'in ways that put non-white, queer, and alter-abled communities in danger.'"
Plaintiffs' Complaint, ¶ 8. Plaintiffs also claim that defendant(s)' statement that Sherman "will not be tolerated in our businesses and communities" is somehow defamatory.

None of these statements are defamatory on their face as there is ample evidence for their truth and plaintiffs have made no effort to present evidence of their falsity as required under California law.

2. Plaintiffs Have Failed to Produce Sufficient Evidence to State a Prima Facie Cause of Action on Any Claims

To enforce a subpoena that would disclose the identity of anonymous speakers in a defamation case, plaintiffs must produce sufficient evidence to state a prima facie cause of action. *Krinsky* at 1171-1172; *See also Glassdoor* at 634; *ZL Techs* at 608. Here, plaintiffs have utterly failed to make a prima facie case for defamation or their remaining two claims. Plaintiffs have produced no evidence of any kind to support their claims. Plaintiffs could have submitted declarations or affidavits of themselves or friends/family to show that the alleged defamatory statements were false. Plaintiffs could have submitted the article at issue. Plaintiffs could have submitted evidence disputing that the anonymous online accounts that were linked to plaintiff Sherman were not, in fact, her accounts (or that she did not operate or register those accounts). Instead, plaintiffs made a bare recitation of the elements of defamation and included unsupported "statements" that they allege are false.

Disclosure of Doe(s') identifying information, under *Krinsky*, requires both a factual and legal basis to support defamation claims and to support the disclosure of

anonymous identities. *Krinsky* at 1172. This includes a requirement that the plaintiff provide some evidence of the falsity of the alleged defamatory statements. *Id.* In *Krinsky*, the Court favorably cited to New Jersey and Delaware cases that have set standards for revealing anonymous identities in defamation cases across the country, to support the notion that a "plaintiff need produce evidence of only those material facts that are accessible to her." *Id.* (citing *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001) and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)). Here, the plaintiffs, as the subjects of the alleged defamatory statements, have all the information at their disposal to provide proof of the falsity of the statements. Plaintiff, nevertheless, provided no proof.

The *Krinsky* court went on to explain that the plaintiff in that case, in meeting its burden to compel the disclosure of identities of anonymous Does, submitted evidence of the falsity of the allegedly libelous statements. Again, plaintiffs have made no such showing. The record, including the complaint, is entirely absent of any evidence indicating the falsity of the statements referenced in the complaint.

As the court in *Krinsky* noted, this requirement is necessary to ensure that "plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism." In this case, there is no factual basis present in the record or plead in plaintiffs' complaint to support plaintiffs' claims that the statements at issue are defamatory in any way. Indeed, given the bare and paltry nature of the complaint, the venue chosen by plaintiff (it is clear, on the face of the complaint, that venue is proper in Oregon, not California), and the history of white-supremacists identifying and then

violently attacking those who speak out against Nazism/white-supremacy, it appears that this complaint was only filed for the purpose of harassing and intimidating Doe(s).

As noted, none of the words in plaintiffs' complaint are, on their face, defamatory. Other than a conclusory recitation that the statements of Does were false and caused injury, plaintiffs have made no attempt to demonstrate the falsity of those statements as required under *Krinsky*. *See Krinsky* at 1172.

In their claim for "Violation of Right to Privacy," plaintiffs assert that Doe(s) publicly disclosed private information of plaintiff Sherman on the website. Complaint ¶ 14. None of the information disclosed was private or in any way privileged. The address of plaintiff Sherman was public information, accessible through the Oregon Secretary of State's website. A copy of this information from the Oregon Secretary of State website is attached as Exhibit C. Brinson Decl. ¶ 8. The article at issue claims that pictures posted to the website at issue were originally posted by plaintiff Sherman on social media and on Plaintiff OG Analytical's own website. *See* Brinson Decl., Exhibit A. The article claims that all of the photos disclosed on the website at issue were first published by plaintiffs. Brinson Decl. ¶ 6, Exhibit A.

Plaintiffs appear to claim, but do not outright plead, that this public information, when coupled with the statement that Sherman and her views "will not be tolerated in our businesses and communities" constitutes some kind of infringement of plaintiffs' rights. Private persons, whether anonymous or not, are well within their rights to use public information to call for a boycott based on the repugnancy of a business or business owners political views or practices. Despite plaintiffs' apparent belief that they

are special because they are white, plaintiffs are not immune or exempt from the long-standing precedents protecting boycotts. *See, e.g., NAACP v. Claiborne Hardware Co.* 458 U.S. 886 (1982). It is well established that when businesses or their owners engage in socially and politically repugnant behavior, they may be boycotted in the U.S. and plaintiffs have no special protections from that long-standing precedent. *Id.*

Plaintiffs' last claim for "intentional interference with prospective economic relations" is based on the alleged defamatory statements noted above. Because plaintiffs did not provide any evidence of their falsity, and otherwise failed to present a prima facie case for defamation, nothing in plaintiffs' third claim for relief permits the disclosure of the identities of the owners, operators, or users of the website at issue.

3. Even if Plaintiffs Presented a Prima Facie Case, Doe(s') First Amendment Right to Engage in Anonymous Speech Outweighs the Disclosure of the Identity of Doe(s)

The First Amendment right of Doe(s) to speak anonymously outweighs the need of plaintiffs to, at this stage, unmask the identity of Doe(s). Unmasking the identity of Doe(s) will likely expose Doe(s) to extrajudicial retaliation on the part of neo-Nazis and white supremacists and will otherwise chill the constitutionally protected anonymous political speech of Doe(s) and others that are similarly situated. At this stage in the litigation, prior to any motion under California's anti-SLAPP statute, disclosure of the identity of Doe(s) would be premature. Like a motion under the anti-SLAPP statute, which would require plaintiffs to, at the outset of litigation, " 'demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited,'" the

court, in this case should apply "the same prophylactic conditions [to] counterbalance … a defendant speaker's constitutional rights to privacy and anonymous speech." See *ZL Techs* at 634.

CONCLUSION

This Court should grant Doe(s') motion to quash the subpoena directed toward Weebly, Inc. because the subpoena would grossly infringe on the right of Doe(s) to engage in protected anonymous political speech, plaintiffs have failed to plead valid claims, failed to identify any actionable words on the part of Doe(s), failed to present a prima facie case for defamation, "violation of right to privacy," and intentional interference with prospective economic relations.

Additionally, in light of the failure of plaintiffs to comply with the California Rules of Civil Procedure, the array of facial defects on the complaint, the apparent intent to harass and intimidate Doe(s), and the general frivolity of the complaint and subpoena, this Court is authorized to impose attorney fees and costs against plaintiff under section 1987.2(b) of the California Code of Civil Procedure in an amount to be determined by further motion if the parties cannot agree on the amount.

Doe(s) request that the Court quash the subpoena and award he/she/them attorney fees.

Dated: October 4, 2018.

By: */s/ Cooper Brinson*
COOPER BRINSON
Attorney for Movant Doe(s)