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10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF SAN FRANCISCO**

12 **JOHN DOE 1**, an individual,

13
14 Petitioner,

15 v.

16 **CLOUDFLARE, INC.**,

17 Respondent.

Case No. CPF-21-517455

DISCOVERY

**PLAINTIFF'S SUPPLEMENTAL
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PETITIONER JOHN DOE 1'S
MOTION TO QUASH AND
REQUEST FOR SANCTIONS**

19 **PATRICK S. TOMLINSON**,

20 Plaintiff,

21 v.

22 **JOHN DOES 1-60, NAMES UNKNOWN**

23 Defendants.

In re out-of-state action:

Patrick S. Tomlinson v. John Does 1-60
Names Unknown, Case No.
2021CV000500
State of Wisconsin Circuit Court,
Milwaukee County

Date: August 23, 2021
Time: 9:30 a.m.
Dept.: 302
Before: The Hon. Ethan P. Schulman

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Case No.

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TABLE OF CONTENTS

BACKGROUND3

 Procedural Background3

ARGUMENT3

 A. Plaintiff Has Met *Krinsky* Requirements.....3

 B. Petitioner Is Subject To Discovery5

 C. Petitioner Has Not Articulated Sufficient Justification For Withholding His
 Identity As A Third-Party Under Any Asserted Privilege6

CONCLUSION7

TABLE OF AUTHORITIES

Cases

Dendrite Intern. v. Doe No. 3 (2001)

342 N.J. Super. 134.....3

Krinsky v. Doe 6

159 Cal. App. 4th 1154.....passim

Lassa v. Rongstad,

2006 WI 2055-7

Masson v. New Yorker Magazine (1991),

501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447.....4

Vultaggio v. Yasko (1998),

215 Wis. 2d 326.....4

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Procedural Background.**

3 Plaintiff filed the original action in Wisconsin on January 26, 2021. The subject
4 subpoena to Cloudflare was served on February 22, 2021. Plaintiff's subpoena to
5 Cloudflare sought information for three different websites, including <onaforums.net.>
6 ("Site"). The Plaintiff's discovery issued to Cloudflare seeks to determine the identity of
7 the Site operator where many of the defamatory statements were published and other
8 actionable conduct is documented. The Petitioner and Site operator filed its Motion to
9 Quash in this Court on May 25, 2021.

10 The parties appeared on June 29, 2021. The Court requested additional briefing
11 on Plaintiff's prima-facie case requirement as it related to Petitioner's role in Plaintiff's
12 lawsuit involving anonymous speech under *Krinsky v. Doe* 6, 159 Cal. App. 4th 1154.

13 **ARGUMENT**

14 **A. Plaintiff Has Met *Krinsky* Requirements**

15 *Krinsky* requires two things (1) notice to the person affected by the subpoena that
16 their identity is being sought, the (2) the Plaintiff must make-out a prima facie case for
17 their asserted tort-theories. *Krinsky*, 159 Cal. App. 4th 1154, 1171-1173.

18 For the notice requirement, where, as here, the subject of the subpoena has
19 received notice of the subpoena and seeks to quash it, that element is satisfied. *Id.* at
20 1171 ("where the defendant is moving to quash the subpoena, the notification
21 requirement benefits no one").

22 For the prima facie case requirement, the Plaintiff need only demonstrate that a
23 libelous statement has been made using the information accessible to the Plaintiff. *Id.*
24 1171-1172, n. 12. The evidence need only be "slight evidence which creates a
25 reasonable inference of fact sought to be established but need not eliminate all contrary
26 inferences." *Id.* 1171, n. 14. The prima facie requirement is not an invitation for
27 defendants to introduce evidence to negate Plaintiff's claims, as it would "afford the
28 anonymous poster an unfair defense advantage." *Krinsky*, 1168 (discussing *Dendrite*

1 *Intern. v. Doe No. 3* (2001) 342 N.J. Super. 134 [775 A.2d 756]). "Where it is clear to the
2 court that discovery of the defendant's identity is necessary to pursue the plaintiff's claim,
3 the court may refuse to quash a *third-party* subpoena if the plaintiff succeeds in setting
4 forth evidence that a libelous statement has been made." *Krinsky*, at 1172 (emphasis
5 added).

6 Here, Plaintiff's Complaint is replete with multiple instances of defamation *per se*.
7 As an example, defendants posted on Petitioner's Site: "Patrick S Tomlinson is a
8 pedophile and a child rapist. He verbally and physically abused his ex wife Adrienne.
9 These are facts, plain and simple...Not a single instance of me calling Pat a pedophile
10 has been a joke." See Ex. 1, Plaintiff's Compl. ¶¶ 9a-b; *see also* Ex. 2 Supp. Decl. Resto,
11 ¶ 4.

12 Wisconsin law finds accusations of pedophilia to be actionable *per se* and not
13 subject to any applicable First Amendment privilege even they are made in public or
14 quasi-public proceedings. *Vultaggio v. Yasko* (1998), 215 Wis. 2d 326, 339.

15 Similarly, the United States Supreme Court has held that falsely attributing
16 quotations to someone that have a disparaging or defamatory impact can sustain a
17 cause of action for libel. *See Masson v. New Yorker Magazine* (1991), 501 U.S. 496, 111
18 S. Ct. 2419, 115 L. Ed. 2d 447, paragraph 1b of the syllabus. The fake reviews set forth
19 verbatim in Plaintiff's complaint include antisemitic passages set in quotations that are
20 falsely attributed to Plaintiff's books about an alien "Xu" (i.e., "Jew") race that utilizes
21 usurious loans and control the financial system. See Ex. 1., Comp. ¶ 11b; *see also* Ex. 2,
22 Supp. Decl. Resto, ¶ 5. The quoted material ("on page 15 he writes 'We will never be free
23 from these usurious loans until we take down the Xus who control the financial system
24 and media') does not appear anywhere in Plaintiff's books and a reasonable reader of
25 such a review would conclude that the reviewer was actually quoting from Plaintiff's book.
26 The statements impugn Plaintiff's character by ascribing antisemitic sentiments to him in
27 his professional work without any factual basis.

1 **B. Petitioner Is Subject To Discovery.**

2 When an individual has knowledge of an anonymous defamer's identity, that
3 individual can be compelled to provide discovery as it relates to the author's identity,
4 including via deposition, even if the person being deposed did not author the defamatory
5 statements. *Lassa v. Rongstad*, 2006 WI 105, ¶¶ 2-23, 40-58.

6 For example, in *Lassa*, as here, the plaintiff sued a defendant directly for
7 defamation and also sought to depose that same defendant as a third-party for discovery
8 purposes to the extent the defendant disclaimed any authorship of the defamatory
9 content that was published. *Id.* The Wisconsin court rejected the defendant's argument
10 claiming he had a constitutional right not to be deposed or disclose other people's
11 identities as it related to who authored and distributed defamatory content. *Id.*

12 Here, Petitioner has published statements indicating that he knows the identity of
13 the people who post on his site based on years of running the various websites the
14 defendants have posted on over the years. See Ex. 2, Supp. Decl. Resto ¶ 6.

15 Petitioner's attempt to reframe the issue as one pertaining to his own liability does
16 not extinguish Plaintiff's right to seek discovery. Any requirement that Plaintiff prove, at
17 the outset, which anonymous defendant published which defamatory review runs afoul of
18 the minimal showing required of *Krinsky*, which merely requires Plaintiff to make a
19 showing that defamation occurred. More importantly, the Plaintiff is only required to set
20 forth information "accessible to h[im]." *Krinsky*, 1171-1172, n. 12. Consequently, Plaintiff
21 does not need a confession from Petitioner admitting which specific fake review he
22 published. It is enough that Plaintiff included a claim in his Complaint for defamation
23 citing the Defendants' admission posted on the Site that they published fake reviews of
24 Plaintiff's books on Amazon, Barnes and Noble, and Goodreads. See Ex. 1, Compl.,
25 ¶10a ("leave the positive reviews up for a week or so, and then edit all the reviews to be
26 vile, negative sh[*]t" <[https://onaforums.net/forum/literary-criticism/183835-contrarian-idea-what-if-weflood-twitter-and-goodreads-w-accts-giving-ridiculous-positive-](https://onaforums.net/forum/literary-criticism/183835-contrarian-idea-what-if-weflood-twitter-and-goodreads-w-accts-giving-ridiculous-positive-reviews/page2)
27 [reviews/page2](https://onaforums.net/forum/literary-criticism/183835-contrarian-idea-what-if-weflood-twitter-and-goodreads-w-accts-giving-ridiculous-positive-reviews/page2)>).
28

1 Petitioner's attempt to introduce evidence claiming that his own reviews that he
2 admitted posting on Goodreads were legitimate rather than defamatory, without
3 specifying which review he posted, or its language, runs afoul of the prima facie test
4 Plaintiff has already met in setting forth the specific language of the defamatory
5 statements published in the fake book reviews. The evidence required from the Plaintiff
6 need only be "slight evidence which creates a reasonable inference of fact sought to be
7 established but need not eliminate all contrary inferences." *See Krinsky* 1171, n. 14.
8 Consequently, Petitioner's attempt to create a contrary inference and characterize the
9 reviews he specifically admitted to authoring as legitimate rather than defamatory when
10 clear and convincing evidence from other forum users shows that the reviews being
11 published were fake allows the defendant an "unfair advantage." *Id.*, 1168.

12 The Court can only quash the subpoena if *none* of the statements in Plaintiff's
13 Complaint published on the Site are actionable. Calling Plaintiff a pedophile in sufficiently
14 factual terms and claiming he beats his wife is a sufficiently factual and defamatory
15 allegation to sustain a prima facie case. Fake reviews are not protected speech. The only
16 way Plaintiff can learn of the defendants' identity as relates to content published on the
17 Site is to learn the Site operator's identity. There is no other way to learn the defendants'
18 identity other than through Petitioner. Petitioner has no freestanding right to remain
19 anonymous for discovery purposes. To the extent Petitioner claims he did not author
20 certain content, he lays no claim to anonymous freedom of speech.

21 **C. Petitioner Has Not Articulated Sufficient Justification For Withholding His**
22 **Identity As A Third-Party Under Any Asserted Privilege.**

23 Freedom of association does not encompass a right to shield others, including
24 third-party witnesses, from having their identity disclosed and being subject to discovery.
25 Mere membership in an association, coupled with an affidavit articulating a subjective
26 fear of reprisal is insufficient for seeking relief from being subject to discovery to identify
27 anonymous defendants who have engaged in defamation. *See Lassa v. Rongstad*, 2006
28 WI 105, ¶¶ 59-73.

1 In *Lassa*, the defendant who was himself being sued for defamation and
2 simultaneously being deposed for discovery of other unknown defendants submitted an
3 affidavit articulating a subjective fear of reprisal to avoid discovery. *Id.* ¶ 66. The court
4 rejected this as a basis for prohibiting discovery because the defendant failed to set forth
5 any facts that demonstrated there were any “particular instances of past or present
6 threats, harassment, or reprisals” that would result from compelling disclosure of the
7 members of the association who contributed to the defamatory content. See *Lassa v.*
8 *Rongstad*, 2006 WI 105, ¶ 67; see also Pet. Mot. to Quash, Decl. John Doe, ¶ 4.

9 **CONCLUSION**

10 For the foregoing reasons, the Court should **DENY** Petitioner's Motion to Quash
11 and request for attorneys' fees and permit Plaintiff to conduct discovery for the limited
12 purpose of identifying the remaining defendants who committed actionable conduct,
13 regardless of Petitioner's ultimate liability. At this stage, the Court need only find that the
14 Plaintiff has pled a colorable claim supported by prima facie evidence and Plaintiff has
15 met that burden here with respect to his defamation claims. Nothing will deprive the
16 Petitioner of maintaining a defense on the merits as to his own speech once identified,
17 but he has no freestanding right as a website operator to remain anonymous or avoid
18 discovery. A mere denial of authorship does not extinguish Plaintiff's defamation claim
19 and right to pursue all relevant discovery, including Petitioner's name as the website
20 operator with relevant information about the defendants.

21 Respectfully Submitted,

22 DATED: July 14, 2021

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23
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Rodney N. Mayr (CA Bar No. 310165)
25 Brinton J. Resto (Ohio Bar No. 97063)
26 Pro Hac Vice Motion Forthcoming

27 Attorneys for Plaintiff Patrick Tomlinson