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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

JOHN DOE 1, an individual,

Petitioner,

v.

CLOUDFLARE, INC.,

Respondent.

PATRICK S. TOMLINSON,

Plaintiff,

v.

JOHN DOES 1–60, NAMES UNKNOWN,

Defendants.

Case No. CPF-21-517455

DISCOVERY

PETITIONER JOHN DOE 1'S SUPPLEMENTAL REPLY IN SUPPORT OF PETITION TO QUASH SUBPOENA TO CLOUDFLARE, INC. ISSUED FOR CASE PENDING IN FOREIGN JURISDICTION PURSUANT TO CCP §2029.600 AND REQUEST FOR SANCTIONS

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

Filed by John Doe 1

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

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to the request of the Honorable Steve Stein, Judge Pro Tem, made at the June 29, 2021 hearing, Petitioner John Doe 1 submits this supplemental brief in support of his Petition to Quash Subpoena to Cloudflare, Inc. The underlying case is *Patrick S. Tomlinson v. John Does 1–60, Names Unknown*, Case No. 2021CV000500, pending in the Wisconsin Circuit Court for Milwaukee County (the "Wisconsin Action").

INTRODUCTION

In the Wisconsin Action, Plaintiff Patrick S. Tomlinson ("Tomlinson") alleges that Defendants John Does 2-60 published defamatory, harassing, and threatening statements about Tomlinson on the website <onaforums.net> ("OnA Forums"). Petitioner is the anonymous operator of OnA Forums and Defendant John Doe 1 in the Wisconsin Action. Tomlinson seeks to identify Petitioner through a subpoena to Cloudflare, Inc. ("Subpoena"). The Court should quash the Subpoena because Tomlinson has not submitted any evidence that supports a claim against Petitioner in the Wisconsin Action.

Tomlinson recognizes the defects in his evidentiary showing. As such, Tomlinson argues that he is entitled to identify Petitioner so that he can seek discovery regarding the other defendants in the Wisconsin Action from Petitioner. Not so. First, Tomlinson's new argument is a pretext for identifying Petitioner (Petitioner is already named as a defendant in the Wisconsin Action). Second, Petitioner has already provided Tomlinson with all reasonably available identifying information about John Does 2-60. Finally, Petitioner's constitutional interest in protecting his anonymity far outweighs Tomlinson's interest in identifying Petitioner to conduct further discovery.

Thus, the Court should quash the Subpoena to Cloudflare. Further, the Court should award Petitioner his costs and fees requested in his opening brief and $4,880 in additional fees incurred in preparing this supplemental brief.

ARGUMENT

A. Plaintiff has not satisfied the *Krinsky* standard as to Petitioner.

Before enforcing a subpoena that seeks an anonymous actor's identity, the issuing party

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must satisfy the *Krinsky* test. *See Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, *passim* (2008). First, the plaintiff must make reasonable efforts to notify the defendant. *See Glassdoor, Inc. v. Superior Ct.*, 9 Cal. App. 5th 623, 634 (2017). "Second, the plaintiff must 'make a prima facie showing that a case for defamation exists' by 'setting forth evidence that a libelous statement has been made.'" *Id.* (quoting *Krinsky*, 159 Cal. App. 4h at 1171 (internal citations omitted)). The required quantum of evidence needed to satisfy this second element is "that which will support a ruling in favor of [the plaintiff] if no controverting evidence is presented." *Id.* (quoting *Krinsky*, 159 Cal. App. 4th at 1171 (internal quotations omitted)). In other words, "[i]n any action predicated on anonymous speech, regardless of legal theory, the plaintiff should not be able to discover the speaker's identity without first making a prima facie showing that the speech in question is actionable." *Id.* at 634–35.

Tomlinson has not presented any evidence that Petitioner engaged in any of the allegedly unlawful conduct described in the Complaint. More specifically, Tomlinson has not submitted evidence of a single post, review, or statement published by Petitioner (*i.e.*, user Quasi101). *Id.* To the contrary, Petitioner has only submitted posts, reviews, and statements published by John Does 2-60. *Id.* In fact, other than the vaguest conspiracy allegations, Tomlinson has not even alleged that Petitioner engaged in any unlawful conduct. Rather, Tomlinson alleges that Petitioner operates OnA Forums, where other users allegedly defamed and harassed Tomlinson. Such a showing is insufficient to satisfy *Krinsky*, particularly in light of the protections afforded to website operators by the Communications Decency Act, 47 U.S.C. §230 ("CDA").

Tomlinson incorrectly argues that "the Plaintiff need only demonstrate that a libelous statement has been made using the information accessible to the Plaintiff." (Tomlinson's Supp. Br. at 3:22-24.) Not so. A defamation plaintiff must make a prima facie showing of all of the elements of defamation claim for which the material facts are available to the plaintiff. *See John Doe 2 v. Superior Ct.*, 1 Cal. App. 5th 1300, 1311–12 (2016). Here, Tomlinson admits that he has evidence linking the allegedly defamatory and harassing statements to specific users of OnA Forums. Thus, Tomlinson must submit evidence showing which allegedly defamatory or harassing statement Petitioner (*i.e.*, user Quasi101) authored. Tomlinson has not done this.

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Importantly, Tomlinson's interpretation of *Krinsky* would allow a plaintiff to unmask an anonymous speaker by presenting evidence of actionable conduct by somebody else—*i.e.*, under Tomlinson's interpretation, he would be entitled to unmask Petitioner even though he has presented no evidence that Petitioner (as opposed to John Does 2-60) engaged in unlawful conduct. Neither *Krinsky* nor any subsequent cases have sanctioned such an intrusion

While Petitioner is sympathetic to Tomlinson's situation, Tomlinson's claims are against John Does 2-60. Because Tomlinson has not presented any evidence that Petitioner engaged in unlawful conduct, the Court should quash the Subpoena.

B. Tomlinson is not entitled to Petitioner's identity to conduct discovery about John Does 2-60.

Tomlinson tacitly concedes that he has not satisfied the *Krinsky* standard and instead argues that he is entitled to unmask Petitioner in order to seek discovery from Petitioner about John Does 2-60. As discussed below, Tomlinson's argument fails.

1. Tomlinson's argument is a pretext for naming Petitioner as a defendant in the Wisconsin Action.

Tomlinson argues that "[t]he only way Plaintiff can learn of the defendants' identity as relates [sic] to content published on the Site is to learn the Site operator's identity." (Tomlinson's Supp. Br. at 3:22-24.). This argument is a pretext. Tomlinson has already named Petitioner as a defendant in the Wisconsin Action using the pseudonym John Doe 1, and he has alleged that Petitioner somehow conspired with John Does 2-60 to defame, harass, and threaten Tomlinson. (Declaration of Jeffrey M. Rosenfeld In Support of Petition to Quash Subpoena to Cloudflare, Inc. (Filed 05/25/2021) ("Prior Rosenfeld Decl.") ¶2 & Ex. A.) Thus, Tomlinson seeks Petitioner's identity to name him in the Wisconsin Action.

Further illustrating the pretextual nature of Tomlinson's argument, Petitioner has already provided Tomlinson's counsel with all information reasonably available to Petitioner that might identify John Does 2-60, and Petitioner has verified the same in his sworn declaration filed with the Court. (Declaration of John Doe 1 In Support of Petition to Quash Subpoena to Cloudflare, Inc. ("John Doe Decl.") ¶4; Prior Rosenfeld Decl. ¶¶6–7 & Exs. D–E.)

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Finally, Tomlinson has admitted in Twitter posts that at least one of his goals is to shut down OnA Forums. (John Doe Decl. ¶¶15–16 & Exs. H–I.)

Because Tomlinson seeks to use the Subpoena to circumvent Petitioner's First Amendment protections as an anonymous speaker, the Court should quash the Subpoena.[1]

2. Petitioner's privacy interests must be balanced against Tomlinson's need for discovery.

Even if Tomlinson's effort to identify Petitioner were not a pretext, Petitioner's constitutionally protected right to anonymity far outweighs Tomlinson's need for Petitioner's identity.

An anonymous speaker has a constitutionally protected right to privacy in remaining anonymous. Cal. Const., art. I, §1.; *see also ZL Technologies, Inc.*, 13 Cal. App. 5th at 632. Where a party has a privacy interest in information of which another party seeks discovery, courts balance several factors of public and social utility to determine whether the need for the information outweighs the third party's privacy interests. *See Life Technologies Corp. v. Superior Ct.*, 197 Cal. 4th 640, 655–56 (2011); *see also Cty. of Los Angeles v. Los Angeles Cty. Emp. Rels. Com.*, 56 Cal. 4th 905, 926 (2013) ("[T]rial courts necessarily have broad discretion to weigh and balance the competing interests.")

Here, Petitioner's right to remain anonymous outweighs Plaintiff's need to identify Petitioner for several reasons. First, Petitioner has a strong privacy interest in remaining anonymous. Cal. Const., art. I, §1.; see also *ZL Technologies, Inc.*, 13 Cal. App. 5th at 632. Second, Tomlinson has published statements about the use of violence against the operator/contributors to OnA Forums (who Tomlinson equates to "Nazis"), and Petitioner would fear for his safety if his identity were revealed. (John Doe Decl. ¶¶7–13 & Exs. A–G.) Third, Tomlinson does not need to identify Petitioner to obtain identifying information about John Doe's 2-60 because Petitioner has already

[1] Plaintiff also fails to address the overbreadth of the Subpoena. As discussed in Petitioner's opening brief, the Subpoena not only seeks identifying information about Petitioner, but also requests Petitioner's bank account and payment information, IP address information, login history, other websites that Petitioner operates through Cloudflare, and "[a]ny other information routinely kept in the ordinary course of business for each" by Cloudflare for Petitioner. Such information is not relevant to the identification of Petitioner or John Does 2-60.

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provided Tomlinson with all identifying information reasonably available to Petitioner. (John Doe Decl. ¶4.) Finally, permitting Tomlinson to obtain Petitioner's identity without satisfying *Krinksy* would eviscerate the First Amendment protections afforded to anonymous speakers. Thus, Petitioner's privacy interests far outweigh Tomlinson's interests in identifying Petitioner.

3. To the extent Tomlinson is entitled to discovery from Petitioner, the Court can and should preserve Petitioner's anonymity.

If the Court finds that Tomlinson is entitled to serve discovery on Petitioner to identify John Does 2-60, it should still protect Petitioner's identity. Courts should, and often do, exercise their discretion to protect an individual's identity from disclosure during discovery. *See Johnson v. Superior Ct.*, 80 Cal. App. 4th 1050, 1072 (2000) (suggesting that trial court draft an order allowing third party to maintain his anonymity during discovery, including at deposition). Trial courts are vested with wide discretion to control the course of discovery, including when making an alternative order. *Williams*, 3 Cal. 5th at 540; *see also Obregon v. Superior Ct.*, 67 Cal. App. 4th 424, 431 (1998); *see also Schnabel v. Superior Court*, 5 Cal. 4th 704, 712 (1993).

If the Court allows Tomlinson to seek discovery from Petitioner to identify John Does 2-60, the Court should exercise its discretion to protect Petitioner's identity. As an example, the Court could require Petitioner to provide discovery responses with Petitioner's name withheld and/or for Petitioner to sit for an audio-only deposition without revealing his identity.

C. Petitioner is entitled to his attorney's fees.

As discussed in Petitioner's opening brief, an award of attorney's fees is mandatory if the Court quashes the Subpoena. *See* CCP §1987.2(c). Here, Petitioner has incurred additional fees in preparing this supplemental briefing. (Declaration of Ruben Peña In Support of Petition to Quash Subpoena to Cloudflare, Inc. ("Peña Decl.") ¶¶2–6 & Ex. A.) Because Petitioner's additional fees are reasonable and supported by evidence, the Court should award those fees in the amount of $4,880 in addition to the $12,330 previously requested. (Peña Decl. ¶¶2–6 & Ex. A.)

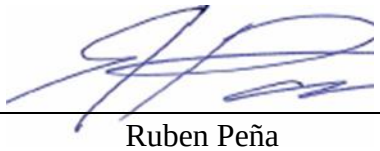
CONCLUSION

For the foregoing reasons, the Court should quash Plaintiff's Subpoena to Cloudflare and award Petitioner his attorney's fees and costs.

Respectfully Submitted,

DATED: July 28, 2021

KRONENBERGER ROSENFELD, LLP

By: 
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