

FILED

IN THE SECOND CIRCUIT COURT FOR DAVIDSON COUNTY TENNESSEE

2015 JUL 29 PM 4: 23

JASON CROSS a/k/a MIKEL KNIGHT,
an individual, AND 1203
ENTERTAINMENT, LLC,

Plaintiffs,

v.

FACEBOOK, INC.,
AND JOHN AND/OR JANE DOES 1-10,
being an individual or individual(s) who
act as administrator(s) of the Facebook
page “Families against Mikel Knight and
the MDRST”—on which false and
defamatory statements were made—and
whose identity is unknown to the Plaintiff
at this time but who will be added by
amendment when ascertained.

Defendants.

Case No. 15C2403

RICHARD R. ROOKER, CLERK

D.C.

**OPPOSITION TO EMERGENCY EX PARTE MOTION FOR TEMPORARY
INJUNCTION AND MOTION TO VACATE TEMPORARY RESTRAINING ORDER**

I. INTRODUCTION

Petitioners Jason Cross aka Mikel Knight and 1203 Entertainment (“Petitioners”) have improperly used their unverified and otherwise deficient Petition for Pre-Litigation Discovery (“Petition”) to seek injunctive relief and obtain an overbroad temporary restraining order (“TRO”) against Facebook that both violates Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c) (“CDA”) and constitutes an impermissible prior restraint on speech in violation of the First Amendment to the United States Constitution. The Court should not condone this abuse of the pre-litigation discovery process.

As an initial matter, Petitioners use of the pre-litigation discovery process to seek a

temporary restraining order and injunctive relief is entirely improper. Rule 27.01 of the Tennessee Rules of Civil Procedure,¹ which governs pre-litigation discovery, provides for exactly that—pre-litigation discovery—and nothing more. It does not provide an avenue for Petitioners to secure a temporary restraining order or injunctive relief without having to file a complaint. In any event, the CDA immunizes Facebook, an interactive computer service, from claims for injunctive relief based on third party content like that at issue here.

Finally, the injunctive relief obtained (and urged) by Petitioners is impermissibly vague and overbroad in that it purports to require Facebook to monitor every post by each of its more than 1.4 billion users to determine if they are posting about Petitioners and if so, whether the post is defamatory. Even if appropriately narrowed in scope and directed solely at the anonymous speakers who created the Facebook page at issue here, this prior restraints on speech violates both the United States and Tennessee Constitutions. U.S. Const. amend. I; Tenn. Const. art. I § 19. Accordingly, the Court should vacate the existing TRO and deny Petitioners' *Ex Parte* Motion for Temporary Injunction (the "Motion").

II. RELEVANT BACKGROUND

Petitioner Mikel Knight is a country music rapper. See www.mikelknight.com (last visited July 23, 2015). Petitioner 1203 Entertainment, LLC is "in the business of managing and promoting various artists," including Knight. *Id.* ¶ 3. Both are residents of Tennessee. Petition ¶¶ 1-2.

Facebook, a Delaware corporation and a resident of California (*id.* ¶ 4), offers online social networking services that enable people to connect and share what is important to them with their friends, family, and coworkers. According to Petitioners, the Doe Defendants are "one

¹ All citations to Rules are to the Tennessee Rules of Civil Procedure unless otherwise specified.

or more unknown individuals, organizations, business, and/or entities of unknown form that created author, organize, operate, and/or manage the Facebook page ‘Families Against Mikel Knight and the MDRST,’” which they allege was available at <https://www.facebook.com/pages/Families-Against-Mikel-Knight-and-the-MDRST/1533971343525187?fref=ts> (“Facebook Page”). *Id.* ¶ 5. Petitioners seek an order from this Court allowing subpoena Facebook to provide identifying and other “relevant personal” information relating to Doe Defendants. *Id.* ¶ 15.

Petitioners purport to have libel and/or false light invasion of privacy claims against Doe Defendants for publishing libelous statements for view in Tennessee. *Id.* p. 1 & ¶ 6. According to Petitioners, Doe Defendants posted statements on the Facebook Page regarding Petitioners, including the following:

- “Don’t be caught in his scam [sic] and surely don’t support this monster Mikel Knight.”
- “Don’t worry about his YouTube views. People like to see what the devil looks like and he can have a billion views and no one will ever buy a ticket for his fake shows or his music on their own.”
- “The devil and his organization is only worried about his blood money music video premier. #Satan.”
- “Mikel Knight is such a coward he won’t even put himself in the front anymore. He is scared. A good video to show his illegal activity with no sales tax or permit sales.”
- “Rebelbrow helping Mikel Knight with his inhumane slave operation.”
- “If you come across a Mikel Knight Van save your money. Buy yourself or family something don’t support this crook.”
- “Looks like he was giving Safe Haven pennies to save face and pocketing the rest of the money. . . . He says he’s going to find another charity to use for his SLAVE LABOR SCAM [sic].”

Id. ¶ 8. Petitioners conclude, without explanation, that these statements are false and defamatory. *Id.* ¶¶ 8, 10.

On July 24, 2015, before Facebook had a chance to respond to these allegations,

Petitioners sought and obtained a TRO from the Court. The TRO provides:

1. Pursuant to Rule 65.03 of the Tennessee Rules of Civil Procedure, the Court hereby issues a Temporary Restraining Order effective for fifteen (15) days restraining Defendant, Facebook, Inc., et al, from publishing on its servers any further defamatory statements regarding Plaintiffs.
2. The parties will appear before the Court on July 31st, 2015, at which time the Court will decide whether a temporary injunction will issue or if the temporary restraining order will be renewed.

TRO at 2.

Upon receiving notice of entry of the TRO from Petitioners, Facebook reviewed the Court docket and learned that the Court had issued a subpoena to Facebook on July 21, 2015. Affidavit of Rocklan William King, III in Support of Response to Petition for Pre-Litigation Discovery ¶ 2, filed concurrently herewith. As of the date of this filing, Facebook has not yet been served with this subpoena. *Id.*

III. DISCUSSION

A. **The Court Should Vacate the TRO and Deny the Motion for a Temporary Injunction.**

The TRO entered by the Court should be vacated and Petitioners' proposed injunctive relief should be denied for four primary reasons: (1) Rule 27.01, which provides for pre-litigation discovery, does not offer a vehicle for Plaintiffs to seek injunctive relief without having to file a Complaint; (2) Facebook is immune from liability for alleged defamatory content posted by third parties; (3) Petitioners' proposed (and issued) injunctive relief is vague and overbroad; (4) the prospective injunctive relief here is an unconstitutional prior restraint on speech.

1. **Rule 27.01 Does Not Provide for Injunctive Relief.**

Petitioner's attempt to obtain injunctive relief against Facebook based on its unverified Petition for pre-litigation discovery is improper. As an initial matter, Rule 27.01, which governs

requests for early discovery, requires that the Petition be verified—a procedural requirement Petitioners have ignored. Tenn. R. Civ. P. 27.01(1) (stating that a person seeking pre-litigation discovery “may file a *verified* petition in any court of record in the county of the residence of any expected adverse party”) (emphasis added). Moreover, Rule 27.01 is a narrow rule that provides for certain limited discovery before a lawsuit is actually initiated. It does not give Petitioner *carte blanche* to ignore the basic rules of litigation and obtain injunctive relief without having to bring suit. Those rules make clear that temporary restraining orders and injunctions are available only in the context of pending litigation.

For example, Rule 65.03, which governs restraining orders, does not provide for injunctive relief unless a lawsuit is filed:

A restraining order may be granted *at the commencement of the action or during the pendency thereof* without notice, if it is clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage before notice can be served and a hearing had thereon.

Tenn. R. Civ. P. 65.03(1) (emphasis added).

Similarly, Rule 65.04, which governs temporary injunctions, makes clear that injunctions are available only during the pendency of an action:

A temporary injunction may be granted *during the pendency of an action* if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Tenn. R. Civ. P. 65.03(2) (emphasis added); *see also* Tenn. R. Civ. P. 65.03(3) (“A temporary injunction may be granted, modified or vacated on motion by a judge of the court *in which the action is pending*. . .”) (emphasis added). Because there is no lawsuit pending, Petitioners premature requests for a temporary restraining order and temporary injunction are entirely inappropriate. The existing TRO should be vacated and Petitioner's request for further

injunctive relief should be denied.

2. Petitioners' Claim for Injunctive Relief is Barred by the CDA.

Congress enacted Section 230 of the CDA to foster the development of the Internet and encourage free speech by shielding service providers from lawsuits arising out of user-generated content. *See Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Section 230 is intended “to protect websites against the evil of liability for failure to remove offensive content.” *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008). Accordingly, Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Section 230 further commands that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with” that clear command. *Id.* at § 230(e)(3). Courts apply Section 230 immunity broadly “to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.” *Id.* at 1175.

By its plain language, Section 230(c) “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service [and] precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.” *Zeran*, 129 F.3d at 330. This immunity extends to requests for injunctive relief. *See, e.g., Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 983-86 (10th Cir. 2000) (finding that a service provider was completely immune from suit under the CDA, including for injunctive relief); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 540 (E.D.Va.2003) (“given that the purpose of § 230 is to shield service providers from legal

responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief”).

Under Section 230(c)(1), a defendant is entitled to immunity if (1) the defendant provides an “interactive computer service,” (2) plaintiff’s claim treats the defendant as the “publisher” or “speaker” of the offending content, and (3) the offending content was “provided by another information content provider.” 47 U.S.C. § 230(c)(1); *see also Jones*, 755 F.3d at 409. As set forth below, Facebook satisfies all three requirements.

Interactive computer service. An “interactive computer service” is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” 47 U.S.C. § 230(f)(2). Facebook, an online service that allows users to access its computer servers to communicate with one another, has repeatedly been found to be an interactive computer service eligible for Section 230 immunity. *See Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 318 (D.D.C. 2012) (“Facebook meets the definition of an interactive computer service under the [CDA].”) (quoting *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011)); *Young v. Facebook, Inc.*, No. 5:10-CV-03579-JF/PVT, 2010 WL 4269304, at *5 (N.D. Cal. Oct. 25, 2010) (describing Facebook as an “interactive computer service” for purposes of Section 230); *Finkel v. Facebook, Inc.*, No. 102578/09, 2009 WL 3240365 (N.Y. Sup. Ct. Sept. 15, 2009) (dismissing complaint under Section 230 and noting that plaintiff did not dispute that Facebook functions as an interactive computer service).

Publisher or speaker. Petitioners’ claims are based on Doe Defendants’ allegedly defamatory statements. Petition at 1-5. Thus, by seeking injunctive relief against Facebook as a “defendant,” Petitioners are improperly attempting to hold Facebook liable as the “publisher” or

“speaker” of the allegedly offending content. *See, e.g., Klayman*, 910 F. Supp. 2d at 321 (Facebook not liable for failure to remove allegedly objectionable content because Section 230 directs that Facebook cannot be treated as the “publisher” or “speaker” of the content at issue); *Gaston v. Facebook, Inc.*, No. 3:12-cv-0063-ST, 2012 WL 629868, at *1-2 (D. Or. Feb. 2, 2012) (Facebook not liable for claims arising from content posted on Facebook by others because it could not be considered the “publisher” or “speaker” of that content under Section 230); *Tetreau v. Facebook, Inc.*, No. 10-4558-CZ (Mich. Cir. Ct. Feb. 23, 2011) (same); *Finkel*, 2009 WL 3240365 (same).

Another information content provider. The Petition alleges that unnamed Facebook users, not Facebook, are responsible for creating the Facebook page at issue and posting the allegedly injurious statements. Petition ¶¶ 5, 7-8. As the Petition acknowledges, these Doe Defendant users, not Facebook, are the “information content providers.” *Id.* ¶ 8 (alleging that “Defendant Doe(s) have posted and continue to post false and defamatory statements against Plaintiffs”); *see, e.g., Seaton v. TripAdvisor LLC*, 728 F.3d 592, 599 (6th Cir. 2013) (noting that even if the plaintiff “had alleged that TripAdvisor’s users’ statements are defamatory, TripAdvisor cannot be held liable for its users’ statements under” the CDA).

Because each of the three elements of Section 230(c)(1) are met, Petitioners’ request for injunctive relief against Facebook is barred.

3. The Injunctive Relief at Issue is Impermissibly Vague and Overbroad.

The injunctive relief sought by Petitioners and contained in the TRO is improper under Rule 65.02, which provides that “[e]very restraining order or injunction shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act restrained or enjoined.” Tenn. R. Civ. P. 65(1). “The standard of specificity is such that

the enjoined party must be able to ascertain from the order itself exactly what acts are prohibited.” *Hogue v. Hogue*, 147 S.W.3d 245, 248 (Tenn. Ct. App. 2004).

Here, the TRO purports to restrain Facebook from “publishing on its servers any further defamatory statements regarding [Petitioners].” TRO at 2. Far from being able to ascertain from the order itself what is prohibited, the TRO would place upon Facebook the obligation to screen all comments posted by Facebook’s more than 1.4 billion active users to determine which statements may pertain to Petitioners and which of those statements, if any, are defamatory. Not only is this technologically infeasible, it purports to elevate Facebook to the status of a court and place upon it the burden of determining the legality of statements made by others about issues it knows nothing about. Thus, the terms of the temporary restraining order and requested injunctive relief are impermissibly vague and overbroad. The court should therefore vacate the existing restraining order and deny Petitioners improper request for injunctive relief.

4. The Prospective Injunctive Relief Sought by Petitioner Constitutes an Improper Prior Restraint on Free Speech in Violation of the First Amendment and the Tennessee Constitution.

The injunctive relief sought by Petitioners also amounts to an impermissible prior restraint on speech. The First Amendment provides that Congress “shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. The Fourteenth Amendment extends that protection to the states. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). In addition, the Tennessee State Constitution provides that “[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.” Tenn. Const. art. I § 19.

“An impermissible ‘prior restraint’ exists when the exercise of First Amendment rights depends upon prior approval of public officials.” *Loden v. Schmidt*, No. 201401284COAR3CV, 2015 WL 1881240, at *7 (Tenn. Ct. App. Apr. 24, 2015) (citing *Deja Vu of Nashville, Inc. v.*

Metro. Gov't of Nashville & Davidson Cnty., 274 F.3d 377, 400 (6th Cir.2001)). For protected speech, a “prior restraint” includes a judicial order forbidding communication when issued to suppress speech because of its content before it is communicated. *Id.* (citation omitted). Accordingly, the First Amendment and the Tennessee Constitution “provide broad protections to prevent the abridgment of a person’s right to freedom of speech.” *Id.*

Even “[i]njunctive orders to enjoin a libel are traditionally disfavored under both common-law and First Amendment prior restraint doctrines.” *Id.* at *8. The traditional rule is that “equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.” *See, e.g., Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206 (6th Cir.1990). Tennessee courts follow the “modern rule” that defamatory speech may be enjoined ***only after a determination that the speech is, in fact, false.*** *In re Conservatorship of Turner*, No. M2013-01665-COA-R3CV, 2014 WL 1901115, at *20 (Tenn. Ct. App. May 9, 2014). No such determination has been or can be made in conjunction with Petitioner’s request for pre-litigation discovery.²

Here, the Court issued a TRO based on affidavits alleging harm from statements anonymous users posted to Facebook. But there has been no finding that the statements at issue in the Petition are, in fact, false.³ Nor is there any information before the Court that would allow

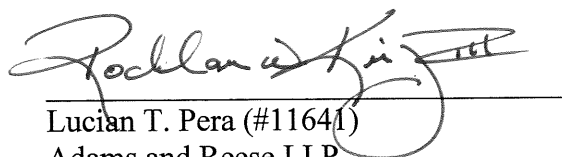
² Petitioners’ claims of defamation and injury to reputation, without more, cannot justify a prior restraint on speech because “private litigants’ interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). As the Supreme Court has held, “[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of a court.” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

³ Petitioners may claim that the statements are “fighting words” -- “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). “Fighting words” are “face to face words ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace.’” *State v.*

it to make such a determination in the context of a request for pre-litigation discovery. Thus, under *Turner*, the TRO and the requested temporary injunction are improper prior restraints on freedom of speech. The existing TRO should be vacated and Petitioner's request for a temporary restraining order denied.

IV. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that this Court vacate the TRO and deny the Motion.



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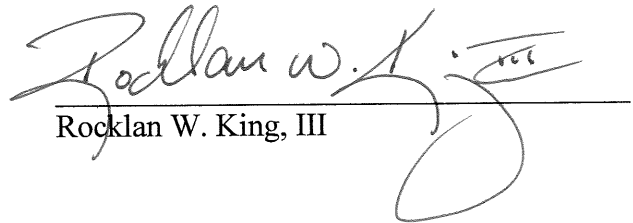
Mitchell, 343 S.W.3d 381, 393 (Tenn. 2011). The statements at issue here were allegedly posted to a Facebook page and, thus, cannot constitute “fighting words.” In addition, none of the statements contained in the Petition so much as request others to take physical action against Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served this the 29th day of July, 2015 by Federal Express Overnight and Electronic Mail on the following:

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