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RICHARD R. ROOKER, CLERK

IN THE SECOND CIRCUIT COURT FOR DAVIDSON COUNTY

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

D.C.

RESPONSE TO PETITION FOR PRE-LITIGATION DISCOVERY

I. INTRODUCTION

Defendant Facebook, Inc. (“Facebook”) is a third party from whom Petitioners Jason Cross aka Mikel Knight and 1203 Entertainment (“Petitioners”) seek discovery to unmask the identity of anonymous speakers who authored allegedly libelous statements appearing on Facebook’s social media service. The right to speak anonymously is a deep-seated right protected by the First Amendment to the United States Constitution and the Tennessee Constitution. The mere act of unmasking an anonymous speaker can injure the speaker and has the potential to chill speech. Courts, therefore, impose a heightened pleading standard and carefully review requests seeking to reveal the identity of anonymous speakers.

The unverified Petition for Pre-Litigation Discovery (“Petition”) implicates anonymous

speech and therefore must be reviewed by this Court under a heightened standard before authorizing the requested discovery against Facebook.¹ When reviewing requests to identify anonymous speakers premised on claims of defamation, at least one Tennessee court has applied the five-part test set forth in *Dendrite Int'l Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (“*Dendrite*”). This Court should do the same.

The Petition does not satisfy the *Dendrite* test, which among other elements, requires a “substantial showing of proof for each element of each cause of action.” *Swartz v. Doe*, No. 08C-431, at 7 (Tenn. Cir. Ct. Oct. 8, 2009) (Hon. Thomas W. Brothers). Indeed, the Petition sets forth no facts or evidence to support Petitioners’ supposedly forthcoming libel and false light invasion of privacy claims. Rather, the Petition alleges in conclusory fashion that discovery should be authorized because the identified statements are “false and defamatory.” For this reason, as well the Petition’s other shortcomings (including that it is not properly verified), the Petition should be denied.

The Court should also quash the subpoena, which was issued on July 21, 2015, prior to the Court’s completion of the *Dendrite* analysis and a ruling on the Petition. Even if the Court rules that the Petition passes muster under *Dendrite*, any order granting Petitioner’s request for pre-litigation discovery must be limited to allowing Petitioners to pursue a California subpoena in accordance with the Uniform Interstate Depositions and Discovery Act, as this Court lacks subpoena power over non-party, non-resident Facebook.

¹ In addition, prior to any ruling on the merits of the Petition, the Court must “appoint, for persons not served in the manner provided in Rule 4.04, an attorney who shall represent them.” Tenn. R. Civ. P. 27.01(2). Facebook has received correspondence from the Public Citizen Litigation Group indicating that the Doe Defendants have contacted them and that they, along with counsel from Bradley Arant Boult Cummings, are willing to be appointed as counsel for Doe Defendants. Affidavit of Rocklan William King, III (“King Affidavit”), Ex. A.

II. BACKGROUND

Petitioners are residents of Tennessee. Petition ¶¶ 1-2. Petitioner 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. 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.

Petitioners allege that Doe Defendants are “one 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 the Court’s permission to issue a subpoena requiring Facebook to reveal 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, and without providing proper notice, Petitioners sought and obtained a TRO from the Court. Simultaneous with the filing of this response, Facebook has also filed its Opposition to *Ex Parte* Motion for Temporary Injunction and Motion to Vacate the TRO. 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. King Affidavit ¶ 2. Facebook has not yet been served with the subpoena in this matter. *Id.*

III. DISCUSSION

A. **Prior to Addressing the Merits of the Petition, the Court Should Appoint Counsel for Doe Defendants.**

Prior to ruling on the Petition, this Court must ensure that Doe Defendants are represented and permit them adequate time to respond. Tenn. R. Civ. P. 27.01(2). Tennessee law requires Petitioners to give each person named in the Petition adequate notice. *Id.* Where Petitioners are unable to effect such notice, the Court is required to appoint counsel for the unserved parties to ensure their rights are protected. *Id.*

Here, Petitioners made no attempt to serve Doe Defendants. Facebook, however, notified the Doe Defendants of the Petition. Facebook thereafter received a letter from Paul Alan Levy of the Public Citizen Litigation Group indicating that he has learned that Doe Defendants object

to the Petition. King Affidavit, Ex. A. As reflected in the letter, Mr. Levy is willing to be appointed as counsel for Doe Defendants together with Thor Urness of Bradley Arant Boult Cummings, who will serve as local counsel. The Doe Defendants are willing to have them serve in that capacity as well. *Id.*

B. The Petition Should Be Denied Because It is Not Verified.

Petitioners have failed to verify the Petition, as required by Rule 27.01 of the Tennessee Rules of Civil Procedure. Tenn. R. Civ. P. 27.01(1). For this reason alone the Petition should be denied.

C. The Petition Should Be Denied Because it Fails to Meet the Standard for Pre-Litigation Discovery.

1. Petitions for Pre-Litigation Discovery Must Satisfy a Heightened Pleading Standard and Courts Must Conduct a Preliminary Inquiry of the Merits of the Claims Before Authorizing Discovery.

The Petition fails to satisfy the heightened pleading standards applicable to requests for early discovery into the identities of anonymous speakers. 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. These provisions “provide broad protections to prevent the abridgment of a person’s right to freedom of speech.” *Loden v. Schmidt*, No. M201401284COAR3CV, 2015 WL 1881240, at *7 (Tenn. Ct. App. Apr. 24, 2015).

The freedom of speech protected by the First Amendment includes the right to speak anonymously on the Internet. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding “no basis for

qualifying the level of First Amendment scrutiny that should be applied to” the Internet); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (“an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment”). Tennessee courts have recognized that “[a]nonymous speech has played a significant role in literary, cultural, and political discourse throughout history.” *Swartz*, 08C-431 at 5.

There are, however, limits to the protections provided to speech. Defamatory speech, anonymous or not, is not protected by the First Amendment. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Thus, when faced with a defamation claim, a court must balance the free speech interests of the defendant with the rights of the plaintiff to seek redress from the court when they have been injured. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-60 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-48 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). This balancing takes several forms depending on the nature of speech at issue, with courts providing the most protection to political and alleged defamatory speech about public figures. *Swartz*, 08C-431 at 6-7 (citing cases).

2. The Court Should Apply the *Dendrite* Test to the Petition.

Tennessee courts, along with a growing number of courts in other states, follow the test set forth in *Dendrite*.² *Swartz*, 08C-431. “The *Dendrite* test uses a five-step analysis to evaluate whether a plaintiff is entitled to discover the identity of an anonymous defendant.” *Id.* at 7. The first 4 steps require the plaintiff to:

² At least five state appellate courts have adopted a form of the test set forth in *Dendrite*. *See Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007); *In re Ind. Newspapers*, 963 N.E.2d 534 (Ind. Ct. App. 2012); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009); *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184 (N.H. 2010); *Pilchesky v Gatelli*, 12 A.3d 430 (Pa. Super. Ct. 2011).

1. Attempt to notify an anonymous online defendant that he or she is the subject of a subpoena or application for order of disclosure;
2. Give the defendant a reasonable time to file opposition to the application;
3. Identify the exact statements purportedly made by each anonymous online defendant that give rise to each claim; and
4. Make a *prima facie* or substantial showing of proof for each element of each cause of action by affidavit, deposition, or sworn statement.

Id. at 7-8. If the plaintiff successfully complies with the first four requirements, and the court concludes that a substantial showing of proof has been made, the court must then balance the First Amendment interests of the anonymous defendant against the strength of the plaintiff's *prima facie* case and the need for disclosure to allow the claims to proceed. *Id.* at 7.

After careful consideration of the various available tests, the *Swartz* court found that “the *Dendrite* test is the best method of determining whether a plaintiff is entitled to pierce a defendant's shield of anonymity.” *Id.* at 8. This Court should apply the *Dendrite* test here as well, as it protects anonymous speech by requiring that “a plaintiff make a substantial legal and factual showing that the claims have merit before permitting discovery of an anonymous defendant's identity.” *Id.*

3. The Petition Does Not Satisfy the *Dendrite* Test.

The Petition fails to satisfy the *Dendrite* test for several reasons. As an initial matter, the Petition fails to indicate that Petitioners attempted to notify the Doe Defendants that they are the subject of an application for an order to disclose their identity. The Doe Defendants have therefore been deprived of a reasonable opportunity to file an opposition to the application.³

³ Facebook notified the Doe Defendants of the Petition on or about July 16, but this does not alleviate Petitioners of their duty to provide notice under Rule 27.01,.

In addition, the Petition fails to make the requisite “substantial showing of proof” on Petitioner’s underlying defamation and false light claims.

Defamation. Defamation “consists of the twin torts of libel and slander.” *Piper v. Mize*, No. M2002-00626-COA-R3CV, 2003 WL 21338696, at *3 (Tenn. Ct. App. June 10, 2003). “Libel is written defamation.” *Secured Fin. Solutions, LLC v. Winer*, No. M200900885COAR3CV, 2010 WL 334644, at *2 (Tenn. Ct. App. Jan. 28, 2010).

Generally, “[t]o establish a prima facie case of defamation in Tennessee, the plaintiff must establish that: 1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement.” *Sullivan v. Baptist Mem’l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999). “A claim for defamation requires proof that ‘the defendant communicated a false and defamatory statement to the person of another, and that as a result thereof the plaintiffs suffered actual damages.’” *Secured Fin. Solutions, LLC*, 2010 WL 334644, at *2. Statements that, taken in context, “cannot ‘reasonably [be] interpreted as stating actual facts about an individual’ because they are expressed in ‘loose, figurative or hyperbolic language,’ and/or the content and tenor of the statements ‘negate the impression that the author seriously is maintaining an assertion of actual fact’ about the plaintiff are not provably false and, as such, will not provide a legal basis for defamation.” *Shamblin v. Martinez*, No. M2010-00974-COA-R3CV, 2011 WL 1420896, at *6 n.8 (Tenn. Ct. App. Apr. 13, 2011) (citing *Milkovich v. Lorain Journal*, 497 U.S. 1, 21 (1990)). When the person allegedly defamed is a public figure, the plaintiff must make the additional showing, by clear and convincing evidence, that the statements were made with actual malice. *See Piper*, 2003 WL 21338696, at *7.

Here, Petitioners have not alleged why the statements at issue were false or should be viewed as statements of fact and not “loose, figurative, or hyperbolic” utterances of the speaker’s opinion. Facebook, as an uninterested third party, does not have sufficient knowledge to make this determination (particularly because Petitioners omit critical context), but notes that general statements such as “Don’t be caught in his scam,” “don’t support this monster,” “People like to see what the devil looks like,” “Mikel Knight is such a coward,” and “If you come across a Mikel Knight Van save your money. Buy yourself or family something don’t support this crook.” are capable of being understood as the opinion of the speaker and can reasonably be classified as “loose, figurative or hyperbolic language.”

The Petition also fails to allege or offer any evidence that other statements, such as “a good video to show his illegal activity with no sales tax or permit sales,” were actually false. Finally, the Petition fails to allege or provide any evidence showing that the statements at issue were viewed by any third parties or caused Petitioners to suffer any actual damages. And to the extent that Knight is considered a public figure (*see* Petition ¶ 3 (alleging that Petitioner 1203 manages and promotes various artists such as Petitioner Knight), Petitioners have not established by “clear and convincing evidence” that the Doe Defendants made the statements with actual malice.

False Light. The Tennessee Supreme Court has adopted the definition of false light invasion of privacy set forth in the Restatement (Second) of Torts:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Eisenstein v. WTVF-TV, News Channel 5 Network, LLC, 389 S.W.3d 313, 317 (Tenn. Ct. App. 2012) (citation omitted). As with defamation, for public figures, actual malice must be shown by clear and convincing evidence. *Id.*

The Petition does not explain why the statements placed Petitioners in a false light. Nor does the Petition make any showing that the false light in which Petitioners were allegedly placed by the Doe Defendants' speech was "highly offensive" to a reasonable person. Petitioners also remain silent on whether Doe Defendants made the statements with actual malice. Finally, as with their defamation claim, Petitioners fail to show they suffered actual damages. *See West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001).

Even if Petitioners could satisfy the threshold requirements of the *Dendrite* test, before the Court can grant the Petition, it must balance the Doe Defendants' First Amendment right of anonymous free speech against the strength of Petitioners' *prima facie* case and the need for disclosure. *Dendrite*, 775 A.2d at 760. This is a required step before the Court can order discovery against Facebook.

D. Only If The Petition Is Granted Should Petitioners be Allowed to Obtain a Subpoena from a California Court.

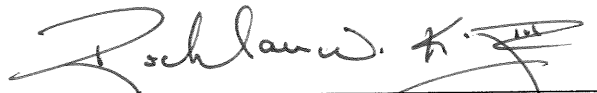
If this Court determines that Petitioners have satisfied the *Dendrite* test by a factual showing that authorizes the requested discovery from Facebook, then it should also direct Petitioners to obtain a subpoena from a court with subpoena power over Facebook. This Court's subpoena power does not reach to nonresidents such as Facebook. *See* Advisory Commission Comments to Tenn. R. Civ. P. 45.05 (noting that Tennessee has adopted the Uniform Interstate Depositions and Discovery Act, Tenn. Code Ann. §§ 24-9-201, *et seq.*, explaining that "Tennessee lawyers seeking to take a deposition or obtain discovery in a foreign jurisdiction must look to that jurisdiction's law for similar assistance").

Facebook and the custodians who have control over Facebook's data are located in Menlo Park, California, where Facebook is headquartered. *See* Petition ¶ 4. Therefore, a subpoena for identifying information must issue from a California state court, or be properly domesticated under California law, and personally served on Facebook. *See* Cal. Civ. Proc. Code § 2029.300; *id.* § 2029.400 ("A subpoena issued under this article shall be personally served in compliance with the law of this state.").

For these reasons, and those identified above, the Petition should be denied and the subpoena that issued on July 21, 2015, before this Court had the opportunity to consider and rule on the Petition, should be quashed.

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court deny the Petition and quash the subpoena or, alternatively, order Petitioners to domesticate and serve a California subpoena on Facebook in California, as required by Tennessee and California law.



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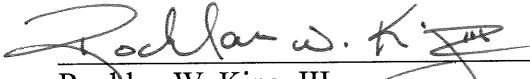
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CERTIFICATE OF SERVICE

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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