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11 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

12	NICHOLAS ASSEF, an individual; and)	No. CV-15-1960-MEJ
13	LINCOLN CROWNE & COMPANY PTY)	
	LTD, an Australian corporation,)	MOTION
14)	OF PUBLIC CITIZEN, INC.
	Plaintiff,)	FOR APPOINTMENT OF
15)	COUNSEL AD LITEM FOR
	v.)	DEFENDANT DOE OR, IN THE
16)	ALTERNATIVE, FOR LEAVE
	DOES 1-10, INCLUSIVE,)	TO FILE AS AMICUS CURIAE
17)	IN OPPOSITION TO DEFAULT
	Defendants.)	JUDGMENT

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TABLE OF AUTHORITIES

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CASES

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821 F.3d 620 (5th Cir. 2016). 5

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292 Ala. 538, 297 So. 2d 362 (1974). 2

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687 F.3d 649 (5th Cir. 2012). 2

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1 *Ron Paul 2012 Presidential Campaign Committee v. Does 1-10*,
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3 *Taubman Co. v. Webfeats*,
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4 **CONSTITUTION, STATUTES AND RULES**

5 United States Constitution
6 First Amendment..... 2, 5

7 Communications Decency Act,
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8 47 U.S.C. § 230(e)(2) 1

9 Lanham Act,
10 15 U.S. C. §§ 1051 *et seq.*..... 3

11 Federal Rules of Civil Procedure
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12 **MISCELLANEOUS**

13 Hill, *Stars and Gripes: Legal challenges over online reviews seek to separate fact from fiction*,
14 ABA Journal (July 2016)..... 3

15 Levy, *Litigating Civil Subpoenas to Identify Anonymous Internet Speakers*,
37 Litigation No. 3 (Spring 2011)..... 3

16 Mullins, *Paul Levy, The Web Bully’s Worst Enemy*,
17 Washingtonian (February 2014)..... 3

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1 Public Citizen moves the Court to appoint one of its attorneys appointed as attorney ad litem
2 for the Doe defendant against whom default judgment has been sought, or in the alternative seeks
3 leave to file a brief as amicus curiae, because it sees this as a case in which a businessman who does
4 not like being criticized is taking advantage of his ability to afford counsel to file an utterly baseless
5 lawsuit, across the ocean from the place where the Doe defendant appears to be located, in the hope
6 of wiping the criticism off the obscure corner of the Internet where it is situated. Only through an
7 adversary proceeding can the Doe's right of free speech have a fair opportunity to be protected.

8 1. Plaintiffs filed this action in the hope of securing a court order against the Doe defendant
9 in the United States that will induce Google to remove the blog from the Internet. Complaint ¶ 17;
10 prayer for relief ¶ 3. *See also* DN 8-1, Evitt Declaration ¶ 2. Because the case concerns a blog that was
11 created to criticize an Australian company, and based on the geo-tracing that was placed in the record
12 in the course of addressing the issue of service on the absent blogger, it appears likely that the
13 anonymous blogger is also located abroad. DN 9, at 2-3. The blogger's failure to respond to the
14 complaint might well reflect lack of ready access to American lawyers who are able to appear in this
15 Court. Indeed, in light of the fact that section 230 of the Communications Decency Act contains an
16 exception for intellectual property claims, 47 U.S.C. § 230(e)(2), plaintiffs could have brought their
17 trademark claim against Google itself. However, had plaintiffs sued Google, the company would have
18 had an incentive to explain to the Court the serious defects in the trademark claim that the Complaint
19 purports to allege, and why the defamation claim is baseless. By confining the litigation to anonymous
20 defendants who are located abroad, plaintiffs have given Google no incentive to oppose their claims.

21 2. Having persuaded the Court to authorize service by email, and having received no response,
22 plaintiffs seek a default judgment compelling defendants to turn over the blog to them. But the
23 decisions whether to enjoin continued publication of the critical speech, or to compel transfer of

1 control of the URL containing plaintiff's name, would best be made through adversary proceedings,
2 rather than through ex parte briefing in which only one side of the case is represented. The need for
3 adversary presentation is particularly great in light of the First Amendment free speech interests that
4 are implicated by plaintiffs' demand for an order pursuant to which Google will remove the critical
5 blog. *See Carroll v. Comm'rs of Princess Anne County*, 393 U.S. 175 (1968).

6 3. The best way to secure an adversary process in this case would be for the Court to appoint
7 an attorney ad litem to respond to the default judgment motion; Public Citizen suggests that the Court
8 appoint undersigned counsel Paul Alan Levy as guardian ad litem. Although Rule 17 specifies
9 circumstances in which a district court **must** appoint guardians ad litem, nothing in that rule precludes
10 the appointment of ad litem representatives in other circumstances. In a number of states, courts
11 routinely appoint attorneys to serve in an ad litem capacity to represent the interests of parties that are
12 absent from the litigation because they cannot be found, such as in foreclosure actions, *Rodriguez v.*
13 *Levin*, 524 So. 2d 1107, 1108 (Fla. Dist. Ct. App. 1988), probate proceedings, *In re Guardianship of*
14 *Marburger*, 329 S.W.3d 923, 929 (Tex. App. 2010); *In re Estate of Robertson*, 271 Ga. App. 785, 789,
15 611 S.E.2d 680, 685 (2005), and actions to quiet title. *Billingsley v. Wallace*, 292 Ala. 538, 540, 297
16 So. 2d 362, 363 (1974). In *Mick Haig Prods. E.K. v. Doe*, 687 F.3d 649 (5th Cir. 2012), the trial judge
17 appointed counsel ad litem to represent the interests of anonymous defendants who were sued for
18 copyright infringement, because he recognized that a pending motion "concerns matters that could
19 materially affect the Defendant Does 1-670's interests[, b]ut, because the Defendants' identities have
20 yet to be ascertained, the Does cannot represent their interests before this Court." *Mick Haig Prods.*
21 *E.K. v. Doe*, No. 3:10-cv-01900-N (N. D. Tex. Oct. 25, 2010), at 1.

22 4. Mr. Levy has extensive experience defending against trademark claims brought against
23 online critics who use a trademark to refer to a product, service or company on which they are

1 commenting. He is widely recognized nationally for litigating the First Amendment rights of
2 consumers who criticize businesses. *E.g.*, Hill, *Stars and Gripes: Legal challenges over online reviews*
3 *seek to separate fact from fiction*, ABA Journal (July 2016), available at [http://www.abajournal.com/](http://www.abajournal.com/magazine/article/legal_challenges_over_online_reviews_seek_to_separate_fact_from_fiction)
4 [magazine/article/legal_challenges_over_online_reviews_seek_to_separate_fact_from_fiction](http://www.abajournal.com/magazine/article/legal_challenges_over_online_reviews_seek_to_separate_fact_from_fiction); Mullins,
5 *Paul Levy, The Web Bully's Worst Enemy* (Washingtonian February 2014), available at
6 <https://www.washingtonian.com/2014/02/03/paul-levy-the-web-bullys-worst-enemy/>. Mr. Levy is also
7 one of the national pioneers in the representation of Doe defendants accused of tortious speech.
8 *Litigating Civil Subpoenas to Identify Anonymous Internet Speakers*, 37 *Litigation* No. 3 (Spring
9 2011).

10 5. Mr. Levy was one of the attorneys appointed ad litem in *Mick Haig, supra*. Mr. Levy also
11 litigated pro bono in the Ninth Circuit on behalf of an individual who had similarly created a
12 noncommercial web site that criticized a trademark holder and used the trademark in the Internet
13 address for the web site, *Bosley Medical Group v. Kremer*, 403 F.3d 672 (9th Cir. 2005). The
14 complaint's allegation that the Internet address violates plaintiff Lincoln Crowne's trademark rights
15 appears to fly in the face of the Ninth Circuit's decision in *Bosley*. Mr. Levy has also handled a
16 number of pro bono cases in other circuits where courts have held that the use of a trademark in the
17 domain name for a non-commercial web site that comments on the trademark holder does not
18 transgress the Lanham Act so long as the underlying web site is not confusing about being sponsored
19 by the trademark holder. *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005); *Taubman Co. v.*
20 *Webfeats*, 319 F.3d 770 (6th Cir. 2003). In this district, Mr. Levy defended the creator of a critical web
21 site using the trademark holder's name as his domain name in *Recouvreur v. Carreon*, 940 F. Supp.2d
22 1063, 1070 (N.D. Cal. 2013). Indeed, in a previous case before this Court, *Ron Paul 2012 Presidential*
23 *Campaign Committee v. Does 1-10*, 2012 WL 12128544 (N.D. Cal. Mar. 8, 2012), a plaintiff

1 withdrew its application for leave to pursue ex parte discovery to identify the authors of a critical
2 YouTube video after this Court ruled, in light of an amicus brief for Public Citizen and other amici
3 that Mr. Levy wrote, that there were serious questions about whether the plaintiff there could state a
4 trademark claim over a noncommercial parody video.

5 6. Mr. Levy has also handled several libel cases brought against anonymous online critics,
6 defending the critics' right to remain anonymous, as well as cases against named defendants in which
7 libel was one of the issues, as well as suits against named defendants (such as the *Bosley* case noted
8 above). Consequently, he is well qualified to defend the interests of the absent defendant in response
9 to plaintiffs' defamation claims. (Defendant is written in the singular because, although the complaint
10 was filed against multiple Does, the Clerk's default was against a single Doe).

11 7. If Mr. Levy is appointed an attorney ad litem, he will associate Jef Pearlman, the co-signer
12 of this brief, and Phillip R. Malone, of the Juelsgaard Intellectual Property and Innovation Clinic at
13 Stanford Law School, as co-counsel for this purpose.

14 8. The appointment of an ad litem representative was originally suggested by Mr. Levy in a
15 letter to Judge James dated June 2, 2015, DN 10, after plaintiff sought leave to take discovery to
16 identify the defendants. Plaintiffs objected to the proposal, DN 11, on the grounds that, among other
17 things, there was "no evidence that the Doe defendants are even unrepresented," *id.* at 2; that the
18 defendants might prefer to negotiate a resolution with plaintiffs rather than oppose the complaint, *id.*
19 at 3; and that, in any event, the suggestion "creates the misimpression that this case can proceed
20 without the involvement of the Doe Defendants." *Id.* at 4. However, it is apparent at this stage of the
21 proceedings that the anonymous blogger is unrepresented, that plaintiffs have not engaged in any
22 negotiations with the anonymous blogger, and that plaintiffs hope to grab the URL in question and
23 obtain an injunction without the involvement of the defendant.

1 9. Although appointment of an attorney ad litem would be the best way to protect to interests
2 of the absent defendant(s), if the Court chooses not to appoint one, Public Citizen urges the Court to
3 allow it to file the attached brief as amicus curiae opposing the motion for a default judgment. Public
4 Citizen is a consumer advocacy organization based in Washington, D.C. It has hundred of thousands
5 of members and supporters nationwide, nearly 42,000 of them in California. Since its founding in
6 1971, Public Citizen has encouraged public participation in civic affairs and has brought and defended
7 numerous cases involving the First Amendment rights of citizens who participate public debates. See
8 generally <http://www.citizen.org/litigation/briefs/internet.htm>. Over the past sixteen years, Public
9 Citizen's attorneys have represented defendants charged with infringing trademarks by using
10 trademarked names in their domain names or other features that make web sites discussing the
11 trademark holders prominently available to Internet users who are looking for information about the
12 trademark holders. For example, Public Citizen's lawyers represented the gripe site operators in *Bosley*
13 *Med. Inst. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005), *Lamparello v. Falwell*, 420 F.3d 309, 313
14 (4th Cir. 2005), *Jenzabar, Inc. v. Long Bow Grp.*, 82 Mass. App. Ct. 648, 653, 977 N.E.2d 75, 81
15 (2012), and *Baker v. DeShong*, 821 F.3d 620 (5th Cir. 2016). Public Citizen has also often filed as
16 amicus curiae in the Ninth Circuit, as well as in this Court, opposing abusive uses of intellectual
17 property theories to quash legitimate commercial competition or as a substitute for defamation claims.
18 *E.g.*, *Multi Time Machine v. Amazon.com*, 804 F.3d 930, 935 (9th Cir. 2015); *Garcia v. Google*, 786
19 F.3d 733, 736 (9th Cir. 2015) (en banc); *Ron Paul Presidential Committee v. Doe*, 3:12-cv-00240-
20 MEJ (N.D. Cal. Mar. 8, 2012).

21 11. Undersigned counsel conferred with counsel for plaintiffs Emily Evitt about the relief
22 sought in his motion; Ms. Evitt was not willing to consent.

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Respectfully submitted,

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July 13, 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on this 13thth day of July, 2016, I filed this Motion for Appointment of Counsel As Litem or in the Alternative for Leave to File as Amici Curiae, and the accompanying amicus brief, and accompanying affidavit and exhibit, through the Court’s ECF system, which will cause copies to be served electronically on counsel for the plaintiffs.

Respectfully submitted,

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