

CHANCERY COURT FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, SHELBY COUNTY, TENNESSEE

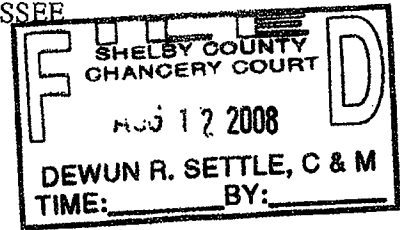
CITY OF MEMPHIS, TENNESSEE
and LARRY A. GODWIN,

Plaintiff,

v.

JOHN AND/OR JANE DOES 1-30
a/k/a "DIRK DIGGLER EX MPD";
NICO3974; and NICO3974@AIM.COM,

Defendants.



No. CH-08-0965 Part III

FILED UNREDACTED UNDER
SEAL AND PUBLICLY IN
REDACTED FORM

**RESPONSE OF DEFENDANT NICO3974 ET AL. TO MOTION TO INTERVENE
AND UNSEAL PLAINTIFFS' PETITION FOR PRE-LITIGATION DISCOVERY
AND MOTION PAPERS**

Plaintiffs City of Memphis, Tennessee and Police Director Larry A. Godwin filed this proceeding seeking to deny a blogger's First Amendment right to speak anonymously. At issue is the blog entitled "MPD Enforcer 2.0," maintained at mpdenforcer20.blogspot.com, which regularly criticizes the leadership of the Memphis Police Department. Plaintiffs claimed that the blogger's identity was needed to pursue certain claims against the blogger based on speech that could be found on the blog. Plaintiffs deliberately did not serve their papers on the blogger, even though they had her email address, and based on spurious reasons contradicted by Memphis Police Department's own web site, plaintiffs claimed that all papers in the case should remain under seal because disclosure of their motion papers could endanger the lives of police officers.¹

Thaddeus Matthews, another blogger who also reports on issues relating to the police department, has moved to intervene, asserting both a personal interest, because he is worried that the

¹Pursuant to the consistent practice of undersigned counsel Mr. Levy, the blogger is described using generic female pronouns. The blogger's actual gender may be male or female.

proceeding is somehow intended to identify Matthews' own sources within the police department, and a more generalized interest like any other citizen in asserting the public's constitutional, statutory, and common law rights of access to judicial records.

Unlike Matthews and his counsel, counsel for the Doe defendant, Nico3974 *et al.*, were given access to the sealed papers after America Online ("AOL") gave notice to defendant that a subpoena had been served seeking to deprive her of the right, under the First Amendment and Virginia law, to speak anonymously absent a showing that she has engaged in actionable wrongdoing.² Consequently, Nico3974 is in a superior position to file this memorandum explaining why the papers should be unsealed. First, Matthews is entitled to intervene in his capacity as a citizen and journalist who is interested in covering public affairs in Memphis and specifically related to the Memphis Police Department. Second, in light of the actual content of the blog and the largely spurious nature of the claims that plaintiffs claim they want to bring against Nico3974, there is no sound basis for keeping any of the papers in this case under seal. Even taking the claims in plaintiffs' moving papers at face value, there would have been justification only to seal one paragraph in one of those papers. Although the Court has not specifically ordered that future papers in this case be filed under seal, and has not even ruled that the Petition and Motion must be maintained under seal, as a precaution we are filing this entire memorandum under seal, but filing publicly (and serving on Matthews) a redacted version of the memorandum pending the Court's ruling on the motion to unseal.

STATEMENT OF THE CASE

This case arises from official hostility to the "MPD Enforcer 2.0" blog, maintained by an

²Although the caption identifies the defendant using several different versions of her pseudonym, there is, in fact, only one anonymous defendant.

anonymous citizen who identified herself on the blog as "Dirk Diggler MPD." Her profile on the blog, <http://www.blogger.com/profile/12303949231769623502>, provided her email address, nico3974@aim.com, so that any member of the public could contact her directly. The blog is largely mirrored on the web site of Zimbio.com, which describes itself as a means for the promotion of blogs. <http://www.zimbio.com/company/bloggers>. The page of the Zimbio site on which the MPD Enforcer 2.0 blog is mirrored is the home page for "Nico3974." For brevity, we refer to defendant in this case as "Nico3974."

As Nico3974 explained in her original post to the blog, she named the blog in homage to the "MPD Enforcer," which

was a newsletter/website that was hosted on geocities.com some years ago. It was an outlet for officers to learn about the latest issues in the department and a good rumor mill for the years. The administration on the 12th floor had tried for years to find out who the authors of the "Enforcer" were as a lot of dirty laundry was being aired for all to read. First and foremost, I was NOT affiliated with the original enforcer and I do not know who they were. I've decided to create this space where my former brothers in the department could post and read all the latest shenanigans that happen day to day on the job. I will welcome all post/stories/information that concern the officers.

* * * *

I urge any MPD officer to contribute to this blog and spread the word through the precincts (stations as they are now called). If you have a shitty supervisor, let us know. There are tons of Webbs and McKaskills on the department that need to be outed.

<http://mpdenforcer20.blogspot.com/2008/03/welcome-visitors.html>

True to her word, Nico3974 has posted many stories on the blog critical of the leadership of the Memphis Police Department, especially Police Director Larry Godwin and many of the subordinates with whom he surrounded himself, and her posts drew hundreds of comments from police officers in the department.

Apparently recognizing that the threat of identification would be the best way to suppress participation in the blog, Police Director Godwin and the City of Memphis began this proceeding on May 23, 2008. Instead of suing Nico3974 as a defendant and spelling out in the requisite detail the specific statements on the blog that they claimed are actionable, and explaining the causes of action, plaintiffs filed a vague and conclusory "Petition to Perpetuate Testimony," purportedly pursuant to Rule 27.01 of the Tennessee Rules of Civil Procedure, a rule that allows "depositions for perpetuating testimony." Plaintiffs contended that they desired to file a complaint against the operator of the MPD Enforcer 2.0 blog, involving three separate causes of action. First, plaintiffs claimed that [REDACTED]

[REDACTED]

[REDACTED] in violation of state and federal law." Second, plaintiffs alleged that Nico3974 had [REDACTED] [REDACTED] in violation of state and federal law." Third, plaintiffs claimed that

[REDACTED]

Petition ¶ 8, at 3.

Plaintiffs claimed that Nico3974 thereby [REDACTED]

[REDACTED] Based on this complaint, plaintiff filed a motion for leave to take discovery from Google (the host of the blog), AOL (which provides email addresses at aim.com), Zimbio (on which the blog was promoted) and Zazzle (whose relevance to the case was not explained in the Petition),

for the purpose of identifying Nico3974.

However, plaintiffs deliberately did not attach the actual language of the posts that were supposedly the basis for their intended lawsuit, so that the Court could assess for itself whether there was any factual or legal basis for the claims. Nor did they bring to the Court's attention the unanimous authority from other courts, holding that before an anonymous Internet speaker may be identified for the purpose of serving process, thus depriving her of her First Amendment right to speak anonymously, notice must be given to the speaker so that she may oppose being identified, the precise words that are alleged to be actionable must be set forth, the causes of action based on those words must be properly alleged, the court must examine the causes of action for legal validity, and evidence must be presented establishing the elements of a prima facie case for the causes of action.³ Finally, in order to ensure that defendant would not have the opportunity to call the Court's attention

³See, e.g., *Quixtar v. Signature Management Team*, 2008 WL 2721265 (D. Nev. Jul. 7 2008); *Doe I and Doe II v. Individuals whose true names are unknown*, 2008 WL 2428206 (D. Conn. June 13 2008); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008); *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Cal.App. 6 Dist. 2008), *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.-Texarkana 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001); *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *In re 2TheMart.com, Inc. Securities Litigation*, 140 F. Supp.2d 1088 (W.D. Wash. 2001); *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. 2007); *Melvin v. Doe*, 49 PaD&C4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003).

Had plaintiffs given notice as required by this unanimous authority, as well as by the text of Rule 27.01, Nico3974 could also have pointed out to the Court that the federal Electronic Communications Privacy Act limits the means by which a public entity and police chief may seek to obtain information relating to the contents of electronic communications, including the sender's identity. Either a public entity that seeks such information without using the proper criminal law procedures, or an Internet Service Provider who provides such information, is liable for statutory damages and attorney fees under 18 U.S.C. § 2707. See *Freedman v. AOL*, 303 F. Supp.2d 121, 127 (D. Conn. 2004). Plaintiffs have been notified of their potential liability. Moreover, we anticipate that AOL will be seeking to quash the Virginia subpoena that has been served upon it.

to these cases, and to the many factual and legal flaws in the supposed causes of action, plaintiffs did not even undertake to comply with Rule 27.01(2) by notifying Nico3974 of the motion for discovery. The only explanation for this omission was the statement that "Defendants' true identities are unknown and no testimonial evidence is sought" by the Petition to Perpetuate Testimony. To the extent that this "argument" implied that plaintiffs had no way of notifying Nico3974, plaintiffs were misrepresenting the situation, in that they could easily have notified Nico3974 by email (since that address was on the blog's profile page), or indeed by posting on the blog itself as in *Dendrite v. Doe*, 775 A.2d at 764 . Moreover, plaintiffs ignored the fact that Rule 27.01 only authorizes **depositions**, for the purpose of perpetuating **testimony**; the noncompliance with Rule 27.01 undercuts the validity of the proceeding. Further ensuring that Nico3974 would not have any opportunity to learn of the effort to strip her of her First Amendment right to speak anonymously, plaintiffs asked the Clerk to file the petition for discovery and the motion for discovery under seal.

On June 19, the Court granted the motion for leave to pursue discovery, apparently signing an order that had been prepared for its signature by plaintiffs. The order specified "this Order Granting Plaintiffs' Motion shall be filed under seal by the Clerk and remain under seal until further notice from this Court." Order at 3. The order said nothing about whether the Petition to Perpetuate Testimony or the Motion for an Order allowing discovery should be maintained under seal. Following the entry of the order, plaintiff served a subpoena on AOL seeking Nico3974's identity. So far as we have been able to determine, no subpoenas have been served on Google, Zazzle or Zimbio. As required by a Virginia statute, Va. Code Ann. § 8.01-407.1, as well as by the authority cited in footnote 3, *supra*, AOL notified Nico3974 that a subpoena had been served seeking her identifying information, and under the terms of the Virginia statute Nico3974 notified AOL that she

objected to the discovery. Undersigned counsel, having been retained by Nico3974, contacted counsel for plaintiffs and obtained a copy of the petition, motion and order.

ARGUMENT

Although she does not agree with one of Matthews' arguments for intervention, Nico3974 agrees that Matthews should be granted leave to intervene to seek to have the filings in this case unsealed.⁴ Like any other citizen or journalist, Matthews has an interest in protecting the public's constitutional, common law, and statutory right of access to judicial records. *Id.* at 7. Nico3974 further agrees with Matthews' articulation of the strong presumption in favor of open records under those authorities, under which the party seeking closure bears the burden of showing a "clearly defined and serious injury" to legitimate interests, shown with specificity and by reference to articulable facts. *Id.* at 3-7. Moreover, plaintiffs made no effort to give notice to the public or any opportunity to be heard on the issue of closure. *Id.* at 6. In fact, plaintiffs deliberately avoided providing notice to anybody, including Nico3974, in order to obtain an Order from the Court through a proceeding in which only the plaintiffs' interests were represented. Given the lack of prior notice and the inability to satisfy the required burden to justify closure, there can be no question that these proceedings were improperly sealed and must now be unsealed. *See, e.g., King v. Jowers*, 12 S.W.3d 410 (Tenn. 1999); *State v. James*, 902 S.W.2d 911, 912 (Tenn. 1995); *State v. Drake*, 701 S.W.2d 604, 607 (Tenn. 1985).

⁴Nico3974 does not agree with the argument, on pages 1 and 2 of his motion, that intervention should be allowed so that he can protect the confidential sources on whom he relies "for his radio talk-show and blog." Having examined the sealed filings, we can say with assurance that they make no reference to identifying those sources, and there is no reason to believe that the discovery sought here will uncover such confidential sources inasmuch as the discovery seeks only to identify Nico3974 who is not a source for Matthews.

Moreover, having examined the sealed papers themselves, counsel for Nico3974 are confident that there is nothing in those papers that merits maintaining them under seal. The first two causes of action identified in the Petition to Perpetuate Testimony – the claims that [REDACTED] [REDACTED] MPD Enforcer 2.0 blog, and that [REDACTED] [REDACTED] on that blog or the non-commercial Zimbio web site – do not even come close to presenting matters that need to be kept confidential from the public. Plaintiffs may be embarrassed to have the public know that they have advanced claims that are so clearly unsupported by the law and the facts.⁵ However, the possibility of embarrassment is not a sufficient reason to close a civil proceeding, as Matthews rightly argues at page 5 of his motion.

The third cause of action includes a factual assertion in paragraph 8 of the petition that, if true, still would not have justified sealing the entire petition as well as the motion and the order, but might have seemed a proper basis for redacting most of that particular paragraph from any public filing. In fact, however, there is serious reason to question the veracity of the statement in the

⁵For example, there is no allegation and no reason to believe that [REDACTED] [REDACTED] which is a fundamental requirement for a [REDACTED] [REDACTED] matter of [REDACTED] the First Amendment. Nor was there any allegation that the use of the materials on the blog [REDACTED], another requirement to ensure that [REDACTED] claims are consistent with the First Amendment. [REDACTED] And there is no allegation or reason to believe that plaintiffs have ever [REDACTED] [REDACTED] which is a fundamental requirement for the establishment of [REDACTED] under federal law, [REDACTED] and under state law which is to be construed in the same way [REDACTED]

petition, and, for reasons explained below, events since Nico3974 learned of the concerns expressed in this paragraph have vitiated any reasons for sealing that might previously have appeared to exist.

Paragraph 8 alleged (and Godwin so attested in his verification) that

[REDACTED]

Petition ¶ 8, at 3.

In fact, the blog contained no such statements. In a blog entry on [REDACTED] Nico3974 published [REDACTED] promoted by Godwin [REDACTED] [REDACTED] in the course of describing his spotty disciplinary record. The blog entry referred caustically to the fact [REDACTED] [REDACTED] and to this police supervisor's reported involvement in illicit oral sex in the course of that assignment. [REDACTED]⁶

In fact, [REDACTED]

[REDACTED] See Stiles Affidavit, Exhibit A. [REDACTED]

[REDACTED] As explained in one such article, [REDACTED]

⁶Apart from the factual validity of the Petition, plaintiffs have not identified the cause of action that would allow the supposed future suit for which they claim they need to perpetuate testimony. There is no legal basis for a lawsuit to bar a private citizen or blogger from publishing truthful information about a police official. Plaintiffs have not identified the cause of action that would allow their suit. In conversations with plaintiffs' counsel, counsel invoked an exemption to the public records law as a basis for his suit, but no authority holds that, simply because a public record could be withheld from disclosure, an injunction may be brought against the publication of that record. *New York Times Co. v. United States*, 403 U.S. 713 (1971). Moreover, the material that was published was not a public record, but [REDACTED]

[REDACTED] To this day,
[REDACTED] appear on the Memphis Police Department's own web site, [REDACTED]
[REDACTED]
[REDACTED]

Moreover, even if there had originally been some reason to seal one paragraph of the Petition to Perpetuate Testimony, because [REDACTED] him as such were on the blog at one time, Nico3974 [REDACTED] as soon as she learned that plaintiffs were claiming that [REDACTED] and despite her doubt, as outlined above, about the veracity of that contention. [REDACTED]
[REDACTED]

[REDACTED] Thus, there is no continuing reason to keep even the one paragraph of the Petition that refers to [REDACTED] under seal.⁷

Indeed, the irony here is that, if it is assumed that plaintiffs' claim had a factual basis, [REDACTED] plaintiffs could have obtained the relief they claim to want simply by notifying Nico3974 of [REDACTED]
[REDACTED] Instead, [REDACTED]

⁷Undersigned counsel Mr. Levy repeatedly asked plaintiffs' counsel, Mr. Bearman, to provide more detailed factual information addressing the distinction [REDACTED] (consistent with Godwin's verification) and [REDACTED] (which is not what Godwin attested to). Mr. Bearman pointedly refused to be specific, instead being willing to say only that he believes that [REDACTED]. We infer from these responses that to the extent that the Petition might be construed to suggested that [REDACTED] the Petition misrepresented the facts. In the event plaintiffs do not withdraw their petition, defendant intends to take Godwin's position to establish the truth of this claim, as well as the other claims on which the Petition is based.

litigation – the Petition to Perpetuate Testimony was filed in secret on May 23, 2008; the order authorizing foreign subpoenas was issued in secret on June 19, 2008; and a subpoena was issued to AOL on July 15, 2008. During all this time, [REDACTED] After Nico3974 was notified of the subpoena, she complained to the press about the effort to suppress her free speech, for reasons that plaintiffs refused to disclose, resulting in a great deal more attention to the blog, [REDACTED] It was not until July 26, 2008 that Nico3974 finally learned that a claim had been put forward [REDACTED]; she immediately [REDACTED] pending an investigation of plaintiffs' claim. Had plaintiffs simply notified Nico3974 of the problem [REDACTED] in May when they filed their papers, or even earlier when [REDACTED] without involving their lawyers (or this Court), Nico3974 would have taken the same common-sense approach to the situation. If anyone has [REDACTED] while exposing the City to a serious claim for damages and attorney fees for their violation of the ECPA, it is the plaintiffs.

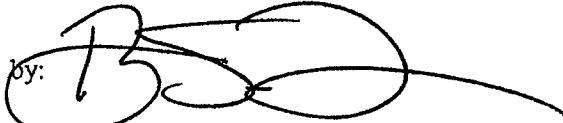
CONCLUSION

The motion to unseal all filings in the case should be granted.

Respectfully submitted,

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August 12, 2008

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the sealed version of the foregoing was served by hand delivery upon counsel for Plaintiffs, David Bearman, Esq., Baker Donelson, Bearman, Caldwell & Berkowitz, PC, 165 Madison Avenue, Suite 2000, Memphis, Tennessee 38103 and that a true and correct copy of the redacted and publicly-filed version of the foregoing was served by hand delivery upon counsel for Thaddeus Matthews, Bruce S. Kramer, Esq., 80 Monroe Ave., Suite G-1, Memphis, Tennessee 38103 and upon counsel for Plaintiffs, David Bearman, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, 165 Madison Avenue, Suite 2000, Memphis, Tennessee 38103, this 12th day of August 2008.



⁸A motion to admit Mr. Levy pro hac vice will be filed shortly.