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VIA EMAIL AND FIRST CLASS MAIL

Mindy Morton
PROCOPIO, CORY, HARGREAVES & SAVITCH LLP
1020 Marsh Road, Suite 200
Menlo Park, CA 94025
mindy.morton@procopio.com

Re: *Kramer v. Doe*, Case No. cv2014-011404
Superior Court of Arizona Maricopa County

Dear Ms. Morton:

I write in regards to the Non-Party Automattic Inc.'s Responses and Objections to Subpoena for Production of John Does I-X, Business Records in Action Pending Outside California (the "Response") filed in the case Ron Kramer and ThermoLife International LLC v. John does I-X. In particular, I want to address Automattic's objections to the request seeking "Any communication between you and the Doe Defendants." As explained fully below, Automattic must produce any and all communications that relate to the identity of blog poster at issue; the Electronic Communications Privacy Act.

As background, I have pursued numerous cases for Internet defamation on behalf of my clients against an individual named Anthony Connors (often writing as "Anthony Roberts"). For years, Mr. Roberts has attacked my clients on the Internet, spreading mostly lies about Mr. Kramer's past in order to smear him in the industry. Once a court finds Mr. Roberts liable for defamation (as the District of New Jersey did regarding the material that appears on the disputed WordPress blog), Mr. Roberts simply moves his material to another site, often anonymously.

In the Response, Automattic has essentially confirmed that we are again dealing with Mr. Roberts. The Blog Owner Email Address provided in Response to Document Request No. 1 listed "BecauseScience@anonymousspeech.com." "Because Science" is something of a mantra for Mr. Roberts. In addition, he has used emails registered at anonymousspeech.com in several of my cases. Unfortunately, that particular domain specializes in making unmasking a speaker (even one so thinly disguised as Mr. Roberts) exceedingly difficult. Furthermore, as in many of

my cases with Mr. Roberts, the IP Address provided is an offshore proxy server that specializes in masking Internet activity.

Even though I am certain that Mr. Roberts is the John Doe in this case, I have no evidence that will allow me to obtain jurisdiction over him. Neither the email address nor the IP address provided in the Response is likely to produce any identifying evidence that will be accepted in court. That leads me to Automattic's response to the request seeking "Any communication between you and the Doe Defendants." You have asserted that "[p]roduction of any communications is prohibited by the [Electronic Communications Privacy Act]." While I can understand why you assert that objection, I specifically crafted my Requests so as not to implicate the ECPA.

Title I of the ECPA applies to the "interception" of electronic communications. It is indisputable that Title I does not apply to communications that Automattic had with the John Doe Defendants. Title II applies to "stored" communications. Again, communications that Automattic had with the John Doe Defendants is not "stored." Electronic storage is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C.A. § 2510(17). Using this definition, "ECS [electronic communication service] providers, subject to enumerated exceptions, generally may not 'knowingly divulge to any person or entity the contents of communications while in electronic storage by that service.'" 4 E-Commerce and Internet Law 50.06[4][C][i] (2013-2014 update) (quoting 18 U.S.C.A. §§ 2702(a)(1), 2702(b)).

Based on your objection, I assume that Automattic claims that it is an ECS: "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C.A. §§ 2510(15), 2711(1). Whether a party is an "ECS provider[] does not end the court's inquiry, however. The court must also determine whether the information sought by the subpoenas—private messages and postings—constitute electronic storage within the meaning of the statute." *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 982 (C.D. Cal. 2010). Furthermore, "[w]hether an entity is acting as an RCS or an ECS (or neither) is context dependent, and depends, in part, on the information disclosed." *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1023 (N.D. Cal. 2012) (finding LinkedIn was neither an RCS or ECS provider with respect to the information allegedly disclosed).

In the Subpoena, we requested "communication ***between*** you and the Doe Defendants." "[I]n civil cases, a party generally is limited to seeking discovery of the contents of a communication ***directly from parties to the communication***, not their service provider." 4 E-Commerce and Internet Law 50.06[4][A] (2013-2014 update). Here, we did not request any communications that Automattic may have had access to as a service provider. We sought communications to which Automattic ***was a party***.

The Ninth Circuit has read the definition of storage rather narrowly, finding that "'subsection (A) applies only to messages in "temporary, intermediate storage,"' and has 'limited that subsection's coverage to messages not yet delivered to their intended recipient.'" *Crispin*, 717 F. Supp. 2d at 982-83 (quoting *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir.

2004)). "[A] storage service necessarily requires a retrieval mechanism to be useful. To retrieve communications in storage, the RCS provider must display those communications in some way. *Id.* at 990. Accordingly, nothing in the ECPA prohibits the disclosure of communications ***between*** Automattic and the John Doe Defendants.

If possible, it is my preference to avoid litigating this matter through a motion to compel in court. I am operating under the assumption that there are few, if any, communications between Automattic and the John Doe Defendants that would be responsive to Request 2. Even if Automattic does not want to provide the actual communications, all we are seeking is information related to the identity of the John Doe Defendants. "'[I]nformation concerning the identity of the author of the communication' is not considered 'contents.'" 4 E-Commerce and Internet Law 50.06[4][B] (2013-2014 update). It is my hope that we can resolve this matter through this attempt to meet and confer.

That said, if we cannot reach a resolution, my client will continue to pursue this matter. In addition to the defamation action against the John Doe Defendants, I would like to alert you to a violation of my client's copyright on the Disputed Blog. On the post entitled "Thermolife and Ron Kramer and Muscle Beach Nutrition" (http://ronkramermusclebeach.wordpress.com/2014/04/23/thermolife-and-ron-kramer-and-muscle-beach-nutrition/), the Disputed Blog posts a screen shot of a release "by ThermoLife International, LLC." My clients have never authorized the John Doe Defendants to use their copyrighted material and object to its appearance on a blog operated by Automattic.

Furthermore, we have never received any answer whatsoever from Automattic regarding the use of my client's name ("Ron Kramer") and trademark ("Muscle Beach") in the name of the Disputed Blog and the URL. The WordPress Terms of Service state "your blog is not presented in a manner that misleads your readers into thinking that you are another person or company." That particular Term is clearly intended for the sole benefit of third-parties and WordPress has promised those third-parties that it "take[s its] terms of service very seriously ***and will suspend any sites that are found to be in violation***." WordPress.com's Dispute Resolution & Reporting (http://en.support.wordpress.com/disputes/).

The wording of these terms creates an intention to benefit third-parties and distinguishes WordPress's Terms of Service from those examined in cases like *Jackson v. Am. Plaza Corp.*, No. 08 CIV. 8980PKC, 2009 WL 1158829 (S.D.N.Y. Apr. 28, 2009) and *Brahms v. Carver*, No. 12-CV-5611 ENV, 2014 WL 3569347 (E.D.N.Y. July 18, 2014).

We respect Automattic's commitment to First Amendment rights. WordPress has provided an effective and meaningful means for millions of people to share their voice. But the Disputed Blog is not worthy of a First Amendment right. The entire contents of the Blog were posted in one day, copying and pasting material from other sources (many of which have withdrawn the material or suspended the operators who were found to be in violation of the law). The Disputed Blog is in blatant violation of the WordPress Terms of Service – in particular a term that only exists to benefit third-parties. It is my sincere hope that we can reach some kind of agreement that is mutually beneficial to my clients and yours.

My client has authorized me to bring suit against WordPress if WordPress continues to display the defamatory blog. At a minimum, should WordPress fail to produce the requested communications, we will seek to compel the requested documents. Nonetheless, we would like to work through these issues, without further litigation. I look forward to hearing from you on or before December 17, 2014.

Best regards,

KERCSMAR & FELTUS PLLC

Gregory B. Collins

GBC:bjb