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SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SAN FRANCISCO

WINELAND-THOMSON ADVENTURES,
 INC. d/b/a THOMSON SAFARIS, a
 Massachusetts corporation,

Plaintiff,

v.

DOES 1 through 10, inclusive,.

Defendants.

Case No. CGC-13-528871

**OPPOSITION OF WEEBLY, INC., TO
 MOTION FOR CONTEMPT AND
 SANCTIONS**

Date: May 10, 2013
 Time: 9:00 a.m.
 Dept.: Dept. 302

Filed herewith:
 Declaration of Joshua Koltun
 Request for Judicial Notice

Introduction

Third Party Witness Weebly, Inc. (“Weebly”) is a web hosting service for the website of anonymous Doe Defendants – apparently residents of Tanzania -- that is the subject of this defamation lawsuit. This motion seeks (1) contempt sanctions for Weebly’s failure to respond or meet and confer concerning a discovery request for records containing identifying information concerning its customer(s), the Doe Defendant(s), and (2) production of those records.

Weebly first consulted and engaged the undersigned counsel concerning its rights and obligations this past Friday (April 26). Weebly first attempted to contact Doe Defendants that same day, to inform them of the complaint and subpoena herein, immediately after consulting counsel. Counsel immediately sought to meet and confer with opposing counsel and sought a brief extension of this matter so that Weebly could inform its customers of the subpoena and have an opportunity to move to quash. That request was denied, so Weebly files this opposition.

Weebly concedes that it should have acted more promptly to obtain legal advice and to respond to the subpoena and to meet and confer, and therefore stipulates to an award reasonable attorney fees to Plaintiff for the inconvenience of having to file the contempt motion.

However, having now obtained legal advice, Weebly understands that the request to produce documents implicates important First Amendment rights of its customers – Doe defendants herein. As explained below, the First Amendment requires that Doe Defendants be given notice of the subpoena and an opportunity to move to quash. Moreover, the First Amendment requires that Plaintiff submit *prima facie* evidence of its claims herein, as explained below. Thus this Court should quash the subpoena until Plaintiffs have made the requisite procedural and substantive showings.

Alternatively, and at a minimum, Weebly requests that any order for it to produce documents be stayed at least 45 days to give Doe Defendants an opportunity to seek to obtain United States counsel and file a motion to quash.

Factual and Procedural Background

Plaintiff, known as “Thompson Safaris,” is a tour operator that arranges and conducts safaris and tours in Tanzania. Complaint, ¶ 4. Weebly is an ISP that hosts a website (“Website”) created by Doe Defendants¹ called “Stop Thomson Safaris.” *Id.*, ¶ 5, 6. Based on their statements, it would appear that Does reside in Tanzania. *Id.*, ¶ 7 (“a group of people who have seen first hand the effect of Thomson’s occupation on the residents of Loliondo”).

The Website, on its face, brings to the attention of the public an ongoing dispute in Tanzania between Plaintiff and/or its affiliate companies and local Masaai residents, concerning the latter’s rights to the use certain land for traditional purposes such as grazing their animals, versus Plaintiff’s use for nature safaris. Koltun Decl., ¶ 1, Exh. A, B, and Request for Judicial Notice.² According to the website, this dispute is the subject of ongoing litigation in the Tanzanian courts as well as a formal United Nations inquiry. *Id.* Although the Website does not disclose the identities of the creators of the website, it contains hyperlinks that appear to be means of contacting them through Facebook and Twitter. Koltun Decl., ¶ 1, Exh A & B.

As indicated on the motion, Plaintiffs served a subpoena on Weebly for identifying information concerning Does, and attempted to meet and confer with Weebly. Weebly did not respond to the subpoena or request to meet and confer. Weebly belatedly sought to obtain legal advice concerning its rights and obligations, and was referred to the undersigned counsel, who first consulted with Weebly, and was engaged by them, on April 26, 2013. Koltun Decl., ¶ 2. That same day, after consulting with counsel, on April 26, 2013, Weebly attempted to contact Doe Defendants to inform them of the pendency of the lawsuit and of the subpoena, and to advise them to seek United States counsel to advise them regarding their rights. Koltun Decl., ¶ 2.

That same day, Koltun contacted plaintiff’s counsel, Mr. Pevsner, to attempt to meet and

¹ In referring to “Defendants” in the plural, Weebly is simply following the Complaint, not making any factual assertion.

² Weebly requests judicial notice of the Website itself, not for the truth of any matters asserted therein, but simply as the relevant context for the purportedly wrongful speech at issue. *See, e.g. Signature Mgmt. Team, LLC v. Automattic, Inc.*, 2013 U.S. Dist. LEXIS 57434, 2-3 (N.D. Cal. Apr. 22, 2013) (taking judicial notice of statements for purpose of deciding whether to protect anonymity); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1100, 1102 (N.D. Cal. 1999)(taking judicial notice of context of allegedly defamatory statements); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076-1077 (9th Cir. 2005)(defendant puts context of statements before court to show lack of defamatory meaning).

1 confer both on the scheduling of the hearing and on the possibility of resolving the discovery dispute
 2 without this Court's intervention. *Id.*, ¶ 3. Mr. Koltun informed Mr. Pevsner that he had just been
 3 engaged, that Weebly was attempting to contact Does and that Does had a First Amendment right to
 4 notice and an opportunity to be heard. *Id.* He requested a brief stay of the matter, first because of a
 5 scheduling conflict on May 10, but also so that the parties could meet and confer concerning the
 6 possibility of staying the matter so that Does could be contacted and given an opportunity to move to
 7 quash. *Id.* Mr. Pevzner was quite courteous but did not have authority to respond on such short
 8 notice. *Id.* On Sunday afternoon, Plaintiff's counsel informed Koltun that it would not grant any
 9 extension. *Id.*

10 ***I. Weebly Concedes That It Should Have Acted Sooner to Give Defendants Notice and***
 11 ***an Opportunity to be Heard, to Object and to Meet and Confer; But the Appropriate***
 12 ***Remedy Should Be to Compensate Plaintiff for the Inconvenience, Not Prejudice***
 13 ***Defendant's Rights***

14 As explained below in sections II and III, Doe Defendants have First Amendment rights to
 15 anonymous speech, both (i) a procedural right to notice and an opportunity to be heard, and (ii) a
 16 substantive right to require Plaintiffs to be put to an initial burden of proof, before they may be
 17 stripped of their anonymity.³

18 Weebly concedes that it should have acted more promptly to consult counsel, to serve objections,
 19 to meet and confer, and to attempt to obtain for its customers, the Doe Defendants herein, an opportunity
 20 to seek United States counsel and file a motion to quash.⁴

21 With respect to the motion for contempt, Weebly will stipulate to pay reasonable attorney fees for
 22 Plaintiff's inconvenience in having to file the motion for contempt. But Weebly has no authority, and no
 23 right to waive its customer's First Amendment rights. Weebly's delay cannot be charged to its customers
 24 and should not prejudice their First Amendment right to be heard.

25 With respect to any order to produce documents, Weebly respectfully suggests that the subpoena

26 ³ Weebly, a third party, has standing to assert the constitutional rights of the Doe Defendants. *See, e.g., McVicker v. King*,
 27 266 F.R.D. 92, 95 (W.D. Pa. 2010) ("entities such as newspapers, internet service providers, and website hosts may, under
 28 the principle of *jus tertii* standing, assert the rights of their readers and subscribers."). It does so here for the limited
 purpose of obtaining the necessary delay so that Defendants have an opportunity to intervene directly and assert their
 rights by motion to quash.

⁴ Weebly will promptly after filing this opposition, serve formal objections reflecting the principles discussed herein.

1 be quashed pending a further showing by Plaintiff showing compliance with the First Amendment
 2 requirements discussed below. At a minimum, Weebly requests that any order for production of
 3 identifying information be stayed for at least 45 days, to afford Doe Defendants a reasonable opportunity
 4 to find United States counsel and file a motion to quash.

5 ***II. Where A Plaintiff Seeks Discovery to Strip A Speaker of His Anonymity on the***
 6 ***Grounds that the Speech is False and Injurious, The Court Must Require That***
 7 ***Defendants Be Afforded Notice And An Opportunity to Move to Quash***

8 The First Amendment protects a right to speak anonymously. *Buckley v. American*
 9 *Constitutional Law Found.*, 525 U.S. 182, 197-99 (1999); *McIntyre v. Ohio Elections Comm.*, 514
 10 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). Moreover, where a court order would
 11 impinge on First Amendment rights, no such order may issue *ex parte* “where no showing is made
 12 that it is impossible to serve or to notify the opposing parties and to give them an opportunity to
 13 participate.” *Carroll v. President & Comm'Rs of Princess Anne*, 393 U.S. 175, 180 (1968)

14 As a consequence, the First Amendment requires that when a plaintiff seeks to use the Court’s
 15 processes to strip a speaker of his anonymity, it must “undertake efforts to notify the anonymous posters
 16 that they are the subject of a subpoena or application for an order of disclosure, and withhold action to
 17 afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the
 18 application.”. *Dendrite v. Doe*, 775 A.2d 756, 760-61 (N.J. 2001), accord *John Doe No. 1 v. Cahill*,
 884 A.2d 451, 460-461 (Del. 2005).

19 Thus, although a target of “online aspersions” has a right to “seek redress by filing suit against
 20 their unknown detractors, the anonymous defendant, “[o]nce notified of a lawsuit **by the Web site host**
 21 **or ISP**,” has a right to “assert his or her First Amendment right to speak anonymously through an
 22 application for a protective order or... a motion to quash the subpoena. *Krinsky v. Doe 6*, 159 Cal.
 23 App. 4th 1154, 1164-1165, 1171 (2008) (emphasis added; relying on *Dendrite* and *Cahill*); *see also*
 24 *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 161 (D. Mass. 2008)(recognizing that
 25 “defendants should have the opportunity to combat the subpoena if they desire to do so” and ordering
 26 ISP to provide individual users with notice, and barring ISPs from responding to subpoena until
 27 defendants have had opportunity to move to quash).

28 Here, Weebly is in a comparable position to the ISPs. Weebly is attempting in good faith

1 (albeit belatedly) to contact Does to afford them the opportunity above.

2 For its own part, however, Plaintiff has not made the requisite showing that it ever made any
3 good faith attempt to notify Does of either the lawsuit or the subpoena. For example, Plaintiff does
4 not appear to have made any attempt to contact Does at their publicly available Facebook and Twitter
5 contacts. *Compare* Dendrite 775 A.2d at 760 (requiring plaintiff to post message on relevant message
6 board); *accord* Cahill, 884 A.2d at 460-461 (“When First Amendment interests are at stake we
7 disfavor ex parte discovery requests that afford the plaintiff the important form of relief that comes
8 from unmasking an anonymous defendant. While in this case [the ISP notified Doe of the discovery
9 request, that might not happen in the future] Accordingly, regardless of the medium in which the
10 allegedly defamatory statement is published, the plaintiff must undertake reasonable efforts to notify
11 the anonymous defendant of the discovery request and must withhold action to allow the defendant an
12 opportunity to respond.”). Indeed, Plaintiff’s refusal to briefly delay this matter so that Weebly may
13 contact the customers suggests Plaintiff may be willfully seeking to deny Does their day in court to
14 defend their anonymity.

15 Accordingly, Weebly requests that the subpoena be quashed without prejudice to Weebly
16 making the requisite procedural showing, as well as the requisite substantive showing discussed in the
17 next section. At a minimum, Weebly respectfully requests that any order by this Court requiring the
18 production of documents with identifying information be stayed for a minimum of 45 days. This
19 period of stay is the minimum necessary to afford Does the practical opportunity to obtain legal advice and
20 formulate their motion to respond. Does are presumably Tanzanians, and this encounter with a foreign
21 legal system is likely to be even more bewildering for them than for lay American individuals. They may
22 well have only meager resources and may have some difficulty finding counsel willing to assist them *pro*
23 *bono*.⁵

24
25 ⁵ The stay will in no way prejudice Plaintiff. Although Plaintiffs seek a preliminary injunction (Complaint, ¶ 38), an
26 injunction be a prior restraint and thus is barred by the First Amendment. *See, e.g., Near v. Minnesota*, 283 U.S. 697
27 (1931) (Prior restraint cannot issue against the publication of a “malicious, scandalous and defamatory newspaper,
28 magazine or other periodical.”); *accord New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (barring
issuance of prior restraint against publication of *Pentagon Papers*, even assuming, *arguendo*, that such publication could
be prosecuted under Espionage Act).

III. A Plaintiff Charging that It Has Been Injured By False Anonymous Speech Must Submit Prima Facie Evidence Supporting Its Claim Before It Can Discover the Speaker's Identity

Plaintiff must make “a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity.” *Krinsky*, 159 Cal. App. 4th at 1172. Some courts have required, further, that assuming such a *prima facie* showing, “the court must then compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of the plaintiff and by a ruling in favor of the defendant.” *Art of Living Found. v. Does*, 2011 U.S. Dist. LEXIS 129836 (N.D. Cal. Nov. 9, 2011) (citing *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 975-976 (N.D. Cal. 2004); *Dendrite*, 342 N.J. Super. at 141-142.

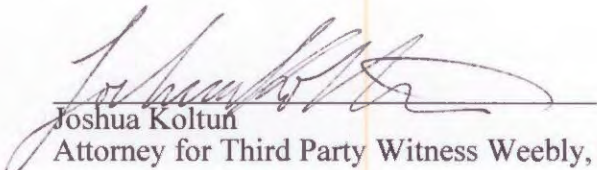
The question whether plaintiff has met the required *prima facie* (or further) showing is optimally framed on a motion to quash from Doe Defendants, who are in the best position to provide the necessary context and background to their own challenged speech. However, in the event that it is not possible to contact Doe Defendants and/or not possible for them to obtain counsel, the Court may appropriately take further action to protect the rights of the absent defendants, such as requiring further efforts to notify Defendants, or to require Plaintiffs to make an *ex parte* showing of the *prima facie* evidence in support of their claims, and/or seeking possible *amicus* briefs as to the sufficiency of the Complaint. *See Dendrite*, 342 N.J. Super. at 146 (denying discovery of identity of certain unrepresented Does on the basis of *amicus* briefing by public interest group, Public Citizen). *See also Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 456 (Md. 2009) (reversing trial court order requiring disclosure of identifying information where plaintiff had not shown that it had met procedural or substantive burdens under *Dendrite* test); *Indiana Newspapers Inc. v. Junior Achievement of Cent. Ind., Inc.*, 963 N.E.2d 534, 552-553 (Ind. Ct. App. 2012) (same); *Pilchesky v. Gatelli*, 12 A.3d 430, 2011 PA Super 3 (Pa. Super. Ct. 2011) (same where modified Cahill/*Dendrite* factors not met).

Thus this Court should quash the subpoena without prejudice, as stated above, and set a further conference to determine such further matters as justice may require. *Cf. Carroll*, 393 U.S. 175, 183-84 (In the sensitive area of First Amendment rights, where relief is sought *ex parte*, court's order” must be tailored as precisely as possible to the exact needs of the case.”)

1 *Conclusion*

2 For the reasons stated, Weebly respectfully requests that the Court quash the subpoena, , and
3 to set a further conference on this matter, before Weebly be required to strip its customers of their
4 anonymity, and at a minimum stay any obligation Weebly may have to respond for a period of at least
5 45 days.

6 DATED: April 29, 2013

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8 Joshua Koltun
9 Attorney for Third Party Witness Weebly, Inc.
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CERTIFICATE OF SERVICE

I am over the age of eighteen years, and not a party to this action. My business address is:
Joshua Koltun Attorney, One Sansome Street, Suite 3500, No. 500. San Francisco, CA 94104.

On **April 29, 2013** I served the

Weebly Opposition to Motion for Contempt

Declaration of Joshua Koltun

Request for Judicial Notice

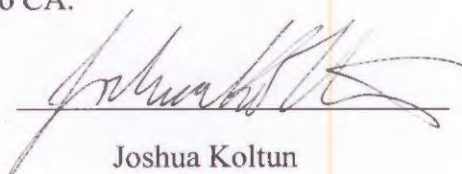
By sending a true copy of the document(s) listed above via *Overnight Federal Express* to:

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I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed on April 29, 2013 at San Francisco CA.



Joshua Koltun