IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

BRETT KIMBERLIN,

Plaintiff,

v.

NATIONAL BLOGGERS CLUB, *et al.*,

Defendants.

Case No.: CVPWG-13-3059

MEMORANDUM OF LAW IN OPPOSITION OF THE MOTION BY PLAINTIFF FOR EXPEDITED DISCOVERY IN CONNECTION WITH THE IDENTITY OF A NON-PARTY

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PRELIMINARY STATEMENT

On December 12, 2014, plaintiff moved the Court "to issue an order to counsel for Defendant Ace of Spades the person ("AOS"), to identify him." Merely squeezing the words "the person" and the pronoun "him" into the sentence describing plaintiff's motion does not change the fact that in his own Second Amended Complaint ("SAC"), Ace of Spades is described, not as a person, but as "a blog registered by Michelle Kerr . . . written by an anonymous blogger." (¶ 23.) Nor does it change the fact that no anonymous blogger known as "Ace of Spades" is named as a party in this action. For this reason, plaintiff's motion, incoherent even on its own terms, is a complete waste of this Court's time and attention in the light of the SAC. A motion sounding in aggrievement for the supposedly unique hurts invoked by anonymously cast slings and arrows cannot, in one fell swoop, also make good a fundamental pleading deficiency so as to add the anonymous hurt-maker as a defendant after three rounds of pleadings and the filing of extensive dispositive motions over the course of many months.

Plaintiff's motion suffers from other serious deficiencies. It fails make any semblance of a legal argument showing entitlement to relief. Even if it were couched in the proper procedural context, plaintiff has failed to meet the established legal standards for unmasking anonymous speakers – especially in light of the fact that, as demonstrated by defendant AOS's pending motion to dismiss, plaintiff's underlying claims are, regardless of the identities of the AOS blog authors, utterly meritless as a matter of law and that he has a history of utilizing the legal system to harass his journalist opponents – including by using the legal system as a lever in depriving them of their constitutional right to anonymity. And, as the public record shows, once this achieved, Mr. Kimberlin will not hesitate, as he did after using the legal system to identify and defendant Aaron Walker, in subjecting him to exactly

the same kind of intimidation, threats and personal harassment Kimberling claims to be victimized by in this lawsuit. As a matter of law and of decency his motion should be denied.

STATEMENT OF FACTS

The Court is, of course, well aware of the underlying factual allegations here. Defendant Ace of Spades is described in the Second Amended Complaint as follows:

> 23. Defendant Ace Of Spades is a blog registered by Michelle Kerr and is located at 3131 Homestead Road, #3E Santa Clara, California 95051 and it is written by an anonymous blogger.

The "anonymous blogger" referred to in ¶ 23 is not named as a party. Nor are any John Doe defendants. Thus plaintiff seeks expedited discovery here concerning a non-party.

Thus because plaintiff has failed to even name an anonymous party as a defendant and discovery has been stayed pending discovery, plaintiff has no legal basis to the relief he seeks here. But even applying the standards governing disclosure of anonymous identities under *Dendrite* and *Brodie* (discussed *infra*), this Court must balance the strength of plaintiff's case – as pleaded and as proved – versus the likely cost to the anonymous speaker of the loss of anonymity.

Rather than engage in dueling affidavits on this matter, here, again, defendant AOS will permit the SAC to speak for itself as it does with respect to the matter of defendant Aaron Walker – a formerly pseudonymous figure whom plaintiff, utilizing the excuse of supposed legal process and, according to well-sourced investigative reports, making unjustified and false accusations against Mr. Walker, nonetheless deprived succeeded in depriving Mr. Walker of his anonymity and effectuated Mr. Walker's termination from his employment. [SAC ¶¶ 52- 59]. Again, in the words of the Second Amended Complaint:

> 52. On or about December 31, 2011, Plaintiff discovered that "Aaron Worthing" was not a real attorney but that Aaron Worthing was actually Defendant Aaron Walker, an attorney licensed in Virginia.

> 53. Plaintiff also discovered that Aaron Worthing was the publisher of a blog dedicated to attacking, smearing, mocking and insulting the Muslim faith and the Prophet Mohammed. That blog was called "Everyone Draw Mohammed," and it solicited vile, pornographic and insulting depictions of the Prophet from people all over the world. In December 2011, Defendant Walker had published more than 800 insulting depictions of the Prophet.
>
> 54. On or about January 5, 2012, Plaintiff, by motion, advised the Montgomery County Maryland Circuit Court judge in the Seth Allen case that the attorney assisting Mr. Allen was not Aaron Worthing but rather was Aaron Walker.
>
> 55. On January 9, 2012, at a hearing on a Motion for Contempt against Mr. Allen, Defendant Walker appeared uninvited and interrupted the proceedings from the viewing area. He demanded that the judge seal the proceedings because Plaintiff had identified him as Aaron Walker, and everyone would know that he was the publisher of the Muslim hate blog. . . .
>
> 57. On January 12, 2013, Defendant Walker was terminated from his employment as an attorney for Professional Health Care Resources after Defendant Walker told it in writing that he was the publisher of the Muslim hate blog. Outside counsel for the company notified Defendant Walker in writing that he was terminated for writing the hate blog placing his co-workers at risk, for writing the hate blog at work and for being incompetent . . .

Compelling stuff. Even more compelling – or, perhaps more accurate, nauseating – is the letter, available on the Internet,[1] that Kimberlin sent to public authorities by which he engineered Mr. Walker's dismissal from his employment as well as a de facto slow-motion "swatting" of him, pretending concern for Mr. Walker's physical safety by virtue of the disclosure of Mr. Walker's identity – a disclosure procured entirely by Kimberlin, and entirely for the purpose of extrajudicial "punishment" of Walker for his commentary.[2]

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[1] A. Walker, "How Brett Kimberlin Tried to Frame Me for a Crime – Part 1: Background.," Allergic to Bull blog, May 17, 2012, found at http://allergic2bull.blogspot.com/2012/05/how-brett-kimberlin-tried-to-frame-me_8111.html.

The entire letter is filed herewith as Exhibit A.

[2] Kimberlin writes, "[T]here . . . exists the very real probability that Mr. Walker could be subjected to serious harm or death now that his identity has been exposed" – i.e., by Kimberlin. Kimberlin continues, essentially "swatting" Walker by virtue of the fact that the letter is addressed to law enforcement agencies, "Moreover, because he lives in a townhouse with adjacent neighbors and works in a large building with hundreds of other people, any attack against him could result in collateral harm to others. In light ofthese concerns, I strongly urge your agencies to develop a

That is the nature of the "relief" Kimberlin seeks here as well.

LEGAL ARGUMENT

A. Ace of Spades is not alleged to be an anonymous person but is alleged to be a blog, and plaintiff has made no showing of entitlement to an order that a non-party contributor to that blog be identified.

Plaintiff's premise, as demonstrated by his submissions, is that he is entitled to the relief afforded, in some circumstances, to plaintiffs seeking the identity of anonymous defendants. Thus, as he states in his "Motion" [Dkt. No. 232], he moves here to order counsel for defendant "Ace of Spades **the person** . . . to identify **him**." As stated above, however, the SAC does not describe Ace of Spades as a person, but as a **blog**. (¶23.) As the Maryland Supreme Court noted, significantly, in *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415 (2009), the identities of parties, as pleaded, are not mere technicalities. Thus where the plaintiff in *Brodie* failed to timely amend his complaint alleging defamation against both the newspaper and **specific** anonymous posters of allegedly defamatory statements on the newspaper's internet discussion forum to include the usernames of the posters who actually made the comments he alleged were defamatory before the statute of limitations had run on the defamation claim, he was precluded from compelling disclosure of the posters' real identities. *Id*. at 419. Here too Kimberlin has not named any person as a defamation defendant, so while the issue of a time bar is not before the Court, the issue of the what is or is not in the pleadings – and what, consequently, identities may or may not be compelled to be revealed – is the same here as in *Brodie*. In both cases, as in all cases, pleadings matter.

Kimberlin makes no effort to address this fact other than jamming a "corrective" word or two into his "motion." And the only case he cites to support his claim for relief is *In re Drasin*,

plan to protect not only Mr. Walker and his wife from any such harm both at work and in their home, but also to protect those who live and work near them." *See* Exhibit A.

No. CIV.A. ELH-13-1140, 2013 WL 3866777 (D. Md. July 24, 2013), which plaintiff claims stands for the proposition that a "plaintiff has a right to the identity of an anonymous blogger defendant who has engaged in tortious conduct against him." The first problem with this formulation is, again, that in *Drasin*, the subpoenas sought the names of "each of the ten Doe Defendants," but Kimberlin is **not seeking the identity of a defendant**.

Secondly, the plaintiff in *Drasin* had a more than plausibly meritorious defamation claim. As the Court explained, "According to ACT, it has suffered harm to its reputation as a result of the blog's extensive commentary on its business practices that are, according to ACT, false and misleading. For example, potential and current clients have allegedly declined to use ACT's services because of the comments on Random Convergence." *Id.* at *4. In contrast, as set out at length in the 12(b)(6) motions of the several defendants, at no point in the SAC does plaintiff Kimberlin so much as **allege** a coherent damage suffered by him as a result of the conduct of any party, including defendant the AOS blog – much less ongoing, immediate harm such as would justify expedited discovery. Thus he is not entitled to expedited discovery. As this Court explained in *U.S. Water Servs., Inc. v. Int'l Chemstar, Inc*., No. CIV.A. GLR-14-347, 2014 WL 3955470, at *5 (D. Md. Aug. 11, 2014), under Federal Rule of Civil Procedure 26(d)(1), "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except ... when authorized by these rules, by stipulation, or by court order," and Local Rule 104.4 prohibits discovery from commencing prior to the court entering a scheduling order. The Court then denied the plaintiff's motion for expedited discovery despite plaintiff's claim

> that it has lost four additional long-term customers since filing the Complaint, resulting in lost annual revenue of approximately $375,000. U.S. Water speculates, based on circumstantial evidence, that Defendants' actions caused the loss of these customers. It seeks limited expedited discovery for the purpose of

> corroborating that circumstantial evidence of wrongdoing, thereby providing a direct factual basis for a preliminary injunction. [Nonetheless,] U.S. Water's Motion will be denied.

The decision in *Water Services* reminded litigants of the general and longstanding rule in the federal courts: discovery comes after, not before, a scheduling conference, absent a showing of special need. Thus even where an actual financial loss was alleged, and all that was sought was corroboration for possibly ongoing harm by which plaintiff might show entitlement to a preliminary injunction, the request for expedited discovery was summarily denied.

Here, in contrast, there is **no** allegation of damage; **no** ongoing harm; **no** defendant; **no** showing. There is no legal basis for the relief sought – and especially for the unique relief sought by plaintiff, i.e., information concerning an anonymous party's right to continue to speak freely without the loss of anonymity. Plaintiff's motion should be denied on these grounds alone.

B. Plaintiff has failed to meet the legal standard required to justify the issuance of a court order requiring the revelation of anonymity.

Defendant AOS has previously argued that, even in the appropriate procedural context (which this is not), a motion seeking order that the identity of "Ace of Spades, the Person" be revealed must as a matter of law meet the standards required of any party asking to strip another of the constitution's presumptive grant of the cloak of anonymity, as set out in *Brodie*, supra. Plaintiff has manifestly not done that here. For one, prior to allowing such discovery, a court must both "require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech; [and] determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters . . ." *Brodie*, 407 Md. at 447. As demonstrated with painstaking particularity in the 12(b)(6) briefing, plaintiff has failed in grand fashion to meet either of these tests. This should resolve the matter entirely under the Brodie standard – although, as defendant AOS has argued

before, the proper test to apply here, given the constitutional issues, is the minimal pleading standard but one requiring at least a showing that plaintiff has some quantum of bona fide proof to support his claim, as in *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001).

Yet no less important is another consideration that was adopted in *Brodie*: "if all else is satisfied, balance the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity, prior to ordering disclosure." *Id*. at 456. These values must, as mentioned in the previous section, also be framed as against the general policy of the federal courts that discovery in aid of identifying the identities of parties (much less non-parties, which are not addressed in any cases known to defendant AOS) should be granted sparingly – and with an eye to the possibility of abuse. As this Court explained in *Malibu Media, LLC v. Doe*, No. PWG-13-365, 2014 WL 7188822 (D. Md. Dec. 16, 2014), pursuing expedited discovery "in bad faith or with the intent to harass a defendant . . . would run afoul of Fed.R.Civ.P. 26(g)," *citing*, Advisory Committee's Notes to the 1983 Amendments ("Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner . . . .") and *Mancia v. Mayflower Textile Servs. Co*., 253 F.R.D 354, 357-58 (D. Md. 2008). Thus, the Court continued, before a plaintiff may obtain an anonymous party's identity, "it not only must be acting in good faith, but convince the court of the need for such information and accede to any conditions or limitations on discovery that the court views as necessary." *Malibu Media* at *7. *See also*, *Mick Haig Productions v. Doe*, 687 F.3d 649, 652 & n.2 (5th Cir. 2012); *Patrick Collins v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012); *On The Cheap, LLC v. Does 1–5011*, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011).

And what of Brett Kimberlin's "good faith"? Forget for the moment that he has initiated this meritless litigation for the sole purpose of preventing lawful speech about his extensive terroristic crimes. Never mind that he has prosecuted this lawsuit to punish people for reporting on his prosecution of lawsuits. Push aside his serial record of misrepresentations to the Court in this and other matters about this and other matters and just take him at this word – for, as mentioned in the Statement of Facts, Brett Kimberlin's intentions here are straightforward: He wishes to use this Court's offices to "out" one of the contributing writers of the Ace of Spades blog, notwithstanding his failure to name that author as a party, and to punish him the way he punished Aaron Walker by getting him fired from his job. How? By asking a court to identify him as punishment for publishing words that offended Brett Kimberlin – in that case, words and pictures, i.e., "insulting depictions" of the Prophet Mohammed.

Taking the facts in the passage from the SAC in the Statement of Facts concerning defendant Walker's conduct when faced with Brett Kimberlin's imminent revelation of his identity at face value, Mr. Walker does not necessarily come across as a prince of the bar. There is no reason to credit Kimberlin's account other than for purposes of this motion, of course. But the question is not whether or not Aaron Walker should be mocking the Prophet Mohammed on a blog. It is not whether or not he was good at his job, or if he wrote his anti-Muslim blog on company time. It is not whether he should have been more courteous, or less contumacious, in expressing his alarm over the effect of Brett Kimberlin's outing of him in the Seth Allen case.

The question is whether it was Brett Kimberlin's decision to effectuate that discharge utilizing the levers of legal process in a litigation that, in fact, ended up going nowhere. The question before this Court, too, is whether – on the strength of the patently meritless claims in this case – the United States District Court for the District of Maryland will place at the disposal

of Brett Kimberlin its offices, its processes, and its prestige in order to effectuate not a legal or equitable end, but the base political, vindictive agenda of a terrorist who has been given every procedural benefit of the doubt in this matter. Defendant respectfully submits that, concerning this "procedural" matter, the time for the extension of that benefit should come to a dramatic and principled end at this point.

CONCLUSION

Based on the foregoing, this Court should deny plaintiff's motion to identify, on an expedited basis, non-party "Ace of Spades, the Person."

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Dated: January 5, 2015

EXHIBIT A

FBI Richmond
1970 E. Parham Road
Richmond, VA 23228

January 5, 2012

Virginia State Police
P.O. Box 27472
Richmond, VA 23261

Fairfax County Police Department-Mason Division
6507 Columbia Pike
Annandale, VA 22003

Manassas Police Department
9518 Fairview Ave
Manassas, VA 20110

Via Email and First Class Mail

Re: Police Protection of Aaron J. Walker, DOB [redacted]

Dear Law Enforcement Agencies:

I am writing to ask your agencies to provide protection to Aaron Justin Walker, who has expressed concern for his and his wife's physical safety from Muslim extremists. Mr. Walker is an attorney licensed by the Washington, DC bar, who lives at [redacted], Manassas, VA 20109. He is now working as corporate counsel at a health care provider by the name of [redacted], located at [redacted], Annandale, Virginia.

The reason Mr. Walker's life may be in danger is that he has been identified in a civil case in Maryland, Kimberlin v. Allen, 339254-V, Montgomery County Circuit Court, as the creator of a blog called www.EveryoneDrawMohammed.blogspot.com. Mr. Walker created and has published that blog for more than a year using the pseudonym "Aaron Worthing." He urged people to draw and submit pictures to him of the Muslim Prophet

Mohammed in various derogatory ways in order show support for Danish cartoonists who had a fatwa issued against them for drawing cartoons ridiculing Mohammed. Muslims who were offended by the depictions then made several violent attacks against the Danish cartoonists and publisher.

Mr. Walker has published hundreds of depictions on Mohammed on his EveryoneDrawMohammed blog, and he has indicated that he fears that he and wife will be subjected to harm now that he has been identified as the creator of the blog. His blog has been banned in Muslim countries, and the State Department has stated that his blog is harming the interests of the United States because it inflames anti-American sentiments. Therefore, there exists the very real probability that Mr. Walker could be subjected to serious harm or death now that his identity has been exposed. Moreover, because he lives in a townhouse with many adjacent neighbors, and works in a large building with hundreds of other people, any attack against him could result in collateral harm to others. In light of these concerns, I strongly urge your agencies to develop a plan to protect not only Mr. Walker and his wife from any such harm both at work and in their home, but also to protect those who live and work near them.

Sincerely,

Brett Kimberlin [redacted]