

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:)	
)	
)	
JEFFREY VERNON MERKEY,)	
)	
)	
Plaintiff,)	
)	
vs.)	Case No. 2:05-CV-521
)	
)	
PERENS, et al.,)	
)	
)	
Defendant.)	
)	
)	
_____)	

BEFORE THE HONORABLE SAMUEL ALBA

August 17, 2005

Motion for Expedited Discovery

Laura Robinson, CSR, RPR, CP
350 South Main Street
144 U.S. Courthouse
Salt Lake City, Utah 84101-2180
(801)328-4800

Appearances of Counsel:

For the Plaintiff:

Jeff V. Merkey
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Lindon, Utah 84042

1 Mr. Bradford. I have also had a chance to look at the
2 amended complaint on this case.

3 MR. MERKEY: Okay.

4 THE COURT: There was a motion filed by the Electronic
5 Frontier Foundation and American Civil Liberties Union to
6 file an amicus brief. I granted that yesterday allowing
7 them to file their brief.

8 MR. MERKEY: Okay.

9 THE COURT: And I have read the position that they
10 have taken relative to this. And that is their brief
11 concerning their opposition to your ex-parte motion.

12 Those are the materials that I have received. Is
13 there anything more?

14 MR. MERKEY: Yes, Your Honor. Based upon the brief
15 that was filed by the Electronic Frontier Foundation, they
16 -- if you condense and issue spot their general arguments
17 that they condense, they basically argue based on existing
18 case law that anonymous defendants on the internet or
19 anonymous speakers are entitled to a protection of the court
20 in terms of protecting their identity from invasive
21 discovery.

22 And they state, through all the references if you wade
23 through it, they feel that there is a sufficient case law to
24 justify that an individual would have to put on an
25 evidentiary hearing and achieve a standard similar to

1 achieving a preliminary injunction prior to being granted an
2 ex-parte order.

3 THE COURT: Not necessarily. I mean some of the cases
4 they cited address a preliminary injunction setting and that
5 is how they came up. But that is not necessarily what
6 they're arguing. I mean what they're arguing is, as I
7 understand it, that there are certain standards whenever
8 expedited discovery needs to come out, and there is a test
9 that needs to be met and that is what I need you to address
10 here today because I need to find out, you know, why you
11 need it. You make certain representations that you don't
12 know who these people are, on the one hand. On the other
13 hand, when I read the material, you identify who they are.
14 So you can't have it both ways. You either know who they
15 are or you don't know who they are. All right.

16 MR. MERKEY: All right. I know who some of them are,
17 Your Honor.

18 THE COURT: Well, that is the point. If you know who
19 some of them are, then you need to try and explore ways to
20 try to get them served. Now, my clerk also brought to me a
21 document that was just recently filed, I guess it was
22 yesterday, is that correct, that dismissal? Who does that
23 dismiss?

24 MR. MERKEY: Your Honor, the dismissal dismisses from
25 the case defendants Grendel, Pagansavage.com, John Sage,

1 Finchhaven.com, Matt Merkey, Brandon Suit and Merkey.net.
2 The only defendants that currently remain active in the
3 litigation are those that -- with the exception of
4 Mr. Petrofsky who has answered the suit is now an active
5 participant.

6 THE COURT: Now, wait a minute. Let's not go that
7 far, okay, because that is something else that I'm going to
8 address in a minute. Now Mr. Petrofsky filed something in
9 here, but that is not an answer to the complaint. He hasn't
10 been served with a complaint. You cannot assume that by
11 filing the document that that constitutes an answer. It
12 does not.

13 MR. MERKEY: Your Honor, Mr. --

14 THE COURT: It does not.

15 MR. MERKEY: Your Honor, Mr. Petrofsky --

16 THE COURT: It may place him under the jurisdiction of
17 the court if he tries to file some sort of a motion saying
18 that this court has no jurisdiction. The fact that he
19 entered an appearance for that purpose, all right, it is
20 only for that purpose. But he hasn't been served yet. You
21 haven't -- you have an address on the material that he sent
22 you. You need to serve him.

23 MR. MERKEY: I'll serve him, Your Honor.

24 THE COURT: All right. You make some reference in
25 your materials that the fact that he filed that that means

1 that he is in the lawsuit. That is not the way it works,
2 Mr. Merkey.

3 MR. MERKEY: Your Honor, Mr. Petrofsky has a copy of
4 the verified petition posted on his web site. He is making
5 public comments on it. He knows about the litigation. I am
6 happy to send him a waiver of service if he'll accept it.

7 THE COURT: If he doesn't --

8 MR. MERKEY: If he doesn't, I'll have him served.
9 I'll have him served if he doesn't.

10 THE COURT: All right.

11 MR. MERKEY: He had filed a motion opposing. I was
12 waiting to see if he wanted to file an answer. You know I
13 have been served in another matter with Mr. Mooney and I
14 properly approached the court and filed an answer. I have
15 not been served. And the reason I had not been served,
16 Mr. Mooney's attorney was basically using the litigation as
17 a lever to leverage settlement from the state. So I just
18 simply answered the litigation. But there is no question
19 that I'm participating in it now.

20 And in the case of defendants Causey and Petrofsky, I
21 don't need any expedited discovery on these defendants, Your
22 Honor. I know where they are and who they are and I'll get
23 them served.

24 In the case of Mrbuttle, I don't need expedited
25 discovery on this defendant either. This defendant is

1 actually a participant of Mr. Causey and I believe it is the
2 same person. So I'll just simply serve him. Mr. Causey
3 told me if I sent the sheriff to serve him the papers, he
4 wouldn't answer the door. That is fine. They can leave
5 them at the front door after they visit enough times.

6 In the case of members atul666, and Saltydog -- in the
7 case of SCOX members atul666 and Saltydogmn, I don't know
8 who these individuals are. I don't know where they reside
9 and I don't have an address of service. They're anonymous
10 internet accounts. They post messages on Yahoo. I'm more
11 than happy to go through these exhibits with you, Your
12 Honor, and reflect some of the statements that they have
13 made and some of the language they have --

14 THE COURT: I reviewed them, Mr. Merkey, and I
15 understand that. What I want to know is what efforts have
16 you made to try and identify who they are, where -- what --
17 you know, that is what is required for me to even address
18 whether I should give you an opportunity for expedited
19 discovery.

20 MR. MERKEY: Your Honor --

21 THE COURT: There has got to be a basis shown to me.

22 MR. MERKEY: I'll answer.

23 THE COURT: What efforts you have made.

24 MR. MERKEY: Okay, Your Honor, I'll answer your
25 question then and I'll actually present exhibits and show

1 you what efforts I have made. I have filed with the court
2 e-mails that I have sent to Pamela Jones at Groklaw
3 attempting to obtain her address of service. I have other
4 exhibits here that I can enter into the record. I have made
5 not less than three requests to her to return me an address
6 of service of where she can be located. She has not
7 responded to these events. In the case of --

8 THE COURT: Hang on for a minute. What e-mails are we
9 talking about? Where did you send them? When did you send
10 them? What other efforts have you made as it relates to
11 that, Mr. Merkey?

12 MR. MERKEY: I was going to answer your first question
13 first, Your Honor. SCOX. If I may go down the list of
14 defendants.

15 THE COURT: Please.

16 MR. MERKEY: Okay. In the case of SCOX, I have
17 contacted Yahoo's legal department, their civil subpoena
18 division, and requested information on the identities of
19 these individuals. I have also made requests for the -- for
20 the objectionable content to be taken down off the website.
21 To date, what Yahoo has done is they have removed the
22 financial information from the eBay data base that was
23 stolen by these individuals and taken those postings off the
24 site.

25 However, in their responses to me, which were

1 telephonically, they have responded by stating they will not
2 reveal the identity of these individuals or produce any
3 discovery meaning any content or e-mails or postings on
4 their site unless they are served with a subpoena from this
5 court. And they have stated that they feel these
6 individuals have the right to privacy and the right to
7 protect their privacy.

8 So in the case of Yahoo, their legal department has
9 specifically told me that and asked me to seek discovery on
10 them through civil subpoena process in order to determine
11 their identities.

12 THE COURT: Was Yahoo served with this motion? This
13 is the ex-parte motion, is that correct?

14 MR. MERKEY: They were served with the motion, Your
15 Honor. I did fax them a copy and they were made aware of it
16 and the case of Ms. Jones --

17 (Whereupon, a criminal case was heard.)

18 THE COURT: Let's go back on the Merkey matter.

19 Mr. Merkey, here is the test that I'm laboring under,
20 okay.

21 MR. MERKEY: Okay.

22 THE COURT: Part of what I had to read and what I read
23 in preparation for the hearing today was the Columbia
24 Insurance Company versus seescandy.com case out of the
25 Northern District of California.

1 The test that they set forth there is this: One, the
2 plaintiff is required to identify the missing party with
3 sufficient specificity that the court could determine
4 whether the defendant could be sued in federal court. Two,
5 make a good faith effort to communicate with the anonymous
6 defendants and to provide them with notice of the suit, thus
7 assuring them an opportunity to defend their anonymity. And
8 three, demonstrate that he had viable claims against the
9 defendants. That is the test that needs to be applied here
10 and that is what I want you to address for me this morning.

11 MR. MERKEY: Okay. You don't want me to address the
12 issues of irreparable harm?

13 THE COURT: Irreparable harm in a context of a
14 preliminary injunction. This is not a preliminary
15 injunction. This is an actual lawsuit, Mr. Merkey, okay?
16 That is a separate test altogether. That is in a different
17 context.

18 MR. MERKEY: I'm aware of that, Your Honor, but that
19 is one of the tests that was labeled in this legal brief.

20 THE COURT: Go ahead.

21 MR. MERKEY: Okay. Going down the list, Your Honor, I
22 have contacted both atul666 and Saltydogmn and, in fact, I
23 have had e-mail dialogues with them negotiating settlement
24 of their claims from the suit. I did not bring those
25 e-mails with me today. If we need to continue the hearing

1 in order for me to present that evidence to you I will.

2 THE COURT: That is part of the evidence that needs to
3 be presented. And it needs to be in the form of an
4 affidavit with appended documents, if you get copies of the
5 e-mails, in order for me to make some sort of a decision on
6 this. Absent that, I can't be, you know, laboring in a
7 vacuum.

8 MR. MERKEY: Well, Your Honor, since you have set the
9 standard on which you will now evaluate this motion, which
10 is very informative and helpful, I would at this point like
11 to move to continue the hearing to assemble the exhibits and
12 then return to the court with those exhibits and with those
13 arguments and make them.

14 THE COURT: Okay. I'll give you that opportunity,
15 Mr. Merkey.

16 MR. MERKEY: And I also --

17 THE COURT: How much time do you need?

18 MR. MERKEY: One day.

19 THE COURT: Well, um, unfortunately I'm on criminal
20 duty and you see what happens in this trying to address
21 different things.

22 MR. MERKEY: As Your Honor knows, I have testified
23 here before.

24 THE COURT: I understand and that hearing took
25 three hours or however long it took.

1 MR. MERKEY: I remember it. In the case of most of
2 the defendants, Your Honor, Mr. Petrofsky, Mr. Causey they
3 will be served today.

4 THE COURT: All right.

5 MR. MERKEY: By waiver. If they reject the waiver
6 I'll send it out to the sheriff. In the case of --

7 THE COURT: The ones that concern me are the anonymous
8 ones. And I need the information that relates to those.
9 All right? And the others, you need to express to me by way
10 of affidavit what efforts have been made.

11 MR. MERKEY: I will.

12 THE COURT: To try and contact those individuals
13 because, you know, it isn't just a matter of course that
14 these motions are granted, but I need to be acting under
15 some sort of legitimate basis before I can rule one way or
16 the other.

17 MR. MERKEY: Well --

18 THE COURT: I'll give you an opportunity to do that.

19 MR. MERKEY: Your Honor, by way --

20 THE COURT: Hang on for a second, Mr. Merkey.

21 MR. MERKEY: Yes, Your Honor.

22 THE COURT: Look at the calendar for the week of the
23 29th.

24 THE CLERK: Okay. Monday afternoon or --

25 THE COURT: What is Thursday of that week? Actually

1 the 1st.

2 THE CLERK: It looks like the morning is open until
3 11.

4 THE COURT: Okay. Let's continue this matter until
5 September 1 at 9:00.

6 MR. MERKEY: Your Honor, I'm going to be out of town
7 on September 1. Can we do it any sooner? You know, if
8 necessary, Your Honor, I'm not sure we need to have a
9 hearing if Your Honor just simply wishes to order that I
10 submit the affidavits with the evidence, Your Honor can
11 simply rule on it without a hearing.

12 THE COURT: We can do that. Get the affidavits to me
13 by no later than the 23rd of this month. Get them to me and
14 then I can rule on those.

15 MR. MERKEY: Your Honor, just as a -- just to -- just
16 to inform the court, one of the terminated defendants,
17 Grendel Pagansavage.com actually retained an attorney to
18 negotiate this stipulation which is sealed and confidential.
19 But during the stipulation, I protected the individual's
20 anonymity. I still to this day do not know who this person
21 is. But their attorney represented them and we successfully
22 settled them out of the litigation.

23 So, you know, the purpose of having protective orders
24 to protect people's confidential information is well
25 established. In terms of protecting the confidentiality and

1 the anonymity of these people I don't think they have a
2 claim to claim that they be anonymous to Your Honor. I
3 think Your Honor has a right to know who they are. If
4 they're part of the suit they can be shown as that.

5 And in the event we do need to bring them here, I
6 think there are provisions that we can put in place to
7 protect their anonymity. I have already done so with one of
8 the defendants.

9 THE COURT: Submit the material to me by Tuesday next,
10 the 23rd, and then I'll review it. I'll make a
11 determination on whether I need any further argument.

12 MR. MERKEY: And Your Honor, I am -- okay. And if you
13 do, Your Honor, I will be out of town until the 5th of
14 September.

15 THE COURT: Okay. So we'll keep that in mind. We'll
16 note it and keep it in mind.

17 MR. MERKEY: Okay. Thank you very much, Your Honor.

18 THE COURT: Thank you. We'll be in recess on this
19 matter.

20 MR. MERKEY: Okay.

21 (Whereupon, the hearing concluded.)
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23
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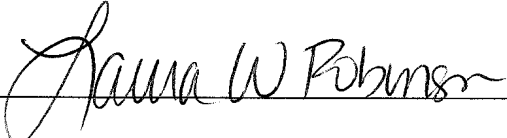
1 STATE OF UTAH)
2)ss
3 COUNTY OF SALT LAKE)
4

5 I, Laura W. Robinson, Certified Shorthand
6 Reporter, Registered Professional Reporter and Notary Public
7 within and for the County of Salt Lake, State of Utah, do
8 hereby certify:

9 That the foregoing proceedings were taken before
10 me at the time and place set forth herein and were taken
11 down by me in shorthand and thereafter transcribed into
12 typewriting under my direction and supervision;

13 That the foregoing pages contain a true and
14 correct transcription of my said shorthand notes so taken.

15 In witness whereof I have subscribed my name and
16 affixed my seal this 1st day of September, 2005.

17
18 
19 _____
20 Laura W. Robinson, CSR, RPR, CP
21 and Notary Public

22 MY COMMISSION EXPIRES:
23 December 1, 2008
24
25