

PRK ENTERPRISES, INC. AND KLEIN INVESTMENTS, INC.	§	IN THE DISTRICT COURT OF
	§	
	§	
VS.	§	JEFFERSON COUNTY, TEXAS
	§	
GOOGLE, INC., BLOGGER.COM,	§	
<a href="http://WWW.OPERATIONKLEINWATCH.BLOGSPOT.COM">WWW.OPERATIONKLEINWATCH.BLOGSPOT.COM</a>	§	
AND <a href="http://WWW.SAMTHEEAGLEUSA.BLOGSPOT.COM">WWW.SAMTHEEAGLEUSA.BLOGSPOT.COM</a>	§	
	§	172 <sup>ND</sup> JUDICIAL DISTRICT

**PETITIONER’S RESPONSE TO RESPONDENTS’ MOTION TO QUASH  
SUBPOENA, AND MOTION TO COMPEL**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Petitioner, PRK Enterprises, et al., who hereby seeks enforcement of the subpoena issued on September 29, 2009 to Respondent, Google.com, for the records related to this Petition. The subpoena Petitioner issued to Google.com seeks the identity of the anonymous blogger publishing <http://samtheeagleusa.blogspot.com/>, <http://operationkleinwatch.blogspot.com/>, and <http://notthisonetoojacques.blogspot.com/>. Google.com notified Movants, who have asked the Court to quash the subpoena and any others on the grounds that the discovery sought would be a violation of their rights under the First Amendment to the United States Constitution and Article I, Section 8, of the Texas Constitution.

In support of this motion, the Petitioner states as follows:

**I. Limitation on the freedom of speech**

While the First Amendment protects anonymous speech (*See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999)), there are limitations on the protections allowed by the First Amendment.

The First Amendment is not intended to protect unconditionally all forms of expression. Particularly, libel and defamation are not constitutionally protected. *See Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 96 L.Ed. 919 (1952) (libelous statements are outside the realm of constitutionally protected speech). Forms of expression, such as the right to speak anonymously, is therefore not absolute. “Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.” *In re Subpoena Duces Tecum to America On-Line, Inc.*, No. 40570, 2000 WL1210372, at \*5 (Va.Cir.Ct. Jan. 31, 2000). The courts must balance the right to communicate anonymously with the right to hold accountable those who engage in communications that are not protected by the First Amendment. Thus, although the right to speak anonymously “would be of little practical value if ... there was no concomitant right to remain anonymous” in the face of a civil action subpoena, a civil litigant has an interest in asserting his or her rights through the litigation process against an anonymous tortfeasor. *Polito v.*

*AOL time Warner, Inc.*, No. 03CV3218, 2004 WL 3768897, 2004 Pa. Dist. & Cnty. Dec. LEXIS 340 (Pa. D. & C. Jan. 28, 2004). In other words, an anonymous speaker who freely defames an individual will be held responsible by facing civil responsibility for their acts. *McMann v. Doe*, 460 F.Supp.2d 259, 263 (D.Mass.2006).

## **II. The Standard to Follow – Quantum of Proof Required**

### **A. Just a Mere Allegation of Libel is Sufficient**

There are no direct cases on point in Texas; however, this is not the first court to be confronted with this problem. There have been different formulations that have decided this issue, ranging from placing an extremely light burden (indeed, virtually no burden at all) on the plaintiff to tender proof of its allegations that would survive a summary judgment, or even more stringent requirements. One case holds that the mere allegation of libel is sufficient. *Alvis Coatings, Inc. v. John Does One Through Ten*, No. 3:04CV374-H, 2004 WL 2904405, 2004 U.S. Dist. LEXIS 30099 (W.D.N.C. Dec.2, 2004). Similarly, other cases have articulated weak requirements that require no more than allegations made in good faith, with some evidence to support the allegations. *See Polito*, 2004 Pa. Dist & Cnty. Dec. LEXIS 340. Petitioner urges the Court to adopt this well-articulated formulation, because the First Amendment does not protect individuals from freely defaming others, while concealing their identities.

Mr. Klein is the victim of anonymous malicious and continuous defamation, which as a matter of law is not protected by the First Amendment. The blogger's position is unwarranted by the law and their identities should be revealed in order for Mr. Klein to pursue a defamation suit against them. The websites at issue contain false information on legal proceedings that do not involve either Mr. Klein individually or the Petitioners; falsely represent that judgments have been taken against the Petitioners and/or Mr. Klein individually; falsely identify a bankruptcy proceeding; identify lawsuits that do not involve Petitioners and/or Mr. Klein individually; and are rife with other defamatory contents.

A statement is defamatory per se if it unambiguously and falsely imputes a crime or criminal conduct to the complaining party. *Fiber Systems Intern., v. Roehrs*, 470 F.3d 1150 (5th Cir. 2006); *Cecil v. Frost*, 14 S.W.3d 414 (Tex.App.Houston [14th Dist.] 2000). The anonymous blogger has maliciously published a photograph that he altered to make it appear that Mr. Klein has engaged in sexual intercourse with an animal. These false accusations are completely atrocious and constitutes defamation per se. Mr. Klein's friends, family, clients, prospective clients, the community and anyone who views the anonymous bloggers' publications, have been led to believe that Mr. Klein engages in such criminal activities. This is not the type of speech intended to be protected by the Framers of the Constitution. The imputation of a crime, such as

engaging in sexual intercourse with an animal, is sufficient evidence that is necessary to pierce the First Amendment's shield.

## **B. Sufficient Evidence to Defeat a Summary Judgment Motion**

In the alternative, if this Court does not adopt the articulated requirements as set forth above, Petitioner prays for this Court to adopt the formulations set out in *Doe v. Cahill*, 884 A.2d 451 (Del.2005). The Court in *Cahill* described the test in these words: "Before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process, he must support his defamation claim with facts sufficient to defeat a summary judgment motion." 884 A.2d at 460. This standard does not require a plaintiff to prove its case as a matter of undisputed fact, but instead to produce evidence sufficient to establish the plaintiff's *prima facie* case:

[T]o obtain discovery of an anonymous defendant's identity under the summary judgment standard, a defamation plaintiff must submit sufficient evidence to establish a *prima facie* case for each essential of the claim in question. In other words, the defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within plaintiff's control*. *Id.* at 465 (quotations and citations omitted, emphasis in original). The emphasized "within plaintiff's control" recognize that a plaintiff at an early stage of the litigation may not possess information about the role played by particular defendant or other evidence that normally would be obtained through discovery. But a plaintiff must produce such evidence as it has to establish a *prima facie* case of its claims asserted in its complaint. *Best Western Int'l, Inc. v. John DOE, et al.*, 2006 WL 2091695, at \*5; *Cahill* at 465.

The purpose of the summary judgment procedure is to summarily terminate litigation when it appears that only a question of law is involved and there is no genuine issue of material fact. *See Gaines v. Hamman*, 163 Tex. 618, 358 S.W.2d 557, 563 (Tex.1962). A movant for summary judgment need only demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c); *Nixon v. Mr. Property Management Co., Inc.*, 690 S.W.2d 546, 548 (Tex.1985). Once this showing is made, the burden shifts and the opponent must do more than simply show that there is some metaphysical doubt as to some material facts. *See Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex.App.-San Antonio 1998, pet. denied). Opponents to a properly established motion for summary judgment may not rest upon their denial in their pleadings, nor may they rest upon assertions unsupported by facts in evidence. *See City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex.1979). *Fontenot v. Columbia Health Care Corp.* 1999 WL 652007, 1 (Tex.App.-Beaumont) (Tex.App.-Beaumont,1999).

To establish a defamation claim against a public figure, a plaintiff must demonstrate: (1) the defendant published a factual statement; (2) that was capable of defamatory meaning; (3) concerning the plaintiff; and (4) while acting with actual malice if the plaintiff is a public figure. *See WFAA-TV, Inc. v. McLemore*,

978 S.W.2d 568, 571 (Tex.1998); *Provencio v. Paradigm Media, Inc.* 44 S.W.3d 677, 680-81 (Tex.App.-El Paso 2001, no pet.).

The facts set forth above clearly demonstrate that Mr. Klein, even if he is considered a public figure, can demonstrate actual malice on the part of the bloggers. The representation made that he is engaging in sexual acts with animals, the blogger's false court judgments, false bankruptcies, false litigation procedures; cutting and pasting his voice to create totally false statements that are ascribed to him; and all the other hateful and vicious comments, clearly demonstrate actual malice.

In short, the Petitioners have demonstrated clearly that the speech at issue is not protected by the United States Constitution First Amendment. It is pure, filthy defamation, and therefore Petitioners request that this Court overrule Respondent's Motion to Quash the Subpoena, and direct Google to produce all responsive information sought therein.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel of record via facsimile, on this \_\_\_\_ day of December, 2009.

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**Via facsimile (214) 939-2090**

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**Via CM/RRR**

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JOHN S. MORGAN