

# **SOCIAL MEDIA & DISCOVERY IN WORKERS' COMPENSATION**

Presented By

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## VIII. ARTICLE I, SECTION 1 OF THE CALIFORNIA CONSTITUTION

A state constitutional privacy guarantee was added to the California Constitution by an initiative passed in the 1972 general election. In construing constitutional provisions added by initiative, California courts frequently refer to the ballot arguments in favor of such initiatives as an indication of “legislative intent.” The following pages 11, 26, 27 and 28 from **PROPOSED AMENDMENTS TO CONSTITUTION – PROPOSITIONS AND PROPOSED LAWS TOGETHER WITH ARGUMENTS – GENERAL ELECTION, TUESDAY, NOVEMBER 7, 1972** are all of the arguments regarding the addition of an inalienable right of privacy to the rights guaranteed under the California Constitution.

<p><b>RIGHT OF PRIVACY.</b> Legislative Constitutional Amendment. Adds right of privacy to</p> <p><b>11</b> inalienable rights of people. Financial impact: none</p>	YES	
	NO	
<p>(This amendment proposed by Assembly Constitutional Amendment No. 51, 1972 Regular Session, expressly amends an existing section of the Constitution; therefore, <b>EXISTING PROVISIONS</b> proposed to be <b>DELETED</b> are printed in <del>STRIKEOUT TYPE</del> and <b>NEW PROVISIONS</b> proposed to be <b>INSERTED</b> are printed in <b>BOLDFACE TYPE</b>)</p>	<p><b>PROPOSED AMENDMENT ARTICLE I SECTION 1.</b> All men people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, <del>and</del> happiness, <b>and privacy.</b></p>	

<b>11</b>	<b>RIGHT OF PRIVACY.</b> Legislative Constitutional Amendment. Adds right of privacy to inalienable rights of people. Financial impact: None	YES	
		NO	

(For Full Text Measure, See Page 11, Part II)

<p><b>General Analysis by the Legislative Counsel</b></p> <p>A “Yes” vote on this legislative constitutional amendment is a vote, to amend the Constitution to include the right of privacy among the inalienable rights set forth therein.</p> <p>A “No” vote is a vote against specifying the right of privacy as an inalienable right.</p> <p>For further details, see below.</p> <p style="text-align: center;">-----</p> <p style="text-align: center;"><b>Detailed Analysis by the Legislative Counsel</b></p> <p>The Constitution now provides that all men are by nature free and independent, and have certain inalienable rights, among which</p> <p style="text-align: center;">(Continued in column 2)</p>	<p><b>Cost Analysis by the Legislative Analyst</b></p> <p>The right to privacy, which this initiative adds to other existing enumerated constitutional rights, does not involve any significant fiscal considerations.</p> <hr/> <p style="text-align: center;">(Continued from column 1)</p> <p>are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.</p> <p>This measure if adopted, would revise the language of this section to list the right of privacy as one of the inalienable rights. It would also make a technical nonsubstantive change in that the reference to “men” in the section would be changed to “people”</p>
<p><b>Argument in Favor of Proposition 11</b></p> <p>The proliferation of government snooping and data collecting is threatening to destroy our traditional freedom. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes.</p>	<p>it possible to create “cradle-to-grave” profiles on every American.</p> <p><u>At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.</u></p>

206 Cal.App.4th 854  
Court of Appeal, Third District, California.

JUROR NUMBER ONE, Petitioner,

v.

The SUPERIOR COURT of

Sacramento County, Respondent;

Demetrius Royster et al., Real Parties in Interest.

No. C067309. | May 31, 2012.

| Review Denied Aug. 22, 2012.

### Synopsis

**Background:** Following conviction of criminal defendants, the Superior Court, Sacramento County, No. 08F09791, [Michael P. Kenny, J.](#), held a hearing on juror misconduct and ordered a juror to execute a consent form pursuant to the Stored Communications Act (SCA) authorizing a social networking website operator to release to the court for in camera review all items the juror posted during the trial. Juror petitioned for writ of prohibition. The Court of Appeal denied petition. The Supreme Court granted review and transferred the matter back to the Court of Appeal for further consideration.

**Holdings:** The Court of Appeal, [Hull, J.](#), held that:

[1] SCA did not preclude trial court from compelling juror to consent to website operator's disclosure of juror's postings, and

[2] statutes governing disclosure of jurors' personal identifying information did not preclude trial court from compelling juror to consent to disclosure of postings.

Petition denied.

[Mauro, J.](#), filed concurring opinion.

West Headnotes (16)

### [1] Searches and Seizures

 Abandoned, surrendered, or disclaimed items

### Telecommunications

 Carrier's cooperation; pen registers and tracing

Fourth Amendment provides no protection for information voluntarily disclosed to a third party, such as an Internet Service Provider (ISP). [U.S.C.A. Const.Amend. 4.](#)

### [2] Telecommunications

 Carrier's cooperation; pen registers and tracing

Only copies of electronic communications held by the electronic communication service (ECS) pending initial delivery to the addressee or held thereafter for backup purposes are protected by the Stored Communications Act (SCA). [18 U.S.C.A. §§ 2702\(a\)\(1\), 2510\(17\).](#)

### [3] Telecommunications

 Carrier's cooperation; pen registers and tracing

If an electronic communication service (ECS) is authorized to access its customer's information for purposes other than storage or computer processing, such as to provide targeted advertising, Stored Communications Act (SCA) protection may be lost. [18 U.S.C.A. §§ 2702\(a\)\(1\), 2510\(17\).](#)

### [4] Telecommunications

 Carrier's cooperation; pen registers and tracing

The Stored Communications Act's (SCA) definition of an "electronic communication service" (ECS) provider was intended to reach a private Bulletin Board System (BBS). [18 U.S.C.A. § 2510\(15\).](#)

### [5] Telecommunications

 Carrier's cooperation; pen registers and tracing

A party does not forfeit Stored Communications Act (SCA) protection by making his

communications available to a closed group, i.e., a private bulletin board. 18 U.S.C.A. § 2701 et seq.

[6] **Telecommunications**

🔑 Carrier's cooperation; pen registers and tracing

Even assuming juror's postings on social networking website were protected by the Stored Communications Act (SCA), the SCA did not preclude trial court from compelling juror to consent to website operator's disclosure of juror's postings for juror misconduct hearing, since the compulsion was on juror himself rather than the website operator. 18 U.S.C.A. § 2701 et seq.

1 Cases that cite this headnote

[7] **Prohibition**

🔑 Scope of inquiry and powers of court

Juror's contention in a petition for writ of prohibition, that trial court's order compelling him to disclose his postings on social networking website for a hearing on juror misconduct violated the Fourth Amendment, was forfeited, where juror provided no argument or legal support. U.S.C.A. Const.Amend. 4.

[8] **Criminal Law**

🔑 Points and authorities

Where a point is raised in an appellate brief without argument or legal support, it is deemed to be without foundation and requires no discussion by the reviewing court.

[9] **Prohibition**

🔑 Scope of inquiry and powers of court

Juror's contention in a petition for writ of prohibition, that trial court's order compelling him to disclose his postings on social networking website for a hearing on juror misconduct violated his Fifth Amendment privilege against self-incrimination, was, at best, speculative, since the trial court would be able to consider and resolve juror's rights under the Fifth Amendment

at such time as the rights came into play as the litigation proceeded. U.S.C.A. Const.Amend. 5.

[10] **Criminal Law**

🔑 Objections and disposition thereof

**Jury**

🔑 Designation and identity of jurors

The statutes governing disclosure of jurors' personal identifying information did not preclude the trial court from applying its inherent power to control the proceedings to compel a juror in a criminal case to disclose his postings on social networking website for a hearing on juror misconduct after being informed that the juror made a posting about the evidence during trial, because the defendants' right to a fair trial was implicated, even though juror testified that he posted nothing substantive and the trial court concluded that he was "credible," where juror's testimony about how much he posted was equivocal, and the issue of whether juror's misconduct was prejudicial could not be determined without looking at his postings. U.S.C.A. Const.Amend. 6; West's Ann.Cal.C.C.P. §§ 206, 237.

*See 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 15; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 49.*

[11] **Criminal Law**

🔑 Role and Obligations of Judge

A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice.

[12] **Criminal Law**

🔑 Objections and disposition thereof

When a trial court is aware of possible juror misconduct, the court must make whatever inquiry is reasonably necessary to resolve the matter.

**[13] Telecommunications** [Computer communications](#)

To the extent other users posted to juror's "wall" on social networking website, a space on juror's profile page that allowed friends to post messages for juror to see, the other users gave up any Stored Communications Act (SCA) privacy right in those posts as to the juror. [18 U.S.C.A. § 2701 et seq.](#)

**[14] Criminal Law** [Objections and disposition thereof](#)

Just as the court may examine jurors under oath, it may also examine other evidence of juror misconduct.

**[15] Telecommunications** [Computer communications](#)

The Stored Communications Act (SCA) protects against disclosure by third parties, not the posting party. [18 U.S.C.A. § 2701 et seq.](#)

**[16] Prohibition** [Scope of inquiry and powers of court](#)

Juror's contention in a petition for writ of prohibition, that trial court's order compelling him to disclose his postings on social networking website for a hearing on juror misconduct violated the Fifth Amendment, was forfeited, where juror provided no argument or legal support. [U.S.C.A. Const.Amend. 5.](#)

**Attorneys and Law Firms**

**\*\*153** The Rosenfeld Law Firm and [Kenneth Rosenfeld](#), Sacramento, for Petitioner.

No appearance for Respondent.

[John K. Cotter](#), [Michael Wise](#), and [Keith J. Staten](#), Sacramento, for Real Parties in Interest.

**Opinion**

HULL, J.

**\*857** Following the conviction of real parties in interest for various offenses stemming from an assault, respondent court learned that one of the trial jurors, fictitiously-named Juror Number One, had posted one or more items on his Facebook account concerning the trial while it was in progress, in violation of an admonition by the court. The court conducted a hearing at which Juror Number One and several other jurors were examined about this and other claimed instances of misconduct. Following the hearing, the court entered an order requiring Juror Number One to execute a consent form **\*858** pursuant to the Stored Communications Act (SCA) ([18 U.S.C. § 2701 et seq.](#)) authorizing Facebook to release to the court for in camera review all items he posted during the trial.

Juror Number One filed a petition for writ of prohibition with this court seeking to bar respondent court from enforcing its order. He contends the order violates the SCA, the Fourth and Fifth Amendments to the United States Constitution, and his state and federal privacy rights.

We conclude the SCA is not applicable to the order at issue here and Juror Number One has otherwise failed to establish a violation of constitutional or privacy rights. We therefore deny the petition.

**FACTS AND PROCEEDINGS**

Juror Number One was a juror in the trial of *People v. Christian et al.*, Sacramento County Superior Court case No. 08F09791 (the criminal trial) in which the defendants, real parties in interest in this writ proceeding, were convicted of various offenses stemming from the beating of a young man on Halloween night in 2008.

**\*\*154** The criminal trial commenced in April 2010, and the jury reached its verdicts approximately two months later, on June 25. On August 10, 2010, one of the trial jurors (Juror No. 5) submitted a declaration in which she stated, among other things, that, on or about May 18, 2010, Juror Number One had "posted comments about the evidence as it was being presented during the trial on his 'Facebook Wall,' inviting his 'friends' who have access to his 'Facebook' page to respond."

On September 17, 2010, respondent court conducted a hearing on this and other allegations of juror misconduct. Four jurors were examined, including Juror Number One and Juror No. 5. Juror No. 5 testified that she did not learn about the Facebook postings until after the trial. Juror Number One had invited her to be a Facebook “friend” and this gave her access to his postings on Facebook, including those during the trial. This is when she saw the post mentioned in her declaration. According to Juror No. 5, one person had responded to the post that he or she liked what Juror Number One had said.

Juror Number One admitted that he posted items on his Facebook account about the trial while it was in progress. However, he indicated those posts contained nothing about the case or the evidence but were merely indications that he was still on jury duty. Juror Number One acknowledged that on one occasion he posted that the case had been boring that day and he almost fell asleep. According to Juror Number One, this was the day they were going \*859 through phone records and he posted that he was listening to piles and piles of “Metro PCS records.” Juror Number One testified that he posted something every other day on his Facebook account and later tried to delete some of his posts. He denied reading any responses he received from his “ friends” to these postings.

The other two jurors who were examined by the court had nothing to contribute on this issue.

At the conclusion of the hearing, respondent court indicated there had been clear misconduct by Juror Number One, but the degree of such misconduct is still at issue.

On October 7, 2010, counsel for real party in interest Royster issued a subpoena to Facebook to produce “[a]ll postings for [Juror Number One] dated 3/01/2010 to 10/06/2010.” Attached was an order from respondent court compelling Facebook to “release any and all information, including postings and comments for Facebook member [Juror Number One].”

Facebook moved to quash the subpoena, asserting disclosure of the requested information would violate the SCA. In its memorandum in support of the motion to quash, Facebook asserted the requested information can be obtained from Juror Number One himself inasmuch as he “owns and has access to his own Facebook account, and can disclose his Facebook postings without limitation.”

On January 28, 2011, counsel for real party in interest Royster issued a subpoena to Juror Number One to produce “[a]ny and all documents provided to [him] by Facebook” and “[a]ny and all posts, comments, emails or other electronic communication sent or received via Facebook during the time [he was] a juror in the above-referenced matter.”

On February 3, 2011, Juror Number One moved to quash the subpoena.

The following day, respondent court granted Juror Number One's motion to quash the subpoena based on overbreadth. However, the court also issued an order requiring Juror Number One to turn over \*\*155 to the court for in camera review all of his Facebook postings made during trial.

Juror Number One filed a petition with this court seeking to bar respondent court from enforcing its February 4, 2011, order. We summarily denied the petition. However, on March 30, 2011, the California Supreme Court granted review and transferred the matter back to us for further consideration. The high court also issued a temporary stay of respondent court's order.

\*860 On April 5, 2011, we vacated our prior order denying the petition, issued an order to show cause to respondent court and ordered that the temporary stay remain in effect.

## DISCUSSION

[1] Congress passed the SCA as part of the Electronic Communications Privacy Act of 1986 (Pub.L. No. 99-508 (Oct. 21, 1986) 100 Stat. 1860 et seq.) to fill a gap in the protections afforded by the Fourth Amendment. As one commentator observed: “The Fourth Amendment offers strong privacy protections for our homes in the physical world. Absent special circumstances, the government must first obtain a search warrant based on probable cause before searching a home for evidence of crime. When we use a computer network such as the Internet, however, a user does not have a physical ‘home,’ nor really any private space at all. Instead, a user typically has a network account consisting of a block of computer storage that is owned by a network service provider, such as America Online or Comcast. Although a user may think of that storage space as a ‘virtual home,’ in fact that ‘home’ is really just a block of ones and zeroes stored somewhere on somebody else's computer. This means that

when we use the Internet, we communicate with and through that remote computer to contact other computers. Our most private information ends up being sent to private third parties and held far away on remote network servers.” (Kerr, *A User's Guide to the Stored Communications Act—And a Legislator's Guide to Amending It* (2004) 72 Geo. Wash. L.Rev. 1208, 1209–1210, fns. omitted (Kerr).) The Fourth Amendment provides no protection for information voluntarily disclosed to a third party, such as an Internet Service Provider (ISP). (See *Smith v. Maryland* (1979) 442 U.S. 735, 743–744, 99 S.Ct. 2577, 2581–2582, 61 L.Ed.2d 220, 229; *United States v. Miller* (1976) 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71, 79.)

To remedy this situation, the SCA creates a set of Fourth Amendment-like protections that limit both the government's ability to compel ISP's to disclose customer information and the ISP's ability to voluntarily disclose it. (Kerr, *supra*, at pp. 1212–1213.) “The [SCA] reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility. Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents, [citation], the [SCA] protects users whose electronic communications are in electronic storage with an ISP or other electronic communications facility.” (*Theofel v. Farey–Jones* (9th Cir.2003) 359 F.3d 1066, 1072–1073.)

The SCA addresses two classes of service providers, those providing electronic communication service (ECS) and those providing remote computing service (RCS). An ECS is “any service which provides to users thereof \*861 the ability to send or receive wire or electronic communications.” (18 U.S.C. § 2510(15); see 18 U.S.C. § 2711(1).) An RCS provides “computer storage or processing services by means of an electronic communications \*\*156 system.” (18 U.S.C. § 2711(2).) Subject to certain conditions and exceptions, the SCA prohibits ECS's from knowingly divulging to any person or entity the contents of a communication while in “electronic storage” (18 U.S.C. § 2702(a)(1)) and prohibits RCS's from knowingly divulging the contents of any communication “which is carried or maintained on that service” (*id.* at § 2702(a)(2)). One exception is recognized where the customer or subscriber has given consent to the disclosure. (*id.* at § 2702(b)(3).)

Any analysis of the SCA must be informed by the state of the technology that existed when the SCA was enacted.

(Robison, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act* (2010) 98 Geo. L.J. 1195, 1204 (Robison).) “[C]omputer networking was in its infancy in 1986. Specifically, at the time Congress passed the SCA in the mid–1980s, ‘personal users [had begun] subscribing to self-contained networks, such as Prodigy, CompuServe, and America Online,’ and ‘typically paid based on the amount of time they were connected to the network; unlike today's Internet users, few could afford to spend hours casually exploring the provider's network. After connecting to the network via a modem, users could download or send e-mail, post messages on a “bulletin board” service, or access information.’ [Citation.] Notably, the SCA was enacted before the advent of the World Wide Web in 1990 and before the introduction of the web browser in 1994.” (*Crispin v. Christian Audigier, Inc.* (C.D.Cal.2010) 717 F.Supp.2d 965, 972, fn. 15 (*Crispin*), quoting from Robison, *supra*, at p. 1198.) In light of rapid changes in computing technology since enactment of the SCA, “[c]ourts have struggled to analyze problems involving modern technology within the confines of this statutory framework, often with unsatisfactory results.” (*Konop v. Hawaiian Airlines, Inc.* (9th Cir.2002) 302 F.3d 868, 874.)

[2] Under the SCA, an ECS is prohibited from divulging “the contents of a communication while in electronic storage by that service.” (18 U.S.C. § 2702(a)(1).) However, the term “electronic storage” has a limited definition under the SCA. It covers “(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.” (*Id.* § 2510(17).) Thus, only copies of electronic communications held by the ECS pending initial delivery to the addressee or held thereafter for backup purposes are protected. (*Theofel v. Farey–Jones, supra*, 359 F.3d at pp. 1075–1076.)

[3] An RCS is prohibited from divulging the content of any electronic transmission that is carried or maintained on its service “solely for the \*862 purpose of providing storage or computer processing services to [the] subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing[.]” (18 U.S.C. § 2702(a)(2)(B).) Thus, if the service *is* authorized to access the customer's information for other purposes, such as to provide targeted advertising, SCA protection may be lost. (See Robison, *supra*, at pp. 1212–1214.)

[4] In addition to protecting traditional electronic mail services and remote processing services, the courts have indicated the SCA was intended by Congress to protect electronic bulletin boards as well. “ ‘Computer bulletin boards generally offer both private electronic mail service and newsgroups. The latter is essentially \*\*157 email directed to the community at large, rather than a private recipient.’ [Citation.] The term ‘computer bulletin board’ evokes the traditional cork-and-pin bulletin board on which people post messages, advertisements, or community news. [Citation.] Court precedent and legislative history establish that the SCA’s definition of an ECS provider was intended to reach a private [Bulletin Board System]. [Citations.]” (*Crispin, supra*, 717 F.Supp.2d at pp. 980–981.) A private bulletin board system is essentially one with restricted access rather than one open to the public at large.

[5] In its order compelling consent to the release of his Facebook postings, respondent court cited *Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, at page 1130, 91 Cal.Rptr.3d 858, for the proposition that the information covered by the order “was posted so that others might read it and that it was not private in any sense that relates to this inquiry.” However, the MySpace posting at issue in *Moreno* was open to the public at large, not a select group of Facebook “friends” like the postings at issue here. A party does not forfeit SCA protection by making his communications available to a closed group, i.e., a private bulletin board. (*Crispin, supra*, 717 F.Supp.2d at pp. 980–981, fn. omitted.) Thus, respondent court’s rationale does not withstand scrutiny.

Juror Number One contends Facebook has been recognized as a provider of electronic communication services within the meaning of the SCA, citing *Crispin, supra*, 717 F.Supp.2d 965. In *Crispin*, the federal district court concluded Facebook and MySpace qualify as both ECS’s and RCS’s. The court provided the following description of those sites: “ ‘Facebook and MySpace, Inc., are companies which provide social networking websites that allow users to send and receive messages, through posting on user-created “profile pages” or through private messaging services.’ ... Facebook’s user-created profile page is known as the Facebook ‘wall,’ ‘a space on each user’s profile page that allows friends to post messages for the user to see.’ These messages ... ‘can be viewed by anyone \*863 with access to the user’s profile page, and are stored by Facebook so that they can be displayed on the Facebook website, not as an incident to their

transmission to another place.’ Similarly ... MySpace has a profile page with a ‘comments’ feature that is identical to the Facebook wall.” (*Id.* at pp. 976–977, fns. omitted.)

The court in *Crispin* concluded that, because Facebook and MySpace provide limited access to messages posted by users on the Facebook “wall” or the MySpace “comments” feature, there is no basis for distinguishing those features from a restricted access electronic bulletin board. There is also no basis for distinguishing the private messaging services provided by those companies from traditional web-based email. Hence, the court concluded Facebook and MySpace qualified as ECS’s. (*Crispin, supra*, 717 F.Supp.2d at pp. 981–982.)

The court next considered whether messages posted on the Facebook wall are in “electronic storage” within the meaning of the SCA. As noted above, this requires either that the message is in temporary, intermediate storage awaiting delivery, or is in backup storage. Regarding the former, the court noted that messages posted to the Facebook wall are not in intermediate storage awaiting delivery to the recipient, because the wall itself is the recipient or final destination for the messages. (*Crispin, supra*, 717 F.Supp.2d at pp. 988–989.) Nevertheless, the court found the messages, once posted, are held for backup purposes. (*Id.* at p. 989.) In the alternative, \*\*158 the court concluded Facebook qualifies as an RCS with respect to posted messages held on the wall. (*Id.* at p. 990.)

Assuming *Crispin* was correctly decided, that case did not establish *as a matter of law* that Facebook is either an ECS or an RCS or that the postings to that service are protected by the SCA. The findings in *Crispin* were based on the stipulations and evidence presented by the parties in that case. The court noted that the parties “provided only minimal facts regarding the three third-party entities that were subpoenaed.” (*Crispin, supra*, 717 F.Supp.2d at p. 976.) The parties cited the companies’ home pages and Wikipedia as authority. (*Ibid.*)

Juror Number One has provided this court with nothing, either by way of the petition or the supporting documentation, as to the general nature or specific operations of Facebook. Without such facts, we are unable to determine whether or to what extent the SCA is applicable to the information at issue in this case. For example, we have no information as to the terms of any agreement between Facebook and Juror Number One that might provide for a waiver of privacy rights

in exchange for free social networking services. Nor do we have any information about how widely Juror Number One's posts are available to the public.

[6] \*864 But even assuming Juror Number One's Facebook postings are protected by the SCA, that protection applies only as to attempts by the court or real parties in interest to compel Facebook to disclose the requested information. Here, the compulsion is on Juror Number One, not Facebook.

In *Flagg v. City of Detroit* (E.D.Mich.2008) 252 F.R.D. 346 (*Flagg*), the plaintiff issued subpoenas for text messages held by SkyTel, Inc., a text messaging service that had contracted with the city to provide such services until 2004 and had maintained the messages thereafter. The city moved to quash the subpoena, arguing the messages were protected by the SCA. (*Id.* at pp. 347–348.) The federal district court held that, because the messages remained in the constructive control of the city, they were subject to discovery under the federal rules, notwithstanding the SCA. (*Id.* at pp. 352–357.) However, the proper procedure would be to seek the information by a document request to the city rather than a third-party subpoena. (*Id.* at p. 366.) To the extent consent of the city is required by the SCA, the city has an obligation under the discovery rules to provide that consent to the service provider. (*Id.* at p. 359.)

In effect, the court in *Flagg* equated the situation presented to that where the materials sought to be discovered were in the actual possession of the party. The court explained: “[A] party has an obligation under [Federal Rules of Civil Procedure] Rule 34 to produce materials within its control, and this obligation carries with it the attendant duty to take the steps necessary to exercise this control and retrieve the requested documents.... [A] party's disinclination to exercise this control is immaterial, just as it is immaterial whether a party might prefer not to produce documents in its possession or custody.” (*Flagg, supra*, 252 F.R.D. at p. 363.) The court continued: “It is a necessary and routine incident of the rules of discovery that a court may order disclosures that a party would prefer not to make.... [T]his power of compulsion encompasses such measures as are necessary to secure a party's compliance with its discovery obligations. In this case, the particular device that the SCA calls for is ‘consent,’ and [the defendant] has not cited any authority for the proposition that a court lacks the power to ensure that this necessary authorization \*\*159 is forthcoming from a party with the means to provide it. Were it otherwise, a party could readily avoid its discovery obligations by warehousing its documents with a third party

under strict instructions to release them only with the party's ‘consent.’” (*Ibid.*; see also *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1446, 44 Cal.Rptr.3d 72 [“Where a party to the communication is also a party to the litigation, it would seem within the power of a court to require his consent to disclosure on pain of discovery sanctions”].)

Thus, the question here is not whether respondent court can compel Facebook to disclose the contents of Juror Number One's wall postings but \*865 whether the court can compel Juror Number One to do so. If the court can compel Juror Number One to produce the information, it can likewise compel Juror Number One to consent to the disclosure by Facebook. The SCA has no bearing on this issue.

[7] [8] Juror Number One contends disclosure of the requested information violates the Fourth Amendment “in that [he] has a legitimate expectation of privacy in the records.” However, beyond merely asserting this to be so, Juror Number One provides no argument or citation to authority. As noted earlier, Juror Number One has provided no specifics as to the operation of Facebook or the nature of his contractual relationship with the website. Obviously, the extent of Juror Number One's “legitimate expectation of privacy” under the Fourth Amendment would depend on the extent to which his wall postings are disseminated to others or are available to Facebook or others for targeted advertising. Where a point is raised in an appellate brief without argument or legal support, “it is deemed to be without foundation and requires no discussion by the reviewing court.” (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647, 199 Cal.Rptr. 72.)

[9] Likewise with Juror Number One's Fifth Amendment claim. Juror Number One asserts he may not be compelled to give evidence against himself. Juror Number One again provides no further argument or citation to authority. But, more significantly, at this point in the litigation and on this record, his Fifth Amendment claim is, at best, speculative. Should Juror Number One's rights under the Fifth Amendment in fact come into play as this litigation proceeds, the court will be able to consider and resolve them at that time.

[10] Juror Number One argues he nevertheless has a privacy right not to disclose his Facebook posts. He cites as support Code of Civil Procedure sections 206 and 237, which protect jurors against involuntary disclosure of personal identifying information. Juror Number One argues these provisions demonstrate a strong public policy to protect jurors from

being compelled to discuss their deliberations. However, as noted above, Juror Number One has failed to demonstrate any expectation of privacy in his Facebook posts. At any rate, protection against disclosure of personal identifying information that might be used by a convicted defendant to contact or harass a juror is not the same thing as protection of a juror's communications, which themselves are misconduct.

But even if Juror Number One has a privacy interest in his Facebook posts, that interest is not absolute. It must be balanced against the rights of real parties in interest to a fair trial, which rights may be implicated by juror misconduct. Thus, the question becomes whether respondent court had the authority to order Juror Number One to disclose the messages he posted to \*866 Facebook during the criminal \*\*160 trial as part of its inherent power to control the proceedings before it and to assure real parties in interest a fair trial.

[11] [12] “A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice.” (*People v. Cox* (1991) 53 Cal.3d 618, 700, 280 Cal.Rptr. 692, 809 P.2d 351, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, 87 Cal.Rptr.3d 209, 198 P.3d 11.) “Criminal defendants have a right to trial by an impartial jury. (U.S. Const., 6th Amend.) ‘[T]here exists a “strong public interest in the ascertainment of the truth in judicial proceedings, including jury deliberations.” [Citation.] ... Lifting the veil of postverdict secrecy to expose juror misconduct serves an important public purpose. “ [T]o hear such proof would have a tendency to diminish such practices and to purify the jury room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them.’ ” [Citations.] [Citation.]” (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 379–380, 100 Cal.Rptr.3d 820.) “When a trial court is aware of *possible* juror misconduct, the court ‘must “make whatever inquiry is reasonably necessary” ’ to resolve the matter.” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255, 91 Cal.Rptr.2d 211, 989 P.2d 645.)

Juror Number One contends the trial court had no authority to compel production of the Facebook posts, because it had completed its investigation of juror misconduct. He repeatedly asserts the trial court conducted a hearing, examined the jurors, and found the jurors testified truthfully. Implicitly, Juror Number One questions the need for any further investigation of the matter, inasmuch as he testified he posted nothing of substance on Facebook. According to Juror Number One, once he informed the court under oath that

he did not post anything of substance to Facebook, the court has no power to inquire further. Juror Number One argues the order at issue here is not really part of the court's continued inquiry into misconduct but an effort to enforce the failed attempts by real parties in interest to subpoena the Facebook records.

Juror Number One's assertion that the trial court accepted Juror Number One's claim that he posted nothing substantive to Facebook is apparently based on the following comment by the court during discussions about whether to bring in additional jurors to testify: “It seems to me that all four jurors who spoke were credible. It seems to me that all four jurors were doing their best to be open and honest, and to convey what they recall with regard to the deliberations. I did not get an impression from any one of the four jurors that there was an effort to hide anything.”

But assuming the court believed Juror Number One had made no effort to hide anything, that does not also mean it believed he testified accurately. \*867 Juror Number One may well not have remembered posting anything of substance on Facebook, yet the evidence may show otherwise. When asked how many times he recalled posting about the case during trial, Juror Number One initially responded: “I probably posted about ‘Day 22’ or ‘Day 24.’ That's about it. Not really posting every day something negative or anything at all.” Later, Juror Number One acknowledged he “posted something every other day.” He also testified that he would go onto Facebook to see what others had posted to his account, but claimed he did not look at items posted in response to his own postings about the trial.

In light of Juror Number One's equivocation about how often and what he posted \*\*161 to Facebook, and the court's express finding that there had been misconduct, with the degree of misconduct still at issue, it can hardly be said respondent court concluded its investigation of the matter. The court may have completed its examination of the jurors, but there was still some question about the content of the Facebook posts themselves. In this regard, it must be remembered that those posts are not just potential evidence of misconduct. They *are* the misconduct.

[13] Juror Number One also contends respondent court's order “necessarily encompass[es] not only [his] privacy, but that of other individuals who were *not* jurors, merely because they are [his] Facebook ‘friends’ and may have posted to his Facebook site during the trial.” But the order at issue here

does not encompass posts by Juror Number One's "friends." The court ordered only that Juror Number One consent to the release of posts made by him during trial. In any event, to the extent others have posted to Juror Number One's Facebook wall, they have given up any privacy right in those posts as to Juror Number One. It would be as if the "friend" had sent Juror Number One a letter which was still in the juror's possession. If the juror's papers are subject to search, then the letter from the "friend" would also be subject to search.

Juror Number One argues several of his Facebook posts were presented to the trial court during the misconduct hearing and none revealed any prejudice to real parties in interest. However, this puts the cart before the horse. If a juror were to acknowledge having consulted with an attorney during trial but refused to say what was discussed, there would be no way to determine from this alone if the communications were potentially prejudicial. By Juror Number One's theory, the court could inquire no further.

The trial in this matter lasted approximately two months. Juror Number One admitted posting something every other day during trial. Thus, there were potentially 30 posts. Juror Number One acknowledged deleting some of his posts, although there is no explanation as to why.

**\*868** The present matter no longer involves a claim of potential misconduct. Misconduct has been established without question. The only remaining issue is whether the misconduct was prejudicial. This cannot be determined without looking at the Facebook posts. Yet Juror Number One would bar the trial court from examining the posts to determine if there was prejudice because there has been no showing of prejudice.

[14] [15] [16] In summary, in the present matter, Juror Number One does not claim respondent court exceeded its inherent authority to inquire into juror misconduct. Just as the court may examine jurors under oath (*People v. Hedgecock* (1990) 51 Cal.3d 395, 417–418, 272 Cal.Rptr. 803, 795 P.2d 1260), it may also examine other evidence of misconduct. In this instance, the court seeks to review in camera the very items—the Facebook posts—that constitute the misconduct. Juror Number One contends such disclosure violates the SCA, but it does not. Even assuming the Facebook posts are protected by the SCA, the SCA protects against disclosure by third parties, not the posting party. Juror Number One also contends the order is not authorized, because the court has completed its investigation of misconduct. But

such investigation obviously has not been completed. Juror Number One also contends the compelled disclosure violates his Fourth and Fifth Amendment rights. However, beyond asserting this to be so, he provides no argument or citation to authority. Thus, those arguments are forfeited. Finally, Juror Number One argues **\*\*162** forced disclosure of his Facebook posts violates his privacy rights. However, Juror Number One has not shown he has any expectation of privacy in the posts and, in any event, those privacy rights do not trump real parties in interest's right to a fair trial free from juror misconduct. The trial court has the power and the duty to inquire into whether the confirmed misconduct was prejudicial.

In the absence of further argument or authority, we conclude Juror Number One has failed to establish respondent court's order exceeded its power to inquire into alleged juror misconduct. The petition for writ of prohibition must be denied.

## DISPOSITION

The petition for writ of prohibition is denied. Upon this decision becoming final, the stay previously ordered in this matter is vacated.

I concur: RAYE, P.J.

MAURO, J., concurring.

The lead opinion states that "even assuming Juror Number One's Facebook postings are protected by the [Stored Communications Act (SCA) (18 U.S.C. § 2701 et seq.) ], that protection applies only **\*869** as to attempts by the court or real parties in interest to compel Facebook to disclose the requested information. Here, the compulsion is on Juror Number One, not Facebook." (Maj. opn. at p. 158.)

It is true the compulsion is on Juror Number One to "consent" to the production of documents. But the trial court is seeking the documents from Facebook, not from Juror Number One. The trial court crafted its order to take advantage of the consent exception in the SCA. (18 U.S.C. § 2702(b)(3).) It ordered Juror Number One to "execute a consent form sufficient to satisfy the exception stated in Title 18, U.S.C. section 2702(b) allowing Facebook to supply the postings made by [Juror Number One] during trial." In essence, the trial court's order is an effort to compel indirectly

(through Juror Number One) what the trial court might not be able to compel directly from Facebook. This is arguably inconsistent with the spirit and intent of the protections in the SCA. Compelled consent is not consent at all. (See, e.g., *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228, 233, 93 S.Ct. 2041, 2048, 2050–2051, 36 L.Ed.2d 854, 863, 866 [coerced consent is merely a pretext for unjustified intrusion].)

The lead opinion explains that “[i]f the court can compel Juror Number One to produce the information, it can likewise compel Juror Number One to consent to the disclosure by Facebook.” (Maj. opn. at p. 159.) This may ultimately be true, but here the trial court bypassed a determination as to whether it could compel Juror Number One to produce the documents. Defendant Royster had issued subpoenas to both Facebook and Juror Number One directing them to produce Juror Number One's postings. Facebook and Juror Number One both moved to quash the subpoenas. The trial court continued the hearing on Facebook's motion to quash and granted Juror Number One's motion to quash, ruling that the subpoena against Juror Number One was overbroad. The trial court then concluded it was “unnecessary” to determine whether it could directly compel Facebook or Juror Number One to produce the documents in their possession.<sup>1</sup> Thus, the trial court compelled consent even though other statutory \*\*163 procedures to directly compel production of the documents were still available and had not yet been exhausted.

Nonetheless, Juror Number One does not assert these specific concerns as contentions in his petition for writ of prohibition, perhaps recognizing that raising such procedural matters would merely delay resolution of the ultimate issues in the case. Instead, he argues the trial court's order violated his rights under constitutional and federal law. He also asserts that the order was an unreasonable intrusion because there is no evidence the Facebook posts were \*870 prejudicial. This final contention encompasses the appropriate balance between Juror Number One's privacy concerns and defendants' right to a fair trial, and it warrants further discussion.

Juror Number One's Facebook posts violated the trial court's instructions to the jury. (Pen.Code, § 1122, subd. (a)(1); CALCRIM No. 101.) This was serious misconduct giving rise to a presumption of prejudice. (*In re Hitchings* (1993) 6 Cal.4th 97, 118, 24 Cal.Rptr.2d 74, 860 P.2d 466 (*Hitchings*); accord, *People v. Wilson* (2008) 44 Cal.4th 758, 838, 80 Cal.Rptr.3d 211, 187 P.3d 1041 (*Wilson*)).

“The disapproval of juror conversations with nonjurors derives largely from the risk the juror will gain information about the case that was not presented at trial.” (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1201, 118 Cal.Rptr.3d 876.) Nonetheless, the presumption of prejudice that arises from discussing the case with nonjurors “is rebutted ... if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant.” (*In re Hamilton* (1999) 20 Cal.4th 273, 296, 84 Cal.Rptr.2d 403, 975 P.2d 600 (*Hamilton*), original italics; accord, *In re Lucas* (2004) 33 Cal.4th 682, 697, 16 Cal.Rptr.3d 331, 94 P.3d 477.)

As the California Supreme Court explained in *Hamilton*, “The standard is a pragmatic one, mindful of the ‘day-to-day realities of courtroom life’ [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]. It is ‘virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.’ [Citation.] Moreover, the jury is a ‘fundamentally human’ institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.] ‘[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection... [Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.’ [Citation.]” (*Hamilton, supra*, 20 Cal.4th at p. 296, 84 Cal.Rptr.2d 403, 975 P.2d 600.)

Accordingly, juror conversations involving peripheral matters, rather than the issues to be resolved at trial, are generally regarded as nonprejudicial. (*Wilson, supra*, 44 Cal.4th at pp. 839–840, 80 Cal.Rptr.3d 211, 187 P.3d 1041 [“trivial” comments to a fellow juror were not prejudicial where not meant to persuade]; *People v. Page* (2008) 44 Cal.4th 1, 58–59, 79 Cal.Rptr.3d 4, 186 P.3d 395 [circulation of a cartoon in the jury room that did not bear on guilt was not misconduct]; *People v. Avila* (2006) 38 Cal.4th 491, 605, 43 Cal.Rptr.3d 1, 133 P.3d 1076 \*871 [juror statements disparaging counsel and the court were not material because they had no bearing on guilt]; \*\*164 *People v. Stewart* (2004) 33 Cal.4th 425, 509–510, 15 Cal.Rptr.3d 656, 93 P.3d 271 [a juror who complimented the appearance of the defendant's former girlfriend committed nonprejudicial

misconduct of a “ ‘trifling nature’ ”]; *People v. Majors* (1998) 18 Cal.4th 385, 423–425, 75 Cal.Rptr.2d 684, 956 P.2d 1137 [general comments by jurors that did not address the evidence were not prejudicial]; *People v. Loot* (1998) 63 Cal.App.4th 694, 698–699, 74 Cal.Rptr.2d 324 [a juror who asked a public defender whether the prosecutor was “ ‘available’ ” committed “technical,” but nonprejudicial, misconduct].)

In determining whether communications are prejudicial or if the presumption of prejudice has been rebutted, the court must consider the “ ‘nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued.’ ” [Citation.]” (*Wilson, supra*, 44 Cal.4th at p. 839, 80 Cal.Rptr.3d 211, 187 P.3d 1041, italics omitted; *People v. Polk, supra*, 190 Cal.App.4th at pp. 1201–1202, 118 Cal.Rptr.3d 876.)

Four jurors testified under oath at the post-trial hearing. Juror No. 5 testified that she had access to Juror Number One's Facebook postings when she became a Facebook friend of his after the jury was discharged. She said she did not receive any Facebook communications regarding the trial during trial or deliberations. After the jury was discharged, Juror No. 5 found at least one Facebook posting by Juror Number One that he made during the trial, but she did not remember any others. She did not notice any comments in response to Juror Number One's post. When presented in the post-trial hearing with a copy of five pages from Juror Number One's Facebook wall—Exhibit D, pages 19 through 23 in the record—Juror No. 5 said they appeared to be the Facebook pages that she had previously seen. Juror No. 5 recognized on those five pages the Facebook posting on May 18, at 7:36 a.m. from Juror Number One that she had seen. Juror No. 5 testified that there was nothing missing on the copy of the five Facebook pages from what she remembered seeing. She is still a Facebook friend with Juror Number One, and other jurors had been “friended” by Juror Number One, too. Juror No. 5 did not talk to the other juror Facebook friends about what Juror Number One had posted.

Exhibit D, the copy of Facebook postings, includes the following relevant entries (with original ellipsis points):

“May 17 at 3:09pm via Facebook for iPhone”: “Week 5 of jury duty ... [.]” Below that post was the following comment from a Facebook friend later that afternoon: “[W]ow .... never been on jury duty that long....” And below that, another friend posted a comment later that evening, saying “5 weeks, difil [*sic*] de creer, pues que hicieron para estar en un caso tan

largo” which \*872 could be understood to mean “5 weeks, hard to believe, but what did they do in order to be in a case so long.”

“May 18 at 7:36am”: “Back to jury duty can it get any more BORING than going over piles and piles of metro pcs phone records ....uuuggghhhhhh[.]” Below the post, a Facebook friend indicated that they “like[d]” that comment.

“May 24 at 12:28am”: “Jury duty week six ... [.]” The copy indicates there were four comments from friends, but only two are visible on the copy. One comment that evening says, “did they convict [S]acramento for pretending to have a pro basketball team?” The other comment that evening says, “You still doing that shit? Sorry to hear holmes!”

“June 27 at 11:21pm via Facebook for iPhone”: “Great to have my life back to normal.... NO MORE JURY DUTY....” The copy indicates that the \*\*165 post was made after the jury had been discharged, and that there were five comments to the post.

Juror Number One testified next. He admitted posting Facebook entries sporadically about the trial even though the trial judge had instructed the jurors not to talk about the case with anyone. He authenticated Exhibit D as depicting him on Facebook. He testified that he did not recall posting anything other than that he was in jury duty, counting down the days, and in one posting he said the piles and piles of Metro PCS phone record evidence was boring and that he almost fell asleep. He said if they had access to his Facebook that day, he did not think they would still find the postings he made during the trial, because he tries to delete a lot of things. But he said he had no idea prior to the hearing why he had been called in for the hearing.

Juror Number One testified that he never had verbal discussions with people about the case. He said he never talked to other jurors about the Facebook postings, and they did not know about them during the trial.

Juror No. 8 testified that Juror Number One never mentioned Facebook to her, she does not use Facebook, and she does not know anything about it. Juror No. 5 told her, as they were waiting in the hall prior to the post-trial hearing, that Juror Number One had posted on Facebook, but Juror No. 8 did not have any personal knowledge about that.

Juror No. 3 testified that he was not aware that any juror might have been doing anything with Facebook, and he had no Facebook communications with other jurors.

**\*873** The evidence presented at the post-trial hearing indicated that the Facebook posts involved peripheral matters and did not involve issues to be resolved at trial. Although Juror Number One admitted deleting Facebook posts, he testified that the only thing he ever posted regarding the trial was comments about the number of weeks he was on jury duty, counting down the days, and in one post mentioning that the phone record evidence was boring. Juror No. 5 and Juror Number One both testified that Exhibit D accurately reflected the type of Facebook posts made by Juror Number One about the trial. There was no evidence that Juror Number One deleted Facebook posts in anticipation of the post-trial hearing. Juror No. 5 said in her declaration that the alleged inappropriate conduct did not influence her decision in the case, and the other jurors did not have access to the posts during the trial and did not talk about them during the trial. After the hearing, the trial court said the testifying jurors were credible and seemed to be doing their very best to be open and honest. The trial court added, “I did not get an impression from any one of the four jurors that there was an effort to hide anything.”

The question is whether this evidentiary record rebuts the presumption of prejudice. Juror Number One says it does. The lead opinion says this record cannot rebut the presumption until all of the Facebook posts are reviewed by the trial court, noting that “Juror Number One would bar the trial court from examining the posts to determine if there was prejudice because there has been no showing of prejudice.” (Maj. opn. at p. 161.)

The lead opinion is correct that there has been no showing of prejudice on this record. Moreover, the evidence elicited at the post-trial hearing could be construed to negate the

possibility of prejudice, even in the deleted posts. Thus, it is possible to conclude, as Juror Number One urges, that the record does not establish a substantial **\*\*166** likelihood that one or more jurors were actually biased against defendants. (*Hamilton, supra*, 20 Cal.4th at p. 296, 84 Cal.Rptr.2d 403, 975 P.2d 600.)

That might have been the end of the analysis if the trial court had made such findings and declined to continue the investigation. But here, the trial court—which was in the best position to evaluate the evidence—determined that it needed to see the deleted Facebook posts in order to rule out prejudice. At the same time, the trial court sought to balance Juror Number One's privacy concerns by ordering in camera review of the posts.

Although a trial court must avoid a “ ‘fishing expedition’ ” when considering allegations of alleged misconduct (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419, 272 Cal.Rptr. 803, 795 P.2d 1260), I am unaware of any authority preventing a trial court from taking steps to rule out prejudice once juror misconduct has been established. Because prejudice is presumed based on Juror Number One's misconduct in posting about the trial on Facebook, and **\*874** because we do not have all of Juror Number One's Facebook posts regarding the case, I cannot say there is “no substantial likelihood” Juror Number One was biased against defendants. (*Hamilton, supra*, 20 Cal.4th at p. 296, 84 Cal.Rptr.2d 403, 975 P.2d 600.) Under these circumstances, the balance between Juror Number One's privacy concerns and defendants' right to a fair trial tips in favor of defendants.

Accordingly, I concur in the disposition.

#### Parallel Citations

206 Cal.App.4th 854, 12 Cal. Daily Op. Serv. 5991, 2012 Daily Journal D.A.R. 7216

#### Footnotes

**1** Counsel for Juror Number One admitted during oral argument in this court that Facebook sent him the posts sought by the trial court.

172 Cal.App.4th 1125  
Court of Appeal, Fifth District, California.

Cynthia MORENO et al., Plaintiffs and Appellants,

v.

HANFORD SENTINEL, INC., et al., Defendants and Respondents.

No. F054138. | April 2, 2009.

| Certified for Partial Publication.\*

| As Modified April 30, 2009.

Synopsis

**Background:** The author of a journal entry on a social networking website and other members of her family brought action against author's sister's high school principal, who submitted the journal entry for republication in the local newspaper, and against the school district, for invasion of privacy and intentional infliction of emotional distress. The Superior Court, Fresno County, No. 06CECG04125AMC, *Adolfo M. Corona, J.*, sustained demurrer without leave to amend. Plaintiffs appealed.

**Holdings:** The Court of Appeal, *Levy, J.*, held that:

[1] principal did not disclose a private fact about author;

[2] principal did not invade author's family members' privacy; and

[3] author's family members did not have standing to assert invasion of privacy claims.

Affirmed in part, reversed in part, and remanded.

West Headnotes (13)

[1] Evidence

🔑 Management and Conduct of Occupations

In an action by a student and her family against a high school principal and school district for invasion of privacy and intentional infliction of emotional distress related to principal's alleged

republication of a journal entry from a social networking website, the Court of Appeal would take judicial notice that principal was the principal of the high school.

[2] Torts

🔑 Nature and extent of right in general

The tort of invasion of privacy protects a right to be let alone.

[3] Constitutional Law

🔑 Right to Privacy

Constitutional Law

🔑 Reasonable, justifiable, or legitimate expectation

To state a claim for violation of the constitutional right of privacy, a party must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) a serious invasion of the privacy interest. *West's Ann.Cal. Const. Art. 1, § 1.*

3 Cases that cite this headnote

[4] Torts

🔑 Privacy in General

To prevail on an invasion of privacy claim, the plaintiff must have conducted himself or herself in a manner consistent with an actual expectation of privacy.

1 Cases that cite this headnote

[5] Torts

🔑 Publications or Communications in General

The elements of the tort of invasion of privacy through public disclosure of private facts are: (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.

6 Cases that cite this headnote

[6] Torts

🔑 [Publications or Communications in General](#)

A matter that is already public or that has previously become part of the public domain is not a private fact, and thus its disclosure does not constitute the tort of public disclosure of private fact.

3 Cases that cite this headnote

[7] **Torts**

🔑 [Miscellaneous particular cases](#)

A journal entry posted on a social networking website disparaging the author's hometown was not a private fact, and thus high school principal's alleged act of submitting the entry to be published in the local newspaper under the author's full name did not constitute the tort of invasion of privacy through public disclosure of private fact, even though the author posted the journal entry to the website under her first name only and removed the entry from the website before learning it had been submitted to the newspaper, where author's identity was readily ascertainable from the website; author's affirmative act made the entry available to anyone with a computer, and the fact that the principal obtained a copy demonstrated that it was accessed by others before being removed.

*See Cal. Jur. 3d, Assault and Other Wilful Torts, § 129; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 664; Annot., Waiver or loss of right of privacy (1974) 57 A.L.R.3d 16.*

[8] **Torts**

🔑 [Publications or Communications in General](#)

For a fact to be a private fact, as required for the tort of public disclosure of private fact, the expectation of privacy need not be absolute; "private" is not equivalent to "secret."

1 Cases that cite this headnote

[9] **Torts**

🔑 [Publications or Communications in General](#)

The claim of a right of privacy, as required for the tort of public disclosure of private fact, is not

so much one of total secrecy as it is of the right to define one's circle of intimacy—to choose who shall see beneath the quotidian mask.

[10] **Torts**

🔑 [Publications or Communications in General](#)

Information disclosed to a few people may remain private, as required for the tort of public disclosure of private fact.

[11] **Torts**

🔑 [Miscellaneous particular cases](#)

High school principal did not commit the tort of invasion of privacy against student or her parents by submitting to the local newspaper a journal entry that had been posted on a social networking website by the student's sister, disparaging the town where the family lived, since the principal's alleged act of submitting the journal entry did not disclose a private fact of the sister who posted it, even if the student and parents suffered direct damages as the community reacted violently; because the republication of the journal entry was not an invasion of the sister's privacy, her family members could not state a claim based on the same alleged invasion.

[12] **Torts**

🔑 [Nature and extent of right in general](#)

**Torts**

🔑 [Persons entitled to sue](#)

For purposes of the tort of invasion of privacy, the right of privacy is purely personal; it cannot be asserted by anyone other than the person whose privacy has been invaded.

1 Cases that cite this headnote

[13] **Torts**

🔑 [Persons entitled to sue](#)

Even if student's sister had an invasion of privacy claim against high school principal for having a journal entry that sister posted on a social networking website, disparaging the town where

her family lived, published in a local newspaper and attributed to the sister by her full name, the student and her parents did not have standing to assert their own invasion of privacy claims, where the newspaper did not identify student or her parents when it published the journal entry; even if the student and parents suffered direct damages as the community reacted violently, their invasion of privacy claim was primarily based on their relationship to student's sister and the community reaction to sister's opinions, not on the principal's conduct directed toward them.

### Attorneys and Law Firms

**\*\*860** Law Office of Paul Kleven and Paul Kleven, Berkeley, for Plaintiffs and Appellants.

Auchard & Stewart and Paul Auchard, for Defendants and Respondents.

### Opinion

#### \*1127 OPINION

LEVY, J.

The issue presented by this appeal is whether an author who posts an article on myspace.com can state a cause of action for invasion of privacy and/or intentional infliction of emotional distress against a person who submits that article to a newspaper for republication. The trial court concluded not and sustained the demurrer to appellants' complaint without leave to amend.

Appellants contend the republication constituted a public disclosure of private facts that were not of legitimate public concern and thus was an invasion of privacy. Appellants note that the republication included the author's last name whereas the myspace.com posting did not. Appellants further argue that the person who submitted the article to the newspaper did so with the intent of punishing appellants and thus they have a claim for intentional infliction of emotional distress.

**\*\*861 \*1128** As discussed in the published portion of this opinion, the trial court properly sustained the demurrer without leave to amend to appellants' invasion of privacy

cause of action. The facts contained in the article were not private. Rather, once posted on myspace.com, this article was available to anyone with internet access. As discussed in the nonpublished portion, the trial court should have overruled the demurrer to the intentional infliction of emotional distress cause of action. Under the circumstances here, a jury should determine whether the alleged conduct was outrageous. Accordingly, the judgment will be affirmed in part and reversed in part.

### BACKGROUND

Since the appeal is from the sustaining of a demurrer without leave to amend, the facts are derived from the complaint. This court must give the complaint a reasonable interpretation and assume the truth of all material facts properly pleaded. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967, 9 Cal.Rptr.2d 92, 831 P.2d 317.) However, contentions, deductions or conclusions of law will not be accepted as true. (*Id.* at p. 967, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

Following a visit to her hometown of Coalinga, appellant, Cynthia Moreno, wrote “An ode to Coalinga” (Ode) and posted it in her online journal on myspace.com. The Ode opens with “the older I get, the more I realize how much I despise Coalinga” and then proceeds to make a number of extremely negative comments about Coalinga and its inhabitants. Six days later, Cynthia<sup>1</sup> removed the Ode from her journal. At the time, Cynthia was attending the University of California at Berkeley. However, Cynthia's parents, appellants David and Maria Moreno, and Cynthia's sister, appellant Araceli Moreno, were living in Coalinga. Araceli was a student at Coalinga High School.

[1] Respondent, Roger Campbell, was the principal of Coalinga High School and an employee of respondent, Coalinga–Huron Unified School District.<sup>2</sup> The day after Cynthia removed the Ode from her online journal, appellants learned that Campbell had submitted the Ode to the local newspaper, the Coalinga Record, by giving the Ode to his friend, Pamela Pond. Pond was the editor of the Coalinga Record.

The Ode was published in the Letters to the Editor section of the Coalinga Record. The Ode was attributed to Cynthia, using her full name. Cynthia had not stated her last name in her online journal.

\*1129 The community reacted violently to the publication of the Ode. Appellants received death threats and a shot was fired at the family home, forcing the family to move out of Coalinga. Due to severe losses, David closed the 20-year-old family business.

Based on the publication of the Ode, appellants filed the underlying complaint alleging causes of action for invasion of privacy and intentional infliction of emotional distress. In addition to respondents, appellants named Lee Enterprises, Inc., Lee Enterprises Newspapers, Inc., and Hanford Sentinel, Inc., the publishers of the Coalinga Record, as defendants. However, these publisher defendants were dismissed following their motion to strike the complaint as a SLAPP suit (strategic lawsuits against public participation) pursuant \*\*862 to Code of Civil Procedure section 425.16. Appellants abandoned their appeal from this judgment.

## DISCUSSION

### 1. Appellants did not state a cause of action for invasion of privacy.

[2] The right to privacy tort was recognized in 1890 based on the trend in tort law to extend protection to “the right of determining, ordinarily, to what extent [a person's] thoughts, sentiments, and emotions shall be communicated to others.” (Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 23, 26 Cal.Rptr.2d 834, 865 P.2d 633.) In other words, the tort protects “a ‘right “to be let alone.” ’” (Ibid.) In 1972, the right to privacy was added to the California Constitution by initiative. (Id. at p. 15, 26 Cal.Rptr.2d 834, 865 P.2d 633.)

[3] [4] To state a claim for violation of the constitutional right of privacy, a party must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) a serious invasion of the privacy interest. (International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 338, 64 Cal.Rptr.3d 693, 165 P.3d 488.) Four distinct kinds of activities have been found to violate this privacy protection and give rise to tort liability. These activities are: (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness. Each of these four categories identifies a distinct interest associated with an individual's control of the process or products of his or her personal life. (Hill v. National Collegiate Athletic Assn., supra, 7 Cal.4th at p. 24,

26 Cal.Rptr.2d 834, 865 P.2d 633.) However, to prevail on an invasion of privacy claim, the plaintiff must have conducted himself or herself in a manner consistent with an actual expectation of privacy. (Id. at p. 26, 26 Cal.Rptr.2d 834, 865 P.2d 633.)

[5] Here, the allegations involve a public disclosure of private facts. The elements of this tort are: “(1) public disclosure (2) of a private fact (3) which \*1130 would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.” (Shulman v. Group W Productions, Inc. (1998) 18 Cal.4th 200, 214, 74 Cal.Rptr.2d 843, 955 P.2d 469.) The absence of any one of these elements is a complete bar to liability. (Id. at pp. 214–215, 74 Cal.Rptr.2d 843, 955 P.2d 469.)

#### a. Having been published on Myspace.com, the Ode was not private.

[6] As noted above, a crucial ingredient of the applicable invasion of privacy cause of action is a public disclosure of private facts. A matter that is already public or that has previously become part of the public domain is not private. (Sipple v. Chronicle Publishing Co. (1984) 154 Cal.App.3d 1040, 1047, 201 Cal.Rptr. 665.)

[7] Here, Cynthia publicized her opinions about Coalinga by posting the Ode on Myspace.com, a hugely popular internet site. Cynthia's affirmative act made her article available to any person with a computer and thus opened it to the public eye. Under these circumstances, no reasonable person would have had an expectation of privacy regarding the published material.

[8] [9] [10] As pointed out by appellants, to be a private fact, the expectation of privacy in the fact need not be absolute. (Sanders v. American Broadcasting Companies (1999) 20 Cal.4th 907, 915, 85 Cal.Rptr.2d 909, 978 P.2d 67.) Private is not equivalent to secret. (M.G. v. Time Warner, \*\*863 Inc. (2001) 89 Cal.App.4th 623, 632, 107 Cal.Rptr.2d 504.) “[T]he claim of a right of privacy is not ‘so much one of total secrecy as it is of the right to define one's circle of intimacy—to choose who shall see beneath the quotidian mask.’” Information disclosed to a few people may remain private.” (Ibid., fns. omitted.) Nevertheless, the fact that Cynthia expected a limited audience does not change the above analysis. By posting the article on Myspace.com, Cynthia opened the article to the public at large. Her potential audience was vast.

That Cynthia removed the Ode from her online journal after six days is also of no consequence. The publication was not so obscure or transient that it was not accessed by others. (Cf. *DVD Copy Control Assn. v. Bunner* (2004) 116 Cal.App.4th 241, 251, 10 Cal.Rptr.3d 185.) The only place that Campbell could have obtained a copy of the Ode was from the internet, either directly or indirectly.

Finally, Cynthia's last name was not a private fact. Although her online journal used only the name "Cynthia," it is clear that her identity was readily ascertainable from her MySpace page. Campbell was able to attribute the article to her from the internet source. There is no allegation that Campbell obtained Cynthia's identification from a private source. In fact, Cynthia's \*1131 MySpace page included her picture. Thus, Cynthia's identity as the author of the Ode was public. In disclosing Cynthia's last name, Campbell was merely giving further publicity to already public information. Such disclosure does not provide a basis for the tort. (*Sipple v. Chronicle Publishing Co.*, *supra*, 154 Cal.App.3d at p. 1048, 201 Cal.Rptr. 665.)

**b. The other members of Cynthia's family do not have an independent cause of action for invasion of privacy.**

[11] Based on the direct damages they allegedly incurred due to publication of the Ode, Cynthia's parents, David and Maria, and Cynthia's sister, Araceli, argue that they have standing to sue for invasion of privacy. However, because the publication of the Ode was not an invasion of Cynthia's privacy, these appellants cannot state a claim based on the same alleged invasion.

[12] [13] Moreover, the right of privacy is purely personal. It cannot be asserted by anyone other than the person

whose privacy has been invaded. (*Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62, 121 Cal.Rptr. 429.) Thus, even if Cynthia did have an invasion of privacy claim, David, Maria and Araceli would not have standing. The Coalinga Record did not identify David, Maria and Araceli when it published the Ode. Their invasion of privacy claim is primarily based on their relationship to Cynthia and the community reaction to Cynthia's opinions, not on respondents' conduct directed toward them. (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1489, 232 Cal.Rptr. 668.)<sup>3</sup>

In sum, because the Ode was not private, appellants' claim is precluded under California privacy tort law.<sup>4</sup> Accordingly, \*\*864 the trial court properly sustained the demurrer to the invasion of privacy cause of action.

2.-3. \*\*

**\*1132 DISPOSITION**

The portion of the judgment sustaining the demurrer to the intentional infliction of emotional distress cause of action is reversed. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings. The parties shall bear their own costs on appeal.

WE CONCUR: ARDAIZ, P.J., and GOMES, J.

**Parallel Citations**

172 Cal.App.4th 1125, 243 Ed. Law Rep. 396, 37 Media L. Rep. 1496, 09 Cal. Daily Op. Serv. 4208, 2009 Daily Journal D.A.R. 4983

**Footnotes**

\* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts 2 and 3 of the discussion.

1 For purposes of clarity, the appellants will be referred to by their first names. No disrespect is intended.

2 Appellants' request that this court take judicial notice that Roger Campbell is the principal of Coalinga High School is granted.

3 David, Maria and Araceli rely on *Vescovo v. New Way Enterprises, Ltd.* (1976) 60 Cal.App.3d 582, 130 Cal.Rptr. 86. However, this case is distinguishable. In *Vescovo*, the right to sue for invasion of privacy was upheld based on facts showing that the defendant's conduct in publishing a derogatory ad about the teenaged plaintiff's mother that included the plaintiff's address caused direct and personal physical intrusions on that plaintiff's own solitude in her own home. (*Id.* at p. 588, 130 Cal.Rptr. 86.)

4 Whether the publication of the Ode infringed on any federal copyright protection the Ode may have had (17 U.S.C. § 101 et seq.) is not before this court and we express no opinion on that issue.

\*\* See footnote \*, *ante*.

285 F.R.D. 566  
United States District Court,  
C.D. California.

Danielle MAILHOIT, Plaintiff,

v.

HOME DEPOT U.S.A., INC., et al., Defendants.

No. CV 11-03892 DOC (SSx). | Sept. 7, 2012.

### Synopsis

**Background:** Former employee brought action against former employer. Former employer filed motion to compel further responses to its request for production of documents.

**Holdings:** The District Court, [Suzanne H. Segal](#), United States Magistrate Judge, held that:

[1] former employer's request for production of any profiles, postings, or messages from any **social networking** site that revealed former employee's mental state was not stated with reasonable particularity;

[2] former employer's request for production of third-party communications to former employee that placed former employee's own communications in context was not stated with reasonable particularity;

[3] former employer's request for any pictures of former employee posted on former employee's profile or tagged to her profile was impermissibly overbroad; and

[4] former employer's request for all **social networking** site communications between former employee and any current or former employees of former employer was reasonably calculated to lead to **discovery** of admissible evidence.

Motion granted in part and denied in part.

West Headnotes (14)

- [1] **Federal Civil Procedure**  
🔑 Particular Subject Matters  
**Federal Civil Procedure**

🔑 Designation of document or thing and contents thereof

**Discovery** requests for **social networking** site content must be reasonably calculated to lead to the **discovery** of admissible evidence and describe the information to be produced with reasonable particularity. [Fed.Rules Civ.Proc.Rule 34\(b\)\(1\)\(A\)](#), 28 U.S.C.A.

### [2] Federal Civil Procedure

🔑 Scope

“Relevancy,” for purposes of the rule allowing **discovery** of matters relevant to a party's claim or defense, is construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case. [Fed.Rules Civ.Proc.Rule 26\(b\)\(1\)](#), 28 U.S.C.A.

### [3] Federal Civil Procedure

🔑 Designation of document or thing and contents thereof

The test for reasonable particularity of a **discovery** request, under the rule requiring the requesting party to describe the requested items with reasonable particularity, is whether the request places a party upon reasonable notice of what is called for and what is not. [Fed.Rules Civ.Proc.Rule 34\(b\)\(1\)\(A\)](#), 28 U.S.C.A.

### [4] Federal Civil Procedure

🔑 Designation of document or thing and contents thereof

All-encompassing demands that do not allow a reasonable person to ascertain which documents are required do not meet the particularity standard of the rule requiring the requesting party to describe the requested items with reasonable particularity. [Fed.Rules Civ.Proc.Rule 34\(b\)\(1\)\(A\)](#), 28 U.S.C.A.

### [5] Federal Civil Procedure

🔑 Persons subject

**Social networking** site content may be subject to **discovery** under the rule governing the production of documents. [Fed.Rules Civ.Proc.Rule 34, 28 U.S.C.A.](#)

[6] **Privileged Communications and Confidentiality**

🔑 Miscellaneous privileges; particular cases

Generally, for **discovery** purposes, **social networking** site content is neither privileged nor protected by any right of privacy.

[7] **Federal Civil Procedure**

🔑 Scope

While a party may conduct **discovery** concerning another party's emotional state, the **discovery** itself must still comply with the general principles underlying the Federal Rules of Civil Procedure that govern **discovery**. [Fed.Rules Civ.Proc.Rules 26\(b\)\(1\), 34, 28 U.S.C.A.](#)

[8] **Federal Civil Procedure**

🔑 Scope

A court can limit **discovery** if it determines, among other things, that the **discovery** is: (1) unreasonably cumulative or duplicative; (2) obtainable from another source that is more convenient, less burdensome, or less expensive; or (3) the burden or expense of the proposed **discovery** outweighs its likely benefit.

[9] **Federal Civil Procedure**

🔑 Discretion of Court

The district court enjoys broad discretion when resolving **discovery** disputes, which should be exercised by determining the relevance of **discovery** requests, assessing oppressiveness, and weighing these factors in deciding whether **discovery** should be compelled.

[10] **Federal Civil Procedure**

🔑 Designation of document or thing and contents thereof

Former employer's request for production of documents seeking any "profiles, postings or messages" from any **social networking** site that revealed, referred, or related to "any emotion, feeling, or mental state" of former employee, as well as communications by or from former employee that revealed, referred, or related to events that could "reasonably be expected to produce a significant emotion, feeling, or mental state," was not stated with reasonable particularity required by **discovery** rule governing production of documents, inasmuch as request could require production of many materials of doubtful relevance. [Fed.Rules Civ.Proc.Rule 34\(b\)\(1\)\(A\), 28 U.S.C.A.](#)

[11] **Federal Civil Procedure**

🔑 Designation of document or thing and contents thereof

Former employer's request for production of documents seeking "third-party communications" to former employee that placed former employee's "own communications in context" was not stated with reasonable particularity required by **discovery** rule governing production of documents, inasmuch as the request was vague and failed to provide notice to former employee of which specific third party communications were sought. [Fed.Rules Civ.Proc.Rule 34\(b\)\(1\)\(A\), 28 U.S.C.A.](#)

[12] **Federal Civil Procedure**

🔑 Photographs; right to take photographs in general

Former employer's request for production of any pictures of former employee taken during relevant time period and posted on former employee's **social networking** site profile or tagged or otherwise linked to her profile was impermissibly overbroad, inasmuch as former employer failed to show that every picture posted to former employee's profile or tagged to her profile would be considered relevant under rule defining scope of **discovery**, or lead to

admissible evidence, and thus, former employee would not be required to respond to request. Fed.Rules Civ.Proc.Rules 26(b)(1), 34(b)(1)(A), 28 U.S.C.A.

[13] **Federal Civil Procedure**

🔑 **Scope**

**Discovery** rules do not allow a requesting party to engage in the proverbial fishing expedition, in the hope that there might be something of relevance in the producing party's **social networking** site account.

[14] **Federal Civil Procedure**

🔑 **Particular Subject Matters**

Former employer's request for all **social networking** site communications between former employee and any current or former employees of former employer adequately placed former employee on notice of materials to be produced and was reasonably calculated to lead to **discovery** of admissible evidence, and thus, former employee would be required to respond to request, where former employee's responses to earlier requests indicated that search for such communications was both technically feasible and not overly burdensome.

**Attorneys and Law Firms**

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**Opinion**

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL FURTHER RESPONSES TO DEFENDANT'S REQUEST FOR PRODUCTION REGARDING **SOCIAL NETWORKING** SITE MATERIAL (SET ONE)**

SUZANNE H. SEGAL, United States Magistrate Judge.

**I.**

**INTRODUCTION**

On August 7, 2012, Defendant filed a Motion to Compel Further Responses to Defendant's \*569 Request for Production of Documents (Set One). (Dkt. No. 105). The parties filed a Joint Stipulation concurrently with the Motion pursuant to Local Rule 37, ("Jt. Stip."), including the declarations of Elizabeth A. Falcone in support of the Motion, (Dkt. No. 107), and Kenneth Helmer in opposition to the Motion. (Dkt. No. 110). The Court held a hearing on the Motion on August 28, 2012. For the reasons stated below, the Motion is GRANTED IN PART and DENIED IN PART.

**II.**

**THE PARTIES' CONTENTIONS**

Defendant requests an Order compelling Plaintiff to produce documents responsive to Requests for Production Nos. 46–49, which collectively seek:

- (1) Any profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) from **social networking** sites from October 2005 (the approximate date Plaintiff claims she first was discriminated against by Home Depot), through the present, that reveal, refer, or relate to any emotion, feeling, or mental state of Plaintiff, as well as communications by or from Plaintiff that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state;
- (2) Third-party communications to Plaintiff that place her own communications in context;

(3) All **social networking** communications between Plaintiff and any current or former Home Depot employees, or which in any way refer [or] pertain to her employment at Home Depot or this lawsuit; or

(4) Any pictures of Plaintiff taken during the relevant time period and posted on Plaintiff's profile or tagged<sup>1</sup> or otherwise linked to her profile.

(Jt. Stip. at 2).<sup>2</sup>

Defendant argues that it is entitled to Plaintiff's communications posted on **social networking** sites ("SNS") such as Facebook and LinkedIn to test Plaintiff's claims about her mental and emotional state. (*Id.* at 1). According to Defendant, Plaintiff testified at her deposition that she suffers from post traumatic stress disorder, depression and isolation, and has cut herself off from communication with friends because of Defendant's alleged wrongdoing. (*Id.*) Defendant argues that SNS communications are particularly likely to contain relevant information because "in this day and age, many communications between friends and/or about an individual's emotional state are communicated via social media." (*Id.*) Defendant states that it has evidence suggesting that Plaintiff maintains Facebook and LinkedIn accounts and that publicly available information from those sites undermines Plaintiff's claims of isolation and loss of friendship. (*Id.* at 8).

Plaintiff acknowledges that "social media is **discoverable** to the extent it is adequately tailored to satisfy the relevance standard," but argues that Plaintiff's requests are impermissibly overbroad. (*Id.* at 11). According to Plaintiff, rather than tailor its requests, Defendant seeks "to rummage through the entirety of [Plaintiff's] social media profiles and communications in the hope of concocting some inference about her state of mind." (*Id.* at 3). Plaintiff further argues that the requested **discovery** is unduly burdensome because she has already testified \*570 about her emotional distress, as well as produced or agreed to produce "documents and communications pertaining to her emotional distress damages going as far back as 2004," (*id.*), which Plaintiff maintains constitute "sufficiently relevant responses." (*Id.* at 14). In particular, Plaintiff asserts that she has already responded to requests for her communications with sixteen different current or former Home Depot employees, which Plaintiff contends "presumably" include her communications via social media. (*Id.*)

### III.

#### DISCUSSION

##### A. **Discovery Requests For Social Networking Site Content Must Be Reasonably Calculated To Lead To The Discovery Of Admissible Evidence And Describe The Information To Be Produced With "Reasonable Particularity"**

[1] [2] A party may "obtain **discovery** regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things." Fed.R.Civ.P. 26(b)(1). Relevancy is construed broadly to encompass "any matter that bears on, or that reasonably could lead to other matter[s] that could bear on any issue that is or may be in the case." *Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 619 (S.D.Ind.2002) (internal quotations omitted). The Supreme Court has instructed that the limitation on **discovery** to "relevant" materials must be "firmly applied," as "the **discovery** provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action.'" *Herbert v. Lando*, 441 U.S. 153, 177, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) (quoting Fed.R.Civ.P. 1) (emphasis in original).

[3] [4] Pursuant to Federal Rule of Civil Procedure 34(a), a party may request documents "in the responding party's possession, custody, or control." Rule 34(b) requires the requesting party to describe the items to be produced with "reasonable particularity" and specify a reasonable time, place, and manner for the inspection. Fed.R.Civ.P. 34(b)(1–2). "The test for reasonable particularity is whether the request places a party upon 'reasonable notice of what is called for and what is not.'" *Bruggeman ex rel. Bruggeman v. Blagojevich*, 219 F.R.D. 430, 436 (N.D.Ill.2004) (quoting *Parsons v. Jefferson–Pilot Corp.*, 141 F.R.D. 408, 412 (M.D.N.C.1992)); see also *Regan–Touhy v. Walgreen Co.*, 526 F.3d 641, 649–50 (10th Cir.2008) ("Though what qualifies as 'reasonabl[y] particular' surely depends at least in part on the circumstances of each case, a **discovery** request should be sufficiently definite and limited in scope that it can be said 'to apprise a person of ordinary intelligence what documents are required and [to enable] the court ... to ascertain whether the requested documents have been

produced.’ ”) (quoting Wright & Miller, 8A Federal Practice and Procedure § 2211, at 415). “ ‘All-encompassing demands’ that do not allow a reasonable person to ascertain which documents are required do not meet the particularity standard of Rule 34(b)(1)(A).” *In re Asbestos Products Liability Litigation (No. VI)*, 256 F.R.D. 151, 157 (E.D.Pa.2009).

[5] [6] The Court recognizes that **social networking** site content may be subject to **discovery** under Rule 34. “Generally, SNS content is neither privileged nor protected by any right of privacy.” *Davenport v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 555759 at \*1 (M.D.Fla. Feb. 21, 2012). However, “[**d**iscovery] of SNS requires the application of basic **discovery** principles in a novel context.” *Simply Storage Mgmt.*, 270 F.R.D. at 434. In particular, several courts have found that even though certain SNS content may be available for public view, the Federal Rules do not grant a requesting party “a generalized right to rummage at will through information that [the responding party] has limited from public view” but instead require “a threshold showing that the requested information is reasonably calculated to lead to the **discovery** of admissible evidence.” *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388 (E.D.Mich.2012); see also *Davenport*, 2012 WL 555759 at \*1 (“A \*571 request for **discovery** [of SNS content] must still be tailored ... so that it ‘appears reasonably calculated to lead to the **discovery** of admissible evidence.’ ”) (quoting Fed.R.Civ.P. 26(b)(1)); *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, 2007 WL 119149 at \*7 (D.Nev. Jan. 9, 2007) (“Ordering ... release of all of the private email messages on Plaintiff's Myspace.com internet account would allow Defendants to cast too wide a net for any information that might be relevant and **discoverable**.”).

[7] Where **discovery** requests seek SNS communications in connection with claims involving the responding party's mental or emotional health, several courts have also found that “the simple fact that a claimant has *had* social communication is not necessarily probative of the particular mental and emotional health issues in the case. Rather, it must be the substance of the communication that determines relevance.” *Simply Storage Mgmt.*, 270 F.R.D. at 435; *Holter v. Wells Fargo and Co.*, 281 F.R.D. 340, 344 (D.Minn.2011). As one court reasoned, “To be sure, anything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of every thought she may have reduced to writing, or, indeed, the deposition of everyone she may have talked to.” *Rozell v. Ross-Holst*, 2006 WL

163143 at \*3–4 (S.D.N.Y. Jan. 20, 2006). Thus, while a party may conduct **discovery** concerning another party's emotional state, the **discovery** itself must still comply with the general principles underlying the Federal Rules of Civil Procedure that govern **discovery**.

[8] [9] “A court can limit **discovery** if it determines, among other things, that the **discovery** is: (1) unreasonably cumulative or duplicative; (2) obtainable from another source that is more convenient, less burdensome, or less expensive; or (3) the burden or expense of the proposed **discovery** outweighs its likely benefit.” *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 558 (D.Conn.2006) (internal citations and quotation marks omitted). “The district court enjoys broad discretion when resolving **discovery** disputes, which should be exercised by determining the relevance of **discovery** requests, assessing oppressiveness, and weighing these factors in deciding whether **discovery** should be compelled.” *Id.* (internal citations and quotation marks omitted).

**B. The Majority Of Defendant's Social Media Requests Fail Rule 34(b)(1)(A)'s Reasonable Particularity Requirement And Therefore Are Not Reasonably Calculated To Lead To The **Discovery** Of Admissible Evidence**

The Court finds that three of the four categories of SNS communications sought by Defendant fail Rule 34(b)(1)(A)'s “reasonable particularity” requirement, and, as such, are not reasonably calculated to lead to the **discovery** of admissible evidence. Consequently, the Court DENIES Defendant's Motion with respect to Categories 1, 2 and 4 of the revised requests. (*See* Jt. Stip. at 2).

[10] Category 1 seeks any “profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries)” from any **social networking** site from October 2005 through the present “that reveal, refer, or relate to any emotion, feeling, or mental state of Plaintiff, as well as communications by or from Plaintiff that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.” (Jt. Stip. at 2). Plaintiff has placed her emotional state at issue in this action and it is conceivable that some SNS communications may support or undermine her claims of emotional distress. Nonetheless, the extremely broad description of the material sought by this category fails to put a “reasonable person of ordinary intelligence” on

notice of which specific documents or information would be responsive to the request, and therefore fails to satisfy Rule 34(b)(1)(A)'s requirement that production requests be stated with reasonable particularity.

Even if the first part of this category, which seeks communications relating to “any emotion,” could be understood to encompass only communications containing specific emotive words (which the request does not identify), \*572 the category would still arguably require the production of many materials of doubtful relevance, such as a posting with the statement “I hate it when my cable goes out.” The second part of the category, which seeks communications relating to “events” that could “reasonably be expected to produce a significant emotion,” is similarly vague and overbroad. Arguably, watching a football game or a movie on television is an “event” that may produce some sort of “significant emotion,” but it is unclear whether Plaintiff would be required to produce messages relating to such activities. Without more specific guidance, Category 1 is not “reasonably particular.” The language of the request does not provide sufficient notice to the responding party of what should be considered responsive material. Defendant fails to make the “threshold showing” that the request at issue is reasonably calculated to lead to the **discovery** of admissible evidence.

[11] Category 2, which requests “third-party communications to Plaintiff that place her own communications in context,” also fails. To the extent that the reference to Plaintiff’s “own communications” means communications regarding “emotions” produced in response to Category 1, Category 2 is entirely predicated on Category 1 and fails for the same vagueness concerns discussed above. Apart from these deficiencies, even if the universe of documents referred to as Plaintiff’s “own communications” could be reasonably circumscribed and understood, the phrase “in context” is vague and also fails to provide notice to Plaintiff of which specific third party communications are and are not called for by the request.

[12] [13] Finally, Category 4, which requests “any pictures of Plaintiff taken during the relevant time period and posted on Plaintiff’s profile or tagged or otherwise linked to her profile,” is impermissibly overbroad. Defendant fails to make the threshold showing that every picture of Plaintiff taken over a seven-year period and posted on her profile by her or tagged to her profile by other people would be considered relevant under Rule 26(b)(1) or would lead to admissible

evidence. See *Simply Storage Mgmt.*, 270 F.R.D. at 436 (“[A] picture posted on a third party’s profile in which a claimant is merely ‘tagged’ [ ] is less likely to be relevant.”) (footnote omitted). “All encompassing” production requests do not meet Rule 34(b)(1)(A)'s reasonably particularity requirement, *In re Asbestos Products Liability Litigation (No. VI)*, 256 F.R.D. at 157, and **discovery** rules do not allow a requesting party “to engage in the proverbial fishing expedition, in the hope that there *might* be something of relevance in [the producing party’s] Facebook account.” *Tompkins*, 278 F.R.D. at 388 (emphasis in original).<sup>3</sup>

[14] In contrast, Category 3, which requests all SNS communications “between Plaintiff and any current or former Home Depot employees, or which in any way refer ... to her employment at Home Depot or this lawsuit,” adequately places Plaintiff on notice of the materials to be produced and is reasonably calculated to lead to the **discovery** of admissible evidence. Plaintiff notes that she has already responded to requests for communications between Plaintiff and sixteen different current or former Home Depot employees, which “would presumably include communications via social media.” (Jt. Stip. at 36). Plaintiff’s responses to those requests indicate that a search for the communications described in Category 3 is both technically feasible and not overly burdensome. (See, e.g., Helmer Decl., Exh. A at 8– \*573 9). Plaintiff did not provide argument or evidence to the contrary in opposition to the current motion. Consequently, the Court GRANTS Defendant’s Motion with respect to Category 3.

#### IV.

#### CONCLUSION

For the foregoing reasons, Defendant’s Motion to Compel Further Responses to Defendant’s Request for Production of Documents (Set One) is GRANTED IN PART and DENIED IN PART. Defendant’s Motion is DENIED with respect to Categories 1, 2 and 4. Defendant’s Motion is GRANTED with respect to Category 3. Plaintiff is ORDERED to serve a written response and to produce documents responsive to Category 3, if any exist, within fourteen (14) days of the date of this Order.

IT IS SO ORDERED.

## Parallel Citations

116 Fair Empl.Prac.Cas. (BNA) 265, 83 Fed.R.Serv.3d 585

## Footnotes

- 1 “‘Tagging’ is the process by which a third party posts a picture and links people in the picture to their profiles so that the picture will appear in the profiles of the person who ‘tagged’ the people in the picture, as well as on the profiles of the people who were identified in the picture.” *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 n. 3 (S.D.Ind.2010).
- 2 As written, Requests for Production Nos. 46–49 seem to require production of the entire contents of Plaintiff’s SNS accounts and are overbroad, as Defendant appears to have recognized. (*See* Jt. Stip. at 4, 15–16, 26 & 37). The instant Motion is limited to a request for an Order compelling production of only the four categories of documents described above, which arguably overlap several different requests for production as originally written. (*See* Jt. Stip. at 2, 9). The Court will therefore address these four categories instead of the four original production requests that they supersede.
- 3 The Court acknowledges that Categories 1, 2 and 4 are closely modeled after three categories of SNS communications that the court in *Simply Storage Mgmt.* ordered produced. *See Simply Storage Mgmt.*, 270 F.R.D. at 436. That court recognized, however, that the categories were not “drawn ... with the precision litigants and their counsel typically seek.” *Id.* The court admonished counsel to make “judgment calls” “in good faith” pursuant to the guidelines articulated by the court in carrying out the order and stated that the requesting party could challenge the production if it believed it fell short of those guidelines. *Id.* These admonishments suggest that the court itself was concerned about the parties’ ability to carry out the order. As noted in the discussion above, this Court finds that the requests suggested in *Simply Storage Mgmt.* are overbroad and vague. These requests fail to provide enough direction to the responding party to comply with Rule 34(b)(1)(A). Accordingly, this Court declines to compel responses to the **discovery** modeled on requests described in the *Simply Storage Mgmt.* case.