ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

July 30, 2012

Chief Justice Tani Cantil-Sakauye and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Juror Number One v. Superior Court (Royster)*
Case No. S203713

To the Chief Justice and the Associate Justices of the California Supreme Court:

Amicus curiae Electronic Frontier Foundation (EFF) urges this court to grant review in the above-referenced case.

THE INTEREST OF AMICUS CURIAE

EFF is a non-profit, member-supported digital civil liberties organization. As part of its mission, EFF has served as counsel for amicus curiae in key cases addressing user rights to privacy, free speech, and innovation as applied to the Internet and other new technologies. With more than 19,000 dues-paying members, EFF represents the interests of technology users in court cases and in broader policy debates surrounding the application of law in the digital age, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to web sites in the world, www.eff.org.

EFF's interest in this case arises out of concern for the privacy rights of electronic social media users. This case presents the question whether judicially-coerced consent can invoke a consent-to-disclosure exception to a federal statute that protects the confidentiality of stored electronic communications. EFF urges this court to grant review in order to decide whether the Court of Appeal's answer—"yes"—undermines that statutory protection.

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DISCUSSION

This Court Should Grant Review to Decide Whether Judicially-Coerced Consent Can Invoke the Disclosure Provisions of the Stored Communications Act.

Electronic social media like Facebook have become ubiquitous with astonishing speed. The number of active monthly Facebook users now exceeds 900 million; Twitter has some 500 million users; LinkedIn boasts more than 100 million members. (See http://en.wikipedia.org/wiki/List_of_virtual_communities_with_more_than_100_million_users [as of July 31, 2012].)

Consequently, the present case—where a sitting juror posted items concerning an ongoing criminal trial to his Facebook wall—was surely inevitable. No admonition can ensure against the occasional intrusion of electronic social media into the jury process. The salient question here concerns the extent to which our trial courts can police such intrusion without running afoul of jurors' privacy rights. That question is a matter of statewide concern worthy of review by this court.

Congress passed the Stored Communications Act (SCA) (18 U.S.C. § 2701 et seq.) in 1986 to protect the confidentiality of communications in electronic storage with a third-party internet service provider or other electronic communications facility. (*Theofel v. Farey-Jones* (9th Cir. 2004) 359 F.3d 1066, 1072-1073.) The SCA generally prohibits third-party providers from divulging the contents of such communications. (18 U.S.C. § 2702(a).) A federal district court held that Facebook postings were protected by the SCA. (*Crispin v. Christian Audigier, Inc.* (C.D.Cal. 2010) 717 F.Supp.2d 965, 981-982, 988-990.)

An exception to the SCA's disclosure prohibition is that a provider may divulge the contents of a communication "with the *lawful consent* of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service." (18 U.S.C. § 2702(b)(3), italics added.) In the present case,

the trial court purported to invoke the SCA's "lawful consent" exception by ordering Juror Number One to consent to Facebook's disclosure of his postings.

The Court of Appeal upheld the superior court's order, explaining: "[E]ven 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*." (Typed opn., p. 13, italics added.) The Court of Appeal added: "[T]he question here is not whether respondent court can compel Facebook to disclose the contents of Juror Number One's wall postings but *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." (Typed opn., p. 15, italics added.)

The Court of Appeal's reasoning raises the question whether judicially-coerced consent can legitimately invoke the SCA's "lawful consent" exception. There is a dearth of legal authority on point. A few courts have addressed this question within the context of consent by a *party* to litigation, and have reached conflicting conclusions, either summarily or in dicta. (See *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1446 ["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."]; *Flagg v. City of Detroit* (E.D.Mich. 2008) 252 F.R.D. 346, 366 ["there is very little case law that confirms the power of a court to compel a party's consent to the disclosure of materials pursuant to a third-party subpoena"]; *J.T. Shannon Lumber Company, Inc. v. Gilco Lumber Inc.* (N.D.Miss 2008) http://scholar.google.com/scholar_case?case=7833522116598748805 ["By requiring the defendant and its employees to consent to the disclosure of such information by subpoena of the internet service provider, the court would undermine the [SCA's] intent to create a zone of privacy around that medium. There is no exception in the statute for civil discovery, and the court declines to create one by

allowing an end run around the statute."] [see Attachment A, attached pursuant to Cal. Rules of Court, rule 8.1115(c)]; *Romano v. Steelcase Inc.* (2010) 30 Misc.3d 426, 435 [907 N.Y.S.2d 650, 657] [ordering plaintiff to consent to disclosure, without addressing whether court had power to do so].) No published decision, however, in California or elsewhere, has decided the question whether judicially-coerced consent by a *non-party juror* can invoke the SCA's "lawful consent" exception.

The answer should be "no," for the simple reason that *coerced* consent cannot be *lawful* consent. "Where there is coercion there cannot be consent." (*Bumper v. North Carolina* (1968) 391 U.S. 543, 550 [88 S.Ct. 1788, 20 L.Ed.2d 797].) "'[T]he absence of official coercion is a *sine qua non* of effective consent.'" (*Hubbard v. Haley* (11th Cir. 2003) 317 F.3d 1245, 1253.)

Here, the superior court constructed, and the Court of Appeal endorsed, a legal fiction which threatens to undermine the privacy rights conferred by the SCA. The analogy to constitutional law is obvious. A coerced confession cannot pass constitutional muster; nor can coerced consent to an unlawful search or seizure. Likewise, coerced consent should not be effective to invoke the disclosure provisions of the SCA. It is an end run around the SCA, which the law should not countenance.

The Court of Appeal posited: "If the [superior] court can compel Juror Number One to produce the information, it can likewise compel Juror Number One to consent to the disclosure by Facebook." (Typed opn., p. 15.) That proposition is itself dubious, given the illegitimate legal status of coerced consent. In any case, however, if the superior court can compel Juror Number One to produce his Facebook postings, then *that* is what the superior court should have compelled, rather than indulging the legal fiction of coerced consent to disclosure by Facebook.

The underlying question here is whether a trial court *can* compel a juror to produce electronic communications like Facebook postings. Should this court grant review, that question will be within the scope of review. (See Cal. Rules of Court, rule 8.516(a)(1), (b)(1) [upon grant of

review, parties may brief and court may decide issues "fairly included" in issue presented for review].) This court should decide that question for the guidance of bench and bar as future cases like this one inevitably arise.

At a minimum, however, this court should decide whether judicially-coerced consent can satisfy the disclosure provisions of the SCA, given the impact that the Court of Appeal's decision, if allowed to stand, could have on the SCA's efficacy.

We are mindful of the constitutional right of the real parties in interest to a fair trial, and the tension between that right and the privacy rights of Juror Number One. This court's intervention is needed to resolve that tension. We urge the court to grant review so that it may chart an appropriate course that addresses both concerns.

CONCLUSION

For the foregoing reasons, EFF urges this court to grant Juror Number One's petition for review. Should the petition be granted, EFF will request permission to file an amicus curiae brief on the merits.

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION
HANNI FAKHOURY
JON B. EISENBERG

By: Jon B. Eisenberg
Jon B. Eisenberg

JBE/jl
Attachment: Proof of Service

ATTACHMENT A

J.T. SHANNON LUMBER COMPANY, INC., Plaintiff
v.
GILCO LUMBER INCORPORATED, et al., Defendants.

Civil Action No. 2:07-CV-119-SA-SAA.

United States District Court, N.D. Mississippi, Delta Division.

October 29, 2008.

ORDER

S. ALLAN ALEXANDER, Magistrate Judge.

The plaintiff, J.T. Shannon Lumber Company, Inc., requests the court reconsider its order quashing the subpoenas *duces tecum* served on Microsoft Corporation, Google, Inc. and Yahoo!, Inc. [docket no. 127]. The court quashed the subpoenas *duces tecum* because they were facially invalid under the Stored Communications Act of 1986. 18 U.S.C. §§ 2701-03 (2006). Moreover, the court found the requested information contained in the subpoenas to be overly broad and unduly burdensome because of the expansive scope of the requested information without sufficient evidence to demonstrate that it would likely lead to admissible evidence. Docket no. 124, pp. 3-4. The plaintiff now requests that the court "direct the Defendant, Gilco Lumber Incorporated ("Gilco") to consent to the release of the information from the listed e-mail providers and require its employees to do so as well." Docket no. 127, p.1. The plaintiff seeks this relief so as to avoid the Stored Communications Act. *Id.*

The court does not typically recognize a motion for reconsideration unless the moving party can show evidence of: 1) an intervening change in controlling law, 2) the availability of new evidence not previously available, or 3) the need to correct a clear error of law or prevent manifest injustice, as required for reconsideration. *Atkins v. Marathon LeTourneau Co.*, 130 F.R.D. 625 (S. D. Miss. 1990).

The Stored Communications Act has not changed since the court issued its order quashing the subpoenas *duce tecum*; thus the statute still controls this matter. The statute is clear on this matter — the third party intermediaries may not disclose such information.[1] The subpoenas as issued remain facially invalid.[2]

In addition to requesting the court reconsider its order quashing the subpoenas *duces tecum*, the plaintiff requests additional relief, which is not proper. By requiring the defendant and its employees to consent to the disclosure of such information by subpoena of the internet service provider, the court would undermine the statute's intent to create a zone of privacy around that medium. There is no exception in the statute for civil discovery, and the court declines to create one by allowing an end run around the statute. *See generally In re Subpoena Duces Tecum to AOL, LLC.*, 550 F.Supp. 2d 606, 611 (E.D. Va. 2008). Finally, the plaintiff has other means of obtaining any discoverable information at its disposal, which would not be contrary to the Stored Communications Act. Therefore, the court is not persuaded by the plaintiff's arguments.

For these reasons, it is ORDERED

That the plaintiff's motion to reconsider is DENIED.

[1] 18 U.S.C. § 2702 (2008).

[2] The plaintiff encourages the court to follow the holding in *O'Grady v. Superior Court*, 44 Cal.Rptr. 3d 72, 88 (2006). *O' Grady* supports the court's original order and does not create any exception to the privacy act for civil discovery or allow for coercion of defendants to allow such disclosure. Therefore, *O'Grady* does not support the plaintiff's motion for reconsideration.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

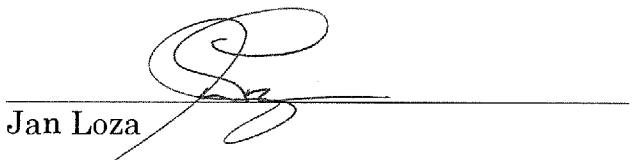
On July 30, 2012, I served true copies of the following document(s) described as **LETTER TO CALIFORNIA SUPREME COURT IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following ordinary business practices. I am readily familiar with my firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on July 30, 2012, at Encino, California.



Jan Loza

Juror Number One v. Superior Court (Royster)
Cal. Supreme Court Case No. S203713

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