

Five Navy Seals, et al v. Associated Press, et al



TKL 5/5/05 8:45

3:05-CV-00555 FIVE NAVY SEALS V. ASSOCIATED PRESS

\*31\*

\*OBJ.\*

FILED

05 MAY -4 PM 4:03

U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY: [Signature] DEPUTY

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7 FOUR NAVY SEALS AND JANE DOE

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

11 FOUR NAVY SEALS AND JANE DOE,  
12 Plaintiffs,

13 v.

14 ASSOCIATED PRESS, a New York corporation;  
15 SETH HETTENA, an individual; and Does 1  
through 50, inclusive,

16 Defendants.

Case No. 05 CV 0555 JM (JMA)

**PLAINTIFFS' OBJECTIONS TO  
DECLARATION OF SETH D.  
BERLIN IN SUPPORT OF  
MOTION TO STRIKE**

Date: May 6, 2005  
Time: 11:00 a.m.  
Ctrm: 6  
Judge: Jeffrey Miller

21 Plaintiffs hereby object to paragraphs 2 through 16 of the Declaration of Seth D. Berlin in  
22 Support of Motion to Strike ("Berlin Declaration") under Federal Rule of Evidence 402. As set forth  
23 in her Declaration in Opposition to Defendants' Motion to Dismiss and Strike, Jane Doe obtained a  
24 smugmug.com account approximately two years ago. As a result, Mr. Berlin's statements regarding  
25 the current configuration of smugmug.com are irrelevant to a determination of how smugmug.com  
26 functioned in 2003.

26 [Signature]  
27 ///  
28 ///

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Further, Plaintiffs' object to paragraph 16 of the Berlin Declaration for the following reasons:

Page; Line	Objectionable Evidence	Legal Grounds for Objection
4:14-16	While there is usually a short lag time until public website pages like mine are added to search engines such as Google, I expect that my photograph would shortly be included in such search engines.	Mr. Berlin has set forth no foundation for his purported knowledge regarding search engines.
5:6-9	Jane Doe's Declaration states, at ¶ 2: "[w]hen I signed up, I chose a password and <i>believed</i> that any photographs I stored on the site were password protected." Based upon my experience with the website, this clearly appears to be a reference to the selection of a password to protect her account information, not to invoke password protection for any photo gallery.	As noted, Mr. Berlin opened a smugmug.com account approximately two years after Jane Doe. As a result, he has set forth no foundation for his statements attempting to interpret Jane Doe's prior experience with the site. Moreover, Mr. Berlin's interpretation of Jane Doe's unambiguous statement is both speculative and argumentative.
5:9-13	Jane Doe also states, at ¶ 3, that she "uploaded th[e] photographs...on [her] personal smugmug.com webpage over a period of time in approximately the fall of 2003," but does not state that she selected a password for any of her <i>galleries</i> of photographs or activated any of the other security options offered by smugmug.com for those galleries.	Again, Mr. Berlin opened a smugmug.com account approximately two years after Jane Doe. As a result, he has set forth no foundation for his statements attempting to interpret Jane Doe's prior experience with the site.
5:13-16	Jane Doe seems to acknowledge that the photos she uploaded were indeed publicly available when she states, at ¶ 4: "I feel awful about this, but the fact is that I thought nobody could access these photographs because <i>the site</i> was password protected" (emphasis added.).	Mr. Berlin's interpretation of Jane Doe's unambiguous statement is speculative and argumentative.

Dated: May 4, 2005

MORRISON & FOERSTER LLP

By:   
 Charles S. Evendorff

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 FOUR NAVY SEALS AND JANE  
 DOE

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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 FOUR NAVY SEALS AND JANE DOE,  
12 Plaintiffs,

Case No. 05 CV 0555 JM (JMA)

13 v.

**PROOF OF SERVICE**

14 ASSOCIATED PRESS, a New York corporation;  
15 SETH HETTENA, an individual; and Does 1  
through 50, inclusive,  
16 Defendants.

17  
18 I, the undersigned, declare:

19 I am employed in the City and County of San Diego, California. I am over the age of 18  
20 years and not a party to the within action. My business address is 3811 Valley Centre Drive,  
21 Suite 500, San Diego, CA 92130.

22 On May 4, 2005, I served the following documents:

23 **PLAINTIFFS' OBJECTIONS TO DECLARATION OF SETH D. BERLIN IN**  
24 **SUPPORT OF MOTION TO STRIKE**

25 by placing a true copy thereof in a sealed envelope(s), addressed as follows, and serving as  
26 indicated below:

27  
28

1 Robert G. Steiner, Esq.  
Luce Forward  
2 600 West Broadway  
Suite 2600  
3 San Diego, California 92101  
Telephone: (619) 236-1414  
4 Facsimile: (619) 232-8311

Attorneys for Defendants Associated  
Press and Seth Hettena

5 David A. Schultz  
Audrey Critchley  
6 LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.  
230 Park Avenue  
7 Suite 1160  
New York, New York 10169  
8 Telephone: (212) 850-6100  
Facsimile: (212) 850-6299  
9

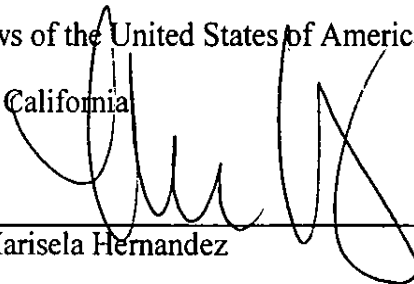
10  (BY PERSONAL SERVICE) I delivered to an authorized courier or driver authorized by  
11 Diversified Legal Services, Inc., P.O. Box 3969, San Diego, California 92163, to receive  
documents to be delivered on the same date. A proof of service signed by the authorized courier  
12 will be filed with the court upon request.

13  (BY OVERNIGHT DELIVERY) I am readily familiar with the practice of Morrison &  
Foerster LLP for collection and processing of correspondence for overnight delivery and know  
14 that the document(s) described herein will be deposited in a box or other facility regularly  
maintained by United Parcel Services, Inc., for overnight delivery.  
15

16  (VIA FACSIMILE) I caused to be delivered to the fax number listed above before 5:00  
p.m. The facsimile machine I used complied with California Rules of Court, Rule 2003(3) and no  
17 error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused  
the machine to print a transmission record of the transmission, a copy of which be filed with the  
18 court upon request.

19  (BY MAIL) I placed each such sealed envelope, with postage thereon fully prepaid for  
first-class mail, for collection and mailing at Morrison & Foerster, San Diego, California,  
20 following ordinary business practices. I am familiar with the practice of Morrison & Foerster for  
collection and processing of correspondence, said practice being that in the ordinary course of  
21 business, correspondence is deposited in the United States Postal Service the same day as it is  
placed for collection. I am aware that on motion of the party served, service is presumed invalid  
22 if postal cancellation date or postage meter date is more than one day after date of deposit for  
mailing in affidavit.  
23

24 I declare under penalty of perjury under the laws of the United States of America that this  
25 declaration was signed on May 4, 2005, at San Diego, California

  
\_\_\_\_\_  
26 Marisela Hernandez  
27  
28