

No.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE TRUE THE VOTE, CATHERINE ENGELBRECHT,
And GREGG PHILLIPS

Mandamus from the United States District Court
for the Southern District of Texas

Case No. 4:22CV3096, *Konnech Inc. v True The Vote, Catherine Engelbrecht And
Gregg Phillips*

**EMERGENCY MOTION FOR RELEASE FROM DETENTION PENDING
DETERMINATION OF APPLICATION FOR MANDAMUS**

TO THE HONORABLE JUDGES OF SAID COURT:

Petitioners Catherine Engelbrecht and Gregg Phillips file this Emergency Motion for Release from Detention Pending Determination of their Application for Mandamus. The district court found the Petitioners to be in contempt of court for refusing to identify an individual they knew to be a federal confidential informant in open court. The Petitioners have been detained since October 31, 2022. Petitioners contend that the district court's order represents a clear abuse of discretion and a manifest miscarriage of justice. Petitioners' continued detention has caused them personal and professional harm. Continued detention by its very nature is

irreparable. In support of this Emergency Motion for Release, Petitioners would show the Court the following:

I.

SUMMARY OF PROCEEDINGS

On September 12, 2022, Plaintiff Konnech Inc. (Konnech) filed a Complaint against True The Vote Inc. (TTV), Catherine Engelbrecht and Gregg Phillips (Defendants) and an Application for a Temporary Restraining Order (TRO). (DOC 1, 5) The Complaint and the TRO are based on alleged violations of 18 U.S.C. § 1030 et seq., the Computer Fraud and Abuse Act, and Texas Remedies Code § 143.002.

On September 21, 2022, Konnech filed a Motion for Order to Show Cause as to Contempt against True The Vote. (DOC 16). The district court set a show cause hearing on October 17, 2022. (DOC 33). The district court conducted the show cause hearing on October 27, 2022. The court continued the hearing until October 31, 2022. The hearing concluded on October 31, 2022. The district judge ordered defendants Catherine Engelbrecht and Gregg Phillips to be detained until they fully complied with the Court's Order as set out in the TRO. (DOC 51).

II

STATEMENT OF FACTS

A. What the district court ordered Petitioners to do

On September 12, 2022, after reviewing Konnech's Original Complaint, its Motion for a Temporary Restraining Order (TRO) and Edward Yu's supporting affidavit, the district court granted Konnech a TRO. Notwithstanding the fact the court had only considered the pleading, the court found that the evidence supported the following findings: (1) Konnech had a substantial likelihood of succeeding on the merits because the Petitioners had allegedly confessed as to having gained unauthorized access to Konnech's protected computers, (2) Konnech was subject to immediate irreparable harm without the TRO, (3) the harm outweighs any potential harm the Petitioners might have suffered, and (4) the TRO was in the public interest. (DOC 9, pp. 1-2).

The court thereafter entered the following injunctions: (1) Petitioners were not to access or attempt to access Konnech's protected computers; (2) Petitioners were ordered to return all property and data obtained from Konnech's protected computers; (3) Petitioners were enjoined from exploiting any property or data gleaned from Konnech's protected computers; (4) Petitioners were ordered to preserve any information or data obtained from Konnech's protected computers; (5) Petitioners were ordered to identify any and all individuals and entities involved in

accessing Konnech's protected computers: (6) Petitioners were ordered to confidentially disclose how, when, and by whom Konnech's protected computers were accessed; and (7) Petitioners were ordered to identify all persons or entities who once had possession, custody, or control or any information or data from Konnech's protected computers. (DOC 9, pp. 2-3).

B. Why the Court ordered the Petitioners detained

During the show-cause hearing on October 27, 2022, Konnech complained that the Petitioners had failed to comply with the fifth, sixth, and seventh directives of the TRO. (DOC 47, pp. 9, 17-19). Petitioners, through counsel, attempted to introduce an affidavit from Gregg Phillips averring that True The Vote had turned over any information in their possession to FBI special agents, that the amount of information Petitioner Phillips had seen in a Dallas hotel room was too massive to have come from an individual computer, and the material Phillips saw may not even have come from a Konnech protected computer. (DOC 47, pp. 10-12). The district court insisted on receiving the Petitioners' testimony. (DOC 47, pp. 13, 21).

Gregg Phillips testified. (DOC 47, p. 29). Phillips identified one individual that he knew personally had "access" to material germane to items five through seven of the court's order (DOC 47, p. 31). Phillips related that he met this individual at a meeting in a Dallas hotel room in January or February of 2021 (DOC 47, pp 31-32). Phillips testified that what he witnessed was information downloaded in the past

– there was far too much information for a single computer. Neither of the petitioners had possession, custody, or control of that information. (DOC 47, p. 33).

After the 2021 winter meeting, the petitioners turned over what they had to the FBI (DOC 47, p. 34). Phillips declared that he did not know how or when or by whom the information was downloaded but the FBI deemed it significant in light of the volume – more than 350 terabytes had been downloaded over the first quarter of 2021. (DOC 47, pp.35-36). Finally, Petitioner Phillips testified that he was aware of only one individual and several agents of the FBI who exercised possession, care, custody, and control over the information he saw. (DOC 47, p. 36).

On cross-examination, Phillips testified one other individual attended the meeting in the Dallas hotel. (DOC 47, p. 39). Phillips refused to identify this individual because Phillips believed him to an FBI confidential informant (DOC 47, pp. 39-40). Phillips continued to refuse to identify the individual after the court ordered him to do so. (DOC 47, p. 40). Petitioner Phillips related that he did not share any of this information with Petitioner Engelbrecht. (DOC 47, p. 52).

Aside from the other individuals in the hotel room and the FBI agents, Phillips had no knowledge of who may have accessed the Konnech protected computers. When counsel asked Petitioner Phillips whether the data he saw came from a Konnech protected computer, Phillips said his contacts believed that it came from a server in China. (DOC 47, p. 73).

Petitioner Phillips declared that he had not accessed or attempted to access a Konnech computer since September 12, 2022. (DOC 47, p. 74). During an examination by the court, Phillips stood his ground and refused to identify the other individual attending the Dallas hotel meeting. (DOC 47, pp. 83-88). When the court asked whether or not Petitioners were going to post personal identification information online, Phillips tried to explain to the court it was asking separate data sets, essentially mixing apples and oranges. The court declared that it was not interested in separate data sets. (DOC 47, pp. 96-97). The court posed a series of arguably unnecessary inflammatory questions that touched upon the toxic culture of internet downloads related to election officials and other public figures. (DOC 47, pp. 97-100). In the end Phillips refused to identify the third individual in the hotel room. (DOC 47, p. 101-103). Phillips testified that if the individual's identity became known his life would be jeopardized by border drug and smuggling cartels. (DOC 47, p. 43).

Petitioner Catherine Engelbrecht testified. (DOC 47, p. 106). Petitioner Engelbrecht testified that she did not have any personal knowledge with respect to the fifth, six, and seventh directives of the TRO – she received all of what she knew from Petitioner Phillips. (DOC 47, p. 108). Indeed, Petitioner Engelbrecht confessed that she did not have any technical knowledge as to how computer data was forwarded to the FBI by a third person (not Petitioners). (DOC. 47, p. 114).

Engelbrecht testified that she was aware of a program called “BinaryEdge” that could be used to determine the location of a computer server. (DOC 47, pp. 134-135). Information gleaned from these public open sources available to anyone gave Petitioner Engelbrecht reason to believe that information concerning American elections ended up on servers in the Republic of China. (DOC 47, p. 139). Petitioner Engelbrecht refused to disclose the identity of the third individual who attended the Dallas hotel room conference. (DOC 47, p. 151).

Notwithstanding Petitioner Engelbrecht’s demonstrative lack of knowledge with respect to disclosure of information as required by the TRO, the court held her in contempt. (DOC 47, p. 172).

III.

RELIEF SOUGHT

Petitioners pray that this Court enter an Order releasing them from the district court’s draconian order of detention for refusing to identify a federal confidential informant in open court whose identity in any event has no bearing on the merits of this defamation case hinging on competing accounts of alleged historical events. Petitioners are filing an Application for Mandamus seeking relief from the Order of Detention contending that the district court’s ruling represents a clear abuse of discretion raising exceptional circumstances amounting to a judicial usurpation of power. *In re Gee*, 941 F.3d 153, 157 (5th Cir. 2019).

Petitioners have been confined over three days. Their continued incarceration is causing them irreparable harm. Petitioners pray that this Court enter an Order releasing them from confinement pending resolution of the Application for Mandamus.

Respectfully submitted,

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**Pro Hac Vice pending*

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF e-service on November 3, 2022, on the following counsel of record:

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Certificate of Compliance

This brief complies with the type-volume limitation of FED. R. APP. P. 32(g)(1) and 27(d)(2)(a) in that it contains 1,495 words. It also complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) in that it has been prepared in a proportionally spaced typeface using Microsoft Word, Windows 11 in Times New Roman 14 point font.

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