

BURBIDGE MITCHELL & GROSS

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

TRIAL LAWYERS

PARKSIDE TOWER

215 SOUTH STATE STREET, SUITE 920

SALT LAKE CITY, UTAH 84111-2311

TELEPHONE

(801) 355-6677

FACSIMILE NUMBER

(801) 355-2341

ihatt@BMGtrial.com

S. IAN HIATT

February 27, 2015

VIA EMAIL & U.S. MAIL

Paul Alan Levy
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001
plevy@citizen.org

Re: *1.800.Vending, Inc. v. Wyland, et al.*, Case No. 1:14-cv-00121-CW

Dear Mr. Levy:

As you know, this firm represents the Plaintiff, 1.800.Vending, Inc. ("1.800") in the above-captioned matter. We write in response to your letter dated February 18, 2015, in which you convey Mr. Kelly's refusal to comply with 1.800's subpoena on First Amendment grounds.

At the outset, you have indicated only that you represent Mr. Kelly, not the authors of the individual posts which are the subject of 1.800's subpoena. Unless Mr. Kelly himself is the author of the comments, he lacks standing to enforce any alleged rights of third parties. Accordingly, there has been no proper objection to the subpoena.

Moreover, your letter seems to ignore the fact that the comments in question are commercial speech, which, as recognized by courts throughout the country, is afforded far less protection than other forms of speech. *See In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011). For example, in the *Koch Industries* case to which you refer in your letter, the court found that the speech at issue was unquestionably political and dismissed the plaintiff's claims; thus, the court's decision to quash the subpoenas was a foregone conclusion. *Koch Ind., Inc. v. Does*, 2011 WL 1775765 (D. Utah May 9, 2011).

In addition, as you know, speech and anonymity are not protected where such speech is defamatory or otherwise illegal, such as in the case of false advertising. In this regard, 1.800 has reason to believe that the identified posts on your client's website were not posted by actual customers; instead, they were posted by 1.800's competitors *posing* as dissatisfied customers.

Through prior legal proceedings, subpoena responses from Pissedconsumer.com and Comcast revealed that the Pissedconsumer.com post referenced in 1.800's Complaint (which you acknowledge is actionable) was made from the home address of Chris Wyland, one of the principals of 1.800's direct competitor. (See Enclosures.) Furthermore, 1.800 has cross-checked the information provided in the posts on your client's website (such as name, location, and number of units allegedly purchased) against its customer database and determined that these anonymous posts on your client's website are not from legitimate customers. *See Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 567 (Va. Ct. App. 2014). Thus, 1.800's interest in protecting its reputation from defamation and false advertising outweighs any First Amendment concerns of the anonymous posters. *See In re Drasin*, 2013 WL 3866777, at *5 (D. Md. July 24, 2013).

We note that your letter does not dispute that the Defendants Chris Wyland and the Grow Entities made the statements that are the subject of the subpoena, nor do you dispute that where made by a competitor, such statements are in violation of state and federal law. We have found no cases standing for the proposition that a person may defame his/her commercial competitor and/or violate the Lanham Act and yet remain cloaked behind a veil of anonymity.

In sum, the *Dendrite* case you cite is far from universally applied and would not be applied where, as here, the anonymous speech is commercial and not attributable to actual, legitimate customers. The *Dendrite* case is further distinguishable where, as here, the plaintiff has suffered actual harm—prospective customers of 1.800 have identified negative posts (such as those identified in the Complaint and in 1.800's subpoena to your client) and have declined to conduct business with 1.800.

Further, to the extent your client believes that notice should be provided to the commenters that are the subject of the subpoena, we note your representation that your client collects email addresses from website users; thus, your client is in the best position to provide any such reasonably calculated notice. In any event, Rule 45 imposes no such obligation on 1.800. *See Faconnable USA Corp. v. John Does*, 2011 WL 2015515, at *7 (D. Colo. May 24, 2011). In addition, we note that pursuant to local rule, there is a protective order automatically in place in this matter which applies to production by third parties and will adequately protect any privacy interests of the anonymous posters. DUCiv. R 26-2(a); Standard Protective Order ¶ 14; *see also In re Drasin*, at *5.

Finally, as your letter seems to anticipate, the accompanying enclosures demonstrate that the IP address identified in item 6 of the subpoena does, in fact, trace back directly to the home address of Mr. Wyland. Thus, any posts from this IP address do not, under any standard, constitute protected speech. We trust that this resolves your client's concerns with respect to this

Mr. Paul Alan Levy
February 27, 2015
Page 3

IP address and ask that a response to this portion of the subpoena be provided without further delay.

While we understand your client's professed belief that users of his website can be most candid when they can speak anonymously, we trust that your client is not interested in having his website used as a portal for false and misleading information by competitors as opposed to actual customers.

Assuming your client is not willing to change his position and before pursuing enforcement with the court, we would prefer to have a telephonic "meet and confer" to discuss this issue. Please let me know when you are available for such a call within the next two weeks.

Sincerely yours,

BURBIDGE MITCHELL & GROSS



S. Ian Hiatt

SIH/me
Encl.



Opinion Corp

Opinion Corporation

(DBA PissedConsumer.com)

Corporate Address:

500 Westover Dr.#1942

Sanford, NC 27330

United States

Information about Post(s)/ Comment(s)

Comment #786935 to review #182040

Created By:

Poster Status:

Email:

IP:

Location set by poster:

Date and Time:

healthy you vending scam

Not Registered

n/a

50.137.171.187

Salt Lake City, Utah

2014-02-20, 11:20 EST

Exhibit

EXHIBIT

D



FACSIMILE TRANSMITTAL SHEET

TO: Bryce R. Lowder	FROM: Comcast Legal Response Center
COMPANY: Nelson Mullins Riley & Scarborough LLP	DATE: 9/4/2014 5:07:02 PM
FAX NUMBER: 919-329-3799	TOTAL NO. OF PAGES INCLUDING COVER: 2
PHONE NUMBER:	SENDER'S REFERENCE NUMBER: 568903
RE: Subpoena	YOUR REFERENCE NUMBER:

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

Attached you will find Comcast's response to the above referenced Subpoena. If you have any questions regarding this matter, please contact the Legal Response Center at 866-947-8572.

Sincerely,

Comcast Legal Response Center



NE&TO
650 Centerton Road
Moorestown, NJ 08057
866-947-8572 Tel
866-947-5587 Fax

CONFIDENTIAL

September 3, 2014

VIA FACSIMILE

Bryce R. Lowder
Nelson Mullins Riley & Scarborough LLP
4140 Parklake Avenue
Glen Lake One, Suite 200
Raleigh, NC 27612
Fax: (919) 329-3799

Re: Jeff Marsh et al. vs. John Doe
Superior Court of the State of North Carolina, Lee County
Case No.: J4-CVS-444
Order Entered: 7/15/2014
Comcast Case #: 568903

Dear Mr. Lowder:

The Court Order dated 7/15/2014, with respect to the above-referenced matter has been forwarded to the Legal Response Center for a reply. The Court Order requests Comcast to produce certain subscriber records pertaining to the following IP Address: 50.137.171.187 assigned on 2/20/2014 at 11:20 EST.

Based on the information provided pursuant to the Court Order, the subscriber information obtained has been provided below:

Subscriber Name: DAWNA WYLAND
Service Address: 936 SW DAVENPORT ST
PORTLAND, OR 97201-2222
Telephone #: 971-229-0685
Type of Service: High Speed Internet Service
Account Number: 8778102113862137
Account Status: Active
IP Assignment: Dynamically Assigned
E-mail User Ids: kingjames07
(the above user ID(s) end in @comcast.net)
Method of Payment: Statement sent to above address

If you have any questions regarding this matter, please feel free to call 866-947-8572.

Very Truly Yours,

Comcast Legal Response Center