IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JANE DOE,	)	
	)	
Movant,	)	
	)	
v.	)	Misc. No. 00-_____
	)	
JOHN HRITZ,	)	
	)	
Respondent.	)	
	)	

MEMORANDUM IN SUPPORT OF
MOTION TO QUASH SUBPOENA TO AMERICA ONLINE

Respondent John Hritz, a high-ranking official of a large company, initiated this proceeding to identify an individual who has exercised her First Amendment right to make anonymous criticisms of his litigiousness on a public Internet message board. Although Hritz alleged generally that movant Jane Doe[1] made "disparaging, threatening and defamatory" comments about him, Hritz has not specified the comments that he deems tortious, and has provided no evidence that anything said was false, much less defamatory. Nevertheless, he invoked a special Ohio procedural rule allowing pre-litigation discovery without even filing a complaint, and has now subpoenaed America Online ("AOL") to provide him with the identifying information that Doe provided to AOL in opening her account. Because there is no reason to believe that a valid lawsuit can be pursued against Doe, and because the First Amendment bars the government from interfering with Doe's decision to speak anonymously

[1] Throughout this brief we refer to movant Doe using the third personal female pronoun in the generic sense, without intending to suggest Doe's actual gender.

unless she is shown to have violated Hritz' rights in some way, the subpoena for information identifying Doe should be quashed.

STATEMENT

A. Facts.

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to read them. As the Supreme Court explained in *Reno v. American Civil Liberties Union,* 521 U.S. 844, 853, 870 (1997), "From the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer." The Court held, therefore, that full First Amendment protection applies to free speech on the Internet. *Id.*

Knowing that people have personal and economic interests in the corporations that shape our world, and in the stocks they hope will provide for a secure future, and knowing, too, that people love to share their opinions with anyone who will listen, Yahoo! has organized outlets for the expression of opinions on these topics. These outlets, called "Message Boards," are an electronic bulletin board system where individuals freely discuss major companies by posting comments for others to read and respond to.

Yahoo! maintains a message board for every publicly traded company and permits anyone to post messages to it. The individuals who post messages there generally do so under a "handle" – similar to the old system of CB's with truck drivers. Nothing prevents an individual from using his real name, but, as an inspection of the message board at issue in this case will reveal, most people choose anonymous nicknames. These typically colorful monikers protect

the writer's identity from those who disagree with him or her, and encourage the uninhibited exchange of ideas and opinions. Such exchanges are often very heated and, as seen from the various messages and responses on the message board at issue in this case, they are sometimes filled with invective and insult. Most, if not everything, that is said on message boards is taken with a grain of salt.

One aspect of the message board that makes it very different from almost any other form of published expression is that, because any member of the public can use a message board to express his point of view, a person who disagrees with something that is said on a message board for any reason – including the belief that a statement contains false or misleading statements about himself – can respond to those statements immediately, and be given the same prominence as the offending message. A message board is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, corporations and executives can reply immediately to criticisms on a message board, providing facts or opinions to vindicate their positions, and thus, potentially, persuading the audience that they are right and their critics wrong. And, because many people regularly revisit the message board about a particular company, the response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

One of Yahoo!'s message boards pertains to AK Steel, the company of which respondent John Hritz is Executive Vice President and General Counsel. In addition to the law department, Hritz' responsibilities include human resources, industrial relations, productivity, environmental affairs, and research and engineering. AK Steel's web site describes the company as "a leader serving the most demanding markets in the production of carbon cold-rolled, metallic coated and stainless steel products." http://www.aksteel.com/index2.html. Yahoo! 's financial web pages

reveal that AK Steel is a very large corporation. In its most recent fiscal year, it had more than 11,000 employees, its sales exceeded $4.5 billion per year, and it had more than $5 billion in assets; Hritz' compensation from AK Steel was $2.7 million. *See* http://biz.yahoo.com/p/a/aks.html; http://yahoo.marketguide.com/mgi/MG.asp?nss=yahoo&rt=abalancestd&rn=A0728. The company frequently appeals for public attention, issuing several press releases every month, http://www.aksteel.com/news/index.html, and it has been embroiled in a number of public controversies, including its compliance with the nation's environmental laws and protracted labor disputes with the unions that represent employees at many of its plants. *E.g.,* Robertson, *AEIF gets steamed about AK no-shows*, American Metal Market, Vol. 105, No. 107, page 2 (June 4, 1997); Hulsey, *AK Puts New Deal on Table*, Dayton Daily News (November 6, 1999), page 1F; Redekopp, *Unions Show Support for AK Steel Workers*, Herald Dispatch, August 29, 2000, http://www.heralddispatch.com/2000/August/29/LNlist6.htm; Dale Dempsey, *AK Steel Faces U.S. Pollution Suit*, Dayton Daily News, June 30, 2000, http://www.ohiocitizen.org/campaigns/prevention/akddn.htm.

The opening message on Yahoo!'s AK Steel message board, dated November 26, 1997, explains the ground rules:

> This is the Yahoo! Message Board about AK Steel Holding Corp (NYSE: AKS), where you can discuss the future prospects of the company and share information about it with others. This board is not connected in any way with the company, and any messages are solely the opinion and responsibility of the poster.

http://messages.yahoo.com/bbs?.mm=FN&board=7078882&tid=aks&sid=7078882&action=m&mid=1.

Every page of message listings is accompanied by a similar warning that all messages should be treated as the opinions of the poster and taken with a grain of salt:

> Reminder: This board is not connected with the company. These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose. Please read our Terms of Service.

http://messages.yahoo.com/bbs?.mm=FN&action=l&board=7078882&tid=aks&sid=7078882&mid=1.

Many members of the public regularly turn to the Yahoo! message board as one source of information about AK Steel. As of the date this brief is filed, almost 9000 messages have been posted on the board. A casual review of those messages reveals an enormous variety of topics and posters. Investors and members of the public discuss the latest news about what products the company has sold and may sell, what new products it may develop, what other businesses AK Steel might buy, what the strengths and weaknesses of AK Steel's operations are, and what its managers and employees might do better. A large number of messages are posted by AK Steel employees, who use the forum to discuss their problems with the company or with unions representing AK Steel workers, including whether AK Steel is meeting its obligations to its employees, and what the employees might do about it. Many of the messages praise AK Steel, some criticize it, and some are basically neutral. Most of the messages give every appearance of being highly opinionated. Many of the posts are extremely vituperative.

Movant Jane Doe is one of the many members of the public who have visited the Yahoo message board for AK Steel and participated in the discussion. Using the screen name "sanibel_us," Doe has posted about 35 messages to the board; like a number of messages from other posters, some of Doe's messages suggest that she works at AK Steel. Hritz attached very short excerpts from twenty of the messages to his Ohio petition; of these excerpts, only one shows an express reference to Hritz: "Hritz will litigate the time of day. OOPS I will be in court." Other messages argue, in sections not shown in the petition, that Hritz' litigious and antagonistic style has hurt AK Steel by provoking hostility on the part of federal regulators and

others with whom the company needs to get along, and that his presence is a detriment to the company's interests. Although some of these messages mention respondent Hritz by name, and criticize him, none of them is even close to defamatory or threatening.[2]

B. Proceedings to Date.

Rather than take advantage of Yahoo!'s open access policy to reply to Doe's criticism, Hritz has substantiated Doe's accusation of litigiousness by filing a petition in Ohio state court, taking advantage of a special Ohio rule that allows discovery to obtain information about a potential adversary in litigation. *See* Exhibit 1. In support of this demand, Hritz claims, in very general terms, that Doe sent e-mail messages to the Yahoo! chat board "containing threatening, libelous and disparaging remarks about Mr. Hritz," *Id*., Petition ¶ 2, and that, without knowing the identity of the responsible party, Hritz "will be prevented from pursuing his legal claims." *Id*. p.1. However, Hritz never specifies the words used by Doe that are allegedly libelous or threatening, not to speak of providing any factual basis for believing that Doe's statements are false, that they contain statements of fact as opposed to non-actionable opinion, or that Doe's statements have caused him any actual damages. Nor, indeed, does the petition ever state that, once Hritz learns Doe's identity, he will file a lawsuit against her.

Based on this barebones petition, Hritz obtained permission from the state court to seek discovery in other states; it then served a subpoena on Yahoo!, forcing it to reveal information that Doe provided when she opened her Yahoo! account. This information included an AOL e-mail address, revealing that Doe is an AOL subscriber. Hritz then obtained a subpoena issued by the Circuit Court of Loudoun County to compel AOL to identify the owner of that e-mail address; in response to that subpoena, AOL sent Doe a copy of the petition that informed her that this action was pending against her in Ohio Superior Court, Butler County.

---

2 All of the messages on the message board can be reviewed and printed by visiting http://messages.yahoo.com/bbs?action=t&type=f&board=7078882&sid=7078882. We have not included all of Doe's messages with this filing, however, because it is Hritz' responsibility to identify, subject to the constraints of Rule 11, the particular statements that he deems actionable.

Doe believes that none of her posts violates Hritz' rights in any way. However, she is concerned that, as a prominent executive at AK Steel, Hritz is well-situated to cause extra-judicial pressure to be brought to bear upon her, such as having her fired or harassed, regardless of whether he ever files suit against her or whether a court finds for her in every respect on Hritz' claims, at which his petition does no more than hint. She is, indeed, concerned that the real purpose of this proceeding is to obtain her name so that such extra-judicial action can be taken against her. Accordingly, Doe has retained undersigned counsel who removed this action to the United States District Court for the Southern District of Ohio on diversity grounds (i.e., Hritz is a citizen of Ohio and Doe is a citizen of a different state, and the amount in controversy exceeds $75,000). *See* Ex. 1.

After a case is removed, "the state courts shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). Because all outstanding state court orders in a removed case are transformed into federal court orders by operation of law, *Granny Goose Foods v. Teamsters Local 70*, 415 U.S. 423, 435-437 (1974), subject to the limitations of the Federal Rules of Civil Procedure, we believe that the Loudoun County subpoena is now deemed a subpoena of this Court under Rule 45. Accordingly, Doe now moves to quash that subpoena because its enforcement would violate the First Amendment.[3]

SUMMARY OF ARGUMENT

This motion presents the Court with an issue of first impression in this circuit – what standard should be used to decide whether, in a particular case, a petitioner's right to obtain redress from an allegedly libelous statement outweighs the speaker's First Amendment right to make anonymous criticisms. Although there are precious few opinions from any courts that address this question, it is an important one because of the rising tide of cases in which persons

[3] Hritz' counsel has advised that he intends to argue that the Loudoun County court still has authority over the subpoena, notwithstanding such cases as *National Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882). Because no explanation has been offered for this rather novel proposition, we have not tried to argue this point in this memorandum, but rather we will wait to review Hritz' legal arguments and respond accordingly.

who have been criticized on the Internet are coming to court to unmask their critics. As a federal district judge put it in the leading case of *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999), in discussing the standards for discovery of a defendant's identity in a domain name dispute, "People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities."

We argue below that, to decide this question of First Amendment rights, a balancing test should be borrowed, by analogy, from the standard that has been developed over the years to decide whether to compel the identification of anonymous sources in libel litigation. Under that test, the Court will ascertain the degree to which a plaintiff has a genuine need for disclosure in order to pursue an otherwise viable claim, and weigh that need against the speaker's need for anonymity. On the facts of this case, there can be no doubt that the right to anonymity should prevail.

ARGUMENT

BECAUSE IDENTIFICATION OF MOVANT DOE TRENCHES ON HER RIGHT TO SPEAK ANONYMOUSLY, AND BECAUSE HRITZ HAS NEITHER PLEADED A CLAIM FOR DEFAMATION NOR SHOWN ANY BASIS FOR SUCH A CLAIM, THE COURT SHOULD QUASH THE SUBPOENA TO AOL.

Although he has filed no complaint in this or any other court, respondent Hritz is seeking to invoke this Court's authority in a way that would infringe irreparably Doe's First Amendment right to speak anonymously. Hritz is attempting to employ the discovery process in a novel way to use this Court as if it were a private detective service, to locate an employee who has engaged in speech criticizing him. At this point, there is no way to determine whether Hritz is seeking to determine whether he has any legitimate potential claim against Doe so that he can bring a lawsuit, or whether he is seeking to use this Court's authority so that he may bring extra-legal

pressures to bear using his authority within the company. Either way, enforcement of the subpoena would terminate Doe's right to engage in anonymous speech, and would impose undue burdens under the First Amendment. Accordingly, this Court should quash the subpoena.

A. The First Amendment Protects the Right to Speak Anonymously.

Hritz' subpoena to AOL, whereby he seeks to use this Court's powers to identify one of his Internet critics, constitutes a potential violation of that critic's right to speak anonymously.

It is well established that the First Amendment protects the right to speak anonymously. The Supreme Court has repeatedly upheld this right. *Buckley v. American Constitutional Law Found*., 119 S. Ct. 636, 645-646 (1999); *McIntyre v. Ohio Elections Comm*., 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of William Shakespeare and Mark Twain through the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*,

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 U.S. at 341-342, 357 (footnote omitted).

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a fully protected medium for public discourse, which places in the hands of any individual who wants to express his views the opportunity, at least in theory, to reach other members of the public hundreds or even thousands of miles away, at virtually no cost; consequently, the Court has held that First Amendment protections are fully applicable to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Several lower court decisions have further upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *ACLU v. Miller*, 977 F. Supp. 1228, 1230, 1232-1233 (N.D. Ga. 1997); *see also ApolloMEDIA Corp. v. Reno*, 119 S. Ct. 1450 (1999), *aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of web site at www.annoy.com, a site "created and designed to annoy" legislators through anonymous communications).

The references in these cases to people who communicate anonymously, because they are afraid of economic retaliation, are not merely theoretical. A number of the anonymous posters in Yahoo!'s AK Steel message board identify themselves as AK Steel employees, and such employees could face retaliation from AK Steel. Once they are identified, Hritz, using his authority over the company's human resources and labor relations activities, could cause AK Steel to take immediate extra-judicial action against them by firing them or otherwise retaliating against them, even if the Court ultimately holds that each and every one of their statements on the message board was legally protected.

At the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. That is because the technology of the Internet is such that any speaker who sends an e-mail, or visits a website, leaves behind an electronic footprint that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original sender. See Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the

information, can snoop on communications to learn who is saying what to whom. As a result, many informed observers have argued that the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

B. Pre-Complaint Discovery Would Violate Doe's Substantive Constitutional Rights.

Enforcement of Hritz' subpoena to obtain Doe's identity would terminate once and for all her right to speak anonymously. Hritz is invoking this Court's authority even though no complaint has been filed and no cause of action set forth. In this posture, there is no way to enforce the subpoena and at the same time uphold Doe's right to due process. Accordingly, this Court should quash the subpoena.

A court order, even when issued at the behest of a private party, constitutes state action which is subject to constitutional limitations, including the First Amendment. *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v City of Little Rock*, 361 U.S. 516, 524 (1960). It has acknowledged that abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. The Court noted that rights may be curtailed by means of private retribution following such court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 U.S. at 524. The novelty of the procedural requirements at issue cannot be used to thwart consideration of the constitutional issues involved. *NAACP v. Alabama*, 357 U.S. at 457. Due process requires the showing of a "subordinating interest which

is compelling" where, as here, compelled disclosure threatens to impair significantly fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463.

Here, it is impossible to determine whether Hritz could make a showing that there is a compelling interest because no complaint has been filed. Indeed, there is no assurance that, after obtaining the disclosure he seeks, Hritz will ever file a complaint. Hritz could well be using this Court as a private detective agency to track down his critics and to exert extra-legal pressures.[4] Thus, regardless of what test this Court may adopt to evaluate the sufficiency of Hritz' claims (which we address below), it is clear that such claims must be filed before there can be any order compelling production. *See, e.g., In re Subpoena Duces Tecum to America Online Inc*., Misc. Law No. 40570 (Va Cir. Ct., Fairfax 2000) (attached as Exhibit 2) ("[B]efore a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made."); *Columbia Insurance Co. v. Seescandy.com,* 185 F.R.D. 573, 579 (N.D. Cal. 1999). *Cf. Quad Graphics, Inc. v. Southern Adirondack Library System*, 174 Misc. 2d 291, 664 N.Y.S.2d 225 (NY Sup. Ct., Saratoga County 1997) (refusing to compel identification of plaintiff's employee using library to surf the web on company time where doing so would breach protected interests and no criminal charges have been filed).

The need for this Court to address the issue is heightened because there is no indication that First Amendment considerations received any attention when the Ohio state court was considering Hritz' request for permission to take pre-litigation discovery. Certainly the papers filed by Hritz in the state court show no discussion of that issue, and the state judge's order does not mention the First Amendment either. And, of course, Hritz took no steps to notify Doe that an order was being sought to obtain compelled identification, unlike the case of *Dendrite Int'l v. John Does 1 to 14*, No. MRSC-129-00 (N.J. Super. Chancery), where notice of an application for

---

4 One of the leading advocates of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and only decide whether they want to sue for libel after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, http://www.fhdlaw.com/html/ corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault,* http://www.fhdlaw.com/ html/bruce_article.htm.

discovery to identify anonymous message board critics was posted on the message board so that the individuals concerned could retain counsel to voice their objections, if any. *See* http://messages.yahoo.com/bbs?.mm=FN&action=m&board=4688055&tid=drte&sid=4688055&mid=867. (That court heard oral argument in August of this year and has not yet issued its decision.) Because the issue was not put before the Ohio court, or decided by that Court in the course of its authorization of pre-litigation discovery, the responsibility to protect Doe's First Amendment rights falls to this Court.

C. This Court Should Require Hritz to Demonstrate That He Has Viable Claims.

Because compelled identification of anonymous speakers trenches on their First Amendment right to remain anonymous, the First Amendment creates a qualified privilege against disclosure. The law pertaining to this issue is in its infancy – so far as we have been able to discover, there are no published decisions on point by any federal court in the Fourth Circuit. However, as more fully discussed below, the courts have a great deal of experience in dealing with an analogous issue, which is whether to compel a person who has been sued for libel (or on some other basis) to identify the anonymous sources upon which the defendant relied in making the statements that are at issue in that case.

In those cases, when deciding whether to compel the production of documents that would reveal the name of an anonymous source, the courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of its case; (2) disclosure of the source is "necessary" to prove the issue because the party seeking disclosure can prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *See also United States v. Cuthbertson*, 630 F.2d 139, 146-149 (3d Cir. 1980) (qualified privilege recognized under common law). This line of cases has been

followed in both the Fourth Circuit, *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), and in this district in a series of opinions by Judge Merhige. *E.g., Gilbert v. Allied Chemical Corp*., 411 F. Supp. 505, 510 (E.D. Va. 1976). *See also NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998). Several other Fourth Circuit decisions have required subpoenas that trench on First Amendment rights to be subjected to exacting scrutiny. *See In re Grand Jury Subpoena*, 829 F.2d 1291, 1299, 1301 n.13 (4th Cir. 1987); *Marshall v. Stevens People & Friends*, 669 F.2d 171, 177 (4th Cir. 1981).

A federal district court recently applied these principles in a case where the plaintiff was seeking to identify John Doe defendants against which it had filed a lawsuit. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). The court expressed concern about the possible chilling effect that such discovery could have:

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

Id. at 578.

Accordingly, it required the plaintiff to make a good faith effort to communicate with the anonymous defendants and provide them with notice that the suit had been filed against them, thus giving them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id*. at 579. This demonstration included a review of the evidence in support of the trademark claims that the plaintiff in that case was bringing against the anonymous defendants. *Id.* at 580.

In yet another case, the Virginia Circuit Court for Fairfax County considered a subpoena for identifying information of an AOL subscriber, in a case similar to this one. The subscriber did not enter an appearance, but AOL did, no doubt concerned not only about the privacy of its customers, but also about the increasing burden it faces as hundreds of would-be litigants seek information about its customers by serving subpoenas in the expectation that there will be no burden of proof to be met to obtain this information. AOL argued for a standard that would protect its subscribers against needless piercing of their protected anonymity – namely, that (1) the party seeking the information must have pled with specificity a prima facie claim that it is the victim of particular tortious conduct and (2) the identity information that is being subpoenaed must be centrally needed to advance that claim. The court decided on a different formulation, requiring the filing of the actual Internet postings on which the defamation claim was based, and then articulated the following slightly different but ultimately comparable standard – the Court must be

> satisfied by the pleadings or evidence supplied to that court . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed, and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.

Ex. 2, *In re Subpoena Duces Tecum to America Online Inc.,* Misc. Law No. 40570 (Va. Cir. Ct. Fairfax Cty. 2000).

Similarly, a recent decision applying Canadian common law required the plaintiff to present evidence in support of its defamation claim before ordering enforcement of a subpoena for the identity of a John Doe defendant. *Irwin Toy, Ltd. v. Doe*, No. 00-CV-195699 CM (September 6, 2000) (attached as Exhibit 3). The Ontario Superior Court of Justice ruled that

mere allegations were not sufficient, because otherwise anonymity on the Internet would be too easily shattered based on spurious claims. [5]

Although each of these cases sets out a slightly different standard, each of them requires the Court to weigh the plaintiff's interest in obtaining the name of the person that has allegedly violated his rights, against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not unnecessarily trammeled. Put another way, the qualified privilege to speak anonymously requires the Court to review a would-be plaintiff's claims, and the evidence supporting them, to ensure that the plaintiff does, in fact, have a valid reason for piercing each poster's anonymity. In the remainder of this brief, we discuss each of the steps that a court faced with this question should follow, borrowing by analogy from the test used in other cases of First Amendment privilege, and then we explain how they apply to the facts of this case.

First, the Court should require Hritz to set forth the exact statements by each anonymous poster that is alleged to have violated his rights. It is startling how often plaintiffs in this kind of case do not bother to do this – they may quote one or two messages by a few individuals, and then demand production of a large number of identities. In this case, Hritz has provided a copy of the first two or three lines of each of about twenty statements posted by Doe, but only one of them shows any reference to Hritz – the statement that Hritz "will litigate the time of day." [6]

Second, the Court should review each statement to determine whether it is facially actionable. Some statements may be too vague or insufficiently factual to be deemed capable of

---

[5] There have also been several unreported cases in which judges, mostly responding to ex parte requests for discovery, have ordered Internet service providers to identify their customers without giving any apparent consideration to the issues that we discuss in this memorandum.

[6] As we have noted above, two other statements name Hritz in portions that were not attached to the request for discovery. These messages are lengthy, multi-paragraph statements that cover a variety of issues. The Court should not be put in the position of having to guess which portions of the statements are alleged to be defamatory. Indeed, under Ohio law Hritz would be required to set forth the substance of the allegedly defamatory statements in order to state a cause of action for libel. *Leppley v. Seitz*, 3 Ohio L. Abs. 751 (Ohio App. 1st Dist. 1925). *Accord*, *Sorin v. Warrensville Hts. Bd. of Ed.*, 464 F. Supp. 50, 53 (N.D. Ohio 1978).

having a defamatory meaning. Indeed, Ohio has adopted the innocent construction rule, under which, if allegedly defamatory words are susceptible of two meanings, one defamatory and one innocent, the defamatory meaning should be rejected and the innocent meaning adopted. *Yeager v. Teamsters Local 20*, 6 Ohio St. 3d 369, 372, 453 N.E.2d 666 (1983). *Accord, England v. Automatic Canteen Corp*., 349 F.2d 989, 991 (6th Cir. 1965); *Smith v. Huntington Pub. Co*., 410 F. Supp. 1270, 1274 (S.D. Ohio 1975) (diversity cases arising in Ohio).

Still other statements may be non-actionable because they are merely statements of opinion: "Ideas and opinions bear the personal imprint of the men and women who hold them. It is therefore particularly important to protect their unfettered expression." *Potomac Valve & Fitting v. Crawford Fitting*, 829 F.2d 1280, 1285-1286 (4th Cir. 1987), *quoting Gertz v. Robert Welch, Inc*., 418 U.S. 323, 339-40 (1974): "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Accord*, *Nanavati v. Burdette Tomlin Mem. Hosp*., 857 F.2d 96, 106-108 (3d Cir. 1998); *Kotlikoff v. The Community News*, 89 N.J. 62, 444 A.2d 1086, 1091 (1982) ("statements of opinion are entitled to constitutional protection no matter how extreme, vituperous, or vigorously expressed they may be").

In this regard, we note that the Ohio Supreme Court has expressly adopted, as a matter of state law, a standard for distinguishing fact from opinion that is more protective of speech than the quite generous First Amendment standard enunciated by the Supreme Court of the United States. *Vail v. Plain Dealer Pub. Co*., 72 Ohio St. 3d 279, 281-282, 649 N.E.2d 182 (1995) (rejecting the narrower standard of *Milkovich v. Lorain Journal Co*., 497 U.S. 1 (1990)). The Ohio courts have also declared that distinguishing opinion from fact depends on the rhetorical context, so that, for example, if a statement is made in a context where speech tends to be hyperbolic and vituperative, it is more likely to be deemed opinion, *Vail, supra*, 72 Ohio St.3d at 282-283. Moreover, the innocent construction rule is invoked in deciding whether a statement is

fact or opinion, as well as in deciding whether there is a defamatory meaning. *Machinists Local 1297 v. Allen*, 22 Ohio St. 3d 228, 235, 490 N.E.2d 865 (1986) (Justice Douglas, concurring).

Indeed, as a general matter, the presumption ought to be that casual statements about a company on a Yahoo! message board express opinions, rather than facts, for the same reason that courts have generally been reluctant to treat negative "stock tips" in financial publications, or commentary in financial newsletters, as defamatory statements of fact. *Biospherics v. Forbes*, 151 F.3d 180, 184 (4th Cir. 1998); *Morningstar v. Superior Court*, 23 Cal. App. 4th 676, 693 (1994). The same casual language, breezy tone, and appearance of being opinions, instead of reported facts, that are found in an investment publications' "stock tips," are commonly found in message board postings as well. Indeed, the Yahoo! message boards contain routinely warn that "These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose." *See* http: //messages.yahoo.com/bbs?.mm=FN&action=l&board=7078882&tid=aks&sid=7078882&mid= 8463. Such a disclaimer has been cited as a basis for denying a cause of action for defamation against an adverse financial rating. *Jefferson County School District v. Moody's Investor Services*, 988 F. Supp. 1341, 1345 (D. Colo. 1997). The notion that most members of the public would treat the average message board posting as a reliable statement of fact on which to base major investment decisions, or to form an opinion about the general counsel of a major company, is almost laughable; that is certainly true of the repartee in which many of the posters on the AK Steel message boards tend to be engaged.

In this case, the only statement that Hritz has specifically identified and that concerns himself is the statement that "Hritz will litigate the time of day." Obviously, this is not a statement to be taken literally, but an assertion that Hritz is unduly litigious. Not only is this plainly a matter of opinion, but the very fact that Hritz has launched this case is an admission that Doe's opinion is well-founded.[7]

---

[7] Under both Ohio law and the First Amendment, Hritz has the burden of proving that statements are false. *National Medic Serv. Corp. v. E.W. Scripps Co.*, 61 Ohio App.3d 752, 755-756, 573 N.E.2d 1148 (Hamilton App. 1989).

Finally, even after the Court has satisfied itself that each of the posters has made at least one statement that is actionable,

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . .. On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.

Missouri ex rel. Classic III v. Ely, 954 S.W.2d 650, 659 (Mo. App. 1997).

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, for which it need not identify the defendants, there is no need to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The requirement that there be sufficient evidence to prevail against the speaker to overcome the interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

Indeed, some courts have gone even further and required the party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest*, 468 F. Supp. 551, 566-567 (E.D. Mich. 1979). Under that approach, the plaintiff is required to meet the summary judgment standard of creating genuine issues of

fact on all issues in the case, including issues with respect to which it needs to identify the anonymous speakers, before it is given the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id*. at 994.

In this case, where no complaint has been filed, no claims alleged, the allegedly tortious statements have not been provided, and no evidence is presented, there is simply no basis for allowing respondent Hritz to harness the power of the court to pierce Doe's anonymity. Hritz has provided only the vaguest indication of his basis for seeking to learn Doe's identity – he asserts, in the most conclusory fashion, that Doe has made "disparaging, threatening and defamatory" statements about Hritz. With one exception, he has not even set forth the substance of the allegedly defamatory remarks, and the one statement he has identified appears to be true, even if it is opinion, and thus not legally defamatory. Hritz has not even alleged falsity, not to speak of coming forward with evidence to support such a claim. Nor is there any proof that these messages have caused Hritz any actual damages. In short, there is no basis for depriving Doe of her First Amendment right to anonymity, and the subpoena should be denied enforcement.

CONCLUSION

The motion to quash the subpoena should be granted.

Respectfully submitted,

_____

Ronald Wiltsie (VSB #30389)
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5629

Of Counsel:

Paul Alan Levy
Alan B. Morrison
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Cindy A. Cohn
Electronic Frontier Foundation
Suite 725
1550 Bryant Street
San Francisco, CA 94103
(415) 436-9333

Robert Corn-Revere
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, NW

Tim Connors
Mark Belleville
Daniel J. McMullen

Washington, DC 20004

CALFEE, HALTER & GRISWOLD LLP
88 East Broad Street , Suite 1500
Columbus, Ohio 43215-3506
(614) 621-1500

October 13, 2000

Attorneys for Movant Doe