

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

iXL ENTERPRISES, INC.,)
a Delaware Corporation,)
)
Plaintiff,)
)
v.) Civil Action No. 2000CV30567
)
JOHN DOES 1-10, individuals,)
)
Defendants.)

**MEMORANDUM IN SUPPORT OF
MOTION TO QUASH SUBPOENA TO YAHOO!**

Plaintiff iXL Enterprises, a global Internet consultant which, like many such companies, has taken a severe beating in the stock market over the past year, initiated this proceeding in an effort to blame its problems on its critics, rather than on its own operational failures. iXL seeks to identify John Doe, an individual who exercised his First Amendment right to make anonymous comments about its operations and management, some of them critical, on a public Internet message board. iXL alleges very generally that Doe's posts are "false and derogatory" and contain confidential business information, but does not specify the false statements or confidential facts. Similarly, although iXL claims, on information and belief, that Doe is an employee of iXL and that, therefore, his critical communications have been made in violation of an employment agreement and Doe's common law duties as an employee, iXL has presented no evidence that Doe is one of its employees, and in fact iXL has been repeatedly informed that Doe does not work for it and never has worked for it.

Nevertheless, after filing its complaint, iXL obtained a subpoena from the Clerk's office and served it on Yahoo! in San Jose, California, thus invoking the power of the Court in an effort to

compel Yahoo! to furnish the identifying information that Doe provided when opening his account with Yahoo! However, 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 unless the complaint alleges, and plaintiff present sufficient evidence to establish a prima facie case that Doe violated iXL's 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 their 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 about companies. 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 discuss.

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 pseudonym – similar to the old system of truck drivers using "handles" when they speak on their CB's. 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 they 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 at no cost, and that response will have 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 iXL Enterprises. According to its corporate profile, iXL is "a worldwide consulting firm that helps companies utilize the power of emerging technologies and advanced business strategy to build stronger, more profitable relationships with their customers and business partners. iXL has 23 offices in the United States, Europe, Latin America and Asia. The company helps businesses identify how the Internet can be used to their competitive advantage and provides expertise in creative design and systems engineering to design, develop and deploy advanced Internet applications and solutions." <http://biz.yahoo.com/p/i/iixl.html>. Yahoo!'s financial web pages reveal that, at its height, iXL had almost 2400 employees, although recent business reverses have reduced that number. The company frequently appeals for public attention, issuing several press releases every month, http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=iixl&script=400, and given the amount of litigation in which the company has been embroiled, it has been in the news frequently. *See, e.g.*, <http://biz.yahoo.com/n/i/iixl.html> (several articles in October 2000 reporting on litigation against iXL).

The opening message on Yahoo!'s iXL message board, explains the ground rules:

This is the Yahoo! Message Board about iXL Enterprises, (NASDAQ: IIXL), 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&action=m&board=19864650&tid=iixl
&sid=19864650&mid=1](http://messages.yahoo.com/bbs?.mm=FN&action=m&board=19864650&tid=iixl&sid=19864650&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. For more information regarding investments and the Internet, please visit the SEC Web site.

<http://messages.yahoo.com/bbs?action=t&type=f&board=19864650&sid=19864650>

Many members of the public regularly turn to the Yahoo! message board as one source of information about iXL. As of the date of this motion, almost 9000 messages had been posted on the iXL board. Review of those messages reveals an enormous variety of topics and posters. Investors and members of the public discuss the latest news about what services the company is providing and may provide, what new businesses it may develop, how iXL compares to its competitors, what the strengths and weaknesses of iXL's operations are, and what its managers and employees might do better. Many of the messages praise iXL, some criticize it, and some are neutral. Most of the messages give every appearance of being highly opinionated. Many of the posts are extremely vituperative.

Movant John Doe is one of the many members of the public who have visited the Yahoo! message board for iXL and participated in the discussion. Using the screen name "wrestlinman_99," Doe has posted a number of messages to the board. Unlike messages from other posters, not a single one of Doe's messages even hints that he might work at iXL. Although some of these messages are critical of iXL or various staff members, others are complimentary; none are even arguably defamatory.

As is true of many other Internet companies, the year 2000 has not been kind to iXL's business or to its stock. From a high near \$60 at the beginning of the year, iXL's shares have plunged below \$1. <http://finance.yahoo.com/q?s=iXL&d=3m>. On October 25, at the time Doe posted the messages about iXL cited in the complaint, its shares were trading below \$3; currently, the price of each share is hovering near \$1. *Id.* A number of class actions have been filed alleging violations of the securities laws. In addition, iXL has been laying off large numbers of employees and closing down entire offices, apparently without giving notices of impending plant closings as required by the federal WARN Act; litigation has been threatened under that law as well.

B. Proceedings to Date.

Rather than take advantage of Yahoo!'s open access policy to reply to Doe's criticism, iXL filed suit against him and now seeks to use the Court's subpoena power to identify Doe. (A copy of the subpoena is attached). Exhibit 1. In support of this demand, iXL claims, in very general terms, that Doe sent e-mail messages to the Yahoo! message board that revealed confidential business information, and that some of Doe's postings "cast iXL in a false and negative fashion," Complaint ¶ 7. Although repeatedly referring to Doe on the assumption that Doe is an employee and thus was subject to confidentiality obligations, *e.g.*, Complaint ¶¶ 14, 15, the complaint never alleges that the information was obtained through employment with iXL. Moreover, iXL never specifies what confidential business information has been revealed, or which messages are false. And although iXL further alleges, on information and belief, that Doe is one of its employees, it does not provide any basis for that belief. Nor does iXL allege that the allegedly false statements contain statements of fact as opposed to non-actionable opinion, that Doe's statements have caused it any actual damages, or that Doe's statements were made with knowledge of falsity or with reckless disregard for the truth.

Based on this barebones complaint, iXL obtained a subpoena from the Clerk of this Court and sent it to Yahoo!, claiming a right to force Yahoo! to reveal identifying information that Doe provided when he opened his Yahoo! account. Although the documents are located at Yahoo!'s headquarters in San Jose, California, iXL did not obtain a commission to take discovery in a foreign state and did not obtain a subpoena from the California courts. Nevertheless, in response to that subpoena, Yahoo! sent Doe a copy of the petition that informed him that this action was pending against him in this Court.

Contrary to the allegations in the complaint, Doe is not an employee of iXL, and has never been an employee of iXL. However, Doe is concerned that his current employer might not be favorably disposed to his participation in an Internet chat board critical of another company. In addition, Doe is concerned about being swept up into the various lawsuits pending against iXL. Indeed, Doe has not told his family that he is a defendant in this action, and he is not anxious to disturb his spouse with this news.

Accordingly, as soon as Doe learned of this lawsuit, he contacted plaintiff's counsel, told them that he was not an employee, and received assurances that if Doe could show that he was not an employee, iXL would drop the case against him. *See* Levy Affidavit, Exhibit B. Undersigned counsel then contacted iXL to discuss the means for this showing, and received assurances that it would not be necessary to file a motion like this so long as the parties were able to cooperate to reach agreement on Doe's non-employee status. Levy Affidavit ¶ 6 and Exhibit D. Since then, however, plaintiff's counsel has pleaded the existence of other pressing business and refused to discuss the matter with defendant's counsel. Levy Affidavit ¶ 6 and Exhibit E. Because Yahoo! has warned Doe that it will disclose his identity unless Doe files a motion to quash the subpoena by today, Doe now files this motion

We attach an affidavit from Doe himself, from which only his identity and the names of his current and previous employers have been redacted, Levy Affidavit, Exhibit A, along with affidavits from Doe's counsel and from a computer expert who watched Doe perform several computer operations that substantiate Doe's employment status. These documents establish that Doe does not have the employment relation (and thus has never signed an employment agreement with iXL) on which each and every one of iXL's claims against him depend. Doe believes that none of his posts violates iXL's rights in any way. However, he is concerned that iXL will cause extra-judicial pressure to be brought to bear upon him, such as by contacting his current employer, regardless of whether a court finds for him in every respect on iXL's claims. He is, indeed, concerned that the real purpose of this proceeding is to obtain his name so that such extra-judicial action can be taken against him. Accordingly, Doe moves to quash the subpoena to Yahoo! because its enforcement would violate the First Amendment and the Georgia Constitution.¹

SUMMARY OF ARGUMENT

This motion presents the Court with an issue of first impression in this jurisdiction – what standard should be used to decide whether, in a particular case, a person's right to obtain redress from an allegedly libelous statement outweighs the speaker's First Amendment right to make anonymous criticisms. Although precious few opinions, from any courts, address this question, it is an important one because of the rising tide of cases in which those who have been criticized on the Internet are coming to court to unmask their critics. As recently stated 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

¹ Through counsel, Doe has sent a letter to iXL giving it notice of his intent to invoke his rights under the Georgia anti-SLAPP and abusive litigation laws. A motion to dismiss on those grounds will not be filed until plaintiff has been afforded the notice period provided by statute.

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.”

To decide this question of free speech and privacy 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 DOE TRENCHES ON HIS RIGHT TO SPEAK ANONYMOUSLY, AND BECAUSE iXL HAS NOT SHOWN ANY BASIS FOR ITS CLAIMS, THE COURT SHOULD QUASH THE SUBPOENA TO YAHOO!

Although it has presented no evidence that Doe is one of its employees, and thus owes the duties set forth in its complaint, plaintiff seeks to invoke this Court's authority in a way that would infringe irreparably Doe's First Amendment right to speak anonymously. iXL is attempting harness the powers of the Court to use it as if it were a private detective service, to locate a member of the public who has engaged in speech criticizing it. Enforcement of the subpoena would terminate Doe's right to engage in anonymous speech, and would impose undue burdens under the First Amendment and the Georgia rights of free speech and privacy. Accordingly, this Court should quash the subpoena.

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

iXL's subpoena to Yahoo!, whereby it seeks to use this Court's powers to identify one of its 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 celebrate 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).

Moreover, the Georgia Supreme Court has repeatedly recognized a right of privacy, founded in the due process clause of the Georgia Constitution, that is far broader than the privacy rights that have been established under the United States Constitution. “[T]he right of privacy is a fundamental right . . . and . . . a government-imposed limitation on the right to privacy will pass muster if the limitation is shown to serve a compelling state interest and to be narrowly tailored to effectuate only that compelling interest.” *Powell v. The State*, 270 Ga. 327, 333, 510 S.E.2d 18, 24 (1998). The constitutional right of privacy has been specifically extended to limit subpoenas seeking personal information. *King v. The State*, 272 Ga. 788, 790 (2000). Similarly, the Georgia Supreme Court has

acknowledged the existence of an interest in making anonymous statements in support of candidates in elections, although the right to anonymous speech is outweighed by a compelling state interest in disclosure when the speech takes the form of money contributed to candidates or paid to buy a newspaper advertisement. *Fortson v. Weeks*, 232 Ga. 472, 480-481, 482-483, 208 S.E.2d 68, 75-76 (1974).

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, including a federal court decision in Georgia, 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).

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. This Court Should Require iXL to Demonstrate That It Has Viable Claims.

Enforcement of iXL's subpoena to obtain Doe's identity would terminate once and for all his right to speak anonymously. iXL is invoking this Court's authority on the assumption that Doe is one of its employees, even though it had provided no basis, other than its unexplained assumptions, to believe that Doe does work for iXL. 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 and hence 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 a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463.

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 court in this state. However, as more fully discussed below, the courts have a great deal of experience in dealing with an analogous issue: 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 analysis was embraced by the old United States Court of Appeals for the Fifth Circuit in *Miller v. Transamerican Pub. Co.*, 621 F.2d 721 (5th Cir.), *as amended on rehearing*, 628 F.2d 732 (5th Cir. 1980). There, the court ruled that, in order to obtain the name of an anonymous source in a libel case,

the plaintiff must show substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.

Id. 628 F.2d at 732

The Eleventh Circuit expressly followed the *Transamerican Press* standard in *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

That Georgia law requires a similar standard is suggested by the language of Georgia's constitutional free speech provision, as construed by the Georgia courts. Under Article I, Section I, Paragraph V of the Georgia Constitution, "No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for abuse of that liberty." This language suggests that, until a determination has been made that the right has been abused, no remedy can be given against the speaker. Indeed, the Georgia Supreme Court has held that, even if a member of the public may be held liable in damages for speech because it is wrongful, an injunction cannot issue against the individual to deprive him of that right while the litigation is being conducted. *Pittman v. Cohn Communities*, 240 Ga. 106, 109, 239 S.E.2d 526, 529 (1977); *accord G. Gordon Murray Productions v. Floyd*, 217 Ga. 784, 790-793 125 S.E.2d 207, 213 (1962) (forbidding prelitigation censorship as forbidden by the Georgia Constitution even though the First Amendment would allow it). Similarly, here, enforcement of the subpoena would strip defendant Doe of his right to speak anonymously prior to

any judicial determination that his speech was an “abuse of that privilege,” and hence is forbidden by Georgia law.

In a number of recent cases, other courts have enunciated a standard that plaintiffs must meet before they can compel the identification of an anonymous Internet speaker. The leading case is *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants who had registered Internet domain names that used the plaintiff’s trademark. 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, the *Seescandy* court 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 two recent cases, state courts have followed the *Seescandy* analysis in deciding whether to require the identification of posters on Internet message boards. The most significant of these cases was decided last month in New Jersey Superior Court. *Dendrite International v. Doe*, No. MRS C-129-00 (November 28,2000), published unofficially at <http://www.citizen.org/litigation/briefs/dendrite.pdf>; copy attached to this brief. Dendrite, a global provider of software services for

pharmaceutical companies, sued four anonymous posters on the DRTE Message Board, alleging that some of them were employees or former employees who had violated their employment agreements by revealing trade secrets or criticizing the company publicly, and that some of them had defamed the company. The company then moved for leave to commence discovery before service of the complaint by subpoenaing Yahoo! to identify the defendants. Judge Kenneth MacKenzie began by ordering, *sua sponte*, that Dendrite publish notice of its motion for leave to subpoena Yahoo! on the Message Board itself, as a means of notifying the defendants that their anonymity was at risk; the required message also included information on how to find a lawyer in the local area through the Bar referral service. Two of the four defendants promptly retained counsel and averred that they were not employees. The plaintiff submitted a copy of its standard employment agreement, which it was trying to enforce, along with testimony that all employees were required to sign the agreement. It also filed affidavits from officers attesting to the falsity of certain statements, and evidence purporting to show the impact of the statements on the company's stock prices.

The court embraced the *Seescandy* approach, Opin. at 5-6, particularly in light of "New Jersey's commitment to maintaining the anonymity of individuals in specific situations and the need to safeguards to ensure that this anonymity is protected." Opin. 8. (In this regard, Georgia law, with its constitutional protection for the right of privacy and its recognition of a right to anonymous speech that may be overcome only by a compelling interest, is quite similar to the law of New Jersey.) Accordingly, Judge MacKenzie required the plaintiff to prove a *prima facie* case on each of the causes of action that it alleged, thus showing that it had a realistic chance of prevailing on the merits and was not seeking to identify the defendant simply for the sake of exposure. Specifically, with respect to the claim that certain defendants had revealed confidential business information and violated their employment agreements, the court refused to allow two defendants to be identified

because the plaintiff had failed to show exactly which information constituted a trade secret, Opin. 16, and because the plaintiff had not rebutted their contention that they were not employees of Dendrite. Opin. 16-17. The court further found that plaintiff's evidence of harm from the statements was insufficient under New Jersey law to support a defamation claim. Finally, the court indicated that it would be willing to entertain any arguments of the two anonymous defendants who had not appeared, such as the possibility that they may not have signed the alleged employment agreements, but only if they appeared to argue for their rights. Thus, the *Dendrite* decision strongly supports Doe's arguments against disclosure here.

Another very recent case articulating the standard for protecting anonymous Internet posters is *Melvin v. Doe*, decided in the Court of Common Pleas of Allegheny County Pennsylvania on November 15, 2000, unofficially published at <http://www.aclu.org/court/melvin.pdf> ; copy of decision attached. In *Melvin*, a judge sued an individual who had criticized her on an America Online web site for allegedly lobbying the governor of Pennsylvania to appoint a particular local attorney to the local bench. Judge R. Stanton Wettick ruled that "[a] plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit. [Accordingly], plaintiff should not be permitted to engage in discovery to learn the identity of the Doe defendants until the Doe defendants had an opportunity to establish that, as a matter of law, plaintiff could not prevail in this lawsuit." Opin. 2 and n.2. Thus, drawing from established case law recognizing the existence of a right to speak anonymously unless the speech is actionable, *id.* 6, "the complaint on its face [must] set forth a valid cause of action and . . . the plaintiff [must] offer testimony that will permit a jury to award damages. *Id.* 14. Accordingly, the court deferred the attempt to identify the defendant until the court had satisfied itself that the plaintiff had presented testimony sufficient to overcome a motion for

summary judgment. However, unlike the New Jersey case, in Pennsylvania the court held that a defamation case could proceed without specific evidence of harm, and so the court ultimately determined that plaintiff could identify the defendant, albeit subject to a protective order.

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 argued for a standard that would protect its subscribers against needless piercing of their protected anonymity. The court required the filing of the actual Internet postings on which the defamation claim was based, and then articulated the following standard for disclosure: 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.

In re Subpoena Duces Tecum to America Online Inc., Misc. Law No. 40570 (Va. Cir. Ct. Fairfax Cty. 2000) (unofficially published at <http://legal.web.aol.com/aol/aolpol/anonymous.html>; copy attached to this brief).

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) (copy attached). 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.²

² In several unreported cases, 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 discussed in this brief.

Although each of these cases sets out a slightly different standard, each requires the Court to weigh the plaintiff's interest in obtaining the name of the person that has allegedly violated its 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 trampled. 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 has 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 a plaintiff to set forth the exact statements by each anonymous poster that is alleged to have violated its 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, iXL has provided a copy of several internet postings, but has not explained how any of them violated its rights. Many of the postings, indeed, appear to be favorable to iXL, and others have little content.

Second, the Court should review each statement to determine whether it is facially actionable. Here, although iXL has alleged that some of Doe's statements are "false and negative," it has neither alleged that they are defamatory, nor alleged the other elements of a defamation cause of action under Georgia law, such as that the statements were made with malice, or that the statements are fact and not opinion. Moreover, the plaintiff's claims depend entirely on the proposition that Doe is an employee of iXL. However, no evidence is presented in support of that proposition, and the evidence that accompanies this motion establishes that Doe does **not** work for

iXL at all, but rather has been employed with a different company for more than a year before the first allegedly actionable posting was made.

To prove these facts, we have attached an affidavit from Doe himself, which avers that he is not an iXL employee and never has been; this affidavit identifies both his current employer (identified publicly in this case by the pseudonym “ABC Company”) and the employer for which he worked before the ABC Company, although those names are redacted from the copy of the affidavit that is filed with the court and served on iXL, in order to protect Doe’s identity. Levy Affidavit ¶ 2 and Exhibit A. Doe is prepared to show the original, unredacted affidavit to the Court in camera should that be necessary. However, to make that step unnecessary, we have attached two more affidavits to establish Doe’s employment status. First, Jason Stele, a computer expert working for Mr. Levy’s employer, Public Citizen, attests that Doe was able to access the internal web pages of the ABC Company, passing through a firewall that would have kept out non-employee intruders, to locate various ABC documents confirming that Doe is who he says he is, that he is an employee of ABC Company, and that Doe has worked there since before September 1999 (that is, well before any of the Internet postings at issue in this case). In addition, according to Mr. Stele, by accessing the wrestlinman_99 account with Yahoo!, Doe showed himself to be the owner of that Yahoo! pseudonym.

Finally, Mr. Levy’s affidavit shows that, when Doe visited his office to sign the affidavit, he displayed his ABC Company employee ID, with a photograph that matched his face; that, by calling the human resources department of the ABC Company, Mr. Levy was able to confirm that Doe started working there long before the Internet postings at issue in this case; and that the start date given by the ABC Company on the telephone matched the start date shown by Doe’s employment records on the ABC Company web site. In addition, Mr. Levy confirms that the emails

that Doe received from Yahoo! not only show Doe's name as the owner of the account, but also used an e-mail address that shows Doe to be an employee of ABC Company. Finally, the Yahoo! account information obtained by Mr. Levy contains Doe's same e-mail address at ABC Company, and contains other personal data confirming Doe's identity.

In sum, the evidence firmly supports Doe's assertion that he works for a company other than iXL, and that he began working there long before the allegedly actionable internet postings were made. Particularly given plaintiff's failure to adduce any evidence to show that Doe works for iXL, or to respond to defendant's explicit request for any information supporting its claim about Doe's employment status, there is no basis to conclude that Doe has any obligations to iXL under either an employment agreement or any common-law duties of employees.

Similarly, although iXL's unverified complaint vaguely asserts that Doe's messages contained confidential information that he was barred from disclosing, iXL has provided no specifics about which pieces of information were known only to insiders, not to speak of presenting proof that the information was not in the public domain. However, in the event plaintiff identifies the allegedly confidential information, defendant will then seek to show that all such information in his posts was already in the public domain.

Finally, even after the Court has satisfied itself that an anonymous poster has made at least one statement that is potentially 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).

In effect, because of the irreparable injury that disclosure of the defendant's name would inflict by denying him his state and federal constitutional right to speak anonymously, this aspect of the test employs a standard comparable to a preliminary injunction analysis to determine whether this particular form of equitable relief should be awarded at the outset of the case.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case, particularly those elements that are based on information within its own control, there is no need to breach Doe's anonymity. *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, there is no evidence that Doe is an employee, or that Doe owes any of the contractual or common law duties on which the complaint is based. There is no copy of the employment agreement allegedly at issue here, and not a single piece of information in doe’s messages has been shown or even identified as being truly confidential, not to speak of there being evidence to support any of iXL’s claims. In short, there is no basis for depriving Doe of his First Amendment right to anonymity or his Georgia constitutional right to privacy, and the subpoena should be denied enforcement.

CONCLUSION

The motion to quash the subpoena should be granted.

Respectfully submitted, this 11th day of
December, 2000

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