

**PUBLIC CITIZEN LITIGATION GROUP**

1600 20TH STREET, N.W.  
WASHINGTON, D.C. 20009-1001

(202) 588-1000

**BY EMAIL TO [ihlatt@bmgtrial.com](mailto:ihlatt@bmgtrial.com)  
AND BY FAX TO (801) 355-2341**

February 18, 2015

S. Ian Hiatt, Esquire  
Burbridge, Mitchell & Gross  
Suite 920  
215 South State Street  
Salt Lake City, Utah 84111

**Re:** *1-800.Vending v. Wyland et al.*  
No. 1:14-cv-00121-CW

Dear Mr. Hiatt:

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, I write on behalf of “Sean Kelly . . . c/o Relentless, Inc.” to object to the subpoena that you served in this case, calling for the production of such records as he may have that would aid in the identification of the users of five different user names associated with statements posted on pages of the web site unhappyfranchisee.com, as well as seeking the contents of all posts or comments from a particular IP address identified in the subpoena. Although your complaint enumerates some statements that might well be actionable, and sufficiently so to warrant overcoming the First Amendment right to speak anonymously on a proper record, we are not persuaded that your clients have made a sufficient showing at this juncture to warrant identification of the Does whose comments are **not** listed in the complaint, but are subject to the subpoena you have sent to Kelly.

Unhappyfranchisee.com is a web site about franchising and about relations between franchisors and franchisees; it includes a large number of comments submitted by members of the public. Users are not required to register in order to comment; they need only provide a screen name and an email address, neither of which is verified before the comment is allowed onto the site. The site does not collect **any** other information about users, apart from the IP address used to make the posting.

Kelly believes that users can be most candid about their experiences when they have the opportunity to speak anonymously. Therefore, Kelly insists that companies or individuals who seek to identify users who have chosen anonymity, but are claimed to have engaged in actionable speech while using his site, must serve a legally valid subpoena, then comply with the *Dendrite* procedure

S. Ian Hiatt, Esquire  
February 18, 2015  
page 2

to show that the plaintiff has a valid basis for overcoming the users' First Amendment right to speak anonymously. *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). *Dendrite* sets forth a five-part test requiring notice of the subpoena so that the Does have a chance to defend their anonymity, specification of the words claimed to be actionable, the alleging of a valid claim against each defendant sought to be identified, the provision of evidence sufficient to make out a prima facie case on each of the elements of the cause of action (or, in some jurisdictions, sufficient to withstand a motion for summary judgment), and finally a showing that, on balance, the plaintiff's interest in obtaining the identifying information outweighs the Doe's First Amendment interest in remaining anonymous. Although the United States District Court for the Eastern District of Pennsylvania has not yet had occasion to discuss *Dendrite* in a reported opinion in the context of a subpoena to identify the authors of anonymous comments, *Dendrite* has been widely followed in courts across the country, including in the Pennsylvania state courts. *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011). The *Dendrite* standard has been used in the United States District Court for the District of Utah, where your lawsuit is pending. *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011).

So far, you and your clients have not justified the discovery you seek. First of all, so far as I am aware you have undertaken no efforts to give notice of your subpoena to the Does by posting on unhappyfranchisee.com that an effort to identify users is underway. Second, although your subpoena identifies the precise words whose authors you seek to identify, there is no reference to those words in your amended complaint pending in the District Court for the District of Utah, nor is there any allegation that those words are defamatory or otherwise actionable. The fact that you have a pending lawsuit against some named defendants who, you allege, have defamed your client or engaged in false advertising does not give you a roving commission to identify any and all critics by sending subpoenas to identify the authors of **other** criticisms that have no apparent relationship to the lawsuit you have brought. If your client believes that additional speakers have defamed it, it will have to sue those speakers and properly allege a defamation claim before it can use compulsory process to require hosts of critical comments to provide identifying information.

Moreover, there is reason to doubt that your client will be able to allege a tenable defamation claim against the authors of most of the comments. Four of the five statements identified in your subpoena were made more than one year ago, but the statute of limitations for libel claims in Utah is one year. Some of the statements that your subpoena identifies are not defamatory, but simply express negative opinions — one of them, indeed, just thanks other posters for the information they provided. Why are you entitled to sue whomever it is that said that? And, inasmuch as Doe defendants cannot be sued in diversity, because you cannot be sure that their citizenship is diverse from the plaintiffs, *Menzies v. Doe*, 194 F.3d 174 (D.C. Cir. 1999) (mem.); *Howell by Goerdt v. Tribune Entertainment Co.*, 106 F.3d 215, 218 (7th Cir. 1997), it is not clear that you will be able to sue them for defamation in federal court. It may well be that the appropriate subpoena proceeding will have to be conducted in state court where *Pilchesky v. Gatelli* is already the governing law.

S. Ian Hiatt, Esquire  
February 18, 2015  
page 3

Finally, even if you can state a valid claim against these additional defendants, you have provided no evidence that any of them have committed an actionable wrong. If you amend your complaint and show that you can properly proceed against any of the Does who have posted comments on unhappyfranchisee.com, and then provide evidence supporting your claims, Kelly will reconsider his refusal to supply identifying information.

You also seek information pertaining to postings from a particular IP address identified in the subpoena. We note that the IP address traces back to Oregon and that some of your named defendants reside there. In that context, we recognize the possibility that you may have some sound evidentiary basis for seeking information about postings from that IP address, but Kelly needs to know what that basis is before taking any further action in response to your subpoena.

If you have any comments or questions about Kelly's position, I'd be glad to discuss them with you.

Sincerely yours,

  
Paul Alan Levy