PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

BY EMAIL TO ihiatt@bmgtrial.com
AND BY FAX TO (801) 355-2341

March 4, 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:

In your February 27, 2015, response to Sean Kelly's Rule 45 objections to your subpoena in this case, dated February 18, 2015, you provide not a whit of evidence to support your contention that you have sufficient basis for contending that you have any realistic chance of prevailing on a claim—not even alleged in your complaint—that the posters of the five comments identified in 1.800.Vending's subpoena have engaged in wrongful speech that violates your client's rights. Indeed, your letter is so full of question-begging assertions as to be risible. You express confidence that a motion to compel identification of the five anonymous commenters would be granted, because you question whether the Eastern District of Pennsylvania would adopt the *Dendrite* standard that would apply in state court under *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011). As portrayed in your letter, your arguments are so weak that, in my judgment, this would be an excellent case in which to test that proposition. But we should certainly have the telephonic meet-and-confer that you request first.[1]

For example, the third paragraph of your letter asserts "the **fact** that the comments in question are commercial speech." (emphasis added) I understand that you assert that fact about the comments (although it is not alleged in your complaint), but saying so in a letter does not make it true. What **evidence** do you have, indeed what reason do you have, to assert that each of the five comments is commercial speech? If you have evidence, we will consider it; otherwise, you should file your motion.

---

[1]Your letter asserts that Kelly has no standing to raise the First Amendment rights of the anonymous posters. *Pilchesky* itself was a case in which the web site owner, Pilchesky, litigated the anonymity rights of his users. Hosts have litigated these issues in many other cases, such as the *Solers* and *Independent Newspapers* cases in the District of Columbia and Maryland, respectively.

The next paragraph of your letter begins with the assertion that the speech is not protected "where such speech is defamatory or otherwise illegal." What evidence do you have the speech is false or otherwise illegal? Just saying this in a letter begs the question. Indeed, given that four of the five posts were made at times outside the statute of limitations, it may not matter whether the statements are false, because you would have no claim against their authors.

You go on to say that your client "has reason to believe" that the identified posts "were not posted by actual customers; instead, they were posted by 1.800's competitors." But you provide no reasons that would persuade anybody that your client actually has any reasons to believe this, not to speak of **evidence** that is probative of the truth of this assertion. The fact that one comment on pissedconsumer.com was made from the home address of Chris Wyland does not provide any reason to believe that other posts are from that address. If you would like to have Kelly check the IP addresses from which each of the five posts was made, and tell you whether any of them were made using an IP address that you can prove was under Wyland's control at the time, perhaps we could consider that as a resolution of your subpoena.

Moreover the remainder of the paragraph gives good reason to doubt your client's contentions. You claim that your client "has cross-checked the information provided in the posts on [Kelly's] web site (such as name, location, and number of units allegedly purchased) against its customer database and determined that those anonymous posts are not from legitimate customers." Even without evidence that your letter is making false statements in this regard, we would need you to be much more specific, and to present those specifics in the form of admissible evidence. But let's look at some of the comments. For example, the comment identified in paragraph 3 of the subpoena is, in its entirety, "There has to be something we can [sic] if we join forces. Who is interested in holding these creeps accountable." I will be very curious to learn what it is about this post that tells you that its author is not a customer, not to speak of that the author is a competitor. Was it the location, or the number of units? When your client makes statements like this, it makes it very difficult to take anything it says seriously.

The next paragraph of your letter asserts that "[I] do not dispute that the Defendants Chris Wyland and the Grow Entities made the statements that are the subject of the subpoena." Now, if you know that these persons authored the comments, you do not need to subpoena Kelly; you can just take discovery from those defendants to show where they posted. You can pursue discovery to learn what statements these defendants made in online fora, either from them or, ultimately, from their ISP's. However, you cannot take away the First Amendment rights of other people who think little of your client in the hope that one of them might be among your current named defendants. I do not have any reason to believe that the statements were made by either Wyland or those entities, and so far as your letter indicates, neither do you. You just assume it, as it would surely be convenient if it were true. More question-begging!

Then you say, "where made by a competitor, such statements are in violation of state and

federal law." Not so. Even if competitors criticize your client, there is nothing illegal about their statements unless there is evidence that the statements are false. You keep begging that question. What is your evidence of falsity?

You next assert that "prospective customers of 1.800 have identified negative posts (such as those . . . in 1.800's subpoena to your client) and have declined to conduct business with 1.800." If you have specifics—evidence tying the specific statements identified in your subpoena to a decline in business—I am ready to review that evidence with Kelly. If a particular one of those posts can be shown to be actionable, then it seems to me you might have a valid ground for discovery of that post.

In addition, you assert that the entire burden of notice rests on Kelly because my letter mentions that those who register to comment provide email addresses. But my letter also advised you that the email addresses are not verified. And there is no reason why you cannot post notice of the subpoena on the message board as, for example, Judge MacKenzie required in the *Dendrite* case itself. You cite the decision of a Magistrate Judge in *Faconnable v. John Does*, 2011 WL 201515 (D. Colo. May 24, 2011), for the proposition that subpoenaing plaintiffs have no obligation to provide notice. But looking at that decision on Westlaw, the little red flag is highly visible. The decision that you cite was vacated by the district judge after the ISP filed objections (invoking the First Amendment rights of its users, I might add) and the plaintiff failed to respond. 799 F. Supp.2d 1202. The Westlaw ruling has no precedential value.

Your letter suggests that Kelly should not want to allow his web site to be used as a portal for false and misleading information. Kelly does pay attention to those problems, as you will see if you look through the web site. He has even had occasion to call users' attention to the suspicious character of some posts. But one way that Kelly polices the line between true and false posts is by applying the *Dendrite* test as best he can, refusing to produce identifying information when a plaintiff cannot present any evidence of falsity, but asking plaintiffs to produce such evidence so that he can take it into account when deciding how to respond to subpoenas. And, of course, if you think he has assessed this incorrectly, you are free to ask for the intervention of an Article III judge.

However, nothing in your letter persuades me that you have any valid reasons for enforcing your subpoena to identify the authors of the five identified comments.

Finally, you address the paragraph of your subpoena that seeks to identify all comments made from a specific IP address. Your letter asserts that you have evidence that one particular post about your client was made from the home address of defendant Wyland, and then you say, "Thus, any posts from this IP address do not constitute protected speech." There are many flaws in this assertion – for example, even your client's adversaries, and even a named defendant, can speak critically and still be engaged in protected speech. Perhaps you mean to argue that you are entitled to discover what your defendants have said even if it **is** protected speech. But there is more basic problem here

– you have evidence that, on one occasion, a statement was made from the home of Mr. Wyland from an IP address which was, as that moment, assigned by Comcast to Mr. Wyland's account. But was it a static IP address or a dynamic IP address? Have you checked that with Comcast? What reason do you have to believe that statements made at other times from that IP address were made from the same account?

I hope you are in a position to address that point when we meet and confer, because this aspect of your subpoena appears to me to be the only one on which you have even the slightest chance of prevailing, based on what you have presented so far. I look forward to speaking with you.

Sincerely yours,

Paul Alan Levy