

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SALEHOO GROUP, LTD.,) No. 10-CV-671
Plaintiff,) DEFENDANT DOE'S MOTION
v.) TO QUASH SUBPOENA
ABC COMPANY and JOHN DOE,) NOTED ON MOTION
Defendant.) CALENDAR: June 4, 2010

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Pursuant to Rules 26(c)(1) and 45(c)(3)(A)(iii), defendant Doe, the operator of the web site at issue in this action for trademark infringement and defamation, moves the Court to quash the subpoena to GoDaddy seeking information that identifies Doe. Plaintiff, the owner of the trademark Salehoo, claims that the use of the domain name salehoosucks.com infringes its mark, and that four-year-old statements posted to the Salehoo Sucks web site defame it. Through an ex parte motion, plaintiff obtained leave to seek discovery from GoDaddy, the company through which the domain name was registered. However, courts throughout the country require a plaintiff who seeks compulsory process to identify anonymous Internet critics so that they can be served with process as defendants, to first show both as a matter of law and as a matter of fact that it has viable claims. On the record in this case, Salehoo cannot make that showing. The subpoena to GoDaddy should be quashed. Indeed, because the lawsuit is frivolous on its face, it should be dismissed.

I. FACTS AND PROCEEDINGS TO DATE

Salehoo is a New Zealand limited liability company that offers a database of wholesalers and brokers for goods that can be sold on eBay, and sells memberships that give access to that database. Salehoo is subject to vigorous criticism on an Internet “gripe site” created by defendant Doe and located at the domain name salehoosucks.com. The home page of the site is attached to the Affidavit of Paul Alan Levy (“Levy Aff.”), Ex. A. The salehoosucks.com domain name was registered in July 2006. *Id.* Ex. B. That site features a lengthy review of Salehoo, which, according to the salehoosucks site, was previously posted on a different web site but removed by the hosting company for that site. *Id.* Ex. C. Salehoo itself has created its own web site, located at the domain name salehoo-scam.com, where it provides a point-by-point rebuttal to that review. *Id.* Ex. D, E. Salehoo Sucks has a few other pages, each one sharply critical of Salehoo. *Id.* Ex. F. The Salehoosucks web site was created in 2006, and the Internet Archive reveals that its content has remained largely static since that year. *Id.* Ex. G.

1 On April 19, 2010, plaintiff filed this action, alleging that the domain name
2 salehoosucks.com infringes its registered trademark in the name “Salehoo,” and that false
3 statements on the web site defame it. On April 20, 2010, plaintiff sought leave to take
4 discovery to identify Doe, the creator of the salehoosucks web site. Although the “Contact
5 Salehoo Sucks” page, <http://www.salehoosucks.com/contact.php>, provides an email address
6 (admin@salehoosucks.com) through which Salehoo could have given notice of its motion to
7 the anonymous owner, Salehoo chose not to do so. On May 4, 2010, the Court granted leave to
8 take discovery. Such a subpoena, dated May 5, 2010, was sent to GoDaddy. *Id.* Ex. H. On
9 May 13, 2010, GoDaddy gave notice of the subpoena to Doe. *Id.* Ex. I. Doe’s counsel Paul
10 Alan Levy therefore called plaintiffs’ counsel David Lowe to advise that Doe planned to file a
11 motion to quash the subpoena, explained the grounds for the motion and also explained why the
12 lawsuit is frivolous. Mr. Lowe declined to withdraw the subpoena. *Id.* ¶ 11.

II. ARGUMENT

A. The First Amendment Protects Against Compelled Identification of Anonymous Speakers.

It is well-established that the First Amendment protects the right to speak anonymously. *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42 (2003); *Watchtower Bible & Tract Soc'y of New York v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the United States 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.

514 U.S. at 341-42, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. Accordingly, First Amendment rights fully apply to communications over the Internet. *Reno v. ACLU*, 521 U.S. 844 (1997).

A court order, even if granted for a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A court order to compel identification in a situation that threatens the exercise of fundamental rights “is subject to the closest scrutiny.” *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); see *Bates v City of Little Rock*, 361 U.S. 516, 524 (1960).

As this Court said in *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001), in refusing to enforce a subpoena to identify anonymous Internet speakers whose identity was allegedly relevant to defense against a shareholder derivative action, “[i]f Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” Similarly, in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999), the court expressed concern about the possible chilling effect of such discovery:

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

1 burden of the other party knowing all the facts about one's
2 identity can foster open communication and robust debate
3 People who have committed no wrong should be able to
4 participate online without fear that someone who wishes to harass
5 or embarrass them can file a frivolous lawsuit and thereby gain
6 the power of the court's order to discover their identities.

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B. A Would-Be Plaintiff Cannot Identify Anonymous Speakers That It Wants to Sue Without Giving Them An Opportunity to Defend Their Anonymity and Showing That It Has Valid Claims and Has Evidence Supporting Those Claims.

In a series of cases decided over the past ten years, both state and federal courts have enunciated procedural and substantive standards that a party seeking to identify anonymous defendants before discovery can be used to compel their identification. The majority test, known as the *Dendrite* test after the New Jersey case that first adopted it, requires five steps¹:

1. **Notice and Timing:** The plaintiff must first try to notify anonymous posters of the subpoena request, including a posting on the message board; the court should then wait a reasonable time before taking further action so that the Does have a chance to defend their anonymity.
2. **Specify the Claims:** The plaintiff must identify the exact statements made by each anonymous defendant, and articulate the causes of action brought about each statement.
3. **Facially Valid Claims:** The Court should review claims under a motion to dismiss standard, and satisfy itself that the relief can be granted on them.
4. **Evidence Supporting the Claims:** The plaintiff must produce sufficient evidence supporting each element of the cause of action (as well as meeting any defenses that are apparent from the record) to make a *prima facie* case. Some courts characterize this stage slightly differently, requiring enough evidence to avoid summary judgment for defendant.
5. **Balancing:** If a *prima facie* case presented, the court should balance the defendant's First Amendment right of anonymous speech against the strength of the *prima facie* case presented and the need to identify the defendant to allow plaintiff to proceed, taking into consideration any such special considerations that may be apparent from the record, such as the egregiousness of the defendant's speech, the defendant's exposure to retaliation from

¹ *Mortgage Specialists v Implode-Explode Indus.*, — A.2d —, 2010 WL 1791274 (N.H. May 6, 2010); *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

1 the plaintiff or others, or the centrality of defendants' speech (or
lack thereof) to the First Amendment's protection.

2 Several other courts have adopted the *Cahill* test (named after a Delaware case) that adopts
3 the first four parts of the *Dendrite* test.²

4 There is no reported decision in this district addressing the standard for deciding
5 whether to compel the identification of anonymous Internet speakers so that they may be served
6 with process as defendants in the case, but *Doe v. 2theMart.com, supra*, recognized the need to
7 protect the anonymity of Internet speakers unless the party seeking to identify can show that
8 such identification is truly necessary. Similarly, unless a plaintiff can show that it has valid
9 claims and evidence to support them, the government interest served by a subpoena to identify
10 the Doe is not sufficiently compelling to overcome the First Amendment right to speak
11 anonymously.³

12 Here, plaintiff cannot meet either the *Dendrite* or the *Cahill* standard; indeed, its claims
13 are so plainly frivolous that the Court should not just grant the motion to quash but dismiss the
14 action.

15 **C. Plaintiff Has Not Shown That This Court Has Personal Jurisdiction of Doe.**

16 Plaintiff is a New Zealand company with no discernible connection to the Western
17 District of Washington. The only ground given for personal jurisdiction is that Doe's web site
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19 ² *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Krinsky v. Doe* 6, 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231
20 (2008); *Doe I & Doe II v. Individuals whose true names are unknown*, 561 F. Supp. 2d 249 (D. Conn. 2008); *In re
Doe 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006);
21 *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

22 We argue below that the complaint is facially frivolous, when considered in conjunction with the documents
23 referenced in the complaint, as a court may do in considering a motion to dismiss under Rule 12(b)(6). Therefore, the
24 Court need not reach the question whether plaintiff has enough evidence supporting its claims to survive summary
25 judgment or to show a prima facie case. However, the fourth part of the *Dendrite/Cahill* standard, which requires
26 evidence and not just allegations, is a key part of the test. Given notice pleading standards, without that requirement
27 a plaintiff could often obtain identifying information just for the price of the filing fee. Moreover, the evidence
needed to meet this test, such as evidence of falsity or injury in a defamation case, or evidence of likelihood of confusion
in a trademark case, is normally in the possession of the plaintiff who can submit it without the need to take discovery
from the Doe defendant. Moreover, courts generally do not give significant relief without evidence, and compelled
identification of a critic is often an important form of relief, because it can facilitate extra-judicial "self-help" against
the speaker. As courts across the country have held in the *Dendrite* line of cases, a rule that allowed a plaintiff to
take away a critic's right to speak anonymously just by making allegations would not give sufficient protection to
the First Amendment right to speak anonymously.

1 can be viewed here, as it can be viewed anywhere else in the world. However, courts reject the
2 proposition that the owner of a web site can be sued anyplace that the site can be seen:

3 If we were to conclude as a general principle that a person's act
4 of placing information on the Internet subjects that person to
5 personal jurisdiction in each State in which the information is
6 accessed, then the defense of personal jurisdiction, in the sense
7 that a State has geographically limited judicial power, would no
8 longer exist. The person placing information on the Internet
would be subject to personal jurisdiction in every State. . . . But
if that broad interpretation of minimum contacts were adopted,
State jurisdiction over persons would be universal, and notions of
limited State sovereignty and personal jurisdiction would be
eviscerated.

9 *ALS Scan v. Digital Serv. Consultants*, 293 F.3d 707, 712-13 (4th Cir. 2002).

10 Two rival bases for personal jurisdiction over claims based on web sites have emerged.
11 The majority rule is based on the so-called *Zippo* sliding scale, under which the operator of a
12 passive web site that just posts information can be sued only where the site owner is located,
13 while a web site that permits commercial interaction with the site owner makes its owner
14 subject to personal jurisdiction in any state where commercial transactions have been
15 completed. *Cybersell v. Cybersell*, 130 F.3d 414, 419 (9th Cir.1997) (citing *Zippo Mfg. Co. v.*
16 *Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa.1997); *Expedia v. Reservationsystem.com*,
17 2006 WL 3734160 (W.D. Wash. Dec. 14, 2006); *Amazon v. Kalaydjian*, 2001 WL 491752
18 (W.D. Wash. Feb. 21, 2001)). A few other courts have concluded that a web site owner who
19 commits an intentional tort, knowing where the victim of the tort is based and hence intending
20 to direct tortious consequences to that state, can be sued in that state. E.g., *Tamburo v.*
21 *Dworkin*, 601 F.3d 693 (7th Cir. 2010).

22 Neither of those tests is met in this case. First, the complaint does not allege that the
23 salehoosucks.com web site is interactive, and scrutiny of the site reveals that it is a passive web
24 site, where its owner posts information and opinions about Salehoo for the world to see.
25 Although the site links to another site through which users can take a quiz,
26 <http://www.auction-revolution.com/>, and hosts a guestbook where viewers can post their own
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DOE'S MOTION TO QUASH SUBPOENA
(C10-671) - 6

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1 opinions about Salehoo, <http://www.salehoosucks.com/comments/>, neither of these features
2 allows the purchase of goods or services or otherwise permits commercial transactions, and
3 hence the site is not “commercially interactive” for personal jurisdiction purposes. Nor is there
4 any allegation or proof that Salehoo is located in Washington, or that the Doe defendant knew
5 that Salehoo is located here. Accordingly, there is no basis for personal jurisdiction.

6 Because plaintiff has not shown that the Court has personal jurisdiction, the
7 *Dendrite/Cahill* standard has not been met, and the motion to quash should be granted. Indeed,
8 the absence of personal jurisdiction is so apparent that the Court should dismiss for that reason.

9 **D. The Trademark Claim Is Frivolous.**

10 Plaintiff alleges that the use of the name “salehoo” in the domain name
11 salehoosucks.com infringes its trademark in that name. Plaintiff’s claim to federal jurisdiction
12 rests entirely on this Lanham Act claim. But that claim is frivolous, for two independent
13 reasons.

14 First, plaintiff cannot bring an infringement claim unless it both alleges and proves that
15 the defendant’s use of a mark is likely to cause confusion among ordinary consumers about the
16 source or sponsorship of the defendant’s goods or services. “The core element of trademark
17 infringement is whether customers are likely to be confused about the source or sponsorship of
18 the products.” *Perfumebay.com v. eBay*, 506 F.3d 1165, 1173 (9th Cir. 2007). As the Ninth
19 Circuit said in *Anti-Monopoly v. General Mills Fun Group*, 611 F.2d 296, 301 (9th Cir. 1979),
20 “[i]t is the source-denoting function which trademark laws protect, and nothing more.”

21 The complaint alleges that defendant has used a mark that is “confusingly similar” to its
22 own, but it never alleges that, as a result of defendant’s conduct, consumers will experience any
23 likelihood of confusion about whether a web site that is posted at the domain name
24 “salehoosucks.com,” and that featured scathing criticism of Salehoo, is sponsored by or in any
25 way affiliated with Salehoo itself. Nor could Salehoo credibly allege such likelihood of
26 confusion, because any such contention would be absurd. The courts have consistently rejected
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1 claims of trademark infringement based on the use of domain names that couple a trademark
2 with a critical word such as “sucks.” *Coca-Cola Co. v. Purdy*, 382 F.3d 774 (8th Cir. 2004);
3 *Lucent Techs., Inc. v. Lucentsucks.com*, 95 F. Supp. 2d 528 (E.D. Va. 2000); *Bally Total*
4 *Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 n.2 (C.D. Cal. 1998). To paraphrase
5 *Taubman v. WebFeats*, 319 F.3d 770, 778 (6th Cir. 2003),

6 [Doe] is “free to shout ‘[Salehoo] Sucks!’ from the rooftops. . . .”
7 Essentially, this is what he has done in his domain name. The
8 rooftops of our past have evolved into the internet domain names
9 of our present. We find that the domain name is a type of public
10 expression, no different in scope than a billboard or a pulpit, and
11 [Doe] has a First Amendment right to express his opinion about
12 [Salehoo], and as long as his speech is not commercially
13 misleading, the Lanham Act cannot be summoned to prevent it.

14 Indeed, most courts hold that even without the use of a word like “sucks,” a domain name for a
15 web site that comments on the trademark holder may properly contain the trademark without
16 infringing on the trademark, so long as the web site is not confusing about being a commentary
17 site. *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045,
18 1056-57 (10th Cir. 2008); *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005); *Taubman v.*
19 *WebFeats*, 319 F.3d 770 (6th Cir. 2003); *Bosley Med. v. Kremer*, 2004 WL 964163 (S.D. Cal.
20 Apr. 30, 2004), *aff’d in rel. part on other grounds*, 403 F.3d 672 (9th Cir. 2005).

21 Second, courts also routinely hold that noncommercial Internet commentary sites that
22 discuss the trademark holder, but do not promote the sale of rival goods and services, may
23 properly use the trademark in their domain names without running afoul of the trademark laws.
24 *Utah Lighthouse*, 527 F.3d at 1052-54; *Bosley Med. v. Kremer*, 403 F.3d 672, 677-678 (9th Cir.
25 2005); *TMI v. Maxwell*, 368 F.3d 433, 436-38 (5th Cir. 2004); *Taubman*, 319 F.3d at 776.
26 Although plaintiff does allege in conclusory terms that Doe is using the web site at
27 salehoosucks.com to promote the sale of goods and services in competition with the plaintiff,
inspection of the salehoosucks.com web site belies that contention. The complaint alleges that,
by linking to the “Auction Revolution” web site that allegedly contains advertising, Doe is
engaged in commercial activity. Complaint ¶ 7. However, in *Bosley* the Ninth Circuit squarely

1 rejected the contention that a gripe site could be deemed commercial by virtue of the presence
2 of commercial activity on sites to which the gripe site links. 403 F.3d at 678.

3 Finally, even if the trademark claim were otherwise meritorious, the use of the Salehoo
4 name is nominative fair use – the use of the names to identify the owners of those names as the
5 subject under discussion. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151-52 (9th Cir. 2002).
6 Indeed, the First Amendment does not permit the use of trademark law to bar a critic from
7 using the trademarked name of a company to identify the target of her criticism. *CPC Int'l v.*
8 *Skippy, Inc.*, 214 F.3d 456, 463 (4th Cir. 2000).

9 Because the trademark claim cannot be sustained for each of these two reasons, plaintiff
10 has not satisfied the *Dendrite/Cahill* standard either as a matter of law or on the evidence, and
11 the subpoena should be quashed. Indeed, because the failure to state a claim is apparent from
12 the face of the complaint and from the documents referenced in it, the case should be
13 dismissed.⁴

14 **E. The Defamation Claim Is Likewise Frivolous.**

15 Because the trademark claim is so plainly lacking in merit, and should be dismissed
16 immediately, the Court need not decide whether there is any merit to the defamation claim,
17 which is before the Court based only on supplemental jurisdiction.⁵ However, the defamation
18 claim is also frivolous as a matter of law, for several reasons.

19 First, the WHOIS record for the domain name reveals that the name
20 “salehoosucks.com” was first registered in July 2006, nearly four years ago. Levy Aff. Ex. B.
21 Moreover, the Internet Archive reveals that the same criticisms of Salehoo have appeared on
22 salehoosucks.com since 2006. *Id.* Ex. G. But the statute of limitations for libel claims in
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24 ⁴ Because the salehoosucks.com web site and Doe’s registration of that domain name is referenced in the complaint,
25 the Court can examine the site and the WHOIS record, and dismiss the complaint after concluding that the actual
documents show that the complaint fails to state a claim on which relief can be granted. *Branch v. Tunnell*, 14 F.3d
449, 453-54 (9th Cir. 1994). *Accord Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998).

26 ⁵ A diversity action cannot be brought against a Doe defendant. *Menzies v. Doe*, 194 F.3d 174 (D.C. Cir. 1999)
(mem.); *Howell by Goerdt v. Tribune Enter. Co.*, 106 F.3d 215, 218 (7th Cir. 1997); *McMann v. Doe*, 460 F. Supp. 2d
259, 264 (D. Mass. 2006).

1 Washington is two years, RCW 4.16.100(1), and the single publication rule applies to claims
2 about Internet postings. *Oja v. Army Corps of Eng'rs*, 440 F.3d 1122, 1129-32 (9th Cir. 2006);
3 *Van Buskirk v. New York Times Co.*, 325 F.3d 87, 89 (2d Cir. 2003).⁶ Moreover, Salehoo has
4 known about the salehoosucks.com web site since 2006, because in that year Salehoo registered
5 the domain name salehoo-scam.com for a web site on which it addresses in detail the criticisms
6 on salehoosucks.com and presents its own side of the story. Levy Aff. Ex. D, E. Thus,
7 Salehoo cannot avoid the statute of limitations by contending that it only recently discovered
8 the existence of salehoosucks.com.

9 Second, on its own salehoo-scam.com web site, Salehoo admits that salehoosucks.com
10 is not defamatory. It argues there that salehoosucks.com carries a redacted version of a
11 criticism originally posted on the web site of Terry Gibbs, that Gibbs's criticisms were
12 removed after Salehoo's lawyers objected, and that the version of Gibbs' criticisms appearing
13 on salehoosucks.com was corrected to meet the lawyers' objections. Levy Aff. Ex. D. Having
14 admitted on its own web site that salehoosucks.com is not defamatory, Salehoo cannot now
15 seek to identify the operator of salehoosucks.com on the ground that that site is defamatory.

16 Third, the complaint asserts that the use of the word "scam" is defamatory, but the
17 naked use of the word "scam" to denounce a person or company is hyperbole and name-calling
18 rather than a statement of verifiable fact on which a defamation claim can be based. *Dilworth v.*
19 *Dudley*, 75 F.3d 307, 310 (7th Cir. 1996); *McCabe v. Rattiner*, 814 F.2d 839 (1st Cir. 1987).
20 Salehoo admits as much on its salehoo-scam.com web page, where it states that "'scam' . . . is
21 an emotive word, a sensationalist word." Levy Aff. Ex. D at 2.

22 Fourth, some of the statements that the complaint alleges to be defamatory appear on
23 the message board portion of the web site, where an August 22, 2006 post by the Doe reveals
24 that one of the posters who **defended** Salehoo was using the IP address of Simon Slade,

25 _____
26 ⁶ Washington courts have adopted the single publication rule, *Herron v. KING Broadcasting Co.*, 109 Wn.2d 514, 746 P.2d
27 295 (1987), reconsidered on other grounds, 112 Wn.2d 762, 776 P.2d 98 (1989), but have not yet addressed its application in
the Internet context. *Momah v. Bharti*, 114 Wn. App. 731, 182 P.3d 455, 467 (2008), review granted, 165 Wn.2d 1027, 203 P.3d
378 (Wash. 2009).

1 Salehoo's owner, and then uses rhetorical language to suggest that Slade must be either
2 "drunk" or a "pathological liar" because he denies being the poster. *Id.* Ex. G at 4. This post is
3 not actionable for several reasons—it is "of and concerning" Slade, but Slade has chosen not to
4 sue (the "of and concerning" requirement is constitutionally required, *New York Times v.*
5 *Sullivan*, 376 U.S. 254, 288-89 (1964)); the language is rhetorical name-calling, and not a
6 statement of fact; and the accusations are opinion based on the disclosed fact—that the post
7 came from Slade's own IP address—whose truth is not denied. *Dodds v. Am. Broad. Co.*, 145
8 F.3d 1053, 1067 (9th Cir. 2003).

9 Fifth, even if the complaint pleaded a proper and timely claim for defamation, there is
10 no **evidence** that any factual statements on the salehoosucks.com web site are actionable. There
11 is, for example, no **evidence** that anything said about Salehoo is false. Without such evidence,
12 discovery to identify the operator of salehoosucks.com cannot be granted. Indeed, there is
13 reason to believe that there is some truth to at least one statement mentioned in the complaint.
14 For example, although Salehoo complains about the statement on salehoosucks.com that its
15 lawyers threaten those who criticize Salehoo with defamation suits, Salehoo's salehoo-
16 scam.com boasts that Gibbs's criticisms were taken down in response to warnings by Salehoo's
17 lawyers to the web hosting service for Gibbs' web site. Levy Aff. Ex. D at 5.

18 Thus, plaintiff has neither shown either that it can bring a claim based on the allegedly
19 defamatory words, nor presented evidence sufficient to withstand summary judgment, nor
20 provided a proper basis for the exercise of jurisdiction over the defamation claim, that
21 defamation claim also does not provide any basis under the *Dendrite* and *Cahill* lines of cases
22 for enforcing Salehoo's subpoena, and the motion to quash should be granted. Because the
23 defamation claims are so plainly time-barred, and otherwise fail as a matter of law, the Court
24 should consider dismissing those claims if it chooses to retain supplemental jurisdiction over
25 them.

III. CONCLUSION

The motion to quash should be granted. Moreover, because the complaint is frivolous, it should be dismissed.

Respectfully submitted, this 20th day of May, 2010.

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