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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BNSF RAILWAY CO., Petitioners, v. JOHN DOE 1, and NETWORK54 CORP., on behalf of JOHN DOE 2, Respondents/Movants.	No. BS110235 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO COMPEL AFFIDAVITS OF STEVEN ROUSSEY AND PAUL ALAN LEVY** DATE: November 5, 2007 TIME: 8:30 AM PLACE: Department 36, Judge Alarcon

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

MISCELLANEOUS

At the first hearing in this case, the Court's Tentative Ruling dismissed the petition of BNSF Railway Co. ("BNSF") for prelitigation discovery because of the procedurally inadequate manner in which BNSF had initiated the petition. Without renewing the petition in a manner that cured either the procedural flaws identified in the Court's Tentative Ruling, or in the motion to quash the resulting subpoena, BNSF has now filed a motion to compel compliance with the subpoena, which is now sought, according to BNSF, not in order to pursue litigation against the John Doe posters of two satirical articles, but to enable BNSF to decide whether it **should** pursue litigation against them. However, California law not only does not permit discovery for that purpose, but indeed the procedural flaws in the petition deprive the Court of jurisdiction. Moreover, the justifications proffered by BNSF fall far short of a compelling interest warranting a breach of the Doe's right to speak anonymously, guaranteed by both the First Amendment and the California Constitution. Accordingly, the motion to compel discovery should be denied, and the motion of John Doe 1 and Network54 (hereafter, "respondents") should be granted. In addition, because BNSF has reinstituted this proceeding without having cured the procedural faults of which it was given notice, the Court should order that, in the event BNSF cures the flaws and then files some future motion in this Court to obtain discovery from Network54, it should be required to pay respondents' reasonable attorney fees incurred through the date of the November 5 hearing, in the amount of $29,571.95.

The parties have agreed to ask the Court to consider the issues on the present motion cumulatively to the facts, arguments and authorities previously submitted in connection with the Doe/Network54 motion to quash. Accordingly, without any further statement of facts and proceedings to date, we proceed to discuss the legal issues at stake.[1/]

[1/] Although the Court took the motion to quash off calendar because it would be mooted by the striking of BNSF's petition, BNSF still seeks to pursue the original petition. Accordingly, the motion to quash remains before the Court, and should be considered at the same time at BNSF's motion to compel.

I. THE COURT LACKS JURISDICTION BECAUSE BNSF DID NOT INITIATE THE PROCEEDING PROPERLY AND IS NOT SEEKING PRELITIGATION DISCOVERY FOR THE ONLY PURPOSE COUNTENANCED BY CALIFORNIA LAW – TO PERPETUATE TESTIMONY.

BNSF purported to initiate this proceeding by having its Texas counsel, who does not belong to the California Bar, file papers in this Court; that same non-California attorney then executed a subpoena. Although BNSF subsequently hired California counsel, who signed a new subpoena, the moving documents were never fixed before that subpoena was issued, and hence the subpoena remained – and remains – based on procedurally inadequate moving papers. For this reason alone, as described in the Court's Tentative Ruling, the subpoena was not issued based on a valid proceeding and there is no basis for compelling obedience to such an invalid subpoena.

Moreover, in support of their motion to quash, respondents pointed out that the California Code of Civil Procedure, § 2029.010, authorizes the issuance of discovery process in support of a proceeding pending in some other state only if the other state has issued a "mandate, writ, letters rogatory, letter of request, or commission," and then only "in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California." Moreover, § 2035.010(a) allows discovery "for the purpose of perpetuating . . . testimony . . . or of preserving evidence," but subsection (b) expressly forbids the use of this procedure "for the purpose either of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed."

The jurisdictional nature of these limits is shown by *Christ v. Superior Court of San Francisco,* 211 Cal. 593, 296 P. 612 (1931). In that case, a party that hoped to initiate litigation in Guatemala pursued a subpoena against a California company, which defeated the motion in the Superior Court for lack of jurisdiction, and in response to a mandamus petition renewed its jurisdictional argument. The Supreme Court ruled that, but for the statutory provision for prelitigation discovery to perpetuate testimony, the respondent's argument would be sound, *id.* at 596, 296 P. at 614; however, because the purpose of the Guatemala discovery was to perpetuate testimony, and because the proceeding was the

same as what was allowed in the prelitigation context in California, there was jurisdiction to pursue such prelitigation discovery.

Here, by contrast, no commission for out-of-state discovery was ever obtained in this case. Far from asking the Texas court to authorize discovery in California, BNSF deliberately concealed from the Texas court that is was seeking to depose a California company that had no presence in Texas – its petition for prelitigation discovery neither listed the address and telephone number of the party to be deposed, nor included a certificate showing service on the person to be deposed (as required by Texas procedure, Rules 202.2(g) and 202.3(a)). The Texas court's order did not mention that discovery was to be taken in California.

BNSF argues that, because the Texas court's order is "a 'court warrant that empowers the execution of an official act,'" it is a commission under § 2029.010. Mem. at 2. BSNF does not provide a citation for the language that it quotes, and, in fact, one of the documents attached to the Novotny Declaration belies the contention that a mere court order allowing discovery is sufficient. A document entitled "Procedures Pursuant to Section 2029, California Code of Civil Procedure" is attached to the Novotny Declaration as the last page of Exhibit F; BNSF argues that this document shows that it filed the right papers to begin this proceeding. Mem. at 1 n.1; Novotny Declaration ¶ 6. However, that document says that BNSF had to file "an original Commission . . . or comparable document that must be issued from the state court which has jurisdiction **directing our court to issue the appropriate subpoena."** (emphasis added). There is nothing in the Texas court's order that directs or requests any California court to do anything.

Moreover, the word "commission" in § 2029.010 has the same meaning as the same word when used in § 2026.010, which governs the procedure for taking out-of-state depositions in cases pending in California. Under that section, a "commission" is a request that expressly requests the cooperation of a court in another state or country. *See* Levy Affidavit, Exhibit J (proposed state form for seeking deposition in another state identifies the state where deposition is to be taken and requests the issuance of process in that state). That is also the way in which the Court of Appeal used the term "commission" in *H.B. Fuller v. Doe*, 151 Cal.App.4th 879, 884 (6 Dist. 2007), where the plaintiff obtained from the

court in Minnesota a "commission" that expressly sought California's cooperation in pursuing a lawsuit that had been filed in that state. That is not what BNSF obtained here.

But even if BNSF had obtained a commission from the Texas court, it still could not seek prelitigation discovery in this case because, as it concedes, is has served the subpoena to identify the possible defendants in a future lawsuit, "if it decides to file suit." Mem. at 4. Although this purpose is expressly barred by C.C.P. § 2035.010(b), a provision invoked in the papers supporting respondents' motion to quash, BNSF still does not even acknowledge this issue in its moving papers.

Without expressly addressing the California statutory authority and caselaw barring prelitigation discovery to identify potential defendants, BNSF also reiterates its contention, set forth in its opposition to the motion to quash, that this Court is "obligated" by the Full Faith and Credit Clause to enforce "out of state discovery orders [like this one,] unless some exception applies." Our reply brief demonstrated that the Full Faith and Credit Clause does not require any deference to orders obtained in violation of due process, which was violated here both because Network54 is not subject to personal jurisdiction in Texas, and because BNSF deliberately avoided giving notice to Network54, thus depriving it of any opportunity to be heard in opposition to the motion.[2/] *See* Reply Brief at 4-5. Nor must a state apply another state's procedural rules; thus, California need not allow prelitigation discovery to identify possible defendants just because Texas does. *Id.* at 4.

Although BNSF has made clear that it has not cured these problems by refiling in Texas, and then in California, following the proper procedures recognized by both states, because it fears being subject to a SLAPP motion, Mem. to Compel at 5 and Levy Aff. ¶ 11, that is surely not an adequate excuse for avoiding a new filing while invoking the Full Faith and Credit Clause to override California's statutory limits on the purpose for which prelitigation discovery may be conducted. Indeed, although the limitations on the Full Faith and Credit Clause that respondents cited in their reply brief (and invoke in the previous paragraph) were based on United States Supreme Court decisions, the

[2/] The Texas rules also require service on the prospective defendants in the intended litigation, either by personal service if they are known, Rule 202.3(a), or by newspaper publication if the defendants are unnamed. Rule 202.3(b). BNSF did neither in this case.

holding of the case whose dictum BNSF cites to support the application of the Full Faith and Credit Clause was that the out-of-state order in that case (from Michigan) was **not** binding because the parties in California were not before the Michigan court and received no notice of the motion to obtain the order. *Smith v. Superior Court*, 41 Cal. App.4th 1014, 1023, 1027 (5 Dist. 1996), *cited* (with the wrong name) in Mem. to Compel. at 2. Yet BNSF unaccountably asks this Court to "enforce" the Texas order, Mem. to Compel at 2, despite its flaws under the Full Faith and Credit Clause, yet fails to address the reasons why that Full Faith and Credit cannot apply here. In sum, BNSF does not explain why it is entitled to require California to use its state power to enable a Texas citizen to accomplish on California soil what could not lawfully be done by California's own citizens.

All of these procedural problems could have been cured before BNSF renewed its efforts to obtain discovery in this case, and during the meet and confer following the Court's resetting of the hearing, respondents' counsel urged that BNSF refile in Texas, and then in this Court, to avoid the need to reach the procedural issues. Yet BNSF comes back to this Court without even addressing the statutory flaws in its quest for discovery, which were raised by respondents in their Reply Brief in support of the Motion to Quash. Accordingly, because BNSF has forced respondents to address yet another procedurally inadequate motion, BNSF should be required to pay reasonable expenses, including counsel fees, in the amount of $29,571.95 as detailed in Mr. Levy's two affidavits.[3/]

II. BNSF HAS NOT JUSTIFIED OVERRIDING THE CONSTITUTIONAL RIGHT TO SPEAK ANONYMOUSLY.

Assuming that the Court reaches the issue despite the numerous procedural flaws in the subpoena, BNSF also argues that the discovery is justified despite the constitutional right to speak anonymously. It advances two arguments in support of its discovery. First, it argues, instead of the standard for which respondents argued in their motion to compel, which requires an evidentiary showing that a would-be plaintiff can show a prima facie basis for its cause(s) of action, balancing the

[3/] This amount is derived by adding $11,061 for time spent in support of respondents' motion to quash, as reflected in Mr. Levy's first affidavit, and to $17,776 for time reflected in Mr, Levy's second affidavit and $734.95 in expenses reflected there.

right to speak anonymously against the strength of the plaintiff's showing of likely success on the merits, it should be enough to show that the statements about which it might want to sue are "arguably defamatory." Second, BNSF argues that the Siegele affidavit shows that it has sufficient evidence to establish a prima facie case of defamation under applicable law. Neither argument has merit.

A. The Court Should Follow the National Consensus Standard That Requires Evidence Establishing a Prima Facie Case.

First, with respect to the appropriate standard, **every** reported state appellate court that has resolved the question of the standard to identify anonymous Internet speakers, and every federal trial court decision of which we are aware, has ruled based not on BNSF's "arguable defamation" standard but rather has required **evidence** that supports a claim of wrongdoing. *See* Mem. Supporting Motion to Quash at 7-9. Some of the cases go further to apply the balancing standard for which our moving papers argued. *E.g.*, *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001).

BNSF cites the supposed "Virginia appellate decision" in *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26, 2000 WL 1210372 (Fairfax County, Jan. 31, 2000), *reversed*, 261 Va. 350, 542 S.E.2d 377 (2001), as an exception, but the citation is doubly wrong. First, in Virginia, the Circuit Court is a trial-level court, not an appellate court; and second, the court said that it must be "satisfied by the pleadings **or evidence** supplied to that court" that there is a valid basis for going forward. *Id.* at *8 (emphasis added). And, in any event, a single trial court decision issued nearly eight years ago should not override the great body of caselaw that has been decided in more recent years.

Moreover, although no reported California state court decision has expressly held that evidence of wrongdoing is needed, two Court of Appeals decisions strongly support respondents' argument here. First, in *Rancho Publications v. Superior Court*, 68 Cal. App.4th 1538, 1545, 1547, 1549 (4 Dist. 1999), the Court of Appeal applied the right of anonymous speech under both the First Amendment and the California Constitution to quash a subpoena that sought to identify several anonymous authors of an advertorial that criticized the plaintiffs in that case. The court held that there is a "qualified privilege" to speak anonymously and that in deciding whether to allow discovery, courts must "carefully

balance the 'compelling' public need to disclose against the confidentiality interests to withhold, giving great weight to fundamental privacy rights." *Id.* at 1550. This case lays to rest BNSF's argument that the right to speak anonymously applies to a requirement of identification "at the time they are engaged in protected speech, as opposed to some other time." Mem. at 3. Second, in *H.B. Fuller v. Doe*, 151 Cal. App.4th 879 (6 Dist. 2007), the Court of Appeal also required that judges faced with subpoenas to identify anonymous Internet speakers should "act with solicitude for the cherished constitutional right" to speak anonymously, and noted that denial of a motion to quash "inflicts irreparable harm on [that] constitutional interest." *Id.* at 893-894. Moreover, although the issue on appeal was whether Fuller could keep confidential the purported evidentiary basis for identifying the Does, the court said that the evidence that Fuller was trying to keep under seal had been the basis for the trial court's decision to compel identification of the Does, *id.* at 894, and it agreed that because the evidence was "relevant to the determination of their liability, if any, for disclosing such information[,] it may therefore be relevant to the question whether plaintiff is entitled to compel disclosure of defendant's identity." *Id.* at 895-896.

Additionally, two California federal court decisions have required the presentation of **evidence** to support the claimed liability as a condition of compelling identification of Doe defendants. *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 580 (N.D. Cal. 1999).

BNSF argues that the right to speak anonymously is properly applied only to core political speech directed at government bodies or public officials, Mem. at 3, but in fact, many cases have applied the right to speak anoymously to speech that criticized private parties. Not only do many of the leading cases setting the standard for identifying anonymous Internet speakers involve claims of defamation or other torts by private companies, *e.g.*, *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006); *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), but the very first Supreme Court decision about anonymous speech upheld the right to circulate anonymous handbills calling for a boycott of businesses because they discriminate. *Talley v. California*, 362 U.S. 60 (1960).

BNSF also implies that the consensus standard amounts to a "blanket right [for claimed defamers] to hide behind the constitution," Mem. at 3, and that the requirement of presenting evidence before anonymous speakers can be identified is somehow inconsistent with the rule, applied in California anti-SLAPP cases, that there is a right to discovery when the evidence needed to establish a prima facie case rests exclusively in the hands of the defendant. *Id.* at 9. Each of these arguments assumes that the consensus standard prevents plaintiffs with genuine and supportable claims from getting their day in court, but nothing could be further from the truth. Any plaintiff that has been defamed should have no difficulty showing (1) that a posting had a defamatory meaning and that **that** meaning was understood by its audience, rather than being an obvious joke; (2) that the posting's defamatory gist was "of and concerning" the plaintiff and not some other person; (3) that the posting's defamatory gist was false; and (4) that the defamatory gist caused actual damage to the person defamed, and not merely imaginary harm. All of this information should be in the plaintiff's possession at the time it seeks discovery, especially when the plaintiff is a huge railroad company with an army of labor relations operatives at its beck and call.

BNSF claims that it cannot present a prima facie case on the issue of actual malice and is not even sure that it can get personal jurisdiction over the prospective Doe defendants. But cases like *Dendrite* and *Doe v Cahill*, 884 A.2d 451 (Del. 2005), require plaintiffs to establish a prima facie case only on those elements that they should be able to establish without taking any discovery from the defendants, such as falsity, defamatory meaning, and damages. Indeed, respondents have not argued in their motion to quash that discovery should be denied for failure to prove malice; hence, regardless of whether BNSF can prove malice, its request for discovery must fail if it cannot meet each of the other elements set forth above. Moreover, BNSF represented to the Texas court that the planned defamation action for which it was seeking discovery would be filed in that court (and hence that prelitigation discovery was properly sought there); if this representation was false, then that is yet another reason

why discovery should be denied here. At the very least, BNSF should be estopped from arguing that it is uncertain about jurisdiction given its previous representations in Texas.[4/]

To be sure, BNSF is not the only plaintiff seeking to identify Doe speakers that has made the same argument, that the consensus standard unfairly prevents plaintiffs from having their day in court. Courts do not accept that argument, for the very good reason that, like BNSF, plaintiffs never show that meritorious lawsuits have been barred by the application of the *Dendrite* rule. In fact, plaintiffs in many *Dendrite*-type cases meet the standard. For example, in *Dendrite* itself, two of the Does were identified, and the Doe was also identified in the companion case to *Dendrite* that was argued at the same time before the same appellate panel. *Immunomedics v. Doe*, 342 N.J. Super. 160, 775 A.2d 773 (2001).

Finally, BNSF argues that even if evidence of wrongdoing may be required before anonymous defendants in John Doe lawsuits can be identified, a lesser standard is justified in a case like this one where not only has no lawsuit been filed, but BNSF is not even certain that it **will** file a defamation action ("BNSF merely seeks to [identify] the posters . . . to determine whether [it can sue them] **if it decides to file suit.**" Mem. at 4, line 13 (emphasis added). That argument should be squarely rejected. The potentially compelling interest that could warrants overriding the right to speak anonymously, assuming that BNSF can establish that it is has a sound legal and evidentiary basis for suit, is the pursuit of its ability to obtain redress for actionable conduct. That fact that BNSF is not certain whether it will file suit if it identifies the speakers, and that it is seeking discovery to facilitate its thought processes about whether to do so, undercuts the strength of its claim that there is a compelling government interest supporting discovery that would infringe the right to speak anonymously.

Indeed, experience suggests that, before it became mandatory to present evidence to identify anonymous Internet speakers, it was quite common for companies to use the threat of discovery to chill speech. Some lawyers who specialize in Doe discovery suggest that suit be filed in the expectation that just issuing the subpoena will slow down critical discussion. Eisenhofer & Liebesman, *Caught by the*

[4/] Indeed, under the procedures for seeking an out-of-state subpoena, the party seeking discovery must present an order from a court "which has jurisdiction." Novotny Decl. Exhibit F.

Net, 10 Business Law Today No. 1 (2000), at 46. The record suggests that BSNF has already had the desired chilling effect, because after Network54 posted its Notice of Subpoena the number of postings on the message board dropped precipitously. Roussey Affidavit ¶ 7 and Exh. 1. However, as we now demonstrate, BNSF has not met the standard for stripping Does of their right to remain anonymous. Accordingly, the motion to compel discovery should be denied. We can only hope that notice of a decision quashing the subpoena would encourage BNSF's employees to re-enter the forum and participate freely.

B. BNSF Has Not Proved A Prima Facie Case.

BNSF has not established a prima facie case of defamation against either of the Doe defendants based on the parody news articles that each of them filed.[5/] We address each of the two articles in turn.

1. John Doe 1's "One-Man Team" Parody Article

John Doe 1 posted a parody article that reported the reactions of BNSF and the Brotherhood of Locomotive Engineers and Trainmen ("BLET") to the supposed ratification of a collective bargaining agreement between the BLET and other unions and the railroad industry. BNSF announced that the contract allowed it to implement its long-term bargaining objective of reducing the number of employees needed to run its trains, essentially eliminating a conductor position. The United Transportation Union ("UTU") was reported to be upset at having been, in effect, sold out by the BLET and to be considering its options, including a strike.

There were several indications within the article that it was a parody, including several typographical errors, as well as the printed "time" of the article being reported as "15:55 am."[6/] The

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[5/] Instead of seeking to show that it can claim defamation, which is the cause of action on which it contended it wanted to sue when it asked the Texas court for leave to take prelitigation discovery, BNSF's memorandum now asserts that it is thinking about suing for disparagement. Even if BNSF were not estopped from seeking to sue on a different cause of action than the one it previously gave as an excuse for identifying the employees who have criticized it, the Supreme Court has held that a plaintiff cannot evade the required minimum elements of a libel claim by changing the label that it places on the tort. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

[6/] Seeking to avoid this obvious joke, BNSF's brief claims that there was nothing unusual about stating the time as "3:55 a.m" because railroads run around the clock. But that is not what the

reporting of an October 31, 1985 hire date as a cut-off for the right to work was an inside-joke reference to the infamous "Halloween agreement" between UTU and BNSF, which an arbitrator later imposed on the BLET. See http://www.ble-t.org/pr/newsletter/0198newsletter/page3.html. This inside joke had the UTU being hoisted on its own petard. But there were also external indications that the posting was a joke, most notably that on June 19 the ballots in the industry-wide referendum to ratify the proposed agreement had not yet been announced, and would not be announced until June 25, 2007, a full six days later. *See* Levy Affidavit Exh. H. Moreover, the message board itself is full of sarcastic posts and parodies. In context, then, it was evident to any of the readers of this message board – railroad workers – that the article was fantasizing about the possible reaction of industry players to a possible outcome of the ratification vote that was still nearly a week away.

In fact, there is **no** evidence that any reader of the message took it seriously. The Affidavit of Milton Siegele offers only an opinion about how union leaders **might** react to the message, if they took it seriously, but his affidavit does not come close to establishing that he has sufficient expertise to offer such an opinion or, indeed, that such a self-serving opinion has a sufficiently scientific basis to be worthy of admission in evidence. Siegele does not identify even a single union official or, indeed, anybody else, who took the article seriously. Even more significant, the record reveals that the only reaction to the posting on the message board itself was a jocular one: with the subject line "Nicely done," and the poster adopting the pseudonym "But false nonetheless," and the entire text of the message was "LOL" – in other words, "Laughing Out Loud":

Nicely done
by But false nonetheless

LOL

Levy Affidavit, ¶ 6 and Exh. F. The relevant audience – the readership of the message board – obviously recognized that this was a parody. And anyone who was confused about whether the news article was real would have had their confusion dispelled by this reaction.

parody article said. The time would be reported either on the 24-hour clock as 15:55, or on a 12-hour clock as 3:55 p.m. No newspaper would list the time of posting of an article as "15:55 a.m."

Moreover, even if this post were taken as stating actual facts and not a parody, BNSF has not established that the defamatory gist of the article is "of and concerning" itself, as it must do under *New York Times v. Sullivan*, 376 U.S. 254, 288 (1964). The article suggests that BNSF has achieved its bargaining objective of many years, and that scarcely harms **its** reputation. BNSF's own brief admits its "continuing insistence on one-man crews." Mem. to Compel at 8. It is the **union** that is being portrayed as having given away crucial membership rights. Even if BNSF were correct that, if taken seriously, union members and union leaders would react negatively to the post and might take economic action as a result, or at least that the posting might ruffle feathers and thus cause labor unrest, the fact remains that BNSF cannot sue for defamation unless the supposed harm comes about as the result of defamation of BNSF. BNSF never explains how an article attributing to BNSF success in obtaining its own bargaining objectives defames it. Even if BNSF had produced probative evidence that the posting had caused labor unrest – which, as discussed below, it has not done – BNSF is not entitled to bring a defamation claim over something that causes labor unrest unless BNSF is the party defamed. Only the party defamed has standing to bring such an action. And the union has not sued to identify any employees.

The final reason why BNSF has not shown a prima facie case is that it fails to show any actual damage as a result of the posting. Instead, the Siegele affidavit meanders around the question, talking about the harm that might befall BNSF **if** labor leaders reacted badly to the message.[7/] But there is no showing that any member of the unions **did** react adversely to the message, or that the message caused any labor unrest. Indeed the only reaction shown in the record is the responsive post that said "L[aughing] O[ut] L[oud]." As the Court of Appeal stated in *H.B. Fuller*, when a party that ought to be able to make direct averments instead chooses to present an affidavit that is worded in a "circulatory manner," the courts infer that the more direct averment is not being made because it cannot be made.

[7/] Indeed, it is unbelievable that a union would go out on strike over a fake news story. Although BNSF's labor relations vice-president obviously has a very low opinion of his counterparts' intelligence, the Court should not allow such an absurd "opinion" about how the national leadership of a labor union would react even if they saw this message board post to support a claim of damage caused by the supposed defamation.

151 Cal. App.4th at 897. Here, Siegele's vague assertions that harm might be possible, based on his self-serving opinions about likely reactions, coupled with the fact that he says **nothing** about any actual reactions on the part of union leaders or union members, create the inference that no union leader did in fact react that way, and hence that there was no actual harm and hence no basis for a libel action under the requirements of *Linn v. Plant Guard Workers*, 383 U.S. 53, 65 (1966).[8/]

Furthermore, as argued in the Motion to Quash Reply Brief, at 7-8, efforts to remedy an alleged libel cannot be enough to meet the *Plant Guards* "actual damage" requirement, else the requirement would always be met. What must be shown, instead, is actual damage caused by the actions of **others**, and evidence of actual impact on reputation. That showing is entirely lacking here.

2. John Doe 2's Railroad Industry "Collusion to Lower Wages" Parody Article.

Similarly, the parody news article posted by John Doe 2, which cited a recent antitrust decision by the Supreme Court but said that the parties to the case were "a labor union" – the BLET – and "railroads." As fully explained in the Motion to Quash Reply Brief, this posting is not "of and concerning" BNSF at all – it says that the BLET brought the case to establish its right to collude with "the railroads." But BLET has not brought a case here, and only BLET can sue over a posting that allegedly defamed it. Claims for group libel are not recognized under Texas law. Moreover, even though the recent case about price fixing involved the sale of brand name leather goods, the gist of the claim about what the case held is substantially true – employers and unions **can** agree to lower wages, and in many bargaining contexts unions do agree to cut wages in return for other concessions such as

[8/] There is no showing that Siegele has any expertise in identifying the likely reaction of labor leaders to postings on this or any other message board. His affidavit asserts that he has, on twenty different occasions, assessed whether union messages contained a veiled threat of strike or job action, and that in each such case the company either obtained an injunction or persuaded the union to use arbitration. However, there is no suggestion that this is a union message at all, or that the message threatens a strike. Siegele's supposed expertise is thus irrelevant to the opinion that he offers, and the opinion should thus be stricken under Section 801 of the California Evidence Code. The affidavit also offers an opinion about the impact of "such postings," but that opinion is irrelevant, because the issue is whether defamatory statements about BNSF caused harm. The relevant portions of the Siegele affidavit should therefore be disregarded. Similarly, the entire Novotny Declaration should be disregarded because he acknowledges in paragraph 2 that parts are not based on personal knowledge, and he never specifies which parts **are** based on personal knowledge.

job security protections or to avoid the closing of an operation. BNSF itself has proposed to cut wages as an alternative to reducing crew size.

These arguments were all made in the Motion to Quash Reply Brief, but BNSF never confronts them. Instead, it mischaracterizes the posting as attributing collusion with the BLET to "its" management. Mem. at 8. But that is not what the posting says; it refers only to collusion with "railroads."

As with the damage allegedly caused by the other posting, the Siegele affidavit dances around the question of damage done by this posting, claiming that BNSF spent resources to address the chance that the posting would stir labor unrest but not identifying a single union official or even union member who took the posting seriously and thought that BNSF was colluding with the BLET to cut wages. Inspection of the message board itself reveals that the only response to the posting was itself jocular – the subject line was "Another triumph of the virtuous over evil"; the author was "Everyone got what they deserved"; and the entire text of the message was "That's what I'm talking about." Levy Affidavit Exh. F.

Accordingly, BNSF has not established a prima facie case of defamation with respect to either of the two postings. There is, therefore, no compelling state interest that outweighs the very substantial First Amendment interest in remaining anonymous and safe from employer retaliation that could result if the posters are identified.

CONCLUSION

The motion to compel discovery should be denied, and the motion to quash the subpoena should be granted.

Dated: October 22, 2007

Respectfully submitted,

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NON-CALIFORNIA AUTHORITY NOT PREVIOUSLY ATTACHED

1. *Immunomedics v. Doe*, 342 N.J. Super. 160, 775 A.2d 773 (N.J. Super. 2001)

2. Texas Rules of Civil Procedure, Rule 202