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September 21, 2007

Gregory H. Smith, Esquire
Fairfield and Woods, P.C.
Wells Fargo Center, Suite 2400
1700 Lincoln St.
Denver, Colorado 80203-4524

Re: *Video Professor v. Doe*

Dear Mr. Smith:

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, I write in response to the subpoenas that you have sent to Leonard Fitness, Inc., seeking to identify all persons who said anything about that company on our client's Internet message boards. We object to the subpoena in its entirety, because as explained below, your subpoena infringes on the First Amendment right to anonymity of the commenters, and your client has not made the showing required by courts across the country before anonymity may be breached. Moreover, the subpoena imposes burdens on Leonard that far exceed the possible benefit to plaintiff from the requested discovery, because much or all of the requested information is privileged, and because much of the information has no relevance to your client's case. In addition, the compensation offered to Leonard for the considerable work that will be required to comply with the subpoena is totally inadequate.

Our first objection to the subpoena is that it seeks privileged information. You seek to strip the posters to the infomercialratings.com and infomercialscams.com web sites of their First Amendment right to speak anonymously, long recognized by the Supreme Court. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995). State and federal courts throughout the country, in cases such as *Dendrite v. Doe,* 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), *Doe v. Cahill,* 884 A.2d 451 (2005), *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005), and *Doe v. 2theMart.com*, 140 F. Supp.2d 1088 (W.D. Wash. 2001), have developed a consensus rule under which, before discovery is allowed to identify anonymous Internet speakers, the speakers are entitled to notice of the claimed basis for being identified and an opportunity to defend their anonymity. The proponent of discovery is required to make an evidentiary and legal showing that it has a likelihood of success on the merits of its case before discovery is permitted. Video Professor has given no notice and made no such showing. Indeed, although Video Professor was aware that Leonard would oppose discovery, it gave Leonard no notice before moving for expedited discovery and its ex parte moving papers did not disclose to the Magistrate Judge that there were legal impediments to such

discovery.

Second, athough the reason you gave for expedited discovery was the need to identify Doe defendants so that they could be served with process, your subpoena sweeps far beyond that limited objective. The complaint states that Video Professor is suing 100 Doe defendants, but looking only at the posts in the Video Professor sections of Leonard's two web sites, there are far more than 100 posts. Moreover, again looking only at the posts in the Video Professor sections, there are many posts with positive comments about Video Professor – we are assuming that you do not contend that those posts are false or defamatory. Yet the subpoena would require Leonard to identify those posters. There are a large number of other posts which, although making negative statements about Video Professor, contain only hyberbolic and rhetorical language, which constitutes non-actionable opinion. These posts cannot be considered "false and defamatory." Even with respect to the negative factual statements, you have not specified which are false. Is it Video Professor's position that any former customer who criticizes its conduct must necessarily be making false statements, and hence is subject to suit for libel? Certainly you have given no evidentiary reason to believe that any of the statements about Video Professor are false.

Indeed, pleading of the actual defamatory words is favored in the federal courts because the exact words used are required to formulate responsive papers, whether that be a motion to dismiss, and answer or, in a case like this one, an opposition to discovery. *Asay v. Hallmark Cards*, 594 F.2d 692, 698-99 (8th Cir.1979). *See also Walters v. Linhof*, 559 F. Supp. 1231, 1234 (D..Colo. 1983) (the substance of the defamatory words must be pleaded). Your complaint, however, says nothing about the substance of the allegedly defamatory words, and these authorities were also not called to the attention of the Magistrate Judge in your ex parte motion for leave to take discovery. We have grave concerns about the legal validity of many of the claims you make in your complaint. However, until you specify the posts on which you are suing, and adduce evidence to support a prima facie claim for each, we will refrain from commenting in more detail.

So far I have addressed only those posts that can be found on the Video Professor sections of the two web sites: http://www.infomercialratings.com/product/video_professor, http://www.infomercialscams.com/defenses/video_professor, and http://www.infomercialscams.com/scams/video_professor/start/0. It remains possible that there are other posts to the web site that refer or relate in some way to Video Professor. In order to comply with the subpoena that you have served, Leonard will have to search his entire web site to identify such posts, and to determine what identifying information he may have about such posts. We see no reason why Leonard should bear the burden of identifying the posts whose authors you seek to identify. You are equally able to review the web site to identify the posts about which you seek discovery, and indeed meeting the standard to overcome the qualified privilege to speak anonymously requires identification of the allegedly defamatory words. To the extent that you confine your desired to discovery to particular posts, my client's burden in responding to the subpoena will be concomitantly reduced. Our demand that you specify the posts in question is thus supported by Rule 45's policy requiring that a

discovering party minimize the burdens on the third-party discovery target.[1]

The specification of relevant posts will also reduce the burden of providing notice to the Doe defendants. As part of the registration process that would-be posters must complete, my client obtains an email address from each would-be poster. Although notice to those email addresses is not a fool-proof means of providing notice – at the time of notice, some email addresses may not be valid for a variety of reasons – Leonard will comply with *Dendrite* by emailing a Notice of Subpoena to each Doe whose identity you seek. For each post whose author you seek, Leonard will have to extract the relevant email address and send the Notice of Subpoena for that post. It should not be Leonard's burden to decide which posters are really within the scope of your desired discovery. By insisting that Video Professor specify the relevant posts, we are trying to reduce Leonard's burden in responding to the subpoena.

Moreover, given the large number of different posts and posters whom you seek to identify, it seems quite likely that the evidence you will need to adduce to show your entitlement to identify each of the posters will be different for each poster. The Does are entitled to know the basis for your prima facie case against them, so that they can better decide whether to oppose your motion to discover their identity, and, should they oppose that motion, to decide what arguments to make. We therefore request that, for each post whose author you seek to identify, you provide us with the factual showing that forms the basis for your claims against that poster. Leonard will include that information in his Notice of Subpoena to each such poster.

Finally, the $40.81 check that you served with each of your subpoenas does not come close to providing adequate compensation for all of the work that Leonard will have to do to comply with the subpoenas and to ensure that the best possible notice is provided to the Doe defendants. Before he undertakes these efforts, you will need to provide him with such compensation as part of your burden under Rule 45.

Sincerely yours,

Paul Alan Levy

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[1] To be sure, the complaint makes clear that although what your client really wants is an injunction against criticisms of your client on Leonard's web sites, the law does not allow you to obtain that remedy. We will not countenance your effort to deter Leonard from allowing criticisms of your client by such an obvious effort to make the maintenance of a web site burdensome.