UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

VIDEO PROFESSOR, INC., a Colorado corporation, Plaintiff, v. JOHN AND JANE DOES 1 THROUGH 100, JOHN DOE CORPORATIONS 1 THROUGH 10, and OTHER JOHN DOE ENTITIES 1 THROUGH 10, all whose true names are unknown, Defendants.	)	Civil Action No. 07-cv-01726-WYD-CBS

OPPOSITION TO MOTION FOR EXTENSION OF TIME

Video Professor, Inc. ("VP"), a controversial company that markets mail-order computer-instruction videos through television infomercials, began this action by filing a breathtakingly vague complaint that names one hundred John Doe individual defendants, ten John Doe corporations, and ten John Doe "other entities," all of whom are alleged to have posted false statements about VP's practices and products "on various Internet bulletin boards operated by third parties." VP's complaint does not identify the "bulletin boards" at issue, the statements alleged to be false, the screen names of its alleged defamers, or even the time frame during which the alleged conduct is alleged to have occurred. In effect, VP seeks to use its ability to name "John Doe" defendants to create a roving commission — unlimited as to time, place or person — by which it can continue to investigate and silence anyone who dares to criticize it on the Internet.

This Court should dismiss VP's action in its entirety because (1) VP has not demonstrated

"good cause," pursuant to Fed.R.Civ.P. 4(m), to justify an extension of the time within which to serve the anonymous defendants; (2) VP cannot demonstrate the existence of federal subject-matter jurisdiction; and (3) VP has not complied with the most minimal requirements of notice pleading: Its complaint is so vague that it does not put anyone on notice that they have been sued or what the allegations are against them. No litigant should be permitted to invoke the jurisdiction and process of the federal courts to conduct a boundless global fishing expedition aimed solely at intimidating its critics.

STATEMENT OF THE CASE

VP began this action on August 16, 2007, by filing a vague and conclusory complaint alleging that one hundred John Doe individual defendants, ten John Doe corporations, and ten John Doe "other entities" had posted false statements about its sales practices and products "on various Internet bulletin boards operated by third parties." Complaint, unnumbered paragraph on page 1. The complaint did not identify either the "bulletin boards" at issue, the statements it alleged to be false, or even the time frame in which the alleged conduct occurred.

VP candidly acknowledged that its real objective was to silence the criticism by obtaining an injunction against operators who carried the messages, but that the Communications Decency Act, 47 U.S.C. § 230, bars such relief, and hence it was suing the individual posters as Doe defendants. *Id.* pages 1-2. Because VP did not know either the names or the residences of the Doe defendants, it did not allege their names in the complaint, and could not allege diversity jurisdiction. Instead, it claimed a right to sue in federal court by alleging that although some of the posters are merely former customers who "for whatever reason" had criticized it, others were allegedly commercial

competitors whose false statements about it amounted to false advertising that was intended to boost their own sales. *Id.* ¶ 15; Count I. VP did not explain why the Court has subject matter jurisdiction over defamation claims against its former customers who are not competitors engaged in false advertising. Then it added four more counts, claiming defamation as well as a variety of other state causes of action that depend on its ability to meet First Amendment standards for proving defamation. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

VP then filed an ex parte motion asking for leave to take discovery to identify "the defendants identified at this juncture as John and Jane Defendants." DN 2, ¶ 3. The motion recited that VP had previously asked "the various bulletin board operators" for voluntary disclosure, but had been turned down. *Id.* ¶ 5. Unlike the complaint, VP's motion stated that "various Internet bulletin boards, including infomercialscams.com, ripoffreport.com, and familyfirst. com" were at issue, ¶ 2, but even though VP knew how to reach those bulletin board operators, it gave them no notice that it was seeking a court order compelling them to disclose information. As a result, the motion was heard ex parte, and nobody before the Court pointed out the many cases holding that discovery to identify anonymous Internet speakers requires an evidentiary showing. *Infra* at 4 n.1. The motion was granted, authorizing third party subpoenas seeking to identify "all persons having posted messages on such third parties' bulletin boards relating or referring to Video Professor."

Subpoenas were then issued to a number of bulletin board operators, seeking to identify posters not just on the three bulletin boards identified in the motion, but also the operators of at least two other online locations. One was "InfomercialRatings.com," which, like InformercialScams.com, is operated by Leonard Fitness, Inc. The second subpoenaed entity is not a bulletin board at all, but

rather the foundation that operates Wikipedia, the well-known online encyclopedia. See Levy Affidavit, Exhibit A. There was no indication in the complaint that communications on Wikipedia were at issue in the case.

Leonard promptly served a notice under Rule 45 of the Federal Rules of Civil Procedure, objecting that the subpoena sought potentially privileged information. *See* Levy Affidavit, Exhibit B. He relied on the consensus view of the courts that have considered the issue – before a court order may be issued breaching the First Amendment right to speak anonymously, even for the purpose of identifying defendants so that they can be served with process in litigation charging them with tortious speech, the plaintiff must give notice to the anonymous defendants, specify the wrongful speech with which they are charged, and submit sufficient legal argument and evidence to show that there is a reasonable likelihood that the speech is, in fact, wrongful.[1] Most of those cases hold that a plaintiff who seeks to identify defendants to pursue a defamation claim must at least present a prima facie case, sufficient to defeat a motion for summary judgment, on the issues of falsity and (if required by the relevant state law) damages. Several cases go further, requiring a balancing of interests even after a prima facie case has been established. *E.g.*, *Mobilisa v. Doe, supra.*

The record does not reflect it, but it is our understanding that the proprietor of

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[1] *E.g., In re Does 1-10*, — S.W.3d —, 2007 WL 4328204 (Tex. App.-Texarkana, December 12, 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. Div. 1 2007); *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006)*; Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004), *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42 (2003); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005).

ripoffreport.com similarly objected to disclosure. For reasons that do not appear of record, it appears that the Wikipedia Foundation failed to respond to its subpoena in any way.

During the pendency of the litigation, it appears that VP has used the case to suppress the speech of other Internet speakers whose statements were not cited in the complaint. For example, after a columnist for the *Denver Post* wrote an article about this litigation, Lewis, *Video Professor wants the book thrown at anonymous critics*, Denver Post, September 23, 2007, available at http://www.denverpost.com/search/ci_6966387, statements about VP's sales practices were posted on the columnist's blog, and a member of the public sent an anonymous email to certain VP staff directing them to the comments. That individual contacted undersigned counsel Mr. Levy, stating that Google had received a subpoena seeking to identify him, and saying that he was "distressed" and "frightened" about being added to the lawsuit. Levy Affidavit, ¶ 10. VP's counsel allegedly told him that only if he signed a comprehensive agreement not to say anything about VP in the future could he avoid being sued personally; in fact, at the same time this individual was trying to find out whether Mr. Levy would represent him, VP's counsel was allegedly telling him that the offer not to sue was contingent on **immediate** signing of the agreement not to speak. *Id.* Rather than risk being sued personally, this individual signed the agreement, and thenceforth refused to talk to Mr. Levy about the wrongdoing in VP's sales department that he had previously begun to describe. *Id.* In the course of investigation in preparation for motion practice over the requested discovery, Mr. Levy spoke to several Internet speakers who reported being threatened with discovery and/or litigation if they did not stop criticizing VP. *Id.*

In response to Leonard's Rule 45 objection, by letter dated October 8, VP enumerated the

statements of 43 John Doe defendants who posted to InfomercialScams.com; it also supplied an affidavit that purported to provide evidentiary support for its defamation claims (it did not claim that any of the 43 posts were false advertising, and did not even purport to supply evidence in support of that claim). Levy Affidavit, Exhibit C. By email dated October 11, VP confirmed that it was not seeking the disclosure of the identities of any of the posters to infomercialratings.com. *Id.,* Exhibit D. However, by letter dated October 19, Leonard explained that the affidavit did not, in fact, provide any evidentiary support that the specific posters had made actionably false statements of fact about Video Professor, and enumerated the kinds of documents that might provide sufficient support to require Leonard to provide the requested identifying information. *Id.*, Exhibit E. When VP did not respond to this request, Leonard made several efforts to discuss the matter with VP, culminating in a letter on November 8 asking VP to confer for the purpose of resolving the discovery dispute. *Id.* Exhibit F. VP never responded, either to discuss means to resolve the discovery dispute or to withdraw the subpoenas.

Based on the passage of 120 days from the August 16 filing of the complaint, without any service having been obtained against any of the defendants, and without any apparent efforts to pursue service against the posters on InfomercialScams.com, Leonard prepared to correspond with VP to request voluntary dismissal to avoid the need for a motion to dismiss pursuant to Rule 4(m), Federal Rules of Civil Procedure. Upon checking the docket, however, Leonard discovered that on December 17, VP had filed a motion to extension of "time to serve the defendants." DN 10, proposed order. The motion recited that VP had obtained identifying IP information from Wikipedia after filing a motion to hold Wikipedia in contempt for failure to respond to its original subpoena,

apparently without any notice to the posters.

According to the motion for extension, at this time VP is not actively seeking identifying information about everybody whose IP information it obtained from Wikipedia, but only seeks "identifying information relating to the most flagrantly defamatory anonymous poster on Wikipedia." *Id.* ¶ 6. A subpoena seeking that information was served on Comcast on December 12, but, because Comcast's counsel had not yet returned telephone calls as of December 14, VP represented that it did not know whether Comcast would produce the subpoenaed information without requiring a court order. *But see* 47 U.S.C.A. § 551(c)(2)(B) (cable provider may not release identifying information without notice **and** a court order). The motion recited in passing that VP "is withdrawing" its subpoenas to infomercialscams.com and ripoffreport.com, *id.* ¶ 2; no mention is made of withdrawing a subpoena to familyfirst.com. Leonard then wrote to VP, asking that the entire action be dismissed, at least against the anonymous InfomercialScams.com, and expressing concern about the misuse of the pendency of the action as "a roving commission to issue subpoenas to identify anybody who dares to criticize your client publicly." Levy Affidavit, Exhibit G. VP responded by email, stating, "As you were already aware [apparently referring to counsel's discovery on DN 10 on PACER], the subpoena of your client Leonard Fitness, Inc. has been withdrawn." *Id.* Exhibit H. VP said nothing about dismissing the action.

Leonard Fitness, Inc., the operator of InfomercialScams.com and InfomercialRatings.com, has therefore entered a special appearance for the purpose of submitting this memorandum urging the Court not to grant any extension of time to serve the individual defendants who have posted comments about plaintiff on his web site, but rather to dismiss the complaint in its entirety.

The Action Should Be Dismissed Because There Is No Showing of Subject Matter Jurisdiction, Because the Complaint Does Not Meet Even the Bare Minimum for Notice Pleading, and Because, in Any Event, Plaintiff Does Not Show Good Cause for Its Failure to Serve Any Defendants.

As we now show, plaintiff has not shown a sufficient basis to allow this suit to continue, for three separate reasons: (1) plaintiff has not shown good cause for failing to serve the anonymous defendants, especially those defendants whose identities it is no longer seeking though the one outstanding subpoena mentioned in its motion for an extension; (2) plaintiff has not shown that the Court has subject matter jurisdiction, and has implicitly stated that it seeks to identify the Comcast user because of its state law cause of action; and (3) the complaint does not meet the standards for notice pleading, not to speak of the standards for suing for defamation and compelling the identification of anonymous speakers.

But even apart from these significant legal obstacles to continuation of the litigation is the public policy issue raised by VP's apparent abuse of the subpoena power obtained through the filing of a vague complaint followed by an ex parte motion for leave to take discovery. Despite the fact that the complaint in this case does not give any individual defendant any notice that he or she is being sued, not to speak of what he is being sued for, VP has used the pendency of the suit as a roving commission to issue subpoenas to web sites or ISP's used by its critics, not to speak of threatening speakers with subpoenas if they dare to continue to advance public criticisms. The only way to put a stop to this abuse is to dismiss the lawsuit without prejudice to its being renewed if VP alleges specific defamatory comments, by specific Does, on specific bulletin boards or other web sites, and shows a sufficient basis for subject matter jurisdiction in this Court, and hence gives the

Court sufficient ground to authorize the invocation of its authority to issue subpoenas compelling the disclosure of private information and breaching the First Amendment right to speak anonymously.

If VP has sufficiently specific allegations of wrongdoing and evidence to back it up, it should have every opportunity to litigate its claims in state court (or in federal court if there are solid grounds for federal jurisdiction). Otherwise, it should respond to its critics in the marketplace of ideas. *See* Enoch, *A Visit to the Video Professor's 'Classroom,'* http://www.consumeraffairs.com/news04/2007/12/video_prof02.html.

A. The Complaint Should Be Dismissed for Failure to Pursue Identification of the Doe Defendants Diligently.

A plaintiff is entitled to an extension of time to serve defendants to avoid dismissal under Rule 4(m) only if it carries the burden of showing "good cause" for its delay in service, *Espinoza v. United States*, 52 F.3d 838, 840 (10th Cir.1995); absent a showing of good cause, the plaintiff must persuade the court to exercise discretion to allow more time, in the circumstances of the case. Good cause is lacking, and discretion should not be exercised in the plaintiff's favor, without "some showing of reasonable diligence" in its efforts to effect service. *Bachenski v. Malnati*, 11 F.3d 1371, 1376-1377 (7th Cir. 1993); *MCI Tel. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995) (good cause needed to excuse lack of diligence on plaintiff's part).

In this case, although plaintiff promptly served subpoenas on the hosts of several bulletin boards, by October 19 it knew that the host of InformercialScams.com was not going to produce any identifying information without an evidentiary showing sufficient to defeat the qualified privilege

for anonymous speech. Far from pursuing discovery at that point, or initiating a motion to compel compliance with the subpoena, plaintiff refused to respond to letters or telephone calls and eventually announced, albeit to the Court without even the courtesy of contacting the subpoena recipients, that it was "withdrawing" subpoenas to identify the defendants who posted on InfomercialScams.com and RipoffReport.com. Because VP has decided not to pursue the discovery that it would need to serve these defendants, the complaint against them should be dismissed.

Plaintiff might have had an argument for diligence with respect to the anonymous defendants who communicated with Wikipedia (assuming that it has alleged a claim against such anonymous speakers), inasmuch as it moved for contempt after Wikipedia ignored the subpoena. However, in late November it apparently obtained IP information with respect to the sixteen Doe defendants whose pseudonyms are set forth in the subpoena to Wikipedia, and yet it waited until December 12 – 115 days after the complaint was filed – to subpoena identifying information about only **one** Doe defendant. It has not pursued subpoenas to identify any of the other Doe defendants. Having deliberately decided not to pursue the other 99 individual Doe defendants, or any of the Doe corporations or "other Doe entities" named as defendants in the complaint. Plaintiff has implicitly acknowledged that it is not diligently seeking to identify **any** of those other 119 defendants. Accordingly, even if the court does not agree that the entire action should be dismissed for the reasons set forth in the remainder of this brief (lack of subject matter jurisdiction and failure to plead with sufficient specificity), the complaint should be dismissed as to all Doe defendants except the one Wikipedia poster whose identity plaintiff is actively pursuing. Plaintiff should be required to identify the pseudonym of the one Wikipedia Doe whom it is pursuing so that the Court can

effectively dismiss the complaint against all other defendants, and confine any discovery to the identification of that one Doe defendant.

B. Plaintiff Has Not Shown Any Basis for Subject Matter Jurisdiction.

The second reason why plaintiff should not be granted any extension of time to serve additional defendants, even against the one Doe defendant whose identity it is still actively pursuing, is that, on this record, plaintiff has made no showing that the Court has jurisdiction of the subject matter. A court is obligated to satisfy itself that its has subject matter jurisdiction at all stages of the case, and the Court should raise the issue sua sponte even if no party has done so. *Image Software v. Reynolds and Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006); *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055 (10th Cir. 2004).

In this case, there has been no allegation of diversity jurisdiction. Instead, plaintiff rests its assertion of jurisdiction on its allegation that some of the defamatory statements about it are "false advertising" in violation of section 43(a)(1)(B) of the Lanham Act. However, in the Tenth Circuit, there is no Lanham Act cause of action for "false advertising" unless the messages are "(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services [and] . . . (4) disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273-1274 (10th Cir. 2000). The posts on InfomercialScams.com do not meet the *Haugen* test at the very least because they do not contain any explicit urging to buy the products of any competitor of Video Professor. *Id.* at 1275-1276. Nor does the Complaint allege the "explicit urging" element of a false advertising claim, or quote any

allegedly actionable words from any web site that satisfy this test.

Moreover, VP has never provided any reason to believe that any of the posters is a competitor of Video Professor or that the motivation of the posters is anything other than dissatisfaction with its sales practices, however mistaken it may consider that dissatisfaction to be. *Nevyas v. Morgan*, 309 F. Supp. 2d 673 (E.D. Pa. 2004). Nor is there any showing of the sort of coordinated campaign to disparage the plaintiff, which is required in light of the rule that "businesses harmed by isolated disparaging statements do not have redress under the Lanham Act; they must seek redress under state-law causes of action." *Fashion Boutique v. Fendi USA*, 314 F.3d 48, 57 (2d Cir 2002). Even assuming that VP firmly believes that the posters may be competitors, a plaintiff cannot overcome the right of anonymous speech by obtaining federal court subpoenas unless its complaint establishes that the Court has subject matter jurisdiction. *Cf. McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006*)*.

Once subject matter jurisdiction has been drawn into question, "the litigant asserting jurisdiction must carry the burden of proving it by a preponderance of the evidence." *Lindstrom v. U.S.,* — F.3d — , 2007 WL 4358287, *2 (10th Cir., Dec. 14, 2007). Yet VP has indicated that the only individual defendant whose identity it is still trying to determine, for the purpose of achieving service, is a defendant whose submissions to Wikipedia were "the most flagrantly defamatory." The complaint alleges that some of the Doe defendants are former customers being sued only for defamation and other state torts, while other Doe defendants are commercial competitors whose statements are false advertising. Plaintiff has not even alleged that the Wikipedia poster is a competitor, not to speak of adducing evidence to support the exercise of subject matter jurisdiction

of a claim against that defendant on a "false advertising" theory. Indeed, for that matter, the complaint alleges only that anoymous persons have posted anonymous statements on "various bulletin boards." Not only is Wikipedia not a "bulletin board," but in its motion for leave to take discovery, when plaintiff identified three bulletin boards to whose operators it intended to send subpoenas, it did not no mention Wikipedia as a forum where plaintiff claimed to have been defamed or subjected to false advertising. For that reason alone, there is no reason to extend the time for VP to serve **any** defendants, even the Comcast customer whose identity is now the subject of a subpoena. The case should, therefore, be dismissed without prejudice for lack of subject matter jurisdiction. Plaintiff will be free to proceed in state court on its defamation claim against that Doe defendant.

C. The Complaint Does Not Allege Violations With Sufficient Specificity to Support Discovery to Identify Any Defendants.

The third reason why the motion for an extension of time should be denied is that, even under the liberal provisions of our notice-pleading system, plaintiff has not alleged defamation (or any other cause of action) with sufficient specificity to put any defendants on notice that a claim has been brought against them, and for what supposedly actionable conduct, so that they can prepare to defend themselves. The complaint alleges only that unspecified anonymous persons placed unidentified false and defamatory statements on unnamed bulletin boards at unstated times. This case is therefore unlike *Dendrite v Doe*, *supra*, where the complaint alleged causes of action against "implementor_extraordinaire," "ajcazz," xxplrr," and "gacbar," based on their postings on a specific message board (a Yahoo! board devoted to Dendrite), *see* Trial Court Opinion, available at

http://www.citizen.org/documents/dendrite.pdf, or *Doe v. Cahill*, where the complaint specified claims against four specifically identified pseudonyms on a specific blog operated by the Delaware State News, the Smyrna/Clayton Issues Blog, 884 A.2d at 454, *reversing Cahill v. John Doe - Number One*, 879 A.2d 943 (Del. Super. 2005) (caption shows that plaintiff identified each Doe defendant by pseudonym), or *Melvin v. Doe*, *supra*, where plaintiff brought suit against defendant "Grant Street 99" over his AOL web page. 575 Pa. at 267, 836 A.2d at 43. *See also Equidyne Corp. v. Does,* 279 F. Supp.2d 481 (D. Del. 2003) (caption reflects the pseudonyms used by the Doe defendants). Instead, this plaintiff has brought suit against anybody and everybody that criticizes it, specific forums and speakers to be identified when that is convenient to the plaintiff. The case should not be permitted to go forward on such vague allegations. *See also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-1965 (2007) ("a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

Indeed, many federal courts hold that a plaintiff who seeks to sue for defamation must plead the actual defamatory words because the exact words used are required to formulate responsive papers, whether that be a motion to dismiss, an answer, or an opposition to discovery. *E.g.*, *Asay v. Hallmark Cards*, 594 F.2d 692, 698-99 (8th Cir.1979); *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 708 (N.D. Ill. 1990); *see also Walters v. Linhof*, 559 F. Supp. 1231, 1234 (D. Colo. 1983) (the substance of the defamatory words must be pleaded). In *Dendrite*, *supra* the Appellate Division of New Jersey's Superior Court required specific recitation of the allegedly defamatory words even before permission could be granted for pre-service discovery.

The Tenth Circuit has repeatedly upheld the dismissal without prejudice of complaints that fail to meet the basic requirement of Rule 8 of the Federal Rules of Civil Procedure, even sua sponte. *See Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161-1162 and nn.2, 3 (10th Cir. 2007). In this case, plaintiff's track record of issuing subpoenas even to identify critics whose statements could not have been contemplated by the complaint given its limitation to "bulletin boards," or given the fact that the statements were made after the complaint was filed, provides yet an additional reason to dismiss the complaint without prejudice to refiling with specific allegations that put defendants on notice of the claims against them, while at the same time allowing the Court to limit any discovery to that which would identify persons who have made specific statements as specified in the complaint. Dismissal without prejudice to such a specific filing is needed to avoid the misuse of the subpoena process to chill critical speech.

CONCLUSION

The motion of plaintiff Video Professor for an extension of time to serve the Doe defendants should be denied, and the case should be dismissed without prejudice.

Respectfully submitted,

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