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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

HOLLIS-EDEN PHARMACEUTICALS, INC., a Delaware corporation, Plaintiff, v. ANGELAWATCH, BEN_CASALE, DICKIE13_62301, DOGMAD2002, GPALCUS (M/CELL BLOCK 5), HEPHDIVER, HEPH_LONG, JARHED2046, LEBEAUSOLEIL, NOTTESCURRA, ONXBRAY, and DOES 1 through 50, inclusive, Defendants.	Case No.: GIC 759462 The Hon. Kevin A. Enright Dept. 62 Complaint Filed: 12/14/2000 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO STRIKE (CODE CIV. PROC., § 425.16) DATE: March 2, 2001 TIME: 10:30 a.m. DEPT.: 62 DISCOVERY CUTOFF: None MOTION CUTOFF: None TRIAL DATE: None

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Plaintiff Hollis-Eden Pharmaceuticals ("HEPH") filed this action to silence public criticism of it on the internet. Defendants are ten anonymous individuals who have taken advantage of a public forum, maintained by Yahoo! on the World Wide Web, to discuss merits and flaws in the company's operations. In the past year, HEPH's stock has experienced a significant drop in price. Instead of accepting responsibility for the drop, HEPH seeks, through this lawsuit, to blame individuals who have criticized the company on a Yahoo! internet message board. More specifically, HEPH seeks to identify its anonymous critics, who are known only by their Yahoo! screen names, and to make them pay damages for exercising their First Amendment right to criticize the company publicly.

In this motion, two of those critics, defendants gpalcus and dickie13_62301 ("dickie13"), whose statements on the Yahoo! forum were entirely lawful, move to dismiss the action on the ground that it is designed to suppress protected speech and qualifies as a Strategic Litigation Against Public Participation ("SLAPP") suit, under Code of Civil Procedure section 425.16 ("section 426.16").[1/]

STATEMENT OF THE CASE

A. Facts

The internet is a traditional public forum, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to listen. First Amendment protection applies to free speech on the internet. As the Supreme Court explained in *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844:

> From the publishers' point of view, [the internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. (*Id.* at p. 853.)
>
> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer. (*Id.* at p. 870.)

[1/] Defendant dickie13 believes that this Court lacks personal jurisdiction over him. He makes this motion because it is his only means to protect his anonymity and his First Amendment right of free speech. He reserves the right to move to dismiss the complaint as to him for lack of personal jurisdiction.

Yahoo! message boards are organized outlets for the exchange of information and expression of opinions about a great many topics, including every publicly traded corporation. These message boards together form an electronic bulletin board system on which individuals freely discuss major companies by posting comments for others to read and respond to. Anyone can post a message on a message board. Although individuals may use their real names, people who post messages generally do so under a screen name, or pseudonym. These often colorful nicknames protect the writer's identity from those who disagree with him or her and encourage the uninhibited exchange of ideas and opinions. Such exchanges often are heated and, as demonstrated by the various messages and the responses on the message board at issue in this case, they are sometimes filled with invective and insult. Most, if not everything, that is said on a message board is taken with a grain of salt.

One aspect of a message board that makes it different from almost any other form of published expression is that, because any member of the public can use a message board to express a point of view, a person who disagrees with something that is said on a message board for any reason—including the belief that a statement contains false or misleading statements about himself—can respond to those statements immediately and at no cost; moreover, the response will have the same prominence as the offending message. Thus, a message board is unlike a newspaper, which cannot be required to print a response to its criticisms. (*Miami Herald Pub. Co. v. Tornillo* (1974) 418 U.S. 241.) By contrast, corporations and executives can reply immediately to criticisms on a message board, providing facts or opinions to vindicate their positions, and thus, potentially, persuading the audience that they are right and their critics wrong. And because many people are regular visitors to the message board about a particular company, the corporate response is likely to be seen by much the same audience as those who saw the original criticism. As a result, the response reaches many, if not all, of the original readers. In this way, the internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

/ / /

One of Yahoo!'s message boards is devoted to discussions about plaintiff HEPH. The first message on Yahoo!'s HEPH board states the message board's purpose:

> This is the Yahoo! Message Board about Hollis-Eden Pharmaceuticals Inc (Nasdaq: HEPH), where you can discuss the future prospects of the company and share information about it with others. This board is not connected in any way with the company, and any messages are solely the opinion and responsibility of the poster. (<http://messages.yahoo.com/bbs?.mm=FN&board=8729158&tid=heph&sid=8729158&action=m&mid=1> [Not. of Lodg., Exh. A, emphasis omitted].)

Every page of message listings is accompanied by a similar warning that all messages should be treated as the opinions of the posters. (See Not. of Lodg., Exh. A at 2, Exh. B at 2.)

According to HEPH's quarterly report, HEPH is "a development-stage pharmaceutical company [that] is engaged in the discovery, development, and commercialization of products primarily for the treatment of infectious diseases and immune system disorders." (See Not. of Lodg., Exh. C at 1.) Since its founding on August 15, 1994, HEPH has not generated any revenues and has an accumulated deficit of $49.8 million. (*Id.* at 2.) It has financed its operations through sales of shares of stock and with loans from its founder, Richard B. Hollis, which were repaid in January 1996. (*Id.* at 3.)

As the complaint states, large numbers of investors turn to the Yahoo! HEPH message board as a source of news and information about HEPH. As of January 17, 2001, more than 16,880 messages had been posted on the board. (See <http://messages.yahoo.com/?action=q&board=HEPH>.) Those messages discuss a variety of topics and were posted by a variety of people. Investors and members of the public have discussed the latest news about what products the company is developing, selling, or buying; the strengths and weaknesses of HEPH's operations; and how its managers and employees are performing. Some of the messages praise HEPH, some criticize it, and some are neutral.

Two of the screen names on the HEPH message board are those of defendants gpalcus and dickie13, on whose behalf this motion is filed. Review of the HEPH message board reveals that gpalcus and dickie13 have posted a great many comments to the board, some supportive of HEPH, some critical, some not related to HEPH, and others merely silly. Although both gpalcus and dickie13 have complained about aspects of HEPH, their criticisms are neither defamatory nor in

violation of any of the other legal duties set forth in the complaint.

The complaint lists ten screen names of individuals, including gpalcus and dickie13, whose messages are the subject of this action. The complaint identifies certain messages that allegedly contravene HEPH's rights, one of which was posted by gpalcus and two of which were posted by dickie13. The message by gpalcus states:

> Nay Say Not?
> by: gpalcus (M/Cell Block 5) 11/3/00 10:40 am
> Msg: 15762 of 16806
>
> This company has plainly and simply misserved its investors. Whatever secret wizardry the man/men/monkeys behind the curtain are doing, the value of our investment has not been attended with the same (if only purported) vigor. I don't know a god-damned thing that this company has perfected solidly except a creeping but constant value seep. Is it simply millennial blue smoke and mirrors; propped up by thrice rejected science.... OR rather, is it revolutionary science hindered by an extremely poorly constructed public face and the business acumen of infected macaques.... Either way, investors dollars have been poorly served - by veiled fraud or by incompetance. Certainly, with 'the goods' - even at a preliminary stage - a worthwhile business model should be able to at least find a price support level... IT SHOULD BE ONE OF THE COMPANY's PRIORITIES!
>
> "Enough hyperbole! Enough whispered promise! Enough waiting for firmamnet".... that's what the market has been saying. ENOUGH DISDAIN FOR YOUR INVESTORS - that's my personal rant....

The message was posted as a reply to Message 15730, which expressed the view that the company was doing well by applying for patents and proceeding with trials to test potential products: "All the naysayers can say what they want...this company continues to stay on their game plan." In the complaint, HEPH quotes only the portion through "incompetence" and alleges that the message was defamatory. (Compl. ¶¶ 12k, 16.)

As quoted in the complaint, the first message by dickie13 states:

> Once again, in my opinion, the Public Relations Department of Hollis-Eden couldn't promote Mickey Mouse into Disneyland. (Compl. ¶ 12d.)

The full message states:

> Re: OT: ONX
> by: dickie13_62301 9/6/00 8:38 pm
> Msg: 14715 of 16832
>
> As I stated in a previous posting to drelvis,"In my opinion, the Public Relations Department of Hollis-Eden is to the business of Public Relations, what a choreographer is to the Six O'clock News. Someone correct me if I a wrong, but to

> my knowledge, there hasn't been a company generated press release since July 11. Once again, in my opinion, the Public Relations Department of Hollis-Eden couldn't promote Mickey Mouse into Disneyland. Remember this at Proxy time fellow shareholders, because it would seem that is the only time to remind management and the board of directors that they are supposed to be working for us-- and not vice versa.
>
> The second message by dickie13 of which HEPH complains states:
>
> Re: angelawatch:
> by: dickie13_62301 9/25/00 8:37 pm
> Msg: 15245 of 16832
>
> I agree with you 100%. I don't think Hollis could find his way around Wall Street with a road map, flashlight and Yellow Cab. I have watched the apologists dedicated to covering Hollis's a__ coughing up crappy little platitudes for almost two years, and the stockholders are all trying to *fall out of the hole" that we have been in since Hollis "took over" from TP. Hopefully, everyone will remember this come proxy time, and maybe if enough people share some of these thoughts, we can throw some of the rascals out. (Compl., ¶ 12e.)

B. Proceedings to Date

HEPH commenced this action on December 12, 2000, by filing a complaint against ten screen names and fifty John Does. The complaint quotes portions of 37 messages posted by the ten screen names. The posting of these messages is the only act of which HEPH complains. The complaint alleges causes of action for libel, trade libel, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, intentional interference with contractual relations, negligent interference with contractual relations, and violation of Business & Professions Code section 17200 (unfair competition).

On December 18, 2000, on HEPH's motion, a third-party subpoena was issued to Yahoo! seeking information about the owners of the screen names identified in the complaint. Yahoo! then notified gpalcus and dickie13 (and presumably the owners of the other screen names) that the subpoena had been served. Yahoo!'s notice stated that Yahoo! would respond to the subpoena within fifteen days of the notice unless notified "that a motion to quash the subpoena has been filed, or the matter has been otherwise resolved."

Gpalcus and dickie13 believe that their messages do not violate HEPH's rights in any way. However, they have chosen to post anonymously and prefer to remain anonymous. Accordingly, counsel for gpalcus and dickie13 advised Yahoo! that a motion to quash the subpoena would be

filed. In addition, gpalcus and dickie13 now file this special motion to strike under California's anti-SLAPP statute, section 425.16. That statute provides, among other things, that all discovery is stayed by the filing of the motion. (§ 425.16, subd. (g).)

ARGUMENT

I. THIS LAWSUIT IS DESIGNED TO CHILL DEFENDANTS' FREE SPEECH AND SHOULD BE DISMISSED UNDER THE SLAPP STATUTE, SECTION 425.16.

A. This Case Falls Within the Scope of the SLAPP Statute.

California law protects against use of the courts to discourage free speech. Lawsuits that have this intended effect are known as SLAPP suits.

> SLAPP suits stifle free speech. They undermine the open expression of ideas, opinions and the disclosure of information. The marketplace of ideas, not the tort system, is the means by which our society evaluates [and validates] those opinions. The threat of a SLAPP action brings a disquieting stillness to the sound and fury of legitimate . . . debate. (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 956.)

In 1992, the California legislature recognized that there was a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition," and found a strong public interest encouraging "continued participation in matters of public significance." (§ 425.16, subd. (a).) As one court explained:

> While SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. . . . Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPP's. Instead, the SLAPPer considers any damage or sanction award which the SLAPPee might eventually recover as merely a cost of doing business. . . . By the time a SLAPP victim can win a "SLAPP-back" suit years later the SLAPP plaintiff will probably already have accomplished its underlying objective. Furthermore, retaliation against the SLAPPer may be counter-productive because it ties up the SLAPPee's resources even longer than defending the SLAPP suit itself. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816 [citations omitted].)

To ensure that "this participation . . . not be chilled through abuse of the judicial process," the legislature established a presumption against the maintenance of litigation arising from any act "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue." (§ 425.16, subd. (b).) Once a court

determines that such an issue is involved, the cause of action "shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id.*) Courts have given special consideration to SLAPP cases and have noted that "the early termination of [such a] lawsuit is highly desirable . . . . The public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain." (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 269.)

The SLAPP statute protects:

> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the . . . constitutional right of free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e).)

The statute expressly provides that it "shall be construed broadly." (§ 425.16, subd. (a).) The SLAPP statute extends to all exercises of free speech rights pertaining to public issues. The California Supreme Court has specifically ruled that a statement can be protected by subdivisions (e)(3) and (e)(4) even if the issue is not pending before a public body. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117-1118, 1123.)

The performance and commercial activities of publicly held companies constitute "matters of public interest" for First Amendment purposes.[2/] (*Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d 1528, 1544-1545.) As such, the public enjoys broad, but not unlimited, latitude to discuss and present opinions regarding these topics. (*Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 695; *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 672-73, [SLAPP statute applies to leaflet in intra-union election]; *Sipple v. Foundation for National Progress* (1999) 71 Cal.App.4th 226, 238; see also *Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at p. 822, fn.6 [(in defamation suit over advocacy of economic boycott by competing organization, § 425.16 deemed applicable to "commercial speech"]; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th

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[2/] Gpalcus and Dickie 13 base this motion on the free expression and privacy rights of the California Constitution, article 1, section 1 as well as the First Amendment. Because no internet case law has developed under Article 1, the cited cases are primarily based on the First Amendment.

628, 650 [statute's phrase "matters of public interest" "include[s] activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals"].)

HEPH is a corporation that has "consumed substantial capital without generating any revenues." (Not. of Lodg., Exh. C at 3.) Moreover, it will continue to require substantial and increasing funds and does "not expect to generate revenue from operations for the foreseeable future." (*Id*.) In this circumstance, HEPH's investors naturally would want to monitor HEPH's management and decisionmaking. In addition, HEPH is a publicly traded corporation that invites public comment by issuing numerous press releases every year. (See Not. of Lodg., Exh. D [list of press releases].) And because HEPH is researching drugs as potential treatments for AIDS, malaria, and other serious diseases, the general public as potential beneficiary of these treatments has a strong interest in HEPH's doings in addition to the interest of investors. When the company's stock price falls, when its drug development seems stalled, when investors are having difficulty getting information from HEPH, the ensuing discussion is a matter of public interest. The SLAPP statute is fully applicable when HEPH brings suit to suppress such discussion.

B. Plaintiff Cannot Establish a "Probability of Success."

Once this Court determines that gpalcus's and dickie13's participation in the Yahoo! message board was an exercise of their freedom of speech with respect to a public issue, or an issue of public interest, HEPH's complaint must be dismissed unless HEPH can carry the burden of demonstrating a probability of success. Based in its complaint, HEPH cannot meet its burden. HEPH has not identified a single message from gpalcus or dickie13 that violates any legal duty.

All of HEPH's seven alleged causes of action turn on the posting of allegedly defamatory messages. The question of whether a statement is susceptible to a defamatory interpretation is a question of law to be determined by the Court. (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546.) In making this determination, the Court should look to the totality of the circumstances, reviewing the meaning of the language in context and the statement's susceptibility to being proved true or false. (*Moyer v. Amador Valley Joint Union High School* (1990) 225 Cal.App.3d 720, 724-725.)

Under California law, defamation is the publication of a false and unprivileged writing or other representation, "which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) The threshold question is whether the publication "impl[ies] an assertion of objective fact." (*Unelko Corp. v. Rooney* (9th Cir. 1990) 912 F.2d 1049, 1053 [quoting *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1].)

> In making the distinction [between fact and opinion], the courts have regarded as opinion any "broad, unfocused and wholly subjective comment," . . . such as that the plaintiff was a "shady practitioner," . . . "crook," . . . or "crooked politician." . . . . Similarly, . . . this court found no cause of action for statements in a high school newspaper that the plaintiff was "the worst teacher at FHS" and "a babbler." The former was clearly "an expression of subjective judgment." And the epithet "babbler" could be reasonably understood only "as a form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching or speaking style." (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837-838 [citations omitted].)

. In this case, all three of the messages identified by HEPH contain figurative and hyperbolic language—the earmarks of nonactionable speech. (See *Morningstar, Inc. v. Superior Court*, *supra*, 23 Cal.App.4th at pp. 676, 696-697; *Unelko Corp v. Rooney*, *supra*, 912 F.2d at p. 1053.

HEPH claims that a single message from gpalcus message defames it by accusing it of "fraud" and "incompetence." (Compl., ¶ 15.) Although those words appear in the message, read as a whole the message is not defamatory because it does not "imply the assertion of objective fact." The message, filled with hyperbolic and rhetorical phrases like "secret wizardry . . . behind the curtain" and "business acumen of infected macaques," easily qualifies as nonactionable criticism. The message expresses his "personal rant," in the words of the message itself—in other words, his "wholly subjective judgment." (*Copp v. Paxton*, *supra*, 45 Cal.App.4th at p. 838.) Indeed, the word "incompetence" is hard to understand as anything but a subjective view, and "veiled fraud" in the context of the message could not reasonably be taken as a factual statement, as opposed to an "exaggerated expression conveying the []speaker's disapproval." (*Id*; see *Underwager v. Channel 9 Australia* (9th Cir. 1995) 69 F.3d 361, 367 ["statement that plaintiff was 'lying' could connote anything from white lies to deception and thus was nonactionable 'rhetorical hyperbole.'"].)

Moreover, gpalcus's message responded to a message stating the company had been doing

a good job and staying on track. Gpalcus expressed dissatisfaction with the company's self-promotion, fallen stock value and obscure actions. The basic facts underlying these opinions—that HEPH has been declining in value and is not close to marketing any product—are well established by HEPH's own quarterly report. (Not. of Lodg., Exh. C.)

Similarly, the allegedly defamatory statements by dickie13 are not even arguably statements of fact. Not even HEPH can explain how dickie 13's messages are defamatory. (See Compl. ¶ 16 [alleging that various messages "accus[e]" HEPH of various things, such as stock price manipulation or fraud, but making no allegation as to dickie13's messages].)

As to the first message, HEPH complains of only one sentence. Not only does dickie13 expressly state that the message is "[his] opinion," but the portion of the message omitted by HEPH states the basis for the opinion: the company had not generated a press release since July 11, nearly two months before dickie 13's posting. This statement is not a factual statement about the promotional susceptibility of an animated mouse. It is a sarcastic critique of HEPH's public relations efforts. It does not even arguably imply an assertion of fact, much less a false assertion; and it is not properly the subject of a defamation action.

The second message from dickie13 is quite similar. It offers satirical criticism, again directed at the company's ability to promote itself, but this time directed more specifically at HEPH executive Richard B. Hollis. The message does not convey to the reader a purported factual statement that Hollis would get lost were he to travel to Manhattan. Rather, dickie13 uses sarcasm to convey his view that Hollis is not managing the company well. His "broad, unfocused and wholly subjective comment" (*Copp v. Paxton*, *supra*, 45 Cal.App.4th at p. 837) is prototypical opinion. As the company seems to recognize, (see Compl. ¶ 16), this message does not contain any false statements of fact, any libelous accusations, or anything on which one could base a defamation claim.

Indeed, courts should presume that casual statements about a company on a Yahoo! message board express opinions, rather than facts, just as courts have generally been reluctant to treat negative "stock tips" in financial publications or commentary in financial newsletters as defamatory statements of fact. (*Morningstar, Inc. v. Superior Court*, *supra*, 23 Cal.App.4th at p.

693; *Biospherics, Inc. v. Forbes, Inc.* (4th Cir. 1998) 151 F.3d 180, 184.) The same casual language, breezy tone, and appearance of being opinions instead of reported facts that are found in an investment publication's "stock tips" are commonly found in message board postings. In fact, the Yahoo! message board warns that "[t]hese messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose." (Not. of Lodg., Exh. A at 2, Exh. B at 2.) Courts have relied on a similar disclaimer to deny a cause of action for defamation against an adverse financial rating. (*Jefferson County Sch. Dist. v. Moody's Investor's Servs., Inc.* (D. Colo. 1997) 988 F. Supp. 1341, 1345.) The notion that most members of the public would treat the average message board posting as a reliable statement of fact on which to base investment decisions is ludicrous. Certainly the claim that the repartee in which gpalcus and dickie13 were engaged had any measurable effect on HEPH's financial well-being or business relationships is absurd.

Furthermore, the complaint alleges that the defendants posted "false derogatory, injurious and libelous statements . . . during the period April 2000, through the present." (Compl. ¶ 11.) If such statements were made, and if they caused harm to the company, it is hard to see how gpalcus's *November* 6 statement, or dickie13's two *September* statements, could be the basis for a damages action. In fact, dickie13's first statement was made August 29. (See message #14484.) Moreover, the history of HEPH's share price belies the claim that these messages caused the company financial harm. The share price rose the day after dickie13's September 6 message (posted in the evening). (Not. of Lodg., Exh. E.) The share price fell slightly the day after dickie13's September 25 message (posted in the evening) and rose back to its September 25 price the day after. (*Id.*) HEPH's share price rose one full percentage point the day of gpalcus's November 3 message (posted in the morning) and rose another half point the day after that. (*Id.*) Accordingly, HEPH's allegation that these defendants can be blamed for the company's difficulties is specious.

Finally, to the extent that the complaint alleges torts other than defamation, the pleading requirements and defenses applicable to defamation actions cannot be evaded merely by placing a new label on what is, in essence, a defamation claim. (*Blatty v. New York Times Co.* (1986) 42

Cal.3d 1033; accord, *Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 52-53, 56.) In *Blatty*, the California Supreme Court dismissed interference with economic advantage claims arising from an allegedly defamatory statement and enunciated the controlling rule:

> Not only does logic compel the conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so too does a very pragmatic concern. If these limitations applied only to actions denominated "defamation," they would furnish little if any protection to free speech . . .: plaintiffs might simply affix a label other than "defamation" to their injurious-falsehood claims . . . and thereby avoid the operation of the limitations and frustrate their underlying purpose. (*Blatty*, 42 Cal.3d at pp. 1044-1045 [citation omitted].)

Because HEPH cannot establish a probability of success with respect to any of its claims against gpalcus or dickie13, the complaint against them should be dismissed.

C. Plaintiff's Third-Party Subpoena to Yahoo! Seeking To Compel Disclosure of Identifying Information About gpalcus and dickie13 Constitutes a Separate Violation of Their Constitutional Rights.

For similar reasons, the third-party subpoena to Yahoo!, through which HEPH seeks to use judicial process to identify its internet critics, constitutes an independent violation of those critics' right to speak anonymously. An individual's right to privacy includes the right to speak anonymously. (*Rancho Publications v. Superior Court* (1999) 68 Cal.App.4th 1538.) "The right to speak anonymously draws its strength from two constitutional sources: the First Amendment's freedom of speech and the right of privacy in Article I, section 1 of the California Constitution." (*Id.* at pp. 1540-1541.)

The First Amendment also protects the right to speak anonymously. (See *Buckley v. American Constitutional Law Found.* (1999) 525 U.S. 182, 199-200; *McIntyre v. Ohio Elections Comm.* (1995) 514 U.S. 334; *Talley v. California* (1960) 362 U.S. 60.) 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 through the authors of the Federalist Papers. As the 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. (*McIntyre*, 514 U.S. at 341-342, 356.)

These rights are fully applicable to speech on the internet. The Supreme Court has treated the internet as a public forum of preeminent importance, which places in the hands of all individuals who want to express their views the opportunity, at least in theory, to reach other members of the public hundreds or even thousands of miles away, at virtually no cost. (*Reno v. American Civil Liberties Union*, *supra*, 521 U.S. 844.) Several cases have upheld the right to communicate anonymously over the internet. (*American Civil Liberties Union v. Johnson* (D.N.M. 1998) 4 F. Supp.2d 1029, 1033; *American Civil Liberties Union v. Miller* (N.D. Ga. 1997) 977 F. Supp. 1228, 1230; see also *ApolloMEDIA Corp. v. Reno* (1999) 526 U.S. 1061, *aff'g* (C.D. Cal.1998) 19 F. Supp.2d 1081) [protecting anonymous denizens of web site at www.annoy.com, site "created and designed to annoy" legislators through anonymous communications].)

Moreover, at the same time that the internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. This capacity exists because any internet speaker who sends an e-mail message or visits a website leaves behind an electronic footprint that provides, if saved by the recipient, the beginning of a path that can be followed back to the original sender. (See Lessig, *The Law of the Horse* (1999) 113 Harv. L. Rev. 501, 504-505.) Thus, anybody with enough time, resources, and interest, if coupled with the power to compel the disclosure of the information, can snoop on communications to learn who is saying what to whom. As a result, many informed observers have argued that the law should provide special protections for anonymity on the internet. (E.g., Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet* (1996) 75 Ore. L. Rev. 117.

Because compelled identification of anonymous speakers trenches on their First Amendment right to remain anonymous, the First Amendment creates a qualified privilege against disclosure. When deciding whether to compel the production of documents that would reveal the

name of an anonymous source, the courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action but goes to the heart of its case, (2) disclosure of the source is "necessary" to prove the issue because the party seeking disclosure can prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. (*Carey v. Hume* (D.C. Cir. 1974) 492 F.2d 631; *Cervantes v. Time, Inc.* (8th Cir. 1972) 464 F.2d 986; *Richards of Rockford, Inc. v. Pacific Gas & Elec.* (N.D. Cal. 1976) 71 F.R.D. 388, 390-391.)

The California courts apply a similar balancing test to determine whether to override the qualified privilege of speaking anonymously:

> Courts carefully balance the "compelling" public need to disclose against the confidentiality interests to withhold, giving great weight to fundamental privacy rights. Mere relevance is not sufficient; indeed, such private information is presumptively protected. The need for discovery is balanced against the magnitude of the privacy invasion, and the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material. (*Rancho Publications v. Superior Court*, *supra*, 68 Cal.App.4th at pp. 1549-1550.)

California state courts are not unique in that view. (See *Columbia Ins. Co. v. Seescandy.com* (N.D. Cal. 1999) 185 F.R.D. 573, 578 ["People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity."].)

With these concerns in mind, a number of courts faced with attempts to take discovery aimed at revealing the identity of an anonymous internet poster have required the plaintiffs to make good faith efforts to communicate with the anonymous defendants and provide them with notice that the suits had been filed against them and to compel the plaintiffs to demonstrate that they had viable claims against the defendants. (See *id.* at p. 579; *Dendrite Intnl. v. Does* (N.J. Super. Chancery Nov. 28, 2000) No. MRS C-129-00 at 5-6, 8 [adopting *Seescandy* approach, particularly in light of state's "commitment to maintaining the anonymity of individuals in specific situations and the need for safeguards to ensure that this anonymity is protected"]; *Melvin v. Doe* (Ct. Common Pleas, Allegheny Cty., Pa. Nov. 15, 2000) No. GD99-10264 ["A plaintiff should not be

permitted to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit."]; *Anonymous Publicly Traded Co. v. Does* (Va. Cir. Ct. Fairfax Cty. 2000) Misc. Law No. 40570, unofficially published at http://legal.web.aol.com/aol/aolpol/anonymous.html [before ordering disclosure, court must be "satisfied by the pleadings or evidence supplied to the court . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction"].)

Here, HEPH has not and cannot make the required showing. Because HEPH has failed to demonstrate that it has viable claims against either defendant (*Seescandy*, 185 F.R.D. at p. 579 ["a conclusory pleading will never be sufficient to satisfy this element"]), it should not be permitted to pierce these individuals' anonymity.

II. THE MOVING DEFENDANTS ARE ENTITLED TO THEIR ATTORNEY'S FEES.

Section 425.15, subdivision (c) provides that a prevailing defendant shall be entitled to recover its attorney's fees and costs. The court should determine that gpalcus and dickie 13 are entitled to attorney's fees and costs; the amount should be set pursuant to the memorandum of costs procedure, since granting of the motion will result in a final order dismissing the case as to gpalcus and dickie 13.

CONCLUSION

The special motion to strike should be granted, and the Court should deny enforcement of the subpoena to Yahoo!. In addition, gpalcus and dickie13 should be awarded their reasonable costs and attorney fees incurred in bringing this special motion to strike.

Dated: January 18, 2001 LUCE, FORWARD, HAMILTON & SCRIPPS, LLP

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