

PUBLIC CITIZEN LITIGATION GROUP

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October 3, 2013

Gary Sizemore, Esquire
Federal Verification Co. a/k/a GSA Applications a/k/a GSA 1000
9230 Fairweather Drive
Largo, Florida 337734634

Re: Federal Verification Co. v. Doe

Dear Mr. Sizemore:

On September 24, 2013, Julia Forte of 800Notes.com received by email from one "Courtney W.," a legal assistant at a Virginia law firm called the "Rivera Law Group," a PDF version of a North Carolina subpoena bearing your signature. The document purports to require production of information, no later than September 23, 2013 (the day before it was emailed), about the identities of the authors of 103 different posts that appeared on the 800Notes message board, a web site operated by Julia Forte that allows its users to post and review information about telemarketing calls. I called you last week to ask some questions about the subpoena, including whether you were going to comply with the *Dendrite* procedure to ensure that none of your company's anonymous critics would be identified without good reason, including their having had a chance to contest the removal of their anonymity. You indicated that you would send me a copy of the complaint that you have filed in the Florida courts. Unfortunately, you have not done that; as I explain later in this letter, now that I have obtained the complaint by other means, I can see why you did not keep your promise. I am, therefore, writing to explain why 800Notes is not going to comply with your subpoena.

First of all, the subpoena has not been properly served. The company that operates 800Notes has not received an original signed subpoena from you, but only an emailed PDF version sent by a law firm whose principal, Domingo Rivera, has told me that his firm is not assisting you with the litigation and, indeed, that the legal assistant in his office should not have sent it on your behalf. I know of no authority under North Carolina law for service by email, and in any event the subpoena was emailed the day after the return date. 800Notes is under no legal compulsion to respond to the subpoena copy that it received.

Second, your subpoena seeks identifying information about the users who posted comments as early as April 19, 2010; the great majority of the comments whose authors your subpoena seeks to identify were posted in 2012 or earlier. 800Notes, however, does not require users to register

before posting, and the IP addresses for comments are generally discarded six months after posting. As a result, even if 800Notes had received a valid subpoena by proper means of service, it would have no information to provide to you about most of the comments.

As for the remaining comments, the First Amendment protects the right to speak anonymously, and to date your clients have not made showing of compelling justification that is needed to overcome that constitutional right. Because you are employing government power – a subpoena – you need to show such compelling justification. Although, as I mentioned to you on the telephone, the issue is open in the North Carolina state courts, there is a fair degree of consensus among state appellate courts and federal courts about how to decide whether to authorize and enforce subpoenas of this sort. *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012); *Koch Industries v. Does*, 2011 WL 1775765 (D.Utah May 9, 2011); *Pilchesky v. Gatelli*, 2011 PA Super 3, 12 A.3d 430 (2011); *Salehoo v. Doe*, 722 F.Supp.2d 1210 (W.D. Wash. 2010); *USA Technologies v. Doe*, 2010 WL 1980242 (N.D. Cal. May 17, 2010); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128 (D.D.C. 2009); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *London-Sire Records v. Doe I*, 542 F. Supp.2d 153, 164 (D. Mass. 2008); *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal. Rptr.3d 231 (Cal. App. 6 Dist. 2008), *In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *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 (N.J. App. 2001); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005); *Melvin v. Doe*, 49 Pa. D&C4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003).

Although these authorities differ somewhat, they agree that the mere fact a plaintiff wants to know the identities of its critics is not a sufficient justification for breaching their First Amendment rights. Rather, these cases require that your clients provide specific notice to the Doe defendants that they are trying to use government power; that you specify verbatim the words of each defendant that allegedly violates your client's rights, and identify the causes of action based on those words; that you properly allege a cause of action against each of them; and that you make an evidentiary showing sufficient to create a prima facie case (or, in some courts, sufficient to avoid a motion for summary judgment), at least on such issues as falsity and damages. Cases in a number of state and federal courts go further and require an explicit balancing of the interests of both sides.

Although no reported North Carolina appellate court has addressed this issue, a federal court in North Carolina has done so. *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D. N.C. Dec. 2, 2004). That case involved postings on home improvement bulletin boards about the plaintiff's product and about the criminality of plaintiff's owner. The court received a detailed affidavit from plaintiff's principal, explaining why the accusations were false, and the court ordered the Does identified.

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Your clients have not complied with **any** of these requirements for enforcing a subpoena to identify anonymous Internet speakers. First, you have done nothing to comply with the notice requirement. Indeed, the file in the Florida court contains your admission, in connection with the subpoenas to Google and several other hosts of allegedly defamatory content, that you have **not** sent notice of subpoenas to the Doe defendants because you don't know who they are, even though you could have posted notice of the subpoenas on the very forums where you claim that defamatory statements have appeared.

Second, although your complaint goes into a fair amount of detail about allegedly defamatory statements posted in Facebook and Google, the complaint is entirely conclusory about the alleged defamation that was posed on several other sites, including 800Notes.com. Because your subpoena seeks to identify the authors of more than one hundred different posts, you will need to be specific about what each statement is and how your claim based on each statement meets the requirements for a valid defamation claim.

Third, because you have not specified any of the allegedly defamatory statements, you have not properly pleaded the elements of a defamation claim for even a single one of posts whose authors you seek to identify. Moreover, judging from the statements on Facebook and Google that you have specified, I am skeptical whether each of the statements will be one of verifiable fact, as opposed to being hyperbolic or rhetorical expressions of opinion that cannot be actionable consistent with either Florida law or the First Amendment principle that there is no such thing as a false idea. *Razner v. Wellington Regional Medical Center*, 837 So.2d 437, 442 (Fla. App. 4 Dist. 2002). In this regard, although your complaint pleads torts other than defamation, such as tortious interference with contract or with business expectancies, because those claims rest on the allegedly defamatory character of the statements, they cannot be maintained without satisfying the elements that the First Amendment imposes on claims for defamation. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

Fourth, you have provided no evidence to support any of your client's claims of tortious speech. Indeed, although we are in no position to assess the veracity of whatever criticisms the anonymous commenters may have made about your clients, press coverage of your clients suggests that there may be significant problems with their performance. Gilpin, *I-Team: Small business owners say Tampa Bay area consultant did little to get them federal work*, http://www.actionnews.com/dpp/news/local_news/investigations/i-team-small-business-owners-say-tampa-bay-area-consultant-did-little-to-get-them-federal-work#ixzz2gbE0QPpP. According to this article, one of your client's lawyers admitted that complaints had enough credibility to stimulate the Florida Attorney General's office to intervene. Indeed, I understand that your client operates under "dozens of names," which raised some question about whether it has commercial reasons for limiting responsibility for wrongdoing committed under any one of its names.

Finally, after I called you to ask whether your client was willing to comply with the *Dendrite*

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requirements, you sent me an email offering to “compromise” by agreeing to accept information from 800Notes about whether any of the anonymous comments were associated with particular IP addresses which, you told me, you “have already linked . . . to defamatory conduct on other websites.” Apart from the fact that it is speech, not conduct, that would be defamatory, the lack of specifics in your complaint or in your email gives me little confidence in your assertions about what comments posted on other web sites might be actionable for defamation. Nor do you provide any assurance that you obtained information about particular IP addresses by making the necessary showings about statements made using those IP addresses. Moreover, before you are entitled to obtain information that could lead to the identification of the individuals responsible for comments on the 800Notes web site, you need to follow the *Dendrite* procedure and make the relevant showings about those comments. Consequently, we have no basis for pursuing the “compromise” that you have suggested.

Accordingly, Forte is not willing, at this time, to produce any of the information requested in your subpoena. In the event you decide to serve the subpoena properly, I hope that your client will also be willing to provide notice to the Doe defendants, to amend its complaint, and to make the requisite showings. Once that has been done, Forte will revisit the issue of compliance with the subpoena.

Sincerely yours,


Paul Alan Levy