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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SALEHOO GROUP, LTD.,

Plaintiff,

v.

ABC COMPANY, et al.,

Defendants.

CASE NO. C10-0671JLR

ORDER GRANTING MOTION
TO QUASH SUBPOENA

I. INTRODUCTION

This matter comes before the court on Defendant John Doe’s motion to quash subpoena (Dkt. # 9). Doe is the anonymous owner and operator of the website <www.salehoosucks.com>, a purported Internet “gripe site” dedicated principally to criticism of Plaintiff SaleHoo Groups, Ltd. (“SaleHoo”). Doe requests that the court quash a subpoena served by SaleHoo on GoDaddy.com, Inc. (“GoDaddy”) seeking to learn Doe’s identity. Having considered the motion, as well as all papers filed in support

1 and opposition, and deeming oral argument unnecessary, the court GRANTS the motion
2 (Dkt. # 9) and QUASHES the subpoena.

3 II. BACKGROUND

4 Doe, an individual of unknown citizenship and residence, owns, operates, and
5 created an Internet gripe site at <www.salehoosucks.com>. The home page of the
6 website identifies itself as an anti-SaleHoo website dedicated to exposing the “truth”
7 about SaleHoo. (Levy Aff. (Dkt. # 10) Ex. A (home page); Lowe Decl. (Dkt. # 14) Ex. 2
8 (home page).) The website claims that SaleHoo threatens individuals who post
9 unfavorable information about SaleHoo with defamation lawsuits and thus “there is no
10 way to get true unbiased reviews of SaleHoo.” (Levy Aff. Ex. A.) SaleHoo purports to
11 fill this void by posting “honest reviews” of SaleHoo. (*Id.*) Other pages of the website
12 feature criticism of SaleHoo, including a negative review of SaleHoo by Terry Gibbs and
13 numerous “reader comments.” (Levy Aff. Ex. C (Gibbs Review) & Ex. G (reader
14 comments); Lowe Decl. Ex. 13 (Gibbs Review) & Exs. 3-4 (reader comments).) The
15 website states that Mr. Gibbs’s review, titled “Is Salehoo A Scam? You Decide!”, was
16 originally posted on Mr. Gibbs’s website, but later moved to <www.salehoosucks.com>.
17 (Levy Aff. Ex. C.)

18 The <www.salehoosucks.com> website also includes links to commercial
19 websites. (Lowe Decl. Ex. 5-12.) For example, the home page includes a link to a “free
20 quiz” to “test your eBay knowledge” and “help you earn more money in your eBay
21 auctions.” (Lowe Decl. Ex. 2.) The “free quiz” link takes users to a quiz on another
22

1 website. (Lowe Decl. Ex. 6.) The website sells *The Auction Revolution*, a book written
2 by Mr. Gibbs, and other services. (Lowe Decl. Ex. 7-11.)

3 SaleHoo, which owns the trademark SALEHOO, filed this lawsuit for trademark
4 infringement, false designation of origin, unfair competition, and defamation. (Am.
5 Compl. (Dkt. # 12) ¶¶ 5, 7-21.) SaleHoo is a New Zealand limited liability company that
6 offers a database of wholesalers and brokers of goods that can be sold on eBay, and sells
7 memberships that authorize access to the database. (Mot. at 2.) SaleHoo explains that
8 the SALEHOO mark is used “in connection with computer software for collecting
9 product market data on the Internet and the provision of online services featuring product
10 sourcing and business information related to online trading and auctions.” (*Id.* ¶ 5.)

11 SaleHoo moved for immediate discovery in this action to identify the owner of the
12 <www.salehoosucks.com> website. (Dkt. # 2.) The court granted leave to take
13 immediate discovery. (Dkt. # 5.) SaleHoo served a subpoena on GoDaddy, who in turn
14 gave notice of the subpoena to Doe. (Levy Decl. ¶ 9 & Ex. H (subpoena).) Doe now
15 moves to quash the subpoena.

16 III. JURISDICTON

17 This court has subject matter jurisdiction based on federal question jurisdiction
18 and supplemental jurisdiction. It is less clear, however, whether the court has personal
19 jurisdiction over Doe. Doe argues that the court lacks personal jurisdiction because the
20 <www.salehoosucks.com> website is a passive website and SaleHoo has not alleged the
21 existence of other contacts with Washington. These are serious jurisdictional concerns.
22 *See Holland Am. Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007) (“We

1 consistently have held that a mere web presence is insufficient to establish personal
2 jurisdiction.”); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416-20 (9th Cir. 1997).
3 Nevertheless, because Doe’s motion is not a properly-noted motion to dismiss, the court
4 will treat the factual allegations in SaleHoo’s amended complaint as uncontested and
5 deems them minimally sufficient for present purposes. *Cf. Rio Props., Inc. v. Rio Int’l*
6 *Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002) (in determining whether a plaintiff has met
7 its burden to make a prima facie showing of jurisdiction in response to a motion to
8 dismiss, the court must accept uncontroverted allegations in the complaint as true).

9 IV. ANALYSIS

10 The First Amendment protects the rights of individuals to speak anonymously
11 both offline and online alike. *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092
12 (W.D. Wash. 2001) (“The right to speak anonymously extends to speech via the
13 Internet.”); *see generally Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853 (1997).
14 “Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas,” and
15 individuals “who have committed no wrongdoing should be free to participate in online
16 forums without fear that their identity will be exposed under the authority of the court.”
17 *2TheMart.com Inc.*, 140 F. Supp. 2d at 1092. Yet the right to speak anonymously on the
18 Internet is not without its limits and does not protect speech that otherwise would be
19 unprotected. *USA Techs., Inc. v. Doe*, __ F. Supp. 2d __, No. C09-80275 SI, 2010 WL
20 1980242, at *3 (N.D. Cal. May 17, 2010); *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254
21 (D. Conn. 2008).

1 Subpoenas seeking the identity of anonymous individuals raise First Amendment
2 concerns. *Doe I*, 561 F. Supp. 2d at 254; *2TheMart.com Inc.*, 140 F. Supp. 2d at 1091-
3 92. With the expansion of online expression, the use of subpoenas to unmask anonymous
4 Internet speakers in connection with civil lawsuits is on the rise. *See generally* Ashley I.
5 Kissinger & Katharine Larsen, *Untangling the Legal Labyrinth: Protections for*
6 *Anonymous Online Speech*, 13 No. 9 J. INTERNET L. 1 (2010); Nathaniel Gleicher, Note,
7 *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320 (2008).
8 The use of subpoenas in the context of the Internet raises serious concerns because it
9 threatens to cause “a significant chilling effect on Internet communications and thus on
10 basic First Amendment rights.” *2TheMart.com Inc.*, 140 F. Supp. 2d at 1093.

11 In recent years, courts have been called on to balance one individual’s First
12 Amendment interests in anonymous Internet speech against another individual’s interests
13 in addressing the harm caused by tortious or actionable speech. As of yet, neither the
14 Supreme Court nor the Ninth Circuit has addressed this issue. District courts and state
15 courts, however, have adopted a range of different tests—some permissive, some
16 stringent—designed to account for the competing interests in cases involving claims for
17 defamation, trademark infringement, and copyright infringement.

18 The case law, though still in development, has begun to coalesce around the basic
19 framework of the test articulated in *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J.
20 Super. Ct. App. Div. 2001). In *Dendrite*, the plaintiff brought suit for defamation arising
21 out of postings by anonymous defendants on an Internet message board. The plaintiff
22 sought to compel the internet service provider to disclose the identities of the anonymous

1 defendants, and one defendant responded by filing a motion to quash. The plaintiff
2 argued, *inter alia*, that its defamation claim against the defendant was sufficient to
3 withstand a motion to dismiss and, accordingly, that discovery of the defendant's identity
4 was warranted. *Id.* at 764. The *Dendrite* court disagreed, and held that a plaintiff seeking
5 such discovery must (1) give notice; (2) identify the exact statements that constitute
6 allegedly actionable speech; (3) establish a prima facie cause of action against the
7 defendant based on the complaint and all information provided to the court; and (4)
8 "produce sufficient evidence supporting each element of its cause of action, on a prima
9 facie basis, prior to a court ordering the disclosure of the identity of the unnamed
10 defendant." *Id.* at 760. Additionally, if the plaintiff makes out a prima facie cause of
11 action, the court must (5) "balance the defendant's First Amendment right of anonymous
12 free speech against the strength of the prima facie case presented and the necessity for the
13 disclosure of the anonymous defendant's identity to allow the plaintiff to properly
14 proceed." *Id.* at 760-61. Some courts have adopted the *Dendrite* test wholesale, *e.g.*,
15 *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, __ A.2d __, No. 2009-
16 262, 2010 WL 1791274, at *7 (N.H. May 6, 2010), and *Indep. Newspapers, Inc. v.*
17 *Brodie*, 966 A.2d 432, 456 (Md. 2009), while other courts have adopted streamlined
18 versions of the *Dendrite* test, *e.g.*, *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005) ("the
19 plaintiff must make reasonable efforts to notify the defendant and must satisfy the
20 summary judgment standard"), *USA Techs., Inc.*, __ F. Supp. 2d __, 2010 WL 1980242,
21 at *4 (requiring (1) "the plaintiff to adduce, without the aid of discovery, competent
22 evidence addressing all of the inferences of fact essential to support a prima facie case on

1 all elements of a claim” and (2) the court to balance the competing interests), and
2 *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 975-76 (N.D. Cal. 2005)
3 (same).

4 This court agrees with Doe and the weight of authority that a *Dendrite*-style test is
5 appropriate to safeguard the First Amendment interests at stake in this action. Doe is
6 engaged in a form of anonymous Internet speech by discussing and criticizing SaleHoo
7 on the <www.salehoosucks.com> website. Regardless of whether SaleHoo ultimately
8 establishes that Doe’s speech is not entitled to First Amendment protection under
9 trademark and defamation law, the purpose of a *Dendrite*-style test is to assess the
10 viability of SaleHoo’s claims before casting aside Doe’s anonymity, which once lost
11 cannot be recovered. SaleHoo contends that a *Dendrite*-style test is unnecessary here
12 because Doe is not the actual speaker. (Resp. (Dkt. # 13) at 3.) This contention,
13 however, is belied by the amended complaint, which targets Doe for having “created,
14 endorsed and/or knowingly published” defamatory statements and for making other
15 misleading statements throughout the website. (Am. Compl. ¶¶ 13, 17, 20-21.) Without
16 more, the court is not persuaded that SaleHoo may sidestep application of a *Dendrite*-
17 style test. The court is also not persuaded that Doe’s status as the defendant, rather than
18 as a third party, mandates a different analysis. Though this court’s decision in
19 *2TheMart.com Inc.* involved a subpoena directed at a third-party witness, the case law
20 principally addresses the issue of subpoenas seeking to identify anonymous defendants.
21 *See, e.g., Dendrite*, 775 A.2d at 760.
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1 Having reviewed *Dendrite* and the case law in this area, the court concludes that,
2 at a minimum, a plaintiff seeking to use a subpoena to discover the identity of a
3 defendant in connection with anonymous Internet speech must satisfy three basic
4 requirements, subject to balancing by the court. This is a case-by-case analysis. The
5 court intends only to sketch the general framework that it will follow. The precise
6 contours of each factor must be explored in other circumstances, and consideration of
7 additional factors may ultimately prove appropriate depending on the facts of a particular
8 case.

9 To begin with, the plaintiff must undertake reasonable efforts to give the
10 defendant adequate notice of the attempt to discover his or her identity and provide a
11 reasonable opportunity to respond. *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 721 (Ariz. Ct.
12 App. 2007). This requirement enjoys general acceptance by the courts, *see, e.g., Doe I*,
13 561 F. Supp. 2d at 254, *Indep. Newspapers, Inc.*, 966 A.2d at 456, and *Cahill*, 884 A.2d
14 at 461, and promotes a full and fair consideration of the issues.

15 Next, the plaintiff must, in general, allege a facially valid cause of action and
16 produce prima facie evidence to support all of the elements of the cause of action within
17 his or her control.¹ *See USA Techs., Inc.*, ___ F. Supp. 2d ___, 2010 WL 1980242, at *4;
18 *Doe I*, 561 F. Supp. 2d at 256; *Dendrite Int'l, Inc.*, 775 A.2d at 760. Courts agree that the
19 strength of the plaintiff's case must be evaluated before he or she is permitted to unmask

21 ¹ The court has no occasion to explore the distinctions that may arise when the plaintiff is
22 a public figure; however, at least one commentator has suggested that a different standard should
apply in such circumstances. *See Gleicher, supra*, at 334-36.

1 an anonymous defendant by subpoena. *See Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 241-
2 44 (Cal. Ct. App. 2008) (reviewing the various standards). As one court emphasized: “It
3 is not enough for a plaintiff simply to plead and pray. Allegation and speculation are
4 insufficient.” *Highfields Capital Mgmt., L.P.*, 385 F. Supp. 2d at 975. Yet courts have
5 articulated a range of different standards with respect to this critical step. At the lenient
6 end of the spectrum, some courts have held that the plaintiff need only make a showing
7 of good faith. *E.g., In re America Online, Inc.*, 52 Va. Cir. 26, 2000 WL 1210372, at *8
8 (Va. Cir. Ct. 2000). Other courts have evaluated the plaintiff’s claims under a motion to
9 dismiss standard. *E.g., Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 579 (N.D.
10 Cal. 1999). Finally, at the stringent end of the spectrum, courts have required the
11 plaintiff to submit evidence sufficient to defeat summary judgment, *e.g., Doe v. Cahill*,
12 884 A.2d 451, 461 (Del. 2005), and *Best W. Int’l, Inc. v. Doe*, No. CV-06-1537-PHX-
13 DGC, 2006 WL 2091695, at *4 (D. Ariz. July 25, 2006), or to make a prima facie
14 evidentiary showing, *e.g., Highfields Capital Mgmt., L.P.*, 385 F. Supp. 2d at 975, and
15 *Dendrite*, 775 A.2d at 760-61. “At bottom . . . the prima facie and summary judgment
16 tests impose similar burdens in terms of how strong a case the plaintiff must present to
17 the court, essentially requiring sufficient evidence to create a jury issue on the underlying
18 claim, and both tests are very speech protective.” Kissinger & Larsen, *supra*, at 19.

19 Having reviewed these standards, the court finds the prima facie standard is
20 appropriate in order to guarantee that the plaintiff has brought viable claims in connection
21 with his or her attempt to unmask the anonymous defendant. *See USA Techs., Inc.*, ___ F.
22 Supp. 2d. ___, 2010 WL 1980242, at *4. “Under such a standard, [w]hen there is a factual

1 and legal basis for believing [actionable speech] has occurred, the writer’s message will
2 not be protected by the First Amendment.” *Doe I*, 561 F. Supp. 2d at 256 (quoting
3 *Krinsky*, 72 Cal. Rptr. 3d at 245). Further, by limiting the plaintiff’s burden to those
4 elements within his or her control, this standard recognizes the potential evidentiary
5 limitations associated with certain causes of action. “[A] plaintiff at an early stage of the
6 litigation may not possess information about the role played by particular defendants or
7 other evidence that normally would be obtained through discovery.” *Best W. Int’l, Inc.*,
8 2006 WL 2091695, at *5. Nevertheless, the plaintiff must still allege facially valid
9 claims even if evidence is not available as to each element.

10 The plaintiff also must demonstrate that the specific information sought by
11 subpoena is necessary to identify the defendant and that the defendant’s identity is
12 relevant to the plaintiff’s case. *See Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119 (2d
13 Cir. 2010); *Doe 1*, 561 F. Supp. 2d at 255; *Sony Music Entm’t Inc. v. Does 1-40*, 326 F.
14 Supp. 2d 556, 566 (S.D.N.Y. 2004); *UMG Recordings, Inc. v. Does 1-4*, No. 06-0652
15 SBA (EMC), 2006 WL 1343597, at *2-3 (N.D. Cal. Mar. 6, 2006); *cf. 2TheMart.com*
16 *Inc.*, 140 F. Supp. 2d at 1095. This factor may also include consideration of whether the
17 plaintiff has alternative means to obtain the information sought by subpoena. *See Arista*
18 *Records, LLC*, 604 F.3d at 119; *Sony Music Entm’t Inc.*, 326 F. Supp. 2d at 566.

19 Finally, where the preceding three factors do not present a clear outcome, the court
20 should balance the interests of the parties. *See USA Techs., Inc.*, ___ F. Supp. 2d ___, 2010
21 WL 1980242, at *4; *Highfields Capital Mgmt., L.P.*, 385 F. Supp. 2d at 976. In doing so,
22 the court should “assess and compare the magnitude of the harms that would be caused to

1 the competing interests by a ruling in favor of plaintiff and by a ruling in favor of
2 defendant.” *Highfields Capital Mgmt., L.P.*, 385 F. Supp. 2d at 976.

3 With the foregoing test in mind, the court turns to SaleHoo’s claims. The court
4 begins with the second factor because Doe has received notice of the subpoena and an
5 opportunity to be heard, and there appears to be no dispute that Doe’s identity is relevant
6 to this action. Therefore, the court asks: has SaleHoo alleged facially valid claims and
7 produced prima facie evidence to support all of the elements of these claims within its
8 control? The answer, on this record, is no.

9 1. Trademark Infringement and Lanham Act Claims

10 To prevail on its claims for trademark infringement, false designation of origin,
11 and unfair competition, SaleHoo must show, among other things, that it holds a
12 protectable mark and that Doe made commercial use of the mark or a similar mark in a
13 manner that caused confusion in the minds of consumers about the origin of the goods or
14 services in question. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543
15 U.S. 111, 117 (2004); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1052
16 (9th Cir. 2008); *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000).
17 In its complaint, SaleHoo alleges that Doe operates the <www.salehoosucks.com>
18 website as an Internet gripe site when in fact the website is designed to direct potential
19 SaleHoo customers to other websites for commercial gain. (Am. Compl. ¶¶ 7-19.)
20 SaleHoo alleges that Doe’s use of the SALEHOO mark is “confusingly similar” to its
21 own. (Am. Compl. ¶ 7.) In its motion to quash, Doe argues that SaleHoo has not met its
22 burden to present evidence regarding likelihood of confusion and commercial use. (Mot.

1 at 8-10.) SaleHoo challenges Doe's legal arguments, but does not point to evidence in
2 the record to support these elements of its claims. (Resp. at 6, 8-11.)

3 Here, the court finds that SaleHoo has not met its burden to make a prima facie
4 showing with respect to likelihood of confusion. Doe plainly uses "SaleHoo" in its
5 domain name and throughout its website, but it is not evident how Doe's use is confusing
6 or whether it has caused actual confusion. (Am. Comp. ¶ 7.) The court is particularly
7 mindful that the average Internet user is unlikely to believe that
8 <www.salehoosucks.com> is either an official SaleHoo website or in any way sponsored
9 or approved by SaleHoo. *See Taubman Co. v. Webfeats*, 319 F.3d 770, 777-78 (6th Cir.
10 2003); *Lucent Techs., Inc. v. Lucentucks.com*, 95 F. Supp. 2d 528, 535-36 (E.D. Va.
11 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 n. 2 (C.D.
12 Cal. 1998) ("no reasonably prudent Internet user would believe that 'Ballysucks.com' is
13 the official Bally site or is sponsored by Bally"). Similarly, it is not evident that the
14 content of the website is likely to cause confusion. Without more, SaleHoo has not made
15 an adequate showing to overcome Doe's motion to quash with respect to these claims.
16 *See Highfields Capital Mgmt., L.P.*, 385 F. Supp. 2d at 977-79 (quashing a subpoena to
17 identify an anonymous defendant where the plaintiff failed to adduce evidence sufficient
18 to make a prima facie showing as to likelihood of confusion).

19 2. Defamation Claim

20 Under Washington law, to make out a prima facie case of defamation, a plaintiff
21 must show falsity, an unprivileged communication, fault, and damages. *Mohr v. Grant*,

1 108 P.3d 768, 822 (Wash. 2005). In its amended complaint, SaleHoo alleges that Doe,
2 by way of example, has

3 stated that SaleHoo's business is a 'scam;' stated that SaleHoo and its legal
4 counsel 'threaten anyone who posts information not favorable to SaleHoo
5 on the web with defamation suits;' falsely attributed untrue statements to
6 SaleHoo personnel; and stated that SaleHoo personnel were either 'drunk'
7 or 'a pathological liar.'

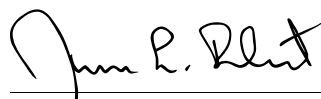
8 (Am. Compl. ¶ 20.) SaleHoo then alleges in cursory fashion that the elements of a
9 defamation claim are satisfied. (*Id.* ¶ 21.) In its response, SaleHoo does not identify
10 evidence to support each element of its defamation claim, but instead rests on the
11 argument that it has alleged a viable defamation claim on the face of its amended
12 complaint. Without more, SaleHoo has not made an adequate showing to overcome
13 Doe's motion to quash with respect to its defamation claim.

14 Having concluded that SaleHoo has not satisfied its burden, the court grants Doe's
15 motion to quash. The court, however, denies Doe's request to dismiss the amended
16 complaint. SaleHoo may have viable infringement and defamation claims against Doe,
17 and the question of whether SaleHoo's claims would survive a properly-noted motion to
18 dismiss or motion for summary judgment is a question not presently before the court.
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V. CONCLUSION

For the foregoing reasons, the court GRANTS Doe's motion to quash (Dkt. # 9) and QUASHES the subpoena served on GoDaddy.

Dated this 12th day of July, 2010.



JAMES L. ROBERT
United States District Judge

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