District Court of Dallas County, Texas
162nd Judicial District

In re: Petition of Protection One, Inc. Requesting a Deposition of a Designated Corporate Representative of Yahoo! Inc.	)	
	)	No. 02-11152-I
Kiakahahaha,	)	
Movant.	)	

SPECIAL APPEARANCE FOR PURPOSE OF MOVING TO DELAY HEARING ON PROPOSED DISCOVERY

Kiakahahaha, one of the persons whom Protection One seeks to identify through pre-litigation discovery from Yahoo! Inc, hereby appears specially for the purpose of seeking to postpone the hearing on petition for leave to take discovery, for the following reasons:

1. This is a proceeding in which Protection One ("POI"), a national home security operation whose principal place of business is located in Topeka, Kansas, is seeking to suppress the free speech of eleven individuals who have used pseudonyms to criticize its business operations, and those of its parent company Westar, a Kansas utility company, on Internet message boards sponsored by Yahoo! Protection One has filed a vague petition under Texas Rule of Civil Procedure 202, seeking to discover the identities of its critics, alleging generally that the eleven individuals have made defamatory comments, but without specifying the allegedly defamatory statements, not to speak of providing any basis for believing that the statements are false or otherwise actionable. The Court has scheduled a hearing on January 9, 2003 at 2 PM.

2. Luckily, an unknown person who reads the POI message board saw the legal notice published in the Dallas Morning News and reprinted it on the POI list, where it came to the attention of Kiakahahaha. Kiakahahaha, as she has disclosed on the message boards, is a former employee of Westar who has published a number of messages about both POI and Westar on the Yahoo!

message boards. Her comments were mostly critical of the company, and included specific suggestions about the way in which the company's performance could be improved as well as identifying particular individuals whom she thought should be replaced and specific proposed replacements.[1]

3. Over the course of the Christmas and New Year's holidays, kiakahahaha was able to reach undersigned counsel Mr. Levy, who was traveling with his family, but who has evaluated the case and agreed to represent kiakahahaha in response to the pre-litigation petition. Counsel intends to advance two principal arguments in response to the petition.

a. Under the cases decided before the adoption of Rule 202, a bill of discovery could be maintained only in a court that had jurisdiction of the anticipated action for which the discovery was sought. *E.g., Ramirez v. Lagunes*, 794 S.W.2d 501, 505 (Tex. App. – Corpus Christie 1990); *Moody v. Moody Bank of Galveston*, 302 S.W.2d 695, 698 (Tex. App. – Galveston 1957). The petition does not expressly allege the basis for personal jurisdiction for the proposed defamation action in Texas. However, its allegation that venue is appropriate in this Court because "a" principal place of business in Irving, Texas, may portend an assertion that its reputation is injured here. However, all the evidence we have been able to discover suggests that POI is headquartered in Topeka, Kansas. Moreover, under accepted principles of personal jurisdiction over tort claims advanced by national or multinational corporations, the corporation cannot simply sue anywhere it has a presence;

[1] We use the female gender to identify kiakahahaha generically, without any intent to specifically denote her gender. We understand that the pseudonym kiakahahaha is a play on the slogan "kiakahaha – go forward with courage", which was the motto of a sensitivity training course to which all employees were subjected during the 1990's.

it must establish that the tort was aimed specifically at its operations in the forum state. *Imo Industries v. Kiekert AG*, 155 F.3d 254, 263-265 (3d Cir. 1998) (recognizing circuit split but identifying the Fifth Circuit as being among the courts following the majority view). *See also Revell v. Lidov*, 2002 WL 31890992 (5th Cir. Dec. 31, 2002) (applying same principle to defamation action by an individual plaintiff). Moreover, although the message board itself is unquestionably interactive, kiakahahaha's posts were entirely passive, and hence there is reason to question whether jurisdiction is appropriate under the "sliding scale" approach to personal jurisdiction over wrongs allegedly committed on the Internet that the Texas courts have endorsed. *See, e.g., Townsend v. University Hospital*, 83 S.W.3d 913, 922 (Tex. App. – Texarkana 2002).

b. The petition seeks discovery that would infringe the First Amendment right to speak anonymously. As the Court of Appeals has recognized, the right to speak anonymously may not be infringed unless a compelling state interest so requires. *State v. Doe*, 61 S.W.3d 99, 103 (Tex.App.-Dallas 2001). A pre-litigation petition of this sort requires the Court to accommodate both the right of a party who believes he has been wronged to identify the person he wants to sue against the right of a speaker to remain anonymous unless there is good reason to believe that his speech was wrongful. In order to reconcile those conflicting rights and interests, the courts in other states have applied a multi-part test, best exemplified by *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), that requires the party seeking discovery to make certain showings, and requires the trial court to evaluate those showings, before authorizing the discovery. Similar tests have been applied by trial courts in Virginia, Pennsylvania, California and Washington

state. Undersigned counsel will urge the Court to adopt a test similar to *Dendrite*, and will urge that, under that test, POI has not justified the discovery that it seeks.

4. So far as we are aware, no reported decision in Texas discusses the standards for pre-litigation discovery into the identity of anonymous Internet speakers. Thus, development of the legal arguments to support that argument will require some care. In addition, crafting the arguments based on facts without requiring the identification of the anonymous speaker in order to test those facts is a task of some delicacy. Moreover, counsel is required to attend a hearing in East St. Louis, Illinois, on Monday, January 6; he must attend a deposition in Philadelphia, Pennsylvania on January 13; and he will be traveling out of the country with his wife, his children, and his elderly mother from January 16 through January 20. Accordingly, the Court is requested to defer the hearing for three weeks, until January 30, 2003.

5. At this time, undersigned counsel represent only kiakahahaha. However, the legal arguments that counsel intend to present apply generally to support the anonymity of all eleven posters whom POI seeks to identify. Moreover, postings on the message boards suggest that other persons whose pseudonyms are the subject of POI's petition are actively seeking representation. Moreover, kiakahahaha has not received any notification from Yahoo! that a proceeding is pending in which POI seeks to discovery her identity, and from previous cases counsel are aware that Yahoo!'s standard procedure is to send out such notice promptly after being served. We question, therefore, whether Yahoo! has been served with notice of the impending hearing even though its address is known to petitioner. Although kiakahahaha saw the notice on the Yahoo! message board, it is possible that some of the individuals whose identities are sought have not read the message board in the past few weeks, and hence they may not even be aware that their anonymity is at risk.

Accordingly, the Court is requested to defer the hearing with respect to all of the identities, in order to ensure that all interested parties have the opportunity to be heard.

6. As recited in the accompanying certificate of conference, undersigned counsel Mr. Levy has attempted three times to contact counsel for petitioner, and has learned from opposing counsel's secretary that his message has, in fact, reached opposing counsel who is out of the office visiting her family until January 6. However, opposing counsel has not called back and we are reluctant to wait until after January 6 to seek to defer a hearing set for January 9. Accordingly, kiakahahaha is now appearing specially to ask the Court to defer the hearing date until January 30.

Respectfully submitted,

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