UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

In re 2TheMart.com, Inc.,	**Case No. MS01-016**
Securities Litigation,	**Pending in U.S.D.C. (C.D. Cal.)** **SACV 99-1127 DOC (ANx)**
This Document Relates To: **ALL ACTIONS.**	**DEFENDANTS' BRIEF IN OPPOSITION TO MOTION OF J. DOE TO PROCEED UNDER PSEUDONYM AND TO QUASH SUBPOENA ISSUED TO SILICON INVESTOR/INFOSPACE, INC.** **Note for Motion Calendar:** **Friday, March 30, 2001** **ORAL ARGUMENT REQUESTED**

III. **SUMMARY OF ARGUMENT**

Enforcement of the subpoena served on Silicon Investor/Infospace (the "Subpoena") is entirely consistent with traditional First Amendment principles. Although the Users had the right to speak anonymously over the Internet message boards, they had no such constitutional right to maintain anonymity after the time of speech. Since the evidence is clearly relevant to the defense in the underlying securities litigation, Defendants Steven W. Rebeil and Dominic J. Magliarditi are entitled to the identifying information for each of the twenty-three users (the "Users") listed on the Subpoena. Defendants hereby respectfully request that this Court deny the Motion of J. Doe to Proceed Under Pseudonym and to Quash Subpoena Issued To Silicon Investor/Infospace, Inc. (the "Motion").

III. **ARGUMENT**

B. **THE FIRST AMENDMENT PROVIDES NO RIGHT TO REMAIN ANONYMOUS**

J. Doe claims that the disclosure of the Users' identifying information threatens their "constitutionally protected choice to speak anonymously" over Silicon Investor's message boards. [Motion, p. 5.] J. Doe fails to realize that *speaking* anonymously is far different from *remaining* anonymous thereafter. Individuals have a constitutional right to speak anonymously that is guaranteed by the First Amendment. In contrast, the First Amendment is completely silent as to anonymity in and of itself. J. Doe, therefore, has no constitutional basis for its Motion to Quash.

2. **The Right To Speak Anonymously Is Entirely Distinguishable From The Right To Remain Anonymous.**

b. **The Supreme Court Has Recognized The Right To Speak Anonymously.**

In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 131 L.Ed.2d 426, 115 S.Ct. 1511 (1995), the Supreme Court recognized that, as part of the First Amendment right to free speech, individuals are guaranteed the right to speak or publish anonymously. *Id.* at 341-343. To reach this conclusion, the Court reasoned that "the identity of the speaker is no different from other *components of [an expression's] content*." *Id.* at 348 (emphasis added). Since information about a speaker's identity may function as an element of content, a speaker should be "free to include or exclude" that element within the content of his or her expressions. *Id.*

McIntyre and subsequent cases have upheld the right to speak anonymously, striking down statutes that require individuals to include their identities as speech content. For example, the following types of statutes have been held unconstitutional because they impose an unconstitutional burden on the First Amendment right to choose the content of one's expression:

(1) Statutes requiring a speaker to disclose his or her identity as a part of the expression, *see, e.g., Buckley v. ACLF, Inc.*, 525 U.S. 182, 142 L.Ed.2d 599, 119 S.Ct. 636 (1999) (identification badge requirement for petition circulators struck down) [Motion, p. 6];

(2) Statutes prohibiting anonymous speech, *see, e.g., McIntyre v. Ohio Elections Comm'n*, *supra*, 514 U.S. 334 (1995) (prohibition on the distribution of anonymous campaign literature struck down) [Motion, p. 6]; and

(3) Statutes prohibiting the use of false identifications, *see, e.g., ACLU v. Miller*, 977 F. Supp. 1228 (N.D.Ga. 1997) (prohibition of Internet transmissions which falsely identified the sender) [Motion, p. 7].

In effect, the challenged statutes in these cases were content-based, requiring disclosure of the speaker's identities as a "condition of entry" into the marketplace of ideas.

McIntyre, 514 U.S. at 343. Since the statutes regulated content, they were impermissible as "direct regulation[s] of pure speech." *Id.* at 345.

b. **The Right To Speak Anonymously Does Not Create Any Right To Remain Anonymous.**

The holding in *McIntyre* cannot be extended to encompass what J. Doe claims is a right to *remain* anonymous. Although no law prevents a speaker from trying to maintain anonymity after exercising the right to speak anonymously, and a speaker may even have a legitimate purpose in remaining anonymous, this prerogative cannot affect the rights of another party subsequently to ascertain that speaker's identity. The First Amendment does not guarantee anonymity; nor has any Court ever held that the First Amendment blocks the efforts of others to determine a speaker's identity. In other words, the absence of the speaker's name from speech does not necessarily protect either the author or the distributor of the speech from being held responsible for the consequences of the speech. *Id.* at 352.

The United States Supreme Court has specifically refused to recognize the right to remain anonymous in *Buckley v. ACLF, Inc.*, *supra*. In *Buckley*, the Court upheld a statute that required circulators of state initiative-petitions to disclose their identities in affidavits after their initial expressions of anonymous speech. *Buckley*, *supra*, 2 L.Ed.2d at 613-614. In upholding the required disclosure, the Court held:

> Unlike a badge requirement worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks. . . . [T]he name badge requirement "forces circulators to reveal their identities at the same time they deliver their political message; it operates when reaction to the circulator's message is immediate" and "may be the most intense, emotional, and unreasoned." The affidavit, in contrast, does not expose the circulator to the risk of "heat of the moment" harassment.

Id. (citations omitted). The Supreme Court further held that the affidavit requirement in *Buckley* "exemplifie[d] exactly the type of regulation for which *McIntyre* left room." *Id.* at 614.

2. **J. Doe Has No Right To Remain Anonymous.**

Although the Internet has spawned an entire field of developing law, the existence of the Internet as a new mode of communication cannot form the basis for J. Doe's attempt to deviate from basic constitutional principles. The First Amendment applies equally here as it did in *McIntyre* and *Buckley*. Clearly, J. Doe's argument for an extension of the right to speak anonymously does not comport with established precedent. Like the affidavit requirement in *Buckley*, the Subpoena is proper because it does not require or force the Users to include their identities within the content of their Internet message board postings.

This lies in stark contrast to the cases cited by J. Doe, where the Courts invalidated content-based regulations of speech. Unlike the identification badge requirement in *Buckley*, *supra*, the Subpoena does not require the Users to state their identity as part of their message board postings. Unlike the prohibition on anonymous campaign literature in *McIntyre*, *supra*, the Subpoena does not forbid the Users from posting anonymous messages, bereft of any identifying information. Finally, unlike the prohibition on false Internet identifications in *Miller*, *supra*, the Subpoena does not prohibit the Users from using pseudonyms like "NoGuano" in their message board postings. In sum, any disclosure of information required by the Subpoena in the instant case is far removed and entirely remote from the content of the Users' speech, and, therefore, the disclosure required by the Subpoena does not infringe on the First Amendment right to free speech.

2. **The *Seescandy* Case Has No Application To J. Doe's Motion To Quash.**

J. Doe cites the case of *Columbia Insurance Co. v. Seescandy.com* ("*Seescandy*"), 185 F.R.D. (N.D.Cal. 1999), to support its purported right to prevent disclosure of the Users' identities pursuant to the Subpoena served on Infospace. In fact, the holding in *Seescandy* related solely to the right to pre-service discovery to identify fictitiously-named defendants. The court's ruling was based upon the fact that the plaintiff sought to obtain a temporary restraining order against a "Doe" defendant before it had ascertained that defendant's true identity. *Id.* at 578-581. The *Seescandy* test, therefore, does not apply in the instant case.

2. **Infospace Does Not Possess The Same First Amendment Privileges Available To Journalists.**

In its Motion, J. Doe confuses the journalist's privilege with the First Amendment right to speak anonymously. J. Doe claims that the journalist's privilege should apply here to prevent the disclosure of the Users' identities. J. Doe's claim fails for the simple reason that the principles underlying the journalist's privilege have no bearing or relevance to the instant case.

The distinction between a journalist and a message board operator like Infospace is clear from their respective roles in speech. A journalist is the author of the news stories that it disseminates to the public. As the author, the journalist has control over the content of the speech it chooses to publish. Thus, journalists may enjoy the First Amendment right to freedom of speech; that right, however, entails the possibility of having to answer for such speech.

Infospace, on the other hand, performs no function similar to that of a journalist. Unlike a journalist, Infospace plays only a passive and non-communicative role in online speech. Infospace merely provides a blank message board and a vehicle for delivery through which the Users may independently author and express their own speech. Infospace is

more similar to the person who delivers the newspaper, or a broadcaster, or a printer of pamphlets than it is to a journalist. Since Infospace performs no speech function, unlike a journalist, J. Doe may not import any First Amendment right to Infospace.

Furthermore, J. Doe's argument is flawed because, taken to its logical conclusion, it frees all parties from any responsibility for online speech. J. Doe argues that individuals have a constitutional right to free Internet speech and have an extended right to remain unaccountable for such speech. J. Doe applies the same argument to Infospace and similar "broadcasters" of Internet speech. J. Doe's argument, therefore, creates an virtual "safe haven" where no author can be held to answer for his or her speech, a result which the drafters of the First Amendment certainly could not have intended.

Finally, J. Doe fails to recognize that the journalist's privilege is qualified and not absolute. *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). The privilege can be overcome in instances where the "opposing need for disclosure" outweighs the First Amendment right to freedom of the press, which is, essentially, a recognition of "society's interest in protecting the newsgathering process . . . and in ensuring the free flow of information to the public." *Id.* at 1292-1293. For the reasons outlined above, Infospace bears no similarity to "newsgathering" journalists and disclosure of the Users' identity will have no effect on the freedom of the press. Thus, no legally justifiable reason exists to apply the journalist privilege in this case.

2. **The Instant Case Bears No Semblance To Cases Which Protect Member Lists Pursuant To The Right To Association.**

The First Amendment right to association invoked by J. Doe also does not prevent the disclosure of identifying information pursuant to the Subpoena. The right to association only prevents disclosure of membership for "groups engaged in advocacy." *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *see also Black Panther*

Party v. Smith, 661 F.2d 1243 (D.C. Cir. 1981). J. Doe's argument fails for the simple reason that no group association can exist based on mere Internet communication.

B. **THE INFORMATION SOUGHT BY THE SUBPOENA IS HIGHLY RELEVANT TO THE DEFENSE IN THE UNDERLYING SECURITIES LITIGATION**

2. **Defendants Have Asserted As An Affirmative Defense That They Were Not The Proximate Cause Of Plaintiffs' Damages.**

This Court should deny J. Doe's Motion because the information sought by the Subpoena is relevant to the Defendants' affirmative defenses, as asserted in Defendants' answer to the Complaint.[1] In the Complaint, the Plaintiffs allege that the Defendants made material misrepresentations and omissions to the investing public about the 2TheMart website, causing them and the other class members to purchase 2TheMart securities at inflated prices to their financial detriment. [Declaration of Michael A. Cabotaje ("Cabotaje Decl."), ¶ 2, Exh. A (Complaint, ¶¶ 1-9).] Among several other affirmative defenses, Defendants claim that "no act or omission of any of the defendants was the cause in fact or proximate cause of any injury or damage to plaintiffs." [Cabotaje Decl., ¶ 3, Exh. B (Answer, p. 17).] Defendants based this affirmative defense upon evidence showing that changes in 2TheMart stock prices were *not* caused by the Defendants but by the illegal actions of individuals who manipulated the 2TheMart stock price using the Silicon Investor Internet message boards.

2. **Defendants Intend To Demonstrate That Plaintiffs' Damages Were Caused By An Illegal Manipulation Of 2TheMart Stock Prices.**

b. **Enforcement Of The Subpoena Is Consistent With Federal Securities Laws Against The Unlawful Manipulation Of Stock Prices.**

The Securities Exchange Act of 1934, as amended (the "Exchange Act"), contains far-reaching proscriptions against market manipulation. Market manipulation under the federal securities laws is defined as "intentional or willful conduct designed to deceive or

defraud investors by controlling or artificially affecting the price of securities." *Ernst & Ernst*, 425 U.S. 185, 199 (1976). All "practices in the marketplace which have the effect of either creating the false impression that certain market activity is occurring when in fact such activity is unrelated to actual supply or demand and tampering with the price itself are manipulative." *Hundahl v. United Benefit Life Insurance Co.*, 465 F. Supp. 1349, 1360 (N.D.Tex. 1979).

Section 9(a)(2) of the Exchange Act ["Section 9(a)(2)"] evidences the state's interest in prohibiting the manipulation of securities prices. Section 9(a)(2) requires that an individual "effect" a "series" of transactions in a security registered on a national securities exchange,[2] creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others. 15 U.S.C. § 78i(a)(2). Improper activity under Section 9(a)(2) may be coupled with devices, such as misleading representations, to manipulate the stock prices further. *See, e.g., U.S. v. Minuse*, 114 F.2d 36, 38 (2d Cir. 1940) (illegal manipulation achieved through transactions that gave an appearance of active trading, combined with the distribution of misleading literature).

Similarly, Section 10(b) of the Exchange Act broadly prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities. Similarly, Rule 10b-5, promulgated under Section 10(b), "prohibits the multitude of deceptive and manipulative devices which continually appear in the securities markets, including activities directed ... toward the manipulation of securities prices." *United States v. Charnar*, 537 F.2d 341, 351 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

The case of *Miller v. Asensio*, 101 F. Supp.2d 395 (D.S.C. 2000) illustrates the applicability of federal securities law to situations similar to that in the underlying matter.

In *Miller*, the plaintiffs alleged that the defendants published through the Internet false and fraudulent reports together with a misleading "strong sell recommendation" regarding the subject company. *Id.* These misrepresentations suggested that the company's market price was grossly inflated. *Id.* at 399. The defendants also allegedly engaged in illegal short selling in a successful effort to drive down the price of the stock. *Id.* The Court in *Miller* held that the allegations were sufficient to state a claim under Section 10(b) and Rule 10b-5. *Id.* at 400.

As in *Miller*, the evidence in the underlying securities litigation provides support to Defendants' claim that the unlawful manipulation of stock prices caused the alleged losses. This evidence consists of: (a) negative, false and misleading comments about both 2TheMart and the Defendants made on Internet message boards, and (b) concurrently posted comments on message boards that were written by Silicon Investor users to induce others to sell 2TheMart stock.

First, Defendants have obtained records of numerous negative, false and misleading comments made on the Silicon Investor message boards during the Class Period. Many of those comments were posted by an author pseudonymously known as "The Truthseeker" (listed as #5 on the Subpoena). On May 25, 1999, for example, The Truthseeker posted statements on the Silicon Investor message board calling 2TheMart (TMRT) a "Ponzi scheme" and accusing the Defendants of "defrauding" past employers and customers. [Cabotaje Decl., ¶10, Exh. C.] Similarly, on July 26, 1999, The Truthseeker referred to the Defendants as "two bit POS CRIM attorneys of TMRT." [Cabotaje Decl., ¶11, Exh. D.]

Similar postings about 2TheMart and the Defendants abound in the Silicon Investor message boards. On July 15, 1999, a poster using the pseudonym "trader14U" (listed as #23 on the Subpoena) called the Defendants "liars and criminals" while attacking the

2TheMart corporation. [Cabotaje Decl., ¶12, Exh. E.] Another poster called the Defendants various epithets, such as "lying, cheating, thieving, stealing, lowlife, criminals." [Cabotaje Decl., ¶13, Exh. F.] Still others challenged the involvement of IBM in the construction of the 2TheMart website. For example, on July 26, 1999, an as-yet-unidentified author of a Silicon Investor posting stated: "OTHER THAN PRELIMINARY DISCUSSIONS, IBM HAS NO CURRENT RELATIONSHIP WITH 2THEMART.COM!!!!" *Id.* As with many of the postings, this message board statement was untrue; Plaintiffs themselves alleged in their Complaint that IBM began contracting with 2TheMart for the website development as early as February 3, 1999. [Cabotaje Decl., ¶1, Exh. A (Complaint, ¶5).]

It is clear that posters on the Silicon Investor message boards abused their Internet speech for the purpose of inducing others to sell their 2TheMart stock. On a Silicon Investor posting dated June 17, 1999, an unidentified author advised Silicon Investor users: "[The 2TheMart] stock has had it . . . . get short or sell your position now while you still can." [Cabotaje Decl., ¶14, Exh.G.] Similarly, on a Silicon Investor posting dated July 16, 1999, another unidentified author advised Silicon Investor users on the 2TheMart message boards to "bail out now." [Cabotaje Decl., ¶15, Exh.H.]

Thus, as in *Minuse* and *Miller*, the negative Internet campaign made to the investing public by The Truthseeker, trader14U and possibly other Silicon Investor users appears to have been part of scheme to manipulate the stock price of 2TheMart. Defendants believe that these Silicon Investor users maintained "short" positions in 2TheMart stock -- selling short when 2TheMart stock prices were high during the Class Period -- and, therefore, had a direct financial interest in driving down the share prices of 2TheMart from that high level. Defendants believe that these individuals violated federal securities laws, by working in concert, and inducing class members to sell their 2TheMart stock to the class

members' detriment, while eventually covering their shorts after a precipitous fall in the 2TheMart stock price.

b. **Identifying Information Requested By Subpoena Will Determine Whether Unlawful Manipulation Occurred.**

The Defendants served the Subpoena on Silicon Investor/Infospace with the intention of determining the true identities of "The Truthseeker," "trader14U," "flodyie" and the other Silicon Investor Users listed on the Subpoena. The Defendants require the identifying information for each of the Users to determine the validity of their affirmative defense based on unlawful manipulation. Only by obtaining the true identities of "The Truthseeker," "trader14U," "flodyie" and others, will Defendants be able to determine, based on available trading records, whether any of them actually manipulated the stock through short sales and through the improper use of the Silicon Investor message boards.[3]

Defendants are aware that some Users listed on the Subpoena may not have posted negative messages about 2TheMart or Defendants on the Silicon Investor message boards. However, Defendants believe that, through Internet communications with the manipulators, Users such as "Smartypnts" (listed as #8 on the Subpoena), "2themoon"(listed as #14 on the Subpoena), and "NoGuano"(listed as #22 on the Subpoena) may have been induced to purchase or sell 2TheMart stock as a result of the negative postings of the manipulators. Confirmation of this and Defendants' reasonable belief that the Plaintiffs' damages were caused by the illegal manipulation of stock rather than through any conduct alleged by the Plaintiffs against the Defendants can only be accomplished by obtaining the true identities of the Users listed on the Subpoena served on Silicon Investor/Infospace.[4]

III. **CONCLUSION**

J. Doe has failed to demonstrate any valid claim to First Amendment protection on behalf of the twenty-three Users listed on the Subpoena. Defendants, on the other hand, have made an evidentiary showing sufficient to demonstrate their right to obtain identifying information sought by the Subpoena. This evidentiary showing, when combined with the state's interest in enforcing federal laws against the unlawful manipulation of stock prices and with the liberal rules of federal discovery, overcomes any argument asserted by J. Doe. For these reasons, Defendants respectfully request that this Court deny J. Doe's Motion to Quash in its entirety.

DATED this ____ day of March, 2001.

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1 Such an order would be consistent with the principle that "[a] district court whose only connection with a case is supervision of discovery ancillary to an action in another district should be especially hesitant to pass judgment on what constitutes relevant evidence thereunder." *Truswal Systems Corp. v. Hydro-Air Engineering, Inc.*, 813 F.2d 1207, 1211-12 (Fed.Cir. 1987).

2 At the time of the actions alleged in the underlying action, 2TheMart securities were not registered under Section 12 of the Exchange Act. Although Section 9(a)(2) may not be applicable in that regard, the Section still evidences a state interest against the manipulation of stock prices and, therefore, provides strong support for the enforcement of the Subpoena in this case.

3 Defendants have also obtained in the course of this litigation reports from the Depository Trust Company in New York that list the banks and brokers who traded 2TheMart stock during the Class Period. [Cabotaje Decl., ¶16.] Defendants are in the process of serving those banks and brokers with subpoenas to determine the names of individuals who bought and sold 2TheMart stock. *Id.* Once Defendants obtain the names from the subpoenaed banks and brokers, Defendants will be able to cross-reference the trading records for those individuals with the identities obtained by the Subpoena. *Id.*

4 The fact that the information obtained might not support Defendants' theories of defense does not preclude the enforcement of the Subpoena. Federal courts have held that "the expectation that discovery may be futile does not, as a general rule, justify barring that discovery altogether." *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 179-180 (E.D.N.Y. 1988), *citing Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 563 (7th Cir. 1984).