Case No. 03-1671

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EQUIDYNE CORPORATION,

Appellee
v.

JOHN DOES 1-21, et al.,
JOHN DOE NO. 9 a/k/a AESCHYLUS_2000

Appellant

Appeal from the United States District Court
For The District of Delaware
Civil Action No. 02-430 (JJF)

OPENING BRIEF OF APPELLANT JOHN DOE NO. 9 A/K/A AESCHYLUS_2000

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June 6, 2003

JURISDICTIONAL STATEMENT

A. District Court Jurisdiction

Plaintiff Equidyne Corporation ("Equidyne") based subject matter jurisdiction on Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S. C. § 78aa, and 28 U.S.C. §1331(a). A23.

B. Appellate Jurisdiction

Appellant John Doe No. 9 a/k/a Aeschylus_2000 ("Aeschylus") bases appellate jurisdiction on 28 U.S.C. §1291 as construed in decisions articulating the collateral order doctrine. Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26 (1949); Bell Atlantic-Pennsylvania Inc. v. The Pennsylvania Public Utility Commission, 273 F.3d 337, 342-44 (3d Cir. 2001); Montgomery County v. Microvote Corporation, 175 F.3d 296, 300 (3d Cir. 1999); In Re: Ford Motor Company, 110 F.3d 954, 957-64 (3d Cir. 1997). See Appellant's Statement Regarding Appellate Jurisdiction docketed April 22, 2003.

On February 28, 2003, Aeschylus served and filed a Notice of Appeal (A1-3) from a Memorandum Order dated February 12, 2003 (A11), which denied a timely filed motion for reargument (A177), pursuant to D. Del. Local Rule 7.1.5, of a Memorandum Order dated November 1, 2002 (A4).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. This appeal presents an issue of application of established First Amendment doctrine to communications on the Internet: What showing must a plaintiff make to obtain information identifying an Internet speaker defendant and thereby deprive that defendant of the well-recognized First Amendment right of anonymous speech? (This issue was raised in the District Court at A66-114, 177-207 (Motion to Quash, Plaintiff's Answering Brief ("PAB"), Motion for Reargument) and ruled upon at A4-12.)

2. Aeschylus contends that Dendrite International Inc. v. John Doe No. 3, 775 A.2d 756 (N.J. Super. App. Div. 2001) properly prescribes what such a plaintiff must demonstrate -- a specification of the statements the defendant purportedly made, a prima facie showing of sufficient evidence supporting each element of a claim assertedly arising from such statements and harm allegedly resulting therefrom, and a demonstration that the plaintiff's need for the identifying information the defendant outweighs the defendant's First Amendment right of anonymous speech. (This issue was raised in the District Court at A66-114, 177-207 and ruled upon at A4-12.)

3. Whether the District Court properly formulated and applied legal precepts and gave insufficient recognition to Aeschylus's First Amendment interests. (This issue was raised in the District Court at A66-114, 177-207 and ruled upon

at A4-12.)

STATEMENT OF RELATED CASES OR PROCEEDINGS

This case has not previously been before this Court. There are no related cases or proceedings.

STATEMENT OF THE CASE

Equidyne brought this action against 21 "John Doe" defendants identified by their Internet screen names. Equidyne alleged generally that the defendants had disclosed on Internet message boards maintained by Yahoo! Inc. ("Yahoo") and Lycos proprietary and confidential information of Equidyne that would have been known only to certain employees and consultants of Equidyne, that such disclosure violated agreements Equidyne maintained with employees and consultants, and that certain message board postings by defendants violated federal securities laws and regulations. Equidyne based its claims on theories of breach of contract and securities laws violations. Equidyne sought unspecified damages and injunctive relief against further disclosure of assertedly proprietary and confidential information. Equidyne has not, however, specified any communications by Aeschylus that purportedly revealed confidential information or constituted market manipulation, nor has Equidyne shown that it sustained any injury from anything Aeschylus allegedly did.

To obtain the defendants' identities, Equidyne caused subpoenas to be served

on Yahoo and Lycos. Aeschylus moved to quash the subpoena directed to Yahoo insofar as it sought information concerning him. Aeschylus contends that Equidyne has not demonstrated a basis for infringing his First Amendment right of anonymous speech. By Memorandum Order dated November 1, 2002 (A4), the District Court denied his motion. Aeschylus timely moved for reargument pursuant to D. Del. Local Rule 7.1.5. A177. By Memorandum Order dated February 12, 2003 (A11), the District Court denied the motion for reargument. Aeschylus served and filed the Notice of Appeal from both Orders on February 28, 2003. A1. The District Court has, as a practical matter, stayed the underlying case pending disposition of this appeal, stating that this Court's decision will affect the District Court's view of other issues in the case. A272-73 (Transcript of Hearing March 31, 2003).

STATEMENT OF FACTS

A. Equidyne Becomes The Subject Of Commentary On Internet Message Boards

Equidyne is a Delaware corporation with its principal place of business in San Diego, California. Equidyne's business is the development, manufacture and sale of needle free transcutaneous drug delivery systems. A23 (Complaint ("Cmpt.") ¶2).

With the increasing availability of computers, the Internet has become a worldwide public forum for communication and exchange of information. Two well-known Internet service providers, Yahoo (http:\\www.yahoo.com) and Lycos (http:\\www.lycos.com), have created vehicles, generally known as message boards, that anyone with Internet access can use to express opinions, exchange ideas, and communicate on subjects of common interest. As is commonly known, people who utilize these electronic bulletin boards generally do so under "screen names" -- typically colorful pseudonyms. A26 (Cmpt. ¶14).

Yahoo maintains a message board for every publicly-traded company. Among these is a message board dedicated to Equidyne, which trades under the symbol "IJX." Yahoo's Equidyne message board is located at http://messages.yahoo.com/?action=q&board=IJX. A26 (Cmpt. ¶14). This message board was established on February 14, 2001 with an initial message reading as follows

(A274):

> This is the Yahoo! Message Board about **Equidyne Corporation ("AMEX: IJX")**, 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 messages are solely the opinion and responsibility of the poster.

As of May 30, 2003, 948 messages had been posted on this message board.[1]

Early messages on Yahoo's Equidyne message board were generally enthusiastic about the company. See, e.g., A275-78 (Messages). During this time, Equidyne's stock was trading between $3.00 and $4.00 per share . A320-21 (Equidyne Stock Price Chart). Later in 2001, however, a number of messages became critical of Equidyne. See, e.g., A279-282 (Messages). Equidyne asserts that in late March 2002 (by which time the market price of its stock had fallen to less than $1 per share, A312 (Equidyne Stock Price Chart), Equidyne received a notice from one Henry J. Rhodes, concerning his intent to nominate an alternate slate of directors for election at the annual meeting of Equidyne shareholders. A31 (Cmpt. ¶31), 99 (PAB).

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[1]The Court may take judicial notice of the existence of the message board and what is said on it (as distinguished from the accuracy of what is said). FRE 201; see, e.g., Washington Post v. Robinson, 935 F.2d 282, 291 (D.C. Cir. 1991)(appellate court may judicially notice existence and content of newspaper articles); MGIC Indemnity Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986)(court may judicially notice matters of public record outside the pleadings). Indeed, Equidyne submitted message board postings to the District Court in connection with briefing on the Motion To Quash. See A118-128, A134-140 (PAB and Exhibits).

According to an Equidyne press release dated April 9, 2002, Equidyne rejected this notice as invalid for failure to meet assertedly applicable legal requirements. A31 (Cmpt. ¶31), A99 (PAB), A117 (PAB Exhibit). Equidyne also told the District Court that no proxy statement supporting the insurgent nominees or describing their qualifications was ever filed with the Securities and Exchange Commission or provided to Equidyne stockholders. A99 (PAB). Public disclosure concerning Rhodes' submission generated additional message postings on the Yahoo Equidyne message board, some of them critical of management. See A292-98 (Messages). On or about May 29, 2002, Equidyne announced that the company's director nominees had been elected. A182 (Equidyne Press Release, Exhibit To Motion for Reargument).[2]

B. Equidyne Sues 21 Anonymous Internet Posters

On May 16, 2002, Equidyne filed this litigation, naming the defendants as John Does 1-21 and by the screen names under which each defendant had posted a message or messages on either the Yahoo or Lycos message board concerning Equidyne. Equidyne alleged that "defendants" were current or former employees of Equidyne or current or former consultants to Equidyne who had violated confidentiality

[2]Equidyne's press release constitutes an admission. FRE 801(d)(2). Moreover, Aeschylus provided this information to the District Court (A182), and Equidyne did not dispute it.

agreements with the company, misappropriated proprietary information, and/or committed securities fraud through their message board postings. See, e.g., A22-23 (Cmpt. ¶¶1, 3). For example, painting with broad brush, Equidyne asserted that "defendants have improperly disclosed on the Message Boards certain proprietary and confidential information of Equidyne that only would have been known to certain employees of Equidyne or consultants to Equidyne." A26 (Cmpt. ¶15).

Count I of Equidyne's Complaint alleged that each defendant had breached a confidentiality, employment or consulting agreement with Equidyne. A28-30 (Cmpt. ¶¶17-25). Count II charged all defendants with using confidential Equidyne information to manipulate the market for Equidyne's stock in violation of anti-fraud provisions of the federal securities laws. A30-31 (Cmpt. ¶¶26-29). Count III charged defendants with violations of the federal laws and regulations governing proxy solicitations. A31-32(Cmpt. ¶¶30-34).

Notably absent from Equidyne's Complaint are any specifics about Aeschylus. The Complaint refers to Aeschylus only in the caption and in introductory paragraphs 1 and 3 which do no more than summarize Equidyne's theory of the case. A22-23. The body of the Complaint does refer to a number of defendants by screen name and summarizes certain message board postings. A26-28. The Complaint, however, says nothing about any message board posting by Aeschylus, nor does it allege any fact to

justify drawing Aeschylus into its theme that all the 21 John Doe defendants had at some time a contractual relationship with the company, sought to manipulate the market for Equidyne stock, or had violated federal laws and regulations regarding proxy solicitations. In short, without a single allegation specific to Aeschylus, the Complaint lumps him into the generic term "defendants."

C. Aeschylus Resists Equidyne's Subpoena, Forcing Equidyne To Specify Aeschylus's Message Board Postings

In order to obtain the identities of the defendants and effect service of process, Equidyne obtained subpoenas directed to Yahoo and Lycos. A47-65. Yahoo notified Aeschylus of the subpoena. A89-90 (Exhibit to Motion to Quash). Assisted by counsel not admitted in Delaware, Aeschylus moved *pro se* to quash the subpoena directed to Yahoo only insofar as it sought information specific to him. A66-88.

Opposing this motion required Equidyne, for the first time, to specify what Aeschylus had done that had prompted Equidyne to charge him with breach of contract and securities fraud. Equidyne specified only three message board postings by Aeschylus.[3]

[3]There were other postings in Aeschylus's name, see, e.g., A299-302 (Messages). Equidyne, however, identified only three to the District Court as allegedly constituting proxy rule violations (A100-101 (PAB), A120, A122, A124 (PAB Exhibits)).

The first was a posting dated February 28, 2002. That day, another John Doe defendant, communicating under the screen name "newdirectorsrequired" posted two messages to the Yahoo Equidyne message board asking Equidyne shareholders who supported a change in the company's directors to send him an email with identifying information. A118-119 (PAB Exhibit). Later that day, Aeschylus posted the following message (A120, PAB Exhibit):

> The messages posted by newdirectorsrequired to replace the Equidyne board of directors is a serious effort with a high likelyhood [sic] of success. Your shares are needed! Please send an email to newdirectorsrequired@yahoo.com.

The next day, a message appeared on the Yahoo Equidyne message board characterized as a reply to the foregoing Aeschylus posting. This poster identified himself as Jeff Miller, an owner of 6500 Equidyne shares, and expressed disappointment with the market performance of Equidyne stock. A121 (PAB Exhibit). Aeschylus responded as follows (A122, PAB Exhibit):

> Jeff -- please send your name, # of shares and contact info to: newdirectorsrequired@yahoo.com. Thanks.

On March 29, 2002, the Yahoo Equidyne message board contained a number of postings about the possibility of a competing slate of director candidates. E.g. A123, 286-88 (Messages). Other messages posted that day were critical of current management. A289-90 (Messages). In the midst of this message traffic, Aeschylus

posted the following (A124, PAB Exhibit):

> I have been into this company since 1998 with a fair number of shares at $1.53 average cost. I have been very disappointed with the way things have gone, but have tried to be patient. My patience has ended and I'm sure all of you feel the same way.
>
> The new slate of directors is certainly a positive development. If elected, they will hopefully get this company on the right track. Obviously, there are a lot of challenges but at least we will have a shot at success. The chances with the current board are nil!
>
> Please be sure to vote your shares for the new slate when you receive your proxy statement.

These messages contain not a shred of support for the Complaint's central assertion that Aeschylus (who was necessarily included in the generic term "defendants") had revealed proprietary or confidential information of Equidyne, had breached an agreement with Equidyne, or had sought to utilize confidential or proprietary information of Equidyne to manipulate the market for Equidyne stock. Equidyne's own submission to the District Court thus reveals that those claims are baseless with respect to Aeschylus. Plainly, the only thing Aeschylus did was express support for the election of new directors. Even with regard to Aeschylus's disenchantment with the incumbent board, Equidyne did not allege how Aeschylus's cheering on the efforts of others caused Equidyne any injury.

D. The District Court Does Not Permit Aeschylus The

Opportunity To Reply To Equidyne And Denies His Motion To Quash

District of Delaware Local Rule 83.5 requires all litigants not appearing *pro se* in that Court to retain Delaware counsel. By the time Aeschylus had retained Delaware counsel, the time for submission of a reply memorandum in support of his motion to quash had passed. Through Delaware counsel, Aeschylus moved for leave to submit a reply memorandum out of time, representing that the memorandum would be submitted within five (5) business days of an order granting such leave (A164, A173). Equidyne opposed this motion as well (A167).

On or about November 1, 2002, more than two months after Aeschylus had sought permission to file a late reply memorandum quickly, the District Court issued a Memorandum Order denying his motion to quash. A4. Aeschylus timely moved for reargument pursuant to D. Del. Local Rule 7.1.5. A177. Equidyne also opposed this motion. A185. By Memorandum Order dated February 12, 2003, the District Court denied the motion for reargument. A11. Aeschylus served and filed a Notice of Appeal from both Orders on February 28, 2003. A1.

SUMMARY OF ARGUMENT

1. The First Amendment to the United States Constitution protects the right of people who choose to communicate on the Internet to do so anonymously.

2. To enforce a subpoena that would require disclosure of the identity of an Internet speaker, the applicant should be required to (a) identify the allegedly actionable statements the speaker purportedly made, (b) demonstrate not only that the action can withstand a motion to dismiss, but that it has evidence supporting each element of its cause of action, including harm resulting from the wrongs alleged, and (c) show that its need for the identifying information outweighs the defendant's First Amendment right of anonymous speech.

3. The District Court erred in denying Aeschylus's motion to quash. In effect, the District Court applied no more than a Fed.R.Civ.P. 12(b)(6) pleading standard which gave insufficient recognition to the First Amendment interests at stake, and either failed to require Equidyne to show harm resulting from Aeschylus's communications or accepted patently inadequate assertions of such harm.

ARGUMENT

IN BALANCING AESCHYLUS'S FIRST AMENDMENT RIGHTS AGAINST EQUIDYNE'S LITIGATIONAL NEEDS, THE DISTRICT COURT INADEQUATELY ANALYZED EQUIDYNE'S CLAIM AND GAVE INSUFFICIENT WEIGHT TO FIRST AMENDMENT INTERESTS

A. Scope And Standard Of Review

The District Court erred in formulating and applying legal precepts. Accordingly, this Court's review is plenary. U.S. v. Pollard, 326 F.3d 397, 405 (3d Cir. 2002).

B. The First Amendment Confers On Internet Speakers Such As Aeschylus A Right To Communicate Anonymously

The First Amendment protects the right to communicate, and to do so anonymously. Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 197-99, 119 S.Ct. 636, 645-46 (1999); McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S.Ct. 1511 (1995); Talley v. California, 362 U.S. 60, 64-65, 80 S.Ct. 536, 538-39 (1960). As the Supreme Court stated in McIntyre (514 U.S. at 341-42, 115 S.Ct. at 1516):

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind... Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is 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 as one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, 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.

Similarly, in Buckley, the Supreme Court found that a Colorado statute that required distributors of political petitions to wear identifying badges unconstitutionally burdened the anonymous exercise of First Amendment rights. See also Lamont v. Postmaster General, 381 U.S. 301, 307, 85 S.Ct. 1493, 1496 (1965) (finding unconstitutional a requirement that recipients of Communist literature notify the post office that they wish to receive it, thereby losing their anonymity); ACLU of Georgia v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997) (striking down a Georgia statute making it a crime for Internet users to "falsely identify" themselves online).

The Supreme Court has also held that Internet speech is entitled to the full array of First Amendment protections. "From the publishers' point of view [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers and buyers. Any person or

organization with a computer connected to the Internet can 'publish' information." Reno v. ACLU, 521 U.S. 844, 853, 117 S.Ct. 2329, 2335 (1997). In light of the vast and dynamic scope of communication on the Internet, which enables anyone with computer access to become the modern equivalent of the town crier or pamphleteer, the Supreme Court held there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." 521 U.S. at 870, 117 S.Ct. at 2344.

"The freedom to publish anonymously extends beyond the literary realm." McIntyre v. Ohio Elections Commission, 514 U.S. at 342, 115 S.Ct. at 1516. Accordingly, courts have upheld the right to communicate anonymously over the Internet. ACLU v. Johnson, 4 F. Supp.2d 1029, 1033 (D. N.M. 1998), aff'd, 194 F.3d 1149 (10th Cir. 1999); ACLU of Georgia v. Miller, supra, 977 F. Supp. at 1232-33.

C. To Deprive Aeschylus Of His Constitutionally Protected Anonymity, Equidyne Must Show A Plausible Basis To Believe That Aeschylus Has Infringed Some Legal Entitlement Of Equidyne And Caused Equidyne Injury Thereby

Even if issued at the request of a private litigant in a civil suit, a subpoena is governmental action subject to constitutional limitations, including the First Amendment. See New York Times Co. v. Sullivan, 376 U.S. 254, 265, 84 S.Ct. 710, 718 (1964); Shelley v. Kramer, 334 U.S. 1, 68 S.Ct. 836 (1948); John Doe v. 2TheMart.com Inc., 140 F. Supp.2d 1088, 1091-2 (W.D. Wa. 2001).

Because anonymous speech presumptively enjoys constitutional protection, a court order to compel identification of a speaker threatens the exercise of fundamental rights and is therefore "subject to the closest scrutiny." NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171 (1958). See Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417 (1960). Where as here, a subpoena would significantly encroach on a fundamental right, its proponent must show "a subordinating interest which is compelling." Bates, 361 U.S. at 524, 80 S.Ct. at 417; see NAACP, 357 U.S. at 463-66, 78 S.Ct. at 1172-4.

Thus, every court that has considered an application to obtain the identities of anonymous Internet speakers has sought to balance the applicant's interest in obtaining the identification against the constitutionally protected anonymity of the speaker. See Dendrite International Inc. v. John Doe No. 3, 775 A.2d 756 (N.J. Super. App. Div. 2001); Immunomedics, Inc. v. Doe, 775 A.2d 773 (N.J. Super. App. Div. 2001); In Re Subpoena Duces Tecum to America Online Inc., 2000 WL 1210372 (Va. Cir. Ct.), rev'd on other grounds, America Online Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001); Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999); John Doe v. 2TheMart.com Inc., supra. As the District Court observed in 2TheMart.com Inc., 140 F. Supp.2d at 1093:

> The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate

> anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Therefore discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.

Indeed, the Yahoo Equidyne message board provides powerful evidence confirming the chilling effect of litigation such as this on Internet communications. News of this lawsuit and the subpoenas seeking information identifying the 21 John Doe defendants began appearing on the message board at about June 15, 2002. See A303-309 (Messages). From the inception of that message board to that time, there had been approximately 680 messages, or a rate of approximately 42.5 per month. From June 15, 2002 until May 30, 2003, there have been approximately 268 postings, a rate of approximately 23.3 per month, representing a 45% decline in monthly postings. Thus, the effect of this lawsuit has been to suppress the free exchange of views about Equidyne, as people understandably do not wish to become embroiled in litigation as the price of expressing opinions and ideas.

Aeschylus respectfully submits that the decision of the Appellate Division of the New Jersey Superior Court in Dendrite International Inc. v. Doe is the most thoughtful and comprehensive effort to establish an appropriate balance between

protecting free expression on the Internet and permitting a plaintiff who can establish some injury requiring redress to proceed with its litigation. Indeed, in the District Court, Equidyne relied on Dendrite as the basis of its argument. A105-112 (PAB).

The Dendrite court established the following analytical framework for considering an application for an order compelling compliance with a subpoena which seeks disclosure of the identity of anonymous Internet posters:

1. The trial court must "first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board." Id. 775 A.2d at 760.

2. Second, the court should "require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech." Id.

3. The court must then engage in an analysis more particularized than the normal standards of Fed.R.Civ.P. 8 and 12(b). "The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has

set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state the claim upon which relief can be granted..., *the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis,* prior to a court ordering the disclosure of the identity of the unnamed defendant." Id. [emphasis added].

4. Finally, if the court concludes that the plaintiff has presented a prima facie cause of action, the court must "balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to proceed properly." Id. at 760-61.

Dendrite thus properly recognized that sufficient protection of the First Amendment interests at stake required more than a plaintiff's ability to articulate a claim that could survive a motion to dismiss under the New Jersey analog to Fed.R.Civ.P. 12(b)(6). Permitting a plaintiff to force anonymous Internet speakers to defend themselves through the device of simple notice pleading would suppress the Internet's ability to function as a forum for public expression, without corresponding societal gain.

Requiring a plaintiff to make a specific showing in support of its claim

before it can have some types of discovery, as Dendrite does, is a device the law employs to mediate between conflicting policy interests in other substantive areas. For example, in shareholder derivative litigation, particularization of pleading under Rule 23.1 performs such a function. See, e.g., Pogostin v. Rice, 480 A.2d 619, 624 (Del. 1984); Guttman v. Huang, 2003 WL 21058185 (Del. Ch.) at *7. Similarly, a court faced with a request to compel a libel defendant to identify anonymous sources assertedly relied upon in making the allegedly libelous statements requires the plaintiff to show: that the identification is not just relevant but necessary to the plaintiff's case; that the plaintiff has shown a prospect of prevailing on other issues in the case; and that the plaintiff has exhausted other means of obtaining the information. E.g., Carey v. Hume, 492 F.2d 631, 636-9 (D.C. Cir.), cert. dismissed, 417 U.S. 938, 94 S.Ct. 2654 (1974); Miller v. Transamerican Press Co., 621 F.2d 721 (5th Cir.), as amended on rehearing, 628 F.2d 732 (5th Cir. 1980).

Accordingly, in its second and third requirements, Dendrite properly requires particularization of a plaintiff's claim. The plaintiff must specify each allegedly actionable statement, show that the statements give rise to a claim that can withstand a motion to dismiss, and that there exists on a *prima facie* basis some evidence "supporting each element" of the cause of action. Dendrite, 775 A.2d at 760. Indeed, the Dendrite court affirmed non-enforcement of the subpoena specifically

because "Dendrite failed to demonstrate the statements posted by John Doe No. 3 *caused it any harm*." Id., 775 A.2d at 772 (emphasis added). Requiring such a showing of harm is entirely appropriate. A plaintiff should need no discovery to demonstrate what harm it suffered. Absent a plausible showing of harm, no relief is ultimately possible and the plaintiff will lose nothing if it cannot proceed with its claim. Balanced against that non-loss is the ineluctable fact that enforcement of the subpoena would permanently deprive the defendant of his constitutional protection. Without a credible showing of harm, the balance easily favors denying enforcement of the subpoena, as neither the plaintiff nor the defendant loses anything in that circumstance.

D. The District Court Erred In Applying A Notice Pleading Standard With No Showing Of Harm Attributable To The Statements by Aeschylus

The District Court, to be sure, reviewed the relevant case law which it then purported to use "as a guidepost" in fashioning its own balance of the interests and equities in the case. A8, A12. It found that Equidyne had shown that Aeschylus had committed a technical violation of the proxy solicitation rules by requesting shareholders to vote for an alternate slate of directors even though a proxy statement had never been filed with the Securities and Exchange Commission or distributed to Equidyne shareholders. A9. On reargument, the District Court rejected Aeschylus's

urging that Equidyne should be required to demonstrate harm from the wrong alleged, but then found that Equidyne had made a sufficient showing. A12. Aeschylus respectfully submits that the District Court's analysis falls far short of the balanced approach taken in any of the decisions which it cited, and effectively fails to give any meaningful protection to the constitutional interests at stake.

First, the District Court totally ignored that while Equidyne had expressly pleaded claims of breach of contract and market manipulation against all defendants -- which necessarily included Aeschylus -- Equidyne implicitly conceded in its own submission that it had no such claim against Aeschylus. Equidyne only pointed to three message board postings by Aeschylus expressing enthusiasm for the efforts of others to run an opposing slate of directors, in order to argue a technical violation of the proxy rules, when Equidyne's obvious target for its substantive contract and securities fraud claims was other defendants, particularly Mr. Rhodes.

Such cheerleading by Aeschylus can only rationally be viewed as trivial. As Equidyne concedes, *there was no proxy contest*. A99 (PAB). Mr. Rhodes' apparent effort to nominate an opposing slate of director candidates for election at Equidyne's shareholder meeting quickly collapsed, no competing slate was ever seriously advanced, no competing proxies were in fact solicited, and Equidyne's

directors were, not surprisingly, re-elected. A182 (Equidyne Press Release). Even assuming Aeschylus's urging other shareholders to vote (A124) could be seen as falling within the broad definition of proxy solicitation in 17 C.F.R. §240.14a-1(l),[4] Aeschylus's exhortation could have no consequence in a real world environment where there were no competing proxies and no opposition candidates.

What Equidyne's charging Aeschylus with wrongs for which it had no evidentiary support demonstrates, and what the District Court ignored, is that whatever the legitimacy of Equidyne's claims against the other John Doe defendants, Equidyne deliberately cast a wide net over message board posters to haul Aeschylus's trivial cheerleading before the Court. Such overcharging necessarily has the effect of intimidating Internet speakers like Aeschylus without corresponding prospect of redressing any legitimate grievances Equidyne may have, and exposes Equidyne's arguments against Aeschylus as post hoc rationalizations.

When, in opposition to Aeschylus's motion to quash, Equidyne argued that Aeschylus had committed a technical violation of the proxy rules, Equidyne did not even attempt to show any harm allegedly resulting from Aeschylus's postings A103-144 (PAB). Aeschylus's motion for reargument then forced Equidyne to come

[4]In the three Aeschylus postings Equidyne placed before the District Court, the only statement that would remotely come within the definition of "solicitation" (see SEC Rule 14a-1(l) in Exhibit C hereto) is the last sentence of the third posting (A124).

up with a theory of harm. The assertion Equidyne conjured was that it had been forced "to retain and consult counsel, at considerable expense, to assist in evaluating Mr. Rhodes' nominations, communicating with the SEC, and preparing the company's proxy materials. In addition these actions had an adverse impact on the morale of Equidyne's employees and diverted substantial amounts of time and effort by Equidyne's executive management from the day-to-day business of the Company." A187-88 (Equidyne's Opposition to Motion for Reargument). Equidyne further asserted that its 2002 election of directors was conducted "against the backdrop of misinformation" and unlawful proxy solicitations. A188 (Id.).

Even if the Court credits these unsupported assertions, what is readily apparent is that the legal expense, alleged impact on employee morale, and time and effort by Equidyne's executive management necessarily resulted from Mr. Rhodes' aborted effort to nominate an opposition slate. Indeed, Equidyne said so in the language quoted above. Equidyne did not even attempt to allege that Aeschylus's three little postings had any marginal effect on any of these asserted harms, nor could it do so credibly. And surely the burden of conducting an election "against the backdrop of misinformation" can hardly be seen as anything other than make-weight rhetoric when in fact there were no competing candidates and the board's nominees were re-elected. These unsubstantiated assertions of harm are nothing more than an

after-the-fact effort to justify lumping Aeschylus in with the other John Doe defendants.

The District Court erred by accepting this flimsy excuse for negating established First Amendment protections. Dendrite properly requires that a plaintiff such as Equidyne produce *evidence* supporting each element of its claim, on a prima facie basis, including harm, id. 775 A.2d at 760, 772. Equidyne plainly failed to do so.

Even if a plaintiff does so, Dendrite further requires a balancing of the strength of the prima facie case against the First Amendment interests at stake. Id. 775 A.2d at 760-61. Here the District Court did not even attempt to make this effort, for if it had, Equidyne could only be seen as falling woefully short. Equidyne claims that Aeschylus should be deprived of his First Amendment protections on a showing of, at most, a technical violation of the proxy rules resulting in no increase in inchoate injury allegedly inflicted by the desultory Rhodes effort to nominate candidates for election as directors.

The District Court improperly weighted its balancing effort against First Amendment interests.[5] Equidyne has not shown that it will lose anything if it is

[5]"...[I]n general, our society accords greater weight to the value of free speech than to dangers of its misuse." McIntyre v. Ohio Elections Commission, 514 U.S. at 357, 115 S.Ct. at 1524.

unable to prosecute its claim against Aeschylus.[6] On the other hand, if the District Court Orders stand, Aeschylus will be irrevocably deprived of the right of anonymous speech to which the First Amendment entitles him.

[6]To the extent Equidyne would argue that Aeschylus may have been acting in concert with Mr. Rhodes, Equidyne can seek to establish that by first taking discovery of Mr. Rhodes whose identity it knows. It need not abrogate Aeschylus's First Amendment rights to develop such evidence if it exists.

CONCLUSION

The District Court's decisions denying Aeschylus's motion to quash in both analytical approach and result do not strike the appropriate balance between constitutional rights and litigational needs. Its decisions should be reversed with directions to grant the motion to quash.

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June 6, 2003

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CERTIFICATE OF BAR MEMBERSHIP

I, Norman M. Monhait, do hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

_____

Norman M. Monhait

Dated: June 5, 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of June, 2003, two copies of the foregoing **Opening Brief Of Appellant John Doe No. 9 a/k/a Aeschylus_2000** were served, by hand delivery, upon:

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