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)

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

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July 21, 2003

INTRODUCTION

While Equidyne[1] admits that its subpoena intrudes on Aeschylus's First Amendment rights, it asserts the Court should subordinate First Amendment interests for an insubstantial reason -- alleged proxy violations that were meaningless because the election of directors was uncontested. Although Equidyne acknowledges the Court should strike a balance between the First Amendment right to anonymous speech and its claim to have been harmed by Aeschylus's postings (Answering Brief of Appellee Equidyne Corporation (hereinafter "AB") at 12), Equidyne's argument puts all the weight on its side of the scale.

ARGUMENT

I. THE PARTIES AGREE ON ANALYTICAL APPROACH

The parties' main briefs reveal a broad area of agreement, substantially narrowing the issues. The parties agree:

> **First**, that this Court's scope of review is plenary. Compare OB at 14 with AB at 11.
>
> **Second**, that the First Amendment encompasses an individual's right to speak anonymously. Compare OB at 14-15 with AB at 11.

[1]Unless otherwise indicated, this brief uses the same abbreviations as in the Opening Brief of Appellant John Doe No. 9 a/k/a Aeschylus_2000 ("OB").

Third, that First Amendment protections apply fully to Internet communications. Compare OB at 15-16 with AB at 11-12.

Fourth, a court-issued subpoena seeking disclosure of the identity of an Internet speaker constitutes governmental intrusion on protected First Amendment interests. Compare OB at 16-17 with AB at 11.

Fifth, to justify such an intrusion, a speaker's First Amendment right to anonymous speech must be balanced against the interests of those who claim to have been harmed by unlawful speech. Compare OB at 17 with AB at 12.

Sixth, the decision of the Appellate Division of the New Jersey Superior Court in Dendrite International Inc. v. John Doe No. 3, 775 A.2d 756 (N.J. Super. App. Div. 2001) provides the most effective analytical framework for achieving such a balance. Compare OB at 19-21 with AB at 15-18. Indeed, Equidyne quotes favorably from a law review article characterizing Dendrite as a "seminal" and "influential" decision. See AB at 18.

The parties disagree in essentially three areas:

First, whether Equidyne was required to demonstrate any harm to justify enforcement of its subpoena. Compare OB at 20-23 with AB at 23-26.

Second, whether Equidyne did in fact demonstrate any such harm. Compare OB at 25-26 with AB at 26-27.

Third, whether the District Court struck the appropriate balance between the protection of Aeschylus's First Amendment right to anonymous speech and Equidyne's claim of harm. Compare OB at 26-27 with AB at 12, 28.

II. EQUIDYNE WRONGLY ASSERTS THAT HARM IS NOT AN ELEMENT OF A CLAIM UNDER SECTION 14(a) OF THE EXCHANGE ACT; THIS COURT HAS HELD THAT HARM IS A REQUIRED ELEMENT

Equidyne acknowledges Dendrite's specific and explicit requirement that "in addition to establishing that its action can withstand a motion to dismiss for failure to state a 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." Dendrite, 775 A.2d at 760; see AB at 24. Equidyne further acknowledges that Dendrite

affirmed denial of subpoena enforcement explicitly because the plaintiff had failed to show any harm from the anonymous postings. Dendrite, 775 A.2d at 760, 772; see Immunomedics, Inc. v. Doe, 775 A.2d 773, 777 (N.J. Super. App. Div. 2001) ("In Dendrite, we concluded that the plaintiff had failed to adequately demonstrate a cause of action based on defamation because of the failure to demonstrate it suffered damages attributable to the messages posted on the ISP message board by the anonymous defendant."). See AB at 24-25.

Equidyne attempts to distinguish Dendrite by asserting that harm is a required element of a defamation claim under New Jersey law, which was the basis of the plaintiff's cause of action in that case, but that "a separate demonstration of harm" (AB at 25), is not an element of Equidyne's claim under Section 14(a) of the Exchange Act against Aeschylus. (AB at 24-25).[2]

This distinction fails. This Court has repeatedly held that injury to the plaintiff is an element of Section 14(a) claim for relief. Shaev v. Saper, 320 F.3d 373, 379 (3d Cir. 2003);In Re NAHC Inc. Securities Litigation, 306 F.3d 1314, 1329 (3d Cir.

[2]Equidyne's brief implicitly concedes that it never had a claim against Aeschylus based on the theory of its complaint that Aeschylus was a former Equidyne employee who had breached a confidentiality agreement. Notwithstanding Equidyne's indiscriminate use of the word "defendants" in its complaint, e.g. ¶¶ 1, 3, 15, A.22-23, 26, Equidyne's brief now says it meant only that "some of the defendants" fell in that category. See AB at 5-6. Equidyne's retreat from its overcharging continues to demonstrate that its inclusion of Aeschylus among the defendants in this case was an effort to intimidate rather than to obtain relief. See OB at 24-25.

2002); General Electric Company v. Cathcart, 980 F.2d 927, 932 (3d Cir. 1992). Indeed the Supreme Court has held that no cause of action even exists under Section 14(a) if the plaintiff is unable to demonstrate any injury from the violation alleged. Virginia Bankshares Inc. v. Sandberg, 501 U.S. 1083, 1087, 1099-1108, 111 S.Ct. 2749, 2755, 2761-66 (1991).

Equidyne's citation to Berman v. Thomson, 312 F. Supp. 1031, 1033 (N.D. Ill. 1970) is unavailing. That decision predates the foregoing authorities. Berman cites Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616 (1970) which left open the question of causation of damages that the Supreme Court ultimately resolved in Virginia Bankshares, 501 U.S. at 1099, 111 S.Ct. at 2761. The Berman court either incorrectly predicted the answer to the question the Supreme Court later addressed in Virginia Bankshares or, its use of the term "financial injury" implies that injury in some form is a requisite of a Section 14(a) claim.

Equidyne also could not obtain injunctive relief against Aeschylus. An injunction requires an existing threat of harm, not an inchoate potential of future harm. McLendon v. Continental Can Co., 908 F.2d 1171, 1182 (3d Cir. 1990); Holiday Inns of America Inc. v. B & B Corporation, 409 F.2d 614, 618 (3d Cir. 1969)(Injunctive relief is available only for "a presently existing actual threat," not "simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by the common law."). Equidyne has not even argued that it

perceives a threat of future harm from Aeschylus.[3] Equidyne also cannot hope to obtain an "obey the law" injunction. McLendon, 908 F.2d at 1182 ("A broad 'obey the law' injunction will be vacated.").

Nor is Equidyne's effort to distinguish Dendrite from Immunomedics meaningful. See AB at 25. The plaintiff in Immunomedics alleged that the particular defendant had described herself in postings as an employee, that the company had a confidentiality agreement with employees, and that the defendant had breached that agreement by revealing obviously confidential information, specifically that the company was "out of stock for diagnostic products in Europe" and was about to fire a senior European executive. Immunomedics, 775 A.2d at 774-75. The Court held that Immunomedics had established "a prima facie cause of action for breach of the confidentiality agreement founded on the content of the [defendant's] posted messages." Id. 775 A.2d at 777. Nothing in the opinion indicates the question of harm was in issue, as it obviously was in Dendrite. That is likely because the parties and the court recognized that the publication of accurate (775 A.2d at 774-75), non-public information about the corporation's internal affairs was inherently harmful.

Equidyne cannot credibly maintain that harm is not an element of a Section

[3]Indeed, an examination of the Yahoo Equidyne message board will reveal no postings by Aeschylus after late May 2002.

14(a) claim. Under the Dendrite standard Equidyne has endorsed (i.e., that it must make a prima facie evidentiary showing of each element of its cause of action, 775 A.2d at 760), it must demonstrate some harm it has sustained from Aeschylus's postings in order to have its subpoena enforced. Indeed, Equidyne appears to concede as much when it says that the balance that must be struck is between "the First Amendment right to anonymous speech" and "the right of those *harmed* by unlawful speech to seek relief against defendants who use anonymity to shield their identity." AB at 12 (emphasis added).

III. AESCHYLUS'S POSTINGS CAUSED NO HARM TO EQUIDYNE

Plainly, Equidyne has made no showing of harm from Aeschylus's three postings cheering on the desultory Rhodes effort to nominate an opposing slate of directors.[4] Equidyne has produced no *evidence* of harm, but rather continues to assert that it was "forced. . . to retain counsel at considerable expense to evaluate the nominations and solicitations, communicate with the SEC and prepare the company's proxy materials." AB at 26. In the sentence preceding that one, however, Equidyne acknowledges that the postings of "other defendants" would have caused those actions

[4]In its answering brief, Equidyne cites to two postings it deigned to place before the District Court. AB at 9; A.299-302. Equidyne's failure to rely on these postings in the trial court shows that Equidyne itself regards them as insignificant. While Equidyne's management is no doubt offended by the content of these messages, they cannot be said to constitute a proxy solicitation, even under the expansive SEC definition.

in any event.[5]

Equidyne's assertion that Aeschylus's postings forced it to prepare "proxy materials" is astonishing. Under applicable state law (8 Del. C. §211(c)), Equidyne is obliged to conduct an annual election of directors, and under Section 14(a) on which it relies, Equidyne must prepare and disseminate proxy materials for such an election. Equidyne implicitly admits that there was no proxy contest in connection with that election. It does not even attempt to explain how its proxy materials for the usual uncontested election were in any way affected by any Aeschylus posting. Equidyne's claim of harm is mere words with no real world credibility.[6]

Similarly, Equidyne's repeat of the mantra that it had to conduct "its 2002 election of directors against the backdrop of misinformation and proxy solicitations that failed to provide the essential information required by SEC rules...." (AB at 26) is a linguistic makeweight for which Equidyne has offered no substantiation. For example, Equidyne does not even suggest how many shareholders, beyond those who

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[5]In the District Court, Equidyne acknowledged that Mr. Rhodes' communication about an alternate slate necessitated the assistance of counsel and SEC communications (A.187-88).

[6]Equidyne now laments that it "could have supported" these assertions "with evidence had it needed to do so before the District Court." AB at 26. This claim by a sophisticated corporate litigant of what it could have done but failed to do, deserves as much sympathy as Equidyne gives the inability of Aeschylus, an out-of-state *pro se* defendant, to file a timely reply brief in the District Court. See AB at 3, footnote 3.

posted on the Yahoo Equidyne message board, may have seen Aeschylus's postings. If shareholders were in fact affected by the postings, at least one or two would have communicated with the company about them. Equidyne has offered nothing to support its "backdrop of misinformation" claim.

Equidyne's claim of "significant harm" (AB 27) to its shareholders is similarly unsupported. Since shareholders never were offered competing candidates, they could not have been misled.

IV. EQUIDYNE HAS SUFFERED NO WRONG NOR SUSTAINED INJURY. THE REQUIRED BALANCE SHOULD FAVOR AESCHYLUS'S FIRST AMENDMENT RIGHT TO ANONYMOUS SPEECH

Besides its unsupported claim of injury, Equidyne's contention that Aeschylus violated the proxy rules is tenuous at best. As noted above at page 7, n.4, in the District Court Equidyne relied on only three postings. The first two, (A.120, 122), cannot reasonably be considered solicitations even within the broad definition of SEC Rule 14(a)-1. See OB Ex. C or AB at 20, n.7. These communications are simply requests that Equidyne shareholders who support the concept of electing new directors identify themselves. Since there was no ongoing proxy contest, a request that dissatisfied shareholders identify themselves cannot reasonably constitute a request for a proxy, a request to execute or not execute a proxy, a furnishing of a proxy, or even "a communication . . . under circumstances reasonably calculated to result in the

procurement, withholding or revocation of a proxy." SEC Rule 14(a)-1.

Only the posting at A.124, with its statement about voting "your shares for the new slate when you receive your proxy statement," could arguably fit within the definition of SEC Rule 14(a)-1(iii). As the Second Circuit said in a decision Equidyne cites, the "question in every case is whether the challenged communication, seen in the totality of circumstances, is 'reasonably calculated' to influence the shareholders' votes." Long Island Lighting Co. v. Barbash, 779 F.2d 793, 796 (2d Cir. 1985). Because there was no "new slate," the request to vote "your shares for the new slate" could not in the circumstances have been "reasonably calculated to result in the procurement, withholding or revocation of a proxy." "Reasonably calculated" should be measured by facts, not by what Aeschylus may have mistakenly believed.

The Supreme Court has directed that the private cause of action under Section 14(a) does not exist for a "defect so trivial. . .that correction of the defect or imposition of liability would not further the interests protected by Section 14(a)." Mills v. Electric Auto-Lite, 396 U.S. at 384, 90 S.Ct. at 621. Similarly, in Virginia Bankshares, the Supreme Court warned that permitting a cause of action without substantial injury posed a threat "of speculative claims and procedural intractability. . . ." 501 U.S. at 1105, 111 S.Ct. at 2765.

Equidyne's claim against Aeschylus is trivial on the merits and its assertions of injury lack credibility and substance. Aeschylus's cheerleading could have no meaningful consequence in the real world of Equidyne's 2002 election of directors where there were no competing proxies and no opposition candidates, and the company's nominees were uneventfully reelected. Equidyne cannot tip in its favor the balance it concedes this case requires. AB at 12.

While Equidyne has not shown any real prospect of obtaining relief from Aeschylus, if the Yahoo subpoena is enforced as to Aeschylus,[7] he will be irretrievably deprived of the right of anonymous speech to which the First Amendment entitles him. With Aeschylus having a legitimate constitutional interest on his side of the balance and Equidyne having no interest on the other, the scales tip in Aeschylus's favor. The subpoena should not be enforced as to Aeschylus.

[7]While Equidyne notes that Yahoo has refused to produce any information in response to the subpoena, AB at 4, that results from Equidyne's unwillingness to seek enforcement of the subpoena. Aeschylus sought a protective order only insofar as the subpoena sought his identifying information. A.70. It is Equidyne's inaction that has permitted Yahoo not to respond concerning any of the other defendants.

CONCLUSION

For the reasons stated in Aeschylus's opening brief and in this brief, the District Court's decisions denying Aeschylus's motion to quash should be reversed, with this Court's direction to quash the subpoena as to Aeschylus.

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OTHER AUTHORITIES

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I HEREBY CERTIFY that on the 18th day of July, 2003, two copies of the foregoing **Reply Brief Of Appellant John Doe No. 9 a/k/a Aeschylus_2000** were served, by hand delivery, upon:

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