UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

ALVIS COATINGS, INC.

Plaintiff,

v.

JOHN DOES ONE THROUGH TEN,

Defendants.

Civil Action No. 3:04-CV-374
Hon. Carl Horn, III

JASON M. SNEED
Attorney for Plaintiff
Bank of America Plaza
101 South Tryon Street, Ste. 4000
Charlotte, NC 28280-4000

JOHN T. HERMANN
Attorney for Doe Defendant
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Berkley, MI 48072
(248) 591-9291

MOTION TO QUASH SUBPOENA

Defendant, JOHN DOE, through his attorney, John T. Hermann files this Motion to Quash a Subpoena issued by this Court in the above-captioned litigation. In support of his motion, Defendant states as follows:

1. This is an action to quash a subpoena issued by Plaintiff, Alvis Coatings, Inc. ("Alvis") for the disclosure of the name, identity, and location of individuals who are alleged to have posted false, misleading and disparaging information on various internet chat rooms and forum sites.

2. The subpoena was served upon Comcast Cablevision ("Comcast") in Mt. Laurel New Jersey on October 11, 2004.

3. Doe Defendant is requesting this Honorable Court to quash said subpoena or, in the alternative, issue a protective order prohibiting Comcast from

revealing the name, identity, or location of the individual using the Internet Protocol address 68.62.45.214 on the dates specified in Exhibit A of the subpoena.

4. In support of its position, Defendant states that (1) Plaintiff has failed to show that its need for the information requested outweighs the anonymous speakers First Amendment rights; (2) the constitutional protections of freedom of association outweighs the Plaintiff's need to be granted access to the name, identity, and location of Doe Defendant; (3) Plaintiff has failed to establish in its pleadings that it has a legitimate good-faith basis that it may be a victim of conduct actionable in this jurisdiction against Doe Defendant; and (4) Plaintiff has failed to establish that the identity of Doe Defendant is centrally needed to advance their claims.

WHEREFORE, for the reasons set forth above, Defendant JOHN DOE respectfully requests this Honorable Court to quash the subpoena or, in the alternative, to issue a protective order preventing Comcast from divulging the name, identity, location or other personal information of Defendant JOHN DOE.

JOHN T. HERMANN (P-52858)
Attorney for Defendant
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(248) 591-9291

Dated: October 20, 2004

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

ALVIS COATINGS, INC.

Plaintiff,

Civil Action No. 3:04-CV-374
Hon. Carl Horn, III

v.

KEVIN BURNS,

Defendant.

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BRIEF IN SUPPORT

On July 30, 2004, Plaintiff, Alvis Coating, Inc. ("Alvis") filed the present lawsuit against 10 John Doe Defendants who are alleged to have posted unflattering comments regarding Alvis's products and business practices on a variety of home improvement websites (i.e. www.bobvila.com and www.oldhouse). The Complaint alleged five causes of action: Violation of The Lanham Act §43(a); Violation of North Carolina Gen. Stat. §75-1.1, Unfair Competition Under North Carolina Common Law; Tortious Interference with A Business Relation; Defamation (*See Plaintiff's Complaint ¶¶ 23-44*) Accompanying the complaint, Plaintiff filed and Emergency Motion for Leave to Conduct Limited Expedited and Preliminary Discovery. In the motion, Plaintiff discovery for the purpose of identifying the Doe Defendants. (*See Plaintiff's Emergency Motion, pp.3-4*) On August 27th, 2004, the court granted in part Plaintiff's request and entered an ex

parte order permitting discovery for the purpose of identifying the identities, location, and legal status of Doe Defendants. (*See Order Expediting Preliminary Discovery*)

I. Comcast Subpoena

On October 11, 2003, Plaintiff issued a subpoena out of North Carolina against Comcast whose principal place of business in Mt. Laurel, New Jersey with a compliance date of October 18, 2004. The subpoena, requested all documents relating in any way to the person or persons who posted messages on the electronic bulleting board listed in its attachment. The subpoena does not explain the relevance of the requested information or relation to the claims made in the lawsuit. Comcast received the subpoena and gave notice to its customer that it would be releasing the requested information unless it received a formal objection by October 20, 2004.

II. Electronic Message Boards Referenced by Plaintiff's

The message boards referenced in Plaintiff's complaint (i.e. www.bobvila.com and www.oldhouse) are widely known informational sources for home repair products and services. Each day hundreds of individuals post messages on these boards commenting on their experience with different businesses and products. Since the messages often communicate a customer's satisfaction and/or dissatisfaction with certain products and businesses, the comments typically include a mixture of both both fact and opinion. Corporations and individuals can reply with their own statements in an effort to persuade readers of their position Responses have the same prominence as the original message and are seen by the same audience as the original postings. In this way, the message board is a true marketplace of ideas for discussion, deserving First Amendment protection.

III. Standard of Review

Presumably, Plaintiff seeks information about the Doe Defendant because of certain postings that are critical of its products and business practices. In Dendrite International, Inc. v. John Doe No. 3, 342 N.J. Super 134, 775 A.2d 756 (App. Div. 2001), the court explained the relationship that customer had with his Internet Service Provider (i.e. Yahoo) by stating, "Yahoo! is an ISP that, among other things, provides a service where users may post comments on bulletin and message boards related to the financial matters of particular companies. Yahoo! maintains a message board for every publicly-traded company and permits anyone to post messages on it." Id. at 761. As the court recognized, "Generally, users of the bulletin boards post messages anonymously under pseudonyms....Yahoo! guarantees to a certain extent that information about the identity of their individual subscribers will be kept confidential." Id. at 762

Similarly, the court in McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995), stated that there is a First Amendment right to speak anonymously. Plaintiff has made no showing to justify destroying this right of these internet users and instead has relied on a conclusory pleading as the basis for its subpoena. Plaintiff's pleading cites five examples of postings which it claims are actionable yet it fails to state with particularity whether such posts are, in fact, false. Without sufficient allegations or evidence to establish a prima facie case, the First Amendment demands that Defendant's right to speak anonymously be preserved. "People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to

discover their identities." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

IV. Discussion

Doe Defendant would lose his fundamental right to speak anonymously if this subpoena is enforced. Yet, Plaintiff has issued the subpoena with nothing more than a conclusory pleading that fails to set forth legitimate claims against any of the Doe Defendants much less provide factual support for these claims. The court should require the Plaintiff to demonstrate legitimate claims against Defendant so that it can balance Plaintiffs need for the requested information with Defendant's First Amendment right

A. Doe Defendant Has A First Amendment Right to Speak Anonymously

Plaintiff seeks to enforce a subpoena for information that would destroy Doe Defendant's right to speak anonymously. In this case, Plaintiff can demonstrate no compelling interest why that First Amendment right should be breached. The Supreme Court has held that the right to speak anonymously is protected under the First Amendment and has recognized the important historical role of anonymous writings, including the literature of Mark Twain and the advocacy of the Federalist Papers. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999); McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960). As the Court noted in Talley, "[T]he Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." Id.at 65. The Court expanded on this in McIntyre, stating, "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism,

regarding Alvis's products and business practices. Rather than pursuing a demonstrable cause of action against a real individual, Plaintiff is utilizing the legal fiction of a John Doe proceeding in order to discover information that may be helpful in suing other individuals under other possible legal theories. Without any established connection between its claims and the anonymous usernames, Plaintiff has subpoenaed Comcast to provide Defendant's personal and private account information. Compelling this disclosure violates Doe's First Amendment right to speak anonymously. Thus, Doe Defendant respectfully requests that this Court quash the subpoena.

A court order to compel production of individuals' identities "is subject to the closest scrutiny" when it impinges on fundamental rights. NAACP v. Alabama, 357 U.S. 449, 461 (1958); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). Furthermore, the abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as the production of names. NAACP, 357 U.S. at 461. Due process requires the showing of a "subordinating interest which is compelling" where disclosure threatens to significantly impair fundamental rights. Bates, 361 U.S. at 524; NAACP, 357 U.S. at 463.

Anonymity on the Internet is itself a fundamental right that must be protected absent a "compelling" need. Bates, 361 U.S. at 524; NAACP, 357 U.S. at 463. "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 enforces under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." Doe v. 2TheMart.com Inc., 140 F.Supp.2d 1088, 1093 (W.D. Wash.

2001). In holding that a corporation's need was not compelling enough to warrant disclosure when compared to the First Amendment right of an anonymous poster, the court in 2TheMart.com stated, "discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts." Id. at 1093.

Recent cases have required plaintiffs to demonstrate a compelling need for anonymous Internet users' private information. In Columbia Ins. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999), the plaintiffs sued several defendants based on registration of Internet domains that used the plaintiffs trademark. Summarizing the chilling effects of discovery, the court noted, "[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity." Id. at 578. The Seescandy.com court required the plaintiff to do four things before authorizing discovery against anonymous defendants: first, identify the individual defendants "with sufficient specificity" in order for the court to determine jurisdictional requirements are met; second, "identify all previous steps taken to locate the elusive defendant" in order to determine that a good faith effort had been made; third, demonstrate to the court that there are viable claims against the defendants, including the ability to survive a motion to dismiss; and fourth, justify the need for the information requested, including a identification of a limited number of people who might be served as well as how such discovery will lead to identifying information about the defendant that would make service of process possible. Id. at 578-581.

Interpreting Seescandy.com in a case that involved anonymous speech on a Yahoo! bulletin board, the court in Dendrite International, Inc. v. John Doe, No.3 342 N.J. Super 134 775 A.2d 756 (App. Div. 2001), focused on what the plaintiff must do to demonstrate that its need for the information is strong enough to justify discovery. The Dendrite court interpreted Seescandy.com as establishing "a flexible, non-technical, fact-sensitive mechanism for courts to use as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." Id. at 770. Rejecting the notion that plaintiffs need only be able to survive a motion to dismiss, the Dendrite court specifically focused on probable cause as mentioned in the third-prong of the Seescandy.com test, concluding that "by equating this prong to the probable cause for warrants, `plaintiff *must make some showing* that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing the specific identifying features of the person or entity who committed the act.'" Id. at 770 (quoting Seescandy.com, 185 F.R.D. at 580) (emphasis of Dendrite court). Such a showing is required to demonstrate a "subordinating interest which is compelling" under Bates. 361 U.S. at 524.

B. Plaintiff Has not Demonstrated A Compelling Interest That Would Warrant Destroying Defendant's First Amendment Right

Plaintiff has only provided only a weak, confusing, conclusory pleading. Under Bates, the court should require Plaintiff to demonstrate that the strength of its case is "a subordinating interest compelling" enough to justify abridging defendants First Amendment right. 361 U.S. at 524. The pleading does not even set forth a prima facie

case,[1] much less a compelling one, that any rights of the plaintiff have been violated by Defendant or anyone else. Both proper allegations and some evidence are required to show a compelling need. Neither one is presented by the Plaintiff

First, Plaintiff has failed to identify Defendant with specificity as required in Seescandy.com. Plaintiff's complaint refers to "Doe Defendants," but fails to present any identifying characteristics of these defendants. The complaint does not explain how Defendants are connected to the allegations in the suit.[2] Plaintiff complaint blanketly alleges that the messages are posted by individuals who are customers, former employees, and/or competitors. As such, Plaintiff's complaint fails to distinguish the different legal standard that may apply to each poster. In fact, several of Plaintiffs claims are only applicable if Defendant is, in fact, a competitor engaging in a similar trade or business practice. Plaintiff should not be allowed utilize the process of the court to facilitate a fishing expedition in the hopes that it may be able to identify someone against whom a demonstrable cause of action could be asserted especially when a Defendant's fundamental rights are at stake.

Second, Plaintiff has not identified any efforts it has made to contact Defendant or other posters to rebut the allegations that it claims are false. Plaintiff could attempt to e-mail Defendants, post messages on the message boards, or contact them through the other "various computers, servers, and Internet Bulletin Boards" mentioned in the Complaint.

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[1] Although the complaint states that the postings are false and/or misleading, Plaintiff has fails to state with particularity the facts that it believes are untrue. Without a showing that the statements are untrue, Plaintiff cannot demonstrate a claim for liability under any legally recognizable theory. Although Plaintiff may disagree with the user's characterizations (i.e. criticism of Plaintiff's products or services), statements of opinion are not actionable.

[2] If, in fact, the posters are not defendants and instead non-parties to the case, their First Amendment right should be analyzed under the test laid out in Doe v. 2TheMart.com Inc., 140 F.Supp.2d 1088 (W.D. Wash. 2001).

Third, Plaintiff must demonstrate it has a viable and compelling case. A conclusory pleading is not sufficient. Plaintiff should set forth specific actionable harm and the specific parties involved in a detailed fashion. Plaintiff fails to properly allege defamation. To state a cause of action for defamation, Plaintiff must allege what statements were made, allege what statements were false, state when and where they were published, and describe how *they* harmed the Plaintiff, explaining the nature of that harm. 5 Witkin, Summary 9th (1990) Torts, § 480, p. 564. Plaintiff alleges only that "Defendants have posted libelous and defamatory postings," about Plaintiff. (See Plaintiff's Complaint at ¶42-43) Yet the Complaint says nothing about the statements allegedly made or the authors. The reader cannot tell whether there were any false statements of fact or merely non-actionable statements of opinion. Furthermore, Plaintiff offers no statements or evidence to support its claims that the postings were made maliciously.

Plaintiff also fails to properly allege tortious interference. To state a cause of action for tortious interference, Plaintiff must describe the underlying wrongful act itself. See 5 Witkin, Summary 9th (1990) Torts, § 6, § 17, pp. 61 & 77. Instead, Plaintiff states tautologically that Defendants statements "constitute tortuous interference with its business." (See Plaintiff's Complaint at ¶37) The Complaint does not state the nature of the "wrongful actions". Moreover, Plaintiff must also describe how the underlying act interfered with its right to contract and how Plaintiff was harmed, including the nature of the harm. The complaint should describe the wrongdoing with sufficient particularity that defendant can assess and assert his or her defenses. Finally, once the underlying act and the interference caused have been stated, Plaintiff must still describe how that

interference was intentional. Beyond Plaintiff's conclusory pleading there is nothing to support that Defendant's were intentional. (See Plaintiff's Complaint at ¶37)

Fourth, Plaintiff has not explained why the requested discovery is necessary. Nowhere in the Complaint does Plaintiff link any specific wrongs to the identifying information requested. Plaintiff has not provided any reason to believe that the subpoena for Defendant's information is likely to yield information identifying the defendants. Additionally, the subpoena used by Plaintiff is excessively broad and goes beyond the purpose of identifying Defendants. In addition to user id and account information, the subpoena requests any "documents relating in any way to the person or persons who posted the messages," and have the potential to go far beyond identifying the Defendant. Each item requested under the subpoena must be specifically justified and limited to avoid abuse of the discovery process and violation of Defendant's rights.

V. Conclusion

Plaintiff needs to demonstrate a compelling interest to destroy the right to speak anonymously. Even if Plaintiff established some actionable claim against Defendants, the Court must weigh the strength and viability of that claim against Defendant's First Amendment right. Here, Plaintiff has not even provided information to support the conclusion that Defendant did anything wrong at all. Since Plaintiffs need not compelling, this Court should not abridge the fundamental right to speak anonymously.

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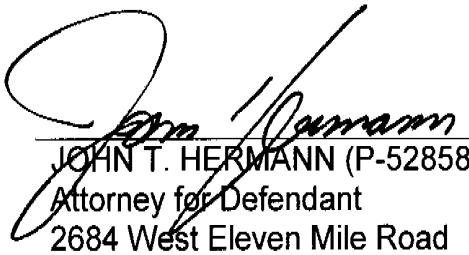
PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

JOHN T. HERMANN, being first duly sworn, deposes and says that on October 20, 2004 he served via U.S. Mail a copy of Defendant's Motion to Quash Subpoena along with a copy of this Proof of Service on Plaintiff 's counsel at the following address: Bank of America Plaza 101 South Tryon Street, Ste. 4000 Charlotte, NC 28280-4000



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