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IN THE 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-H

**RESPONSE OF ALVIS COATINGS, INC. TO MOTION TO QUASH SUBPOENA,
AND MOTION TO COMPEL COMCAST'S RESPONSE TO SUBPOENA**

Plaintiff Alvis Coatings, Inc. ("Alvis") respectfully requests that the Court reject the *Motion to Quash Subpoena* filed by an unidentified individual claiming to be one of the Defendants in this matter. This individual has no First Amendment right to make false and libelous statements on the Internet or elsewhere under a cloak of anonymity. Plaintiff further requests that the Court order that the entity to which the Plaintiff's Subpoena was directed, Comcast IP Services, immediately comply with the terms of the subpoena, without objection.

I. Procedural Background

On July 30, 2004, Alvis filed the present lawsuit against Defendants John Does One Through Ten. The suit is directed at, and aims to substitute as Defendants, the individual(s) who made false, misleading and disparaging statements with regard to Alvis, its business, products, employees and customers on a number of home improvement industry websites. The Complaint alleges causes of action for violation of Lanham Act, the North Carolina Unfair and Deceptive

Trade Practices Act, N.C.G.S. § 75-1.1, Unfair Competition Under North Carolina Common Law, Tortious Interference with Business Relations, and Defamation. With the Complaint Alvis filed a *Motion for Leave to Conduct Limited Expedited and Preliminary Discovery*. The Court granted the motion by *Order* dated August 27, 2004 *Order*. (See *Order Expediting Preliminary Discovery*, August 27, 2004, attached hereto at Exhibit A).

In its motion for expedited discovery, Alvis requested leave from the court to serve discovery requests for the limited purpose of identifying the persons responsible for making false statements anonymously in two Internet forums, one sponsored at www.bobvila.com and the other at www.oldhouse.com. The subpoenas to the two message board operators were narrowly drafted, and asked for documents relating to the identity of a number of specifically-identified messages posted in the forums. (See *Subpoena to Bobvila.com* and *Subpoena to Oldhouse.com*, attached hereto at Exhibit B).

In response to the subpoenas, the operators of [Bobvila.com](http://www.bobvila.com) and [Oldhouse.com](http://www.oldhouse.com) both identified specific Internet Service Providers ("ISPs") from which the specified messages originated, along with the numerical code coordinating to the specific computer or IP address from which each message was authored (e.g., ISP Roadrunner and IP address No. 24.164.46.149). Accordingly, it was necessary to serve a second round of subpoenas on the identified ISPs to identify the individual(s) associated with each particular IP address. Alvis noticed a trend in the IP addresses identified by [Bobvila.com](http://www.bobvila.com): 16 of the messages originated from a single source, IP address 68.62.45.214. The person(s) authoring these 16 messages used the following pseudonyms:

- Chuck

- N.martin
- Vince Doyle
- A fellow customer
- Jay Hanna
- Eddie Ranfern
- Virginia customer
- Ed Swanson
- Gary Victor (one message) and Gary V. (three messages)
- Luis Mendoza
- duped
- Jerry Lewis
- please no ads

The messages originating from IP address 68.62.45.214 using the above pseudonyms are rife with false and disparaging statements about Alvis, its officers, dealers and products. The author even alleges that several named officers and dealers of Alvis products are “criminals.”

Elsewhere this author states authoritatively that the Alvis product is “a back engineered paint” and “an elastomeric paint produced and purchased from a [sic] unnamed Fla. paint manufacturer” the “equal” of “[a] 4yr. warranty paint of [sic] the shelf at Big Lots,” and, contradicting that statement, that “the Alvis product is Duron’s Siding in a Can, privately labeled by Alvis.”

Alvis further narrowed the scope of its discovery and served two more subpoenas, specifically requesting that the two most significant ISPs identified, Comcast IP Services

("Comcast") and Roadrunner, provide documents sufficient to identify the name, address and telephone number of the individuals corresponding to specific IP addresses disclosed by Bobvila.com and Oldhouse.com. (The *Subpoena* to Comcast IP Services and the *Subpoena* to Roadrunner are attached hereto at Exhibit C).

After receipt of its *Subpoena*, Road Runner directed Alvis to its subsidiary company, Bright House Networks, which possessed the information and documents sought. Bright House Networks provided the identifying information requested. The other subpoena was served on Comcast on October 6, 2004. (See U.S. Mail green card indicating service of the *Subpoena* on Comcast on October 6, 2004, also attached hereto at Exhibit C). Pursuant to the Court's *Order*, which required compliance with any subpoena issued within 15 days of service, Comcast was required to respond to the subpoena by October 21, 2004. Comcast responded by requesting dates corresponding to IP address 68.62.45.214. In an effort to assist Comcast in providing the required response, Alvis served a revised *Subpoena* (also attached at Exhibit C) by mail on October 11, 2004 containing the additional information requested by Comcast.

Instead of producing the information required by the *Subpoena*, Comcast reported to Alvis that it was notifying the customer corresponding to IP address 68.62.45.214 (the customer using the pseudonyms above) of the Alvis subpoena. Comcast invoked the Cable Communications Policy Act as the purported basis for notifying its customer and refusing to produce the requested information or documents to Alvis, and advised Alvis that it believed that it was under an obligation to provide the customer 15 days to respond.¹

¹ Comcast's reliance on the Cable Communications Policy Act of 1984, 47 U.S.C. § 551, is misplaced. 15 U.S.C. § 551(c) provides, "(1) Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a

After notifying the customer, Comcast refused to provide the subpoenaed information. Alvis made an additional demand, extending the deadline for Comcast's response to October 25, 2004, in an effort to resolve the dispute without involving the court and in order to comply with the provisions of Rule 37 of the Federal Rules of Civil Procedure. Comcast again failed to respond by the stated deadline. On October 25, the potential John Doe defendant purportedly connected to IP address 68.62.45.214 moved to quash the subpoena.

II. The Motion to Quash Filed by the Potential John Doe Defendant Is Procedurally Defective, Having Not Been Filed for a Proper Reason Set Forth in Rule 45

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, "[o]n timely motion, a court by which the subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer to travel to a place that is more than 100 miles from the place where the person resides, is employed or regularly transacts business in person, except that, subject to the provisions clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial a be

person other than the subscriber or cable operator. (2) A cable operator may disclose such information if the disclosure is – (A) necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber; (B) subject to subsection (h), made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed; (C) a disclosure of the names and addresses of subscribers to any cable service or other service, if—(i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and (ii) the disclosure does not reveal, directly or indirectly, the – (I) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or (II) the nature of any transaction made by the subscriber over the cable system of the cable operator; or (D) to a governmental entity as authorized under chapter 5119, 121, or 206 of title 18, United States Code [18 USC §§ 2510 et seq., 2701 et seq., or 3121 et seq.], except that such disclosure shall not include records revealing cable subscriber selection of video programming from a cable operator."

At least one federal court has ruled that the Cable Communications Policy Act does not even apply to Internet customers of cable service providers. In *In re United States*, 157 F. Supp. 2d 286 (S.D.N.Y. 2001) the U.S. District Court for the Southern District of New York found that 47 U.S.C.S. § 551 had to be read to apply only to a narrow definition of cable service that would exclude the provision of Internet access by a cable company. Even if Comcast was required to notify its customer under this Act, the Court should clarify by Order that the information requested pursuant to the *Subpoena* to Comcast indeed must be provided because of the likely violation of civil law by the customer.

commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

Rather than formulate an argument based on the Federal Rules, and therefore a proper basis for filing a motion to quash, John Doe I generally attacks the Alvis subpoena with strident First Amendment arguments. As set forth below, the false and disparaging statements of the person claiming to be a likely defendant in this matter do not receive protection under the First Amendment so as to require continued concealment of the speaker's identity.

III. The Motion to Quash Should Be Denied Because It Does Not Aim to Protect a Legitimate First Amendment Right Or Any Other Interest

A. Any First Amendment Right to Speak Anonymously Does Not Shield Statements That Violate the Law.

The First Amendment does not protect knowingly false speech. Solano v. Playgirl, Inc., 292 F.3d 1078, 1089 (9th Cir. Cal. 2002) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)). As John Doe I argues in his motion to quash, the Supreme Court has recognized that the right to speak anonymously is protected under the First Amendment to the Constitution. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999) (invalidating a Colorado statute that required initiative petition circulators to wear identification badges); McIntyre v. Ohio Election Comm., 514 U.S. 334 (1995) (overturning an Ohio law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature; Talley v. California, 362 U.S. 60 (1960) (invalidating a California statute prohibiting the distribution of any handbill that did not contain the name and

address of the person issuing the literature). The Supreme Court does not appear to have considered anonymous speech made on the Internet, but there does not appear to be any reason to differentiate Internet speech from other speech as regards the limited right to speak anonymously. See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563, 100 S. Ct. 2343 (1980) (the First Amendment, while offering protection to truthful commercial speech, does not protect false or misleading commercial speech); Rosenblatt v. Baer, 383 U.S. 75, 86, S. Ct. 669, 676 (1966) (Supreme Court acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation"); Gerz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S. Ct. 2997, 3007 (1974) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake").

The most analogous case in the Internet age appears to be Columbia Ins. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999). In Seescandy, the owners of the rights to the federally registered trademark SEE'S CANDIES sought to assert claims against the unknown registrar of the website www.seescandies.com. In determining whether to grant discovery for purposes of determining the identity of the individuals operating the allegedly infringing website, the court noted the dilemma created by an Internet user's ability to act anonymously and the difficulty created for parties who find themselves injured by the acts of these individuals. Id. at 578.

"In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances. However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. People are permitted to interact

pseudonymously and anonymously with each other so long as those acts are not in violation of the law.”

Id. (emphasis supplied).

Like the vast collection of Supreme Court precedent that preceded the Seescandy.com decision, the court recognized a clear limitation of the First Amendment right to freedom of speech, refusing to provide protection for speech that violates the law. John Doe I is perfectly within his rights to engage not only in thoughtful and intelligent dialogue on the Internet, but also in heated debate, base humor, foolish diatribe and thoughtless communication. However, once he engages in speech that is unlawful, First Amendment protection dissolves. When John Doe I made the decision to knowingly post false statements about the business and employees of Alvis, he gave away the right to have his speech remain anonymous and instead engaged in unprotected defamation and tortious interference. John Doe I's comparisons of his false and disparaging postings to the thoughtful and historical political discussions contained in the Federalist Papers and the timeless literature of Mark Twain are farcical. As set forth below, at least a half dozen of the 16 statements associated with IP address 68.62.45.214 are libelous, and others are either libelous and/or constitute violation of North Carolina's Unfair and Deceptive Trade Practices Act and/or common law unfair competition.

B. The Statements of John Doe I Are Libelous, False, Defamatory, and Constitute Unfair and Deceptive Trade Practices.

The 16 postings originating with the owner of IP address 68.62.45.214 are attached hereto at Exhibit D. At least six of those postings are false and defamatory to Alvis, its employees and/or dealers. Those six as well as at least six others form the basis for liability on the part of John Doe I for Unfair and Deceptive Trade Practices and/or Unfair Competition.

Counsel for John Doe I, John Hermann, acknowledges that at least two of the statements listed as examples in the Complaint were authored by his client, John Doe I. Mr. Hermann also agreed, in a phone conference with Plaintiff's counsel, that at least some of the statements believed to have been made by his client, John Doe I, contain falsities. The literally false statements authored by the owner of IP address 68.62.45.214 are outlined below, together with the declaration of Craig Hartman, Chief Operating Officer of Alvis, who testifies as to the falsities of several of the statements.

Many other statements of John Doe I are expected to be proven false or to constitute violation of North Carolina law after further discovery. To prove violation of North Carolina's Unfair and Deceptive Trade Practices Act, Alvis must prove: (1) an unfair or deceptive act or practice; (2) which is in or affects commerce; and (3) which proximately caused injury. N.C.G.S. § 75-1.1(a). The term "unfair" under the Act is broader than and includes the concept of "deception." Rice v. Vitalink Pharmacy Services, Inc., 124 F.Supp.2d 343, 347-48 (W.D.N.C. 2000). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." Opsahl v. Pinehurst, Inc., 81 N.C. App. 56, 69 (1986). Whether the conduct was unfair or deceptive is a legal issue for the court. Ellis v. Northern Star Co., 326 N.C. 219 (1990). Regarding unfair competition, the North Carolina Supreme Court has stated that the "test" for unfair competition "is simple, and lies in the answer to the question: Has the plaintiff's legitimate business been damaged through acts of the defendants which a court of equity would consider unfair?" Carolina Aniline & Extract Co. v. Ray, 221 N.C. 269 (1942). In order to state a claim for defamation in North Carolina, the plaintiff must allege "that the defendant caused injury to

the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person.” Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 29 (2002), (citing Tyson v. L’eggs Products, Inc., 84 N.C. App. 1, 10-11 (1987)). As shown below, the statements of John Doe I fulfill the elements of these causes of action.

1. John Doe I Made at Least Six False Statements Anonymously Between February 24, 2004 and May 13, 2004.

a. Post Number 215268 Contains False Statements

In Post Number 215268, using the pseudonym Chuck, John Doe I stated to the public on May 13, 2004:

“[b]y the way ,did you know that the Alvis product is Duron’s Siding in a Can,privately [sic] labeled by Alvis and available to consumers everywhere.... With a 5 Year Warranty. It’s Paint.”

(See Exh. D, Post No. 215268). It is false that Alvis sells a product that is a privately labeled Duron product. It is false that Alvis sells Duron’s “Siding in a Can” product. It is false that the ALVIS SPRAY ON SIDING® exterior coating product is an ordinary paint product. (Declaration of Craig Hartman (“Hartman Decl.,” attached hereto at Exhibit E), at ¶ 3). To the contrary, the premier product of Alvis, ALVIS SPRAY ON SIDING®, is privately manufactured for Alvis by a company other than Duron, and cannot be bought over the counter or by “consumers everywhere.” The ALVIS SPRAY ON SIDING® product comes with a limited, transferable lifetime warranty. The ALVIS SPRAY ON SIDING® product is not ordinary paint, but rather is a thick coating with a high solids content including a high content of polymers and resins. (Hartman Decl., ¶ 4).

b. *Post Number 210945 Contains False Statements*

In Post Number 210945, using the pseudonym N. Martin, John Doe I stated to the public on April 28, 2004:

“I was told by a Duron insider that this is the product that Alvis buys and has labeled “Spray on Siding” [sic] Funny, nowhere does Duron say it has a lifetime warranty. Deception abounds with Alvis Coatings, Inc.”

(See Exh. D, Post No. 210945). It is false that Alvis buys and labels a product made by Duron. (Hartman Decl., ¶ 5).

c. *Post Number 209918 Contains False Statements*

In Post Number 209918, using the pseudonym Vince Doyle, John Doe I stated to the public on April 25, 2004:

“[a] while back a 30 yr. chemist posted that Alvis Spray on Siding was a back engineered paint. ...Their product is an elastomeric paint produced and purchased from [sic] unnamed Fla. paint manufacturer....they include additives to mask and change test results. A 4yr. warranty paint of [sic] the shelf at Big Lots is its equal.”

(See Exh. D, Post No. 209918). It is false that Alvis’ Spray on Siding exterior coating product is “purchased from an unnamed Fla. paint manufacturer.” Alvis also never has added or has had anyone add additives to its products to manipulate or change test results. (Hartman Decl., ¶ 6).²

² That Alvis has not declared false other statements in this or any other posting should not be taken as an acknowledgment that they are truthful. For example, Alvis does not know what the author professes to believe the terms “elastomeric paint” or “back engineered paint” mean, and chooses not to comment on their truthfulness or falsity until other facts are brought to light through discovery or otherwise.

d. Post Number 185841 Contains False Statements

In Post Number 185841, using the pseudonym Eddie Ranfern, John Doe I stated to the public on February 24, 2004:

“[s]limy companies like Alvis ... are giving a perfectly legit product and hundreds of honest hard working people a bad name. At least this site gets these creatures out from under their rocks where all can see them for what they are. Thank you Michigan consumers for exposing these frauds.”

(See Exh. D, Post No. 185841). It is false that Alvis is a slimy company or that the company is a “fraud.” It is false that Alvis is giving its products, employees and others associated with Alvis Spray on Siding exterior coating products a bad name. (Hartman Decl., ¶ 7). Alvis is a company engaged in the business of distributing, and authorizing others to use, distribute and apply coating products used in commercial, residential and industrial applications. Alvis products are distributed through independently owned dealers who market, sell and install such products including, *inter alia*, Alvis Spray On Siding® permanent coating products, to their customers in their territories. The Alvis dealer network now makes Alvis products available in approximately 75 markets in 29 states throughout the nation. (Hartman Decl., ¶ 7).

e. Post Number 204527 Contains False Statements

In Post Number 204527, using the pseudonym Jay Hanna, John Doe I stated to the public on April 9, 2004:

“The truth is that Midwest Spray on Siding has replaced the bankrupt Permacoat of Michigan and is attempting to prop up Robert Lahousse, while he avoids the michigan [sic] attorney general and all those he has cheater [sic] out of their hard earned dollars.alvis [sic] continues to bless this operation at the same tim [sic] as their top sales executive disappears wulith [sic] a boat-load of funds...Anton,Dobyne,Hartman,Ard, Caldwell [sic]....all criminals.

(See Exh. D, Post No. 204527). It is false that a top sales executive of Alvis disappeared with a “boat load” of company funds. Craig Hartman, the Chief Operating Officer of Alvis, particularly expresses outrage at the accusation by John Doe I that he is a “criminal,” since he never has been charged with or convicted of any crime. (Hartman Decl., ¶ 8).

f. Post Number 204812 Contains False Statements

In Post Number 204812, using the pseudonym “A fellow customer,” John Doe I stated to the public on April 10, 2004:

[i]n a mad scramble to collect as much monies as possible,Permacoat [sic] and Alvis made the decision to for go [sic] the smaller job and sign up as many large jobs as possible to get the larger profits to keep them afloat and to make sure they did as many of those jobs as possible before the weather stopped applications,regardless [sic] of the quality control.

(See Exh. D, Post No. 204812). It is false that Alvis “signed up” jobs of any kind. Alvis is a company in the business of selling products to its authorized dealers. The sale of applications of those products to consumers is the sole responsibility of those authorized dealers. (Hartman Decl., ¶ 9).

2. In At Least Two Other Statements Made by John Doe I, John Doe I Purports to Represent a Competitor of Alvis

Not only does John Doe I disparage Alvis, posting blatantly false information about its products and employees, but John Doe I also endorses the competitors of Alvis, promoting the benefits of another exterior coating product company and its products.

In Post Number 204817, using the pseudonym “Virginia Customer,” John Doe I stated to the public on April 10, 2004:

“[t]hey fixed my Alvis mess with what I think is the AmViCo product and I couldn’t be happier with the results.”

(See Exh. D, Post No. 204817).

In Post Number 207445, using the pseudonym Ed Swanson, John Doe I stated to the public on April 18, 2004:

“I agree that of the many products out there ,only [sic] Alvis Spray on Siding is problematic. I chose the AmViCo product and have had 2 years of great results here in Michigan.”

(See Exh. D, Post No. 207445). On information and belief, these statements also are false and will be proven so during discovery of this matter. Moreover, they specifically promote the alleged benefits of the products of an Alvis competitor. The author on April 10 claimed to be a “Virginia customer” who had used the product of an Alvis competitor, and yet 8 days later, on April 18, claimed that he had had two years of “great results here in Michigan.” Unless the author lives in two places at one time, at least one (and probably both) of these contradictory declarations will prove to be false. These statements will be shown to violate North Carolina’s prohibition against unfair competition and/or the Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1.

3. In the Remaining Statements, John Doe I Contradicts Himself Such That at Least Some of the Statements Will Be Shown to Be False, Defamatory, Libelous, and Constitute Unfair Competition and Unfair and Deceptive Trade Practices.

In addition to John Doe I’s false statements regarding Alvis and the positive remarks directed to an Alvis competitor, John Doe I poses as a number of different characters, in order to provide additional false and disparaging comments regarding Alvis and its business.

In Post Number 210546, John Doe I represents that he is a potential customer of Alvis, who has not yet agreed to purchase the Alvis Spray on Siding exterior coating products. In this post, using the pseudonym Gary V., John Doe I stated to the public on April 27, 2004:

"I am so glad I read this before I paid the kid who represented this Alvis stuff as Lifetime."

(See Exh. D, Post No. 210546).

Apparently John Doe I did not take his own advice. In Post Number 211734, John Doe I represents that he is a current customer of Alvis who has had the Alvis Spray on Siding exterior coating product applied to his home and is now experiencing difficulty contacting an Alvis dealer regarding repairs. In this post, using the pseudonym Gary Victor, John Doe I stated to the public on May 1, 2004:

"I called there [sic] number 3 times and have yet to receive a call back since Feb. I called the same number for a free estimate and got a call back the same day from Robert. When I asked about repairs he became surly and told me that I was talking to the wrong people."

(See Exh. D, Post No. 211734).

John Doe I not only claims that he is a potential customer and a disgruntled existing customer of Alvis, but he also claims he is both a former installer of Alvis products who no longer installs Alvis products, as well as a currently-well-connected insider. In Post Number 208205, John Doe I represents that he is a former installer of the Alvis Spray on Siding exterior coating product, as well as an installer of the products of Alvis competitor. In this post, using the pseudonym Luis Mendoza, John Doe I stated to the public on April 20, 2004:

"I have been a [sic] installer for this and some other similar products. ... I've been installing the Alvis product in Michigan, North [sic] Carolina, Illinois [sic] and Texas with similar results."

(See Exh. D, Post No. 208205).

In Post Number 226703, John Doe I represents that he is an Alvis insider having specific information about Alvis' business and dealers. In this post, using the pseudonym Gary V., John Doe I stated to the public on June 23, 2004:

"I was informed by a former supplier that he received notice [of the purported bankruptcy filing of a purported Alvis dealer] and thus ends any chance of customers remedies against the defunct Alvis dealer."

(See Exh. D, Post No. 226703).

About the only consistency in these postings is John Doe I's butchering of spelling and grammatical rules. It simply is impossible that John Doe I is each of the individuals he purports to be in these postings. The only explanation is that many of the statements of John Doe I are false, and willfully aimed to wreak damage on Alvis, its business and reputation. As stated by Mr. Hartman, these statements in fact have caused Alvis financial and reputational harm.

(Hartman Decl., ¶ 2). Such statements are not protected by the First Amendment and the identity of the author of these statements should be identified.

C. Alvis Has a Compelling Need to Identify the Person(s) Making False and Defamatory Statements Against Alvis, and Has Met Its Burden.

Federal courts understandably have struggled with the Internet and the implications of the new technology on First Amendment jurisprudence. In Seescandy, the Northern District of California ruled that four limiting principals should apply to discovery aimed to reveal the identity of anonymous Internet speakers. First, the District Court required that the plaintiff identify the targeted individual with some specificity so the court could determine if he or she truly was a person amenable to suit. Alvis has met that burden by associating 16 public statements with a single IP address. Second, the plaintiff was required to identify all previous

steps taken to locate the defendant, justifying the failure to properly serve. *Id.* at 578-579. The Court now is well familiar with the efforts of Alvis to uncover the source of the false statements about it and its products and employees, which information is not otherwise available.

Third, the plaintiff was required to show that the case would withstand a motion to dismiss, "to prevent abuse of this extraordinary application of the discovery process and to insure that plaintiff has standing[.]" *Id.* at 579-80. As set forth above, the statements attributable to John Doe I constitute, *inter alia*, defamation, unfair competition and a violation of North Carolina's Unfair and Deceptive Trade Practices Act. Fourth, the plaintiff was required to file a discovery request justifying the need for the information requested. *Id.* at 580.³ Here, Alvis not only made a specific motion to the Court prior to the service of any subpoenas which outlined the need of Alvis for the subpoenas based on the false statements then available, but Alvis now also has connected many of those statements to a single source, John Doe I, and has furthered its request justifying the need to obtain the identity of John Doe I in this brief.

Similarly, in *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (Va.Cir.Ct. 2000), rev'd on other grounds, 261 Va. 350, 542 S.E.2d 377 (Va. 2001), the court reviewed a subpoena seeking the identity of certain John Doe defendants who allegedly had made defamatory statements and disclosed confidential information online. The Virginia lower court recognized the First Amendment right to Internet anonymity, and held that an Internet service provider could assert that right on behalf of its users. The court applied a two part test determining whether the subpoena would be enforced. First, the court must be convinced by the

³ Other courts, in interpreting *Seescandy.com*, have focused on the third prong, as well as the court's statement that the "plaintiff must *make some showing that an act giving rise to civil liability actually occurred*," and that the discovery is aimed at identifying the person who committed that act. *Dendrite International, Inc. v. John Doe, No. 3*, 342 N.J. Super 134, 775 A.2d 756 (N.J. App. Div. 2001) (emphasis supplied).

pleadings and evidence submitted that "the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where the suit was filed[.]" Second, "the subpoenaed identity information [must be] *centrally needed to advance that claim.*" (emphasis added). In that particular case, because the court concluded that the plaintiff had met these requirements, the discovery was allowed. The Virginia court concluded that the compelling state interest in protecting companies outweighed the limited intrusion on the First Amendment rights of any innocent Internet users. Under this different but related standard, Alvis meets its burden.

As stated by the U.S. District Court for the Western District of Washington in John Doe v. 2themart.com, Inc., 140 F. Supp.2d 1088 (W. Dist. Wash. 2001), interpreting the Seescandy.com and America Online, Inc. cases:

The courts in Seescandy.com and America Online, Inc. applied similar factors. Both required a showing of, at least, a good faith basis for bringing the lawsuit, and both required some showing of the compelling need for the discovery sought. In both cases, the need for the information was especially great because the information sought concerned J. Doe defendants. Without the identifying information, the litigation against those defendants could not have continued.

Id. at 1094-1095. The Court went on to articulate its own balancing test, stating that it would consider four factors in determining whether a subpoena will issue: (1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source. Under this third but related standard, Alvis meets its burden as to all counts.

The First Amendment does not protect false speech. John Doe I has engaged in a willful, concerted attack on Alvis for the purpose of harming Alvis, its business, reputation, employees, products and goodwill. His efforts have been wanton and without consideration of the rights of Alvis -- or the truth. The Court should reject John Doe I's attempt to keep his name from being associated with the words written by him. Instead, the Court should order that Comcast immediately comply with the *Subpoena* and the Court's prior order and that sunshine be shed on the identity of John Doe I so that he may answer in Court for the harm he has done to Alvis.

Alvis certifies that, pursuant to Rule 37, it has sought to confer with Comcast in good faith before filing this motion.

IV. Conclusion and Prayer for Relief

Alvis respectfully requests that the court deny the motion to quash filed on behalf of John Doe I, order immediate compliance with Court's order and subpoena by Comcast, and, in discretion of Court, grant Alvis its costs and attorneys' fees associated with making this motion pursuant to Rules 37 and 45.

Respectfully submitted, this 8th day of November, 2004.



Jason M. Sneed (N.C. State Bar No. 29593)
S/ Benjamin Pleune (N.C. State Bar No. 28748)
ALSTON & BIRD LLP
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Telephone: (704) 444-1000
Facsimile: (704) 444-1111

Attorneys for Plaintiff
ALVIS COATINGS, INC.

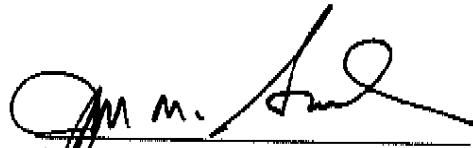
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of RESPONSE OF ALVIS COATINGS, INC. TO MOTION TO QUASH SUBPOENA, AND MOTION TO COMPEL COMCAST'S RESPONSE TO SUBPOENA was served by placing a copy in U.S. Mail, postage prepaid, and addressed to the following:

John T. Hermann, P.C.
2684 West Eleven Mile Road
Berkley, Michigan 49072
Attorney for John Doe I

Matthew Moleski
Network Abuse / Policy Observance Agent
Comcast IP Services
1800 Bishops Gate Blvd.
Mt. Laurel, New Jersey 08054
Subpoenaed Entity

on the 8th day of November, 2004.


An Attorney for Plaintiff