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John Doe No. 3 ("aquacool_2000")

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANSWERTHINK CONSULTING GROUP, INC., a Florida Corporation,

Plaintiff,

vs.

JOHN DOE #1, aka "ansr_sucks," JOHN DOE #2, aka "bobkaus_daddy," JOHN DOE #3, aka "aquacool_2000," JOHN DOES #4-12, individuals whose names are presently unknown,

Defendants.

DISCOVERY MATTER

CASE NO. CV 00-03407-NM (CTx)

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA

DATE: June 12, 2000
TIME: 2:00 p.m.
CRTM: K

I. INTRODUCTION AND SUMMARY OF PROCEEDINGS.

This motion arises from two lawsuits pending in the Southern District of Florida. Defendant responded to Plaintiff's initial lawsuit, *AnswerThink v. John Doe* (Case No. 00-00709) with an Application Under Rule 12(d) or Alternatively Motion for Judgment on the Pleadings that is still pending. Defendant has also filed a Motion for Protective Order and Sanctions based, in part, on the subpoenas that Plaintiff caused to be served in that first lawsuit. A copy of that motion is attached as Exhibit H. One of those subpoenas, to Earthlink, was the subject of an earlier motion to quash that was addressed by this Court in an April 6 minute order that stayed compliance with the subpoena.

Plaintiff filed a second lawsuit, *AnswerThink v. Hackett* (Case No. 00-01223) that has now been transferred to Judge Moore, the same judge who is handling the first lawsuit. The instant motion addresses a subpoena to Earthlink that was issued in the second lawsuit, a subpoena that is identical to the first Earthlink subpoena.

Plaintiff vociferously attacks the instant motion to quash the second Earthlink subpoena, but fails to come to grips with a key factor – this Court's April 6 minute order on the earlier motion to stay the first Earthlink subpoena.[1] Plaintiff would like to pretend that this Order does not exist, or that it was unaware of it. The Court stayed compliance with the first Eathlink subpoena pending a ruling on a motion to dismiss that is still pending in the Southern District of Florida. Plaintiff claims that it was unaware of the Order when the second subpoena was served. But this does not explain a failure to abide by the Order once Plaintiff became aware of it.

In reality, Plaintiff has no justification for service of a second, identical subpoena to Earthlink under the guise of the second lawsuit. There is no explanation

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[1] The order states that there was no compliance with Local Rule 7.15. But that rule applies to discovery motions filed pursuant to Federal Rules of Civil Procedure 26-37. The first motion, and this one, are filed pursuant to Fed.R.Civ.P. 45. Arguably, Local Rule 7.15 and the joint stipulation requirements are inapplicable to a motion to quash a subpoena.

Plaintiff contends that "aquacool" has revealed his identity and/or conceded that he is Greg Hackett. This is not accurate.[2] Plaintiff alleges that Mr. Hackett is "aquacool" based on information that was improperly obtained from Yahoo! The Motion for a Protective Order and Sanctions seeks to remedy this situation by limiting Plaintiff's use of the information. Plaintiff should not be permitted to profit from its misuse of the subpoenas to further erode aquacool's privacy interests.

III. THE SECOND COMPLAINT IS MERITLESS.

The lynchpin to the second complaint remains the comments that aquacool allegedly posted on the Yahoo! message board for AnswerThink. See paragraphs 25, 29 and 32 of Exhibit D. Examples of the allegedly libelous comments were attached to the first complaint and it was painfully obvious that they could not support a defamation claim. Plaintiff now employs the artifice of refusing to identify the comments that support its second complaint because of the tremendous harm that identification of these comments would supposedly cause. This is a transparent ploy and there is no indication that the comments which allegedly support the second lawsuit are any different from the comments cited in the first complaint.

Plaintiff has now trumped-up the allegations that these comments are somehow a violation of an employment agreement. Of course, Plaintiff is unwilling or unable to identify which, if any, of the comments on the Yahoo! message boards contained important and highly sensitive trade secrets. The lack of specificity reveals the inherent weakness of Plaintiff's case.

Based on these disingenuous allegations, Plaintiff reaches the unremarkable conclusion that the First Amendment does not preclude an action for breach of contract. This truism presupposes, of course, that a breach has occurred. Plaintiff's flimsy allegations are not dispositive on this issue.

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[2] If Plaintiff is convinced that Mr. Hackett is aquacool, the second earthlink is unnecessary.

The cases that Aquacool has cited, including NLRB v. Midland Daily News, infra, recognize that courts must be on guard to prevent threadbare complaints from being used as a pretext to obtain private information. The plaintiff in these situations must do something more than rely on the allegations of the complaint in order to justify the discovery. Plaintiff fails miserably at this test.

IV. CONCLUSION.

Defendant has taken measures to defend his privacy interests through the filing of a Motion for Protective Order in the first lawsuit. Any ruling on that motion will affect discovery in both cases. Plaintiff should not be allowed to disregard this Court's April 6 order, and the pending Motion for a Protective Order, via enforcement of the second Earthlink subpoena. The motion to quash should, therefore, be granted.

Dated: June 3, 2000

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aquacool_2000