

**IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA**

| | | |
|---|---|-------------------|
| FIRSTWAVE TECHNOLOGIES, INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | CIVIL ACTION FILE |
| v. |) | NO. 03-105421-42 |
| JOHN DOES 1-10, persons presently |) | |
| unknown to Plaintiff but whose identity |) | |
| will be included in amendments hereto |) | |
| when those identities are discovered, |) | |
| |) | |
| Defendants. |) | |

**DEFENDANT’S MOTION FOR PROTECTIVE ORDER
AND OBJECTION TO SUBPOENA DUCES TECUM
FOR DEPOSITION TO BELLSOUTH CORPORATION**

Defendant John Doe, through undersigned counsel and pursuant to O.C.G.A. §§ 9-11-26 and 9-11-30, hereby moves for the entry of a protective order to preclude the taking of the deposition duces tecum of BellSouth Corporation, and objects to the production, copying and inspection of documents that are the subject of the Subpoena Duces Tecum For Deposition served on BellSouth Corporation, and as grounds states:

Background

On or about July 29, 2003, Plaintiff filed and served the Subpoena Duces Tecum for Deposition of BellSouth Corporation (the “Subpoena”). A true and correct copy of the Subpoena is attached hereto as Exhibit “A.” The Subpoena requests the identity or other identifying characteristics of the persons described in the attached exhibit.

Undersigned have just been retained by John Doe based on his/her receipt of the notice of the Subpoena from proposed deponent BellSouth Corporation ("BellSouth"). Undersigned has contacted BellSouth and informed them of the pending filing of this motion. BellSouth informed undersigned of its intention to provide the requested documentation at the close of business Friday, August 15, 2003 with the exception of receipt of this motion. This motion shall prevent the production of such requested information and corresponding deposition until a Court Order is entered requiring the same or the parties agree to such.

Analysis

The Subpoena is improper as John Does has an inherent right to privacy for his/her activities on the internet as defined by the First Amendment. Although it is a new area of technology before the courts, the case law agrees that disclosure of the identity of internet users must be subject to careful scrutiny.

The right to the freedom of speech is protected by the First Amendment to the United States Constitution and this limitation on governmental interference has been imposed on the states via the Fourteenth Amendment. *See, e.g., First Nat'l Bank v. Bellotti*, 435 U.S. 765, 779-80, 98 S.Ct. 1407 (1978). The law is clear that a court order, even when initiated at the request of a private party in a civil action, constitutes state action and is therefore subject to constitutional limitations. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948).

The law is similarly clear that the First Amendment protection extends to speech via the Internet. *See, Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997) ("Through the use of web pages, mail exploders and newsgroups, [any person] can become a pamphleteer.") Additionally, it is well established that the First Amendment protects the right to speak with anonymity. *See, e.g., Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200, 119 S.Ct. 636 (1999) (invalidating, on First Amendment grounds, a Colorado statute that required initiative petition circulators to wear identification badges); *Talley v. California*, 362 U.S. 60, 65, 80 S.Ct. 536 (1960) (invalidating a California statute prohibiting the distribution of "any handbill in any place under any circumstances" that did not contain the name and address of the person who prepared it, holding that identification and fear of reprisal might deter "perfectly peaceful discussions of public matters of importance.")

As an obvious conclusion, the right to speak anonymously extends to speech via the Internet. The "ability to speak one's mind" on the Internet "without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." *Dendrite Intern., Inc. v. Doe No. 3*, 775 A.2d 756, 342 N.J. Super. 134 (N.J. Super. Ct. App. Div. 2001); *citing Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

In *Doe v. 2TheMart.Com*, the District Court held that "[s]tripping anonymity by civil subpoena enforced under liberal rules of civil discovery would have significant chilling effect on Internet communications and thus on basic First

Amendment rights.” 140 F.Supp.2d 1088 (W.D. Wash. 2001). Guided by the principles of the First Amendment, the Doe Court allowed the unknown defendant to protect his/her right without disclosing his/her identity. Id. at 1091.

The Court in Dendrite Intern., Inc. v. Doe No. 3, when faced with a subpoena to disclose the identify of anonymous Internet posters, offered “the following guidelines to trial courts . . . [t]he trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.” 775 A.2d at 768. In the Court’s analysis it sets forth two relevant guidelines. First, “[t]he 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 a claim upon which relief can be granted. . . .” Id. at 760. In other words, “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.

Second, “assuming 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 properly proceed.” Id. at 760-761.

To properly determine the Plaintiff's compliance, this case and any other similar anonymous internet cases “must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.” Id. at 761.

Taking into consideration the underlying principle in protecting a person's First Amendment rights to free “anonymous” speech, this Court should first carefully review the complaint to determine whether plaintiff has set forth a prima facie cause of action requiring disclosure of John Doe. The identity of John Doe may not be required at this point in the suit, as Plaintiff is able to proceed with its action and conduct investigation as to its website and any relevant security. Then the Court should balance the defendant's most basic First Amendment rights against (i) the strength of the prima facie case presented; and (ii) the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

Conclusion

In light of this burden, undersigned on behalf of John Doe requests an evidentiary hearing for proper analysis and balancing of the parties' rights and sufficiency of Plaintiff's claim, including necessity.

WHEREFORE, defendant John Doe respectfully requests the entry of a protective order as to the Subpoena Duces Tecum for Deposition of BellSouth Corporation, and such other relief the Court deems proper.

Respectfully submitted this 15th day of August, 2003.

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| |) | |
| Defendants. |) | |

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served
via facsimile and U.S. Mail on the following parties:

Bryan G. Harrison, Esq.
Morris, Manning & Martin LLP
1600 Atlanta Financial Center
3343 Peachtree Road, N.E.
Atlanta, Georgia 30326

BellSouth Corporation
c/o Prentice Hall Corporation
Suite 300
400 Technology Parkway South
Norcross, Georgia 30092
Attention: Mike Flammia

This 15th day of August, 2003.

Susan E. Edlein