THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY, MARYLAND

ZEBULON J. BRODIE	
vs.	**17-C-06-11665**
INDEPENDENT NEWSPAPERS, INC., et al	

MEMORANDUM AND ORDER

This matter stems from allegedly defamatory *per se* statements about Zebulon J. Brodie's ("Plaintiff") business that were published over the Internet via a web-forum by three unknown individuals. Plaintiff filed suit against the host of the web-forum, Independent Newspapers, Inc. ("INI"), and against the three unknown individuals as Defendants John Doe 1, 2, and 3 ("Defendants Doe").[1] INI moved to dismiss the action in its entirety and for a protective order shielding them from complying with Plaintiff's request for identifying information about the Defendants Doe. This Court dismissed Plaintiff's action, insofar as it pertained to INI, and denied their motion for protective order. INI now moves for reconsideration of that denial and requests this court articulate the analysis set forth.

FACTUAL AND PROCEDURAL HISTORY

On March 14, 2006, Plaintiff, a real estate developer and owner of two food stores, alleges that the Defendants Doe transmitted text to an Internet forum hosted by INI. The text accused the Plaintiff, among other things, of maintaining "dirty and unsanitary-looking food service places" and allowing trash from those establishments to "waft" into the nearby waterway. Additionally, with regard to a historical home, the Plaintiff claims that these defendants accused him of getting "away with torching it," and having no "sense of decency."[2] Additionally, the following discussion occurred:

> **CorsicaRiver**: I think there must be a special circle in Hell reserved for a greedy, selfish developer who deliberately burns down a beautiful pre-war Civil War [sic] house, after cutting down all the 100-year-old cypress trees around it. . . What I'm referring to is not in Centreville, but nearby in Church Hill . . . The white Greek Revival house facing 213 that Zeb Brodie sold 3 months ago for $1.85 mil to developers, who deliberately torched it this past weekend. . . . Shame on you, Mr. Brodie!

[1] The Defendants Doe are only known to Plaintiff by their screen-name pseudonyms; namely "CorsicaRiver," "chatdosoleil," and "Born & Raised Here," as they appeared on INI's forum during the event in question.

[2] For a more detailed background of this case see this Court's November 21, 2006, memorandum.

Born & Raised Here: Oh my God, they burned the place down? I can't believe it!!! I heard Bill Sharp bought it from Brodie, don't know if that's true or not. Has anyone else heard the same thing?

CorsicaRiver: Yes, they burned it down . . . and shame on Bill Sharp as well as on Mr. Brodie! I just found out some more information about the house. It was known as the Charles Cahall Farm and apparently dated back to the 1850s. In his 1980 historic sites survey, Orlando Ridout of the Maryland Historic Trust called it "one of the most carefully preserved farmhouses in the country," "remarkable," and "virtually untouched." There were also a well-preserved meat house, windmill, and granary . . .

SecretAgentMan: Bastards!

Chatdusoleil: . . . Has there been a news story on the fire this weekend? Or an investigation?

On May 22, 2006, Plaintiff filed suit against INI and the Defendants Doe alleging defamation and conspiracy to commit defamation. In his complaint, Plaintiff alleged that these statements, were false, were made knowingly false, were directed to individuals in his community and has harmed him. Subsequently, Plaintiff subpoenaed INI for information identifying the Defendants Doe. In response, INI filed a motion for protective order. On November 21, 2006, this Court issued an Memorandum and Order holding that INI was both a provider and user of an interactive computer service "under the CDA[3] and was thus immune from liability in the instant action with respect to the Defendant Does' statements." Additionally, the Court denied INI's motion for protective order. On December 21, 2006, INI moved to reconsider this Court's November 21, 2006 Order, to the extent that the motion for protective order was denied.

ANALYSIS

The parties disagree not only about what the proper application of the law is but also on what battleground the fight should be fought. For instance, INI claims they should not be required to disclose the names of the Defendants Doe because disclosure of the anonymous speakers would chill protected speech, and is further barred by proper application of any one of many standards. Plaintiff, on the other hand, posits that defamation *per se* is not protected speech, thus not implicating the First Amendment, and alternatively, proper application of certain standards concludes in his favor.

The first issue this Court must resolve is the protections afforded to the statements themselves. Defamatory speech regarding a private individual that involves a matter of purely private concern does not enjoy the full panoply of protections provided to statements concerning other individuals. While defamatory speech (whether libelous, slanderous, *per se*, or *per quod*) may be the subject of a civil "penalty" through a tort action brought by the injured party, the speech, nonetheless, may still be protected to a

[3] Communications Decency Act, 47 U.S.C. § 230.

certain extent. These protections are realized through restrictions on the ability of courts to grant recovery for defamed public officials; public figures; or private individuals when the subject matter of the statement is of public concern. *See New York Times v. Sullivan*, 376 U.S. 254 (1964)(public official may not recover for defamatory words relating to his official conduct in the absence of "clear and convincing" proof that the statement was made with "malice"); *Associated Press v. Walker*, 388 U.S. 130 (1967)(extending the rule in *New York Times v. Sullivan* to public figures); *Gertz v. Robert Welch*, 418 U.S. 323 (1974)(prohibiting liability without fault and restricting recovery of presumed or punitive damages in cases involving defamatory statement involving matter of public concern). However, when the matter relates to a private individual and is of a purely private concern, the constitutional limitations established by *Gertz* do not apply. *Gertz*, *supra* at 347 (so long as [the States] do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual). Instead, merely the elements of defamation are applicable. While the allegedly defamatory speech in the present case is not protected due to the status of the injured party or the subject matter, the anonymity of the speaker nonetheless implicates First Amendment analysis.

The right to speak anonymously is protected by the First Amendment and the disclosure of an anonymous speaker's identity implicates significant Constitutional safeguards. The First Amendment protects anonymous speech. *Talley v. California*, 362 U.S. 60 (1960)(distribution of anonymous handbills urging boycott of certain merchants allegedly involved in discriminatory practices, fell within the ambit of the protections afforded by the First Amendment); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 197-99 (1999)(requiring distributors of political campaign materials to wear identifying badges and file affidavits disclosing their identities held prohibitively burdensome on a person's right to anonymous speech); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995)(an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment). These First Amendment protections extend to speech on the internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 (1997)(in support of finding Communications Decency Act of 1996 unconstitutionally vague and overbroad, Court reasoned that the dramatic expansion of the internet as a new marketplace for ideas, in the absence of evidence to the contrary, requires presumption that governmental regulation of content of speech more likely to interfere with free exchange of ideas than to encourage it). However, even protected anonymous speech is not absolute. "The First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 741 (1996). "As a general rule, anonymous speakers should not be able to use the internet to freely defame individuals." *McMann v. Doe*, 460 F.Supp.2d 259, 263 (D. Mass. 2006).

The content of the statements (and the status of the injured party) in the case *sub judice* afford no heightened protection and is not within the realm of protected speech, however, anonymity of the speaker is and the protections afforded to anonymity must be balanced. Unfortunately, at this time, a well-settled balancing test is not readily apparent. Analysis regarding the protections to be afforded vis-à-vis an apropos standard to be employed when deciding whether disclosure of the identities of anonymous speakers should be permitted is a matter of first impression in both Maryland and the Fourth Circuit. Furthermore, this issue has resulted in varying decisions and standards throughout the country. The task before the Court is to find an equitably harmonious resolution between the right to redress of an aggrieved party for actionable wrongs they have sustained from unprotected speech while simultaneously giving due regard to the right to speak freely and anonymously. There have emerged numerous tests from the jurisdictions that have passed upon this issue so far by which courts have balanced the competing interests. As of this date, there has not emerged a consensus or majority approach.

As *Sony Music Entm't Inc. v. Does 1-40*, 326 F.Supp.2d 556 (S.D.N.Y. 2004), details, cases evaluating subpoenas seeking identifying information from internet service providers regarding subscribers who are parties to litigation have considered a variety of factors to weigh the need for disclosure against First Amendment interests. *Id.* at 564-5. These factors include: (1) a concrete showing of a prima facie claim of actionable harm, *see Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579-81 (N.D.Ca. 1999) (permitting plaintiff to request discovery, based on particular factors, to determine identities of defendants known only by Internet pseudonyms and domain name registration identities); *See generally, America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001); *Dendrite Int'l Inc. v. Doe*, 342 N.J.Super. 134, 775 A.2d 756, 760 (N.J. App. Ct. 2001); (2) specificity of the discovery request, *Seescandy.com*, 185 F.R.D. at 578, 580; *Dendrite*, *id.* at 760; (3) the absence of alternative means to obtain the subpoenaed information, *see Seescandy.com*, 185 F.R.D. at 579; (4) a central need for the subpoenaed information to advance the claim, *America Online*, 261 Va. 350; *Dendrite*, 775 A.2d at 760-61; and (5) the party's expectation of privacy, *Sony,* 326 F.Supp.2d 556 (2004).

INI urges this Court to employ the standard utilized by the Appellate Division of the Superior Court of New Jersey in *Dendrite Int'l Inc. v. Doe.* The *Dendrite* court held that the appropriate standard should: (1) require notice to the potential defendants and an opportunity to defend their anonymity; (2) require the plaintiff to specify the statements that allegedly violate his rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of his claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing his right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. *Dendrite*, 775 A.2d at 760-61. In *Dendrite,* a publicly traded corporation appealed from the denial of its request to ascertain the identity of one of four anonymous defendants. Specifically, John Doe No. 3 posted assertions on a message board hosted by Yahoo! that changes in company's accounting

policy resulted in misleading earnings, various contracts were being structured to defer income, and the president was actively "shopping" the company. The *Dendrite* court sought to "strike 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." *Id.*, at 141.

According to INI's position, this standard's virtuosity lies in its flexible nature and ability to provide for a preliminary determination based on a case-by-case assessment of the equities. Further, the test reflects the necessity for heightened scrutiny when the information sought by subpoena implicates individuals' First Amendment rights. The Court concludes, however, that it would be disingenuous and exceed all bounds of equity to inform a plaintiff that his right to seek redress is barred because he has not done something never before required of a similarly situated person, i.e., posting information to the Defendants Doe that he is seeking their identifying information. This Court refuses to adopt and apply the aforementioned *Dendrite* standard.

A corollary test, and, indeed, the standard upon which *Dendrite* was based, also provides illusory and ultimately unsatisfactory analytical standards. Under the *Seescandy* standard, when faced with a demand for discovery to identify an anonymous speaker prior to service being effected, a court should (1) identify the missing party with sufficient specificity to satisfy jurisdictional requirements, (2) identify all previous steps taken to locate the anonymous defendant, (3) establish that plaintiff's suit could withstand a motion to dismiss, and (4) require the plaintiff to file a request for discovery with the court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons on whom discovery be served. *Seescandy.com*, 185 F.R.D. at 578-80. Along with the *Dendrite* standard, many of the *Seescandy* steps would venture into the realm of civil procedure redundancy in the present case due, most assuredly, to its application to disclosure prior to service being effected. The requirement that the information is unavailable from any other source is irrelevant. So too is identifying the party satisfying jurisdictional requirements. The need to balance plaintiff's right to protect his good name versus the defendant's First Amendment right to free speech is no less present where plaintiff attempts to learn the identity by some other available means or where he attempts to learn it by subpoena. Indeed, a defendant's First Amendment rights are more likely to be protected by the court where a subpoena or deposition or other discovery is sought than where a plaintiff attempts to learn the identity of the party.

Under the *AOL* standard, the court should order a non-party, Internet service provider, to provide information concerning the identity of a subscriber: (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) 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 suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim. *See America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (2001). Requiring a plaintiff to merely have a "good faith" does little to protect an anonymous speaker's First

Amendment rights. *See John Doe No. 1 v. Cahill*, 884 A.2d 451, 458 (Del. 2005)(this "good faith" standard is too easily satisfied to protect sufficiently a defendant's right to speak anonymously).

Under the *Sony* standard, Plaintiff argues, a general standard of review for discovery should be used when determining any review of a challenge to a subpoena seeking the identities of anonymous posters. In other words, the court should determine where there is a reasonable likelihood that the discovery request will lead to identifying information that would make possible service upon particular defendants who could be sued in the court. *Sony Music Ent., Inc. v. Does 1-40*, 326 F.Supp.2d 556, 566 (2004). In *Sony*, plaintiffs -- seventeen record companies -- sued forty unidentified "Doe" defendants for copyright infringement, alleging that defendants illegally downloaded and distributed plaintiffs' copyrighted or exclusively licensed songs from the Internet, using a "peer to peer" file copying network. *Sony, id.*, at 558. The *Sony* court held that an individual who uses the internet to download or distribute copyrighted music without permission is engaging in the exercise of speech, albeit to a limited extent only and further concluded that such a person's identity is not protected from disclosure by the First Amendment. *Id.* The distinguishing factor between *Sony* and the case *sub judice*, thereby making its outcome inapposite, is the *Sony* court's finding of defendants' minimal expectation of privacy due to (1) the users' assent to the dissemination of their identities for violating copyright laws, and (2) the minimal expectation of privacy inherent in file to file sharing.

One commentator has negatively commented on the "new wave of standards being employed" by courts when dealing with the unmasking of anonymous individuals on the internet in light of First Amendment concerns. *See* Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards,* 83 Oregon L. Rev. 795, 801 (2004).

As there currently exists no well-settled and appropriate analysis to apply in the present case, the Court shall utilize all of the suitable standards used in other jurisdictions that have addressed this issue and then weigh the equitable balance thereby taking a mixed *Sony/Dendrite* approach. Plaintiff argues the *Sony* standard is the most appropriate to apply in this case because the facts are similar and the standard itself provides for discovery as contemplated by the Maryland Rules. Further, Plaintiff argues that he has satisfied the jurisdictional requirements of *Seescandy* because he alleged the statements were made to residents in Centreville, Maryland and all referred to properties, businesses, and businessmen in and around Centreville, Maryland. Thus, it is more likely than not that the alleged tortious activity occurred in Maryland. Next, Plaintiff was unable to ascertain the identities of the Defendants Doe by means of their screen names and were rebuffed by their efforts to obtain their names from INI. Further, Plaintiff maintains that the statements were defamation *per se* and thus he is entitled to a presumption that the statements were defamatory and injurious, regardless of the averment of special damages. Additionally, the information he seeks is made in good faith for a legitimate purpose, and is only that information sufficient to permit service of process on the Defendants Doe, and sufficient protections are available to prevent unnecessary disclosure to third parties

or for unintended purposes. He will be unable to "advance" his claim without the information. Finally, insofar as it pertains to the general standard of review for discovery, there is a reasonable likelihood that the discovery request will lead to identifying information that would make possible service upon particular defendants who could be sued in this court.

INI argues the *Sony* standard should not be applied in this case because the file to file sharing in that case involved non-expressive conduct. INI emphasizes that disclosure of the Does' identities is unwarranted in this case using any standard cited by either party. The basis for their last contention relies on the fact that every court to address the issue requires the court to satisfy itself that the plaintiff has stated a valid claim. Additionally, INI asserts that Plaintiff has pointed to no evidence that sheds light on his allegations beyond conclusory statements in the complaint. Specifically, INI asserts that the statements made by the Defendants Doe were not "of and concerning" Plaintiff; were matters of opinion, not fact; there has been no showing that the statements were false; and no showing that the statements were published with the requisite degree of fault.

This Court agrees with INI that, no matter what standard this Court utilizes in deciding whether or not to grant their motion for protection order, the piety of the First Amendment requires ensuring that Plaintiff has stated a valid claim of defamation.

Plaintiff has sued Defendants Doe for intentionally, and, alternatively, negligently making defamatory *per se* statements regarding his business that have caused him actual damages. The elements of defamation for a private individual [as in this case], are: (1) a statement tending to expose one to public scorn, hatred, contempt, or ridicule, (2) communicated to a third person who reasonably recognizes the statement as being defamatory, (3) provable falsity, (3) fault by either a negligence standard or an actual malice standard, and (4) harm. *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 510-11 (1995); *Gohari v. Darvish*, 363 Md. 42 (2001); *see also Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580 (1976). Fault may be based either on a negligent or a constitutional malice standard. *Shapiro v. Massengill*, 105 Md. App. 743, 771 (1995), *cert denied*, 341 Md. 28 (1995) (citations omitted). The standards have many important distinctions.

To prove constitutional malice the plaintiff must prove, by clear and convincing evidence, that the defendant published the statement either with reckless disregard for its truth or with actual knowledge of its falsity. *Id.* If the statement is defamatory *per se*, a presumption of harm to reputation arises as a matter of law and thus both presumed and punitive damages may be awarded. *Hearst Corp. v. Hughes*, 297 Md. 112, 125 (1983).

By contrast, the plaintiff must prove negligence by the preponderance of the evidence. *Shaprio, supra* at 771. While Maryland continues to recognize the distinctions between defamation *per se* and defamation *per quod*, a plaintiff seeking to impose liability for defamation *per se* based upon a negligent standard must still prove that the defamatory statement(s) caused actual damages to him. *Jacron*, 276 Md. at 597, 591; *Shapiro,* 105 Md. App., at 774. The plaintiff is not, however, required to prove the

defamatory character of the statement. *Shapiro*, 105 Md. App., at 773 (*citing Metromedia, Inc. v. Hillman*, 285 Md. 161 (1979)).

Plaintiff contends that the statements made were defamatory *per se* in that they tend to, and in fact did, injure him in his profession and employment. Words are *per se* defamatory when their injurious character is a self-evident fact of common knowledge, about which the court takes judicial notice and need not be pleaded or proved. *M&S Furniture Sales Co. v. Edward J. De Bartolo Corp.*, 249 Md. 540, 544 (1968); *see S. Volkswagen, Inc. v. Centrix Fin., LLC*, 357 F.Supp.2d 837, 843 (D. Md. 2005)(statement which disparages the business reputation of a plaintiff is one of the categories traditionally considered to be defamation *per se*); *Montgomery Ward & Co. v. Cliser*, 267 Md. 406, 422 (1972)(words which falsely charge a person with or impute to him the commission of a crime for which he is liable to be prosecuted and punished are actionable per se . . . .)(citation omitted); *Shapiro, supra* at 777 ([i]t is actionable [*per se*] to impute professional dishonesty to a lawyer or to call a lawyer a quack or a shyster or a crook)(citation omitted); *Carter v. Aramark Sports & Entm't Servs.*, 153 Md. App. 210, 238 (2003)(allegation that a person is a thief constitutes defamation *per se*)(citation omitted).

Defendant has attempted to give notice to the potential defendants and INI has done an admirable job of defending their anonymity. Plaintiff has specified the statements that allegedly violate his rights. This Court has reviewed the complaint to ensure that it states a cause of action based on each statement and against each defendant. It is true, as INI states, some of the statements by the Defendants Doe are "not of and concerning" Plaintiff. It is clear, for example, that, from the information provided as to one matter, the Defendants Doe were either referring to another individual (the person who burned the house down and not Plaintiff) or were speaking in opinion and hyperbole ("bastards!"). On the other hand, the statements that Plaintiff alleges in his Complaint, regarding Plaintiff's maintaining a "dirty and unsanitary-looking food-service place" and allowing trash from those establishments to "waft" into the nearby waterway most certainly refer to Plaintiff and are not within any privilege and are actionable.

CONCLUSION

The Motion for Protective Order, or reconsideration, shall be denied in part and granted in part. Plaintiff may enforce a subpoena regarding the identity of individuals who asserted that Plaintiff's business(es) was a "dirty and unsanitary-looking food-service place" and/or that Plaintiff's business(es) allowed trash to "waft" into the nearby waterway. As to all other matters, specifically including the burning of the subject house, the protective order will preclude discovery of individuals who purportedly made statements regarding that issue.

THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY, MARYLAND

ZEBULON J. BRODIE

vs.

INDEPENDENT NEWSPAPERS, INC., et al

17-C-06-11665

ORDER

For the reasons set out in the foregoing Memorandum, it is this 12 day of March, 2007 by the Circuit Court for Queen Anne's County

ORDERED, that the Motion for Reconsideration is **GRANTED** in part and **DENIED** in part; and it is

ORDERED, that the requested protective order is denied as to statements regarding Plaintiff's businesses to the extent providing available discovery regarding the identity of those individuals who made statements that Plaintiff's food service business was maintained in a "dirty and unsanitary-looking" manner, and was permitting trash from the business to pollute the nearby waterway; and it is

ORDERED, that the protective order is granted as to all other related discovery.

Thomas G. Ross
Judge

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