SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

Chambers of
Kenneth C. MacKenzie
Presiding Judge
(Morris and Sussex Counties)

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ON OPINIONS

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RE: Dendrite International v. John Does, et als.
Docket No. MRS C-129-00

Gentlemen:

The Court reserved decision following oral argument on July 28, 2000, the return date of plaintiff's Order To Show Cause. This letter contains the Court's findings of fact and conclusions of law.

STATEMENT OF FACTS

Dendrite International, Inc., ("Dendrite"), commenced this action for breach of contract, breach of fiduciary duty, defamation, misappropriation of trade secrets, and other causes of action against John Does Nos. 1 through 4, whose names are unknown at this time. (Verified Complaint at ¶¶ 29, 39 and 47). The John Doe Defendants are currently known by their user names: John Doe No. 1 is known as "implementor_extrodinaire;" John Doe No. 2 is known as "ajcazz;" John Doe No. 3 is known as "xxplrr;" and John Doe No. 4 is known as "gacbar." Dendrite believes that John Does Nos. 1 through 4 have acted willfully and maliciously. (Id.). Defendants John Does Nos. 1 through 4 are the authors of numerous messages posted under fictitious names on an internet-based financial

boards maintained by Yahoo!, Inc., ("Yahoo"). Dendrite alleges that John Doe's actions pose an immediate and continuing threat of harm to Dendrite, including the threat of the loss of employees. (Id. at ¶¶ 15, 21, 28, 37). Yahoo will not release the identity of the John Does without a subpoena or court order. (Certification of David A. Zonana, ("Zonana Cert."), ¶ 2). The relief Dendrite seeks would permit a subpoena to be served on Yahoo requesting production of documents sufficient to identify the name, address and/or e-mail address of the John Does.

Dendrite is a global provider of specialized integrated products and services for pharmaceutical customers and consumer product costumers. Dendrite is a New Jersey corporation and maintains its principal place of business in Morristown, New Jersey. (Verified Complaint at ¶ 4). The messages posted by John Does Nos. 1 through 4, at issue in this suit, are attached as Exhibits to the Certification of Michael S. Vogel. (Exhibit to the Certification of Michael S. Vogel, ("Vogel Cert.")). In their internet messages, John Does Nos. 1 and 2 state that they are current or former employees of Dendrite. (Verified Complaint at ¶ 11; Vogel Cert. at Exhibit C and Exhibit F). As such, John Does Nos. 1 and 2 are under a contractual obligation not to disclose Dendrite's proprietary or confidential information without permission for a period of two years from departure, not to induce Dendrite employees to terminate their employment and not to engage in activities that are adverse to the interests of Dendrite. (Verified Complaint at 10; Vogel Cert. at Exhibit B, Dendrite Employment Agreement, (the "Agreement"), at ¶¶ 6, 10 and 11). R. Bruce Savage, the Executive Vice President of Dendrite, certifies that since its inception, Dendrite has required all employees to sign a standard form employment agreement, which has always included a confidentiality provision. (Certification of R. Bruce Savage, ("Savage Cert.") at ¶ 3).

Paragraph 10(iii) of the Agreement states that during the period an employee is employed by Dendrite and for two years thereafter, he or she shall not:

> employ, attempt to employ or assist anyone else in employing any employee or contractor of Dendrite or induce or attempt to induce any employee or contractor of Dendrite to terminate their employment or engagement with Dendrite . . . .

(Id.). Dendrite argues that via the internet postings of John Doe No. 1, this portion of the employment agreement has been violated. Dendrite argues that John Doe No. 1 has also breached his[1] obligation not to induce Dendrite employees to terminate their employment with Dendrite through his March 28, 2000, posting. In that March 28, 2000, posting, John Doe No. 1 stated:

> I chat on this exchange because I want to alert the people like me at dendrite that there are better jobs at better companies out here and I stand to gain a lot of money in referral fees if they come work with me. Its not a VW bug like dendrite gives away to help fill there over 100 open positions but the cash from referring dendrite refugees will pay for a rather nice vacation.

[1]For the purposes of this Opinion, the Court will refer to all John Does as males. The Court is not aware of the gender or identity of any of the John Does.

(Vogel Cert. at Exhibit C).

Dendrite also alleges that John Does Nos. 1 and 2's message postings contain *per se* defamatory statements, which falsely accuse Dendrite and its management of fraudulent business practices. Dendrite looks to a statement made by John Doe No. 1 wherein he alleged that Dendrite has a policy of not paying bonuses. (Vogel Cert. at Exhibit D). John Doe No. 1 has posted messages in which he claimed that certain software products offered by Dendrite, pharmarep.com and MDConnect, do not exist. (Id. at Exhibit E). Dendrite asserts that this accusation is false. John Doe No. 2 has posted a message which stated that "upper management has threatened to fire me and all of my co-workers at least once a week. We work this way daily." (Id. at Exhibit F).

Dendrite argues that John Doe No. 3 has posted messages which falsely state that Dendrite's management was secretly and unsuccessfully "shopping" the company and, in addition, has posted messages which falsely assert that Dendrite has not been honest in its revenue recognition. (Id. at Exhibit G). The posted message read:

> John's got his contracts salted away to buy another year of earnings- and note how they're changing revenue recognition accounting to help it. However, the analysts have caught on to the lack of prospects here. That's why the stock has plunged and no short term tweaking is going to help, much. DRTE simply does not appear to be competitive moving forward. John knows it and is shopping hard. But Siebel and SAP already have turned him down. Hope Oracle does want in bad (and that's what they'll get). But it doesn't help job prospects in Morristown any does it?

(Id.). John Bailey, the President of Dendrite, denies that he is shopping the company. (Certification of John E. Bailey, ("Bailey Cert.") at ¶ 3). Mr. Bailey certifies that Dendrite has not approached Siebel or SAP concerning an acquisition of Dendrite, nor has Dendrite ever been "turned down." (Id.). Mr. Savage certifies that other than as required from time to time by the Financial Accounting Standards Board, Dendrite has not changed its revenue recognition policy. (Savage Cert. at ¶ 6). Mr. Savage states that Dendrite has refuted in detail and in public a report made by the Center for Financial Research and Analysis which asserted that Dendrite had changed its revenue recognition to boost earnings. (Id. at Exhibit A, the CFRA Report). Mr. Savage further states that the only annual increase built into Dendrite's contracts is an indexing normally based on the consumer price index. (Id.). Dendrite alleges that John Doe No. 3 has also revealed details of the workings of confidential contracts with third parties. (Vogel Cert. at Exhibit H).

Dendrite argues that John Doe No. 4 has posted confidential information on certain accounts within hours of the company learning of such information. (Vogel Cert. Exhibit I). In particular, just after midnight on April 20, 2000, John Doe No. 4 posted a message stating, "SEBL has beaten DRTE again, in a pharma deal not previously mention here. Anybody care to speculate?" (Id.). Later that day, John Doe No. 4 posted a message which read, "and a pharmaceutical company that just selected Siebel. Question: name three things that come from Switzerland." (Id.). Mr. Savage certifies that

these postings refer to the fact that Roche Canada had decided to renew a contract with Siebel rather than to enter into a contract with Dendrite. (Savage Cert. at ¶ 12). Mr. Savage states that Dendrite learned of this decision in the early evening of April 19, 2000. (Id.).

John Doe No. 4, certifies that he was never employed by Dendrite and that he has never performed any type of work for Dendrite. (Certification of John Doe No. 4, ("gacbar Cert.") at ¶ 7). Therefore, John Doe No. 4 claims that he could not have misappropriated any trade secrets of Dendrite as he has not been privy to such. (Id.). John Doe No. 3, stated in one of his postings that he has never worked at Dendrite, nor does he work for any of Dendrite's competitors. (Vogel Cert. at Exhibit H).

In his supplemental certification to the Court, Michael Vogel alleges that Dendrite's stock prices have dropped as a result of the postings made by the John Doe Defendants.

> March 28, 2000: Both John Does Nos. 1 and 3 posted messages. Vogel Cert. Exhibits C and G. At the close of trading, Dendrite stock had dropped approximately 3% in value. (Vogel Reply Cert. at ¶ 9; Exhibit C thereto).
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> April 3, 2000: John Doe No. 4 posted a message. Vogel Cert. Exhibit I. At the close of trading, Dendrite stock had dropped approximately 8% in value. (Id. at ¶ 10).
>
> April 7, 2000: John Doe No. 2 posted messages. Vogel Cert. Exhibit F. At the close of trading, Dendrite stock had dropped approximately 11% in value. (Id. at ¶ 11).
>
> April 10, 2000: John Doe No. 1 posted a message. Vogel Cert. Exhibit D. At the close of trading, Dendrite stock had dropped approximately 7% in value. (Id. at ¶ 12).
>
> April 20, 2000: John Doe No. 4 posted a message. Vogel Cert. Exhibit I. At the close of trading Dendrite stock had dropped approximately 8% in value. (Id. at ¶ 13).

Mr. Vogel attaches to his reply certification, articles regarding the ability of internet posters to disseminate information on the internet in order to manipulate stock prices. (Vogel Reply Cert. at Exhibits O, P & Q).

Yahoo has a Privacy Policy, in which Yahoo states that it is committed to safeguarding the privacy of its users. (Id. at Exhibit L). This Privacy Policy outlines how Yahoo uses the individual user's information, how Yahoo safeguards this information and with whom Yahoo will share this information. (Id.). Yahoo states that:

> ... as a general rule, Yahoo! will not disclose any of your personally identifiable information except when we have your permission or under special circumstances, such as when we believed in good faith that the law requires it or under the

circumstances described below....

> Yahoo! may also disclose account information in special cases when we have reason to believe that disclosing this information is necessary to identify, contact, or bring legal action against someone who may be violating Yahoo!'s Terms of Service or may be causing injury to or interference with (either intentionally or unintentionally) Yahoo!'s rights or property, other Yahoo! users, or anyone else that could be harmed by such activities. Yahoo! may disclose or access account information when we believe in good faith that the law requires it and for administrative and other purposes that we deem necessary to maintain, service, and improve our products and services.

(Id.).

RELIEF REQUESTED

Dendrite requests that the Court enter an Order granting Dendrite leave to conduct limited expedited discovery, including the issuance of a commission to take discovery out-of-state, for the purpose of obtaining information sufficient to identify defendants John Does Nos. 1 through 4 and serve them with the Complaint in this action. John Does Nos. 3 and 4 request that Dendrite's request for leave to conduct expedited discovery relating to the identity of John Does Nos. 3 and 4 be denied. John Does Nos. 3 and 4 also request that claims against them be dismissed.

ANALYSIS

Dendrite asserts that under the guise of fictitious on-line names, John Does Nos. 1 and 2 have admitted that they are current or former employees of Dendrite and have then gone on to breach their employment Agreements. Thus, Dendrite argues, providing it with ample basis upon which to file the Verified Complaint in this case. However, Dendrite states that absent the limited discovery sought herein, Dendrite cannot identify John Does Nos. 1 through 4 in order to obtain an enforceable remedy. In order to identify the defendants, Dendrite must be able to serve a subpoena on Yahoo, which has the information from which the defendants' identities may be uncovered (i.e. name, address, email address, IP address).

In deciding a similar issue, the California District Court stated that the traditional reluctance for permitting filings against John Doe defendants and the traditional enforcement of 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." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal 1999). The Court went on to state:

> 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. This ability to speak one's mind without the burden

> of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. 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 identity.

Id.

Similarly, in another case, the Virginia Circuit Court[2] dealt with the issue of whether the issuance of a subpoena duces tecum against AOL, which was not a party to the action, would constitute an unreasonable intrusion on a Doe's First Amendment rights, and whether a state's interest in protecting its citizens against potentially actionable communications on the Internet was sufficient to outweigh the right to anonymously speak on the internet. In re Subpoena Duces Tecum to America Online, Inc., No. 40570, 2000 WL 1210372, at *5 (Va. Cir. Ct. Jan. 31, 2000). That court held that the protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions. Id. at *6. In support of its holding, the Virginia court cited the dangers of misuse of the Internet which arise by virtue of the fact that the Internet provides a "virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people." Ibid.

In cases similar to the one at bar, both above-noted courts set forth tests to determine whether the First Amendment rights of a person can be abridged. In Seescandy.com, the District Court found that some limiting principals should be applied to the determination of whether discovery to uncover the identity of a defendant is warranted. Seescandy.com, supra, 185 F.R.D. at 577. The District Court found that the "following safeguards will ensure that this unusual procedure will only be employed in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service, and will prevent use of this method to harass or intimidate." Ibid. See also Care v. Hume, 492 F.2d 631 (D.C. Cir. 1974); Cervantes v. Time, 464 F.2d 986 (8th Cir. 1972); Richards of Rockford v. PGE, 71 F.D.R. 388, 390-391 (N.D.Cal. 1976). The District Court espoused the following four requirements which must be satisfied in order to discover the actual identity of a defendant: (1) identify the missing party with sufficient specificity such that the court can determine that defendant is real person or entity who could be sued in federal or state court; (2) identify all previous steps taken to locate the elusive defendant; (3) establish, to the court's satisfaction, that plaintiff's suit could withstand a motion to dismiss; and (4) file a statement of reasons justifying the specific discovery requested, as well as the identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about the defendant that would make service of process possible. See Id. at 578-80

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[2] This is the court of general jurisdiction in Virginia.

The Virginia Circuit Court provided for a different two-prong test to determine when a subpoena request is reasonable and accordingly would require an internet service provider to identify its subscribers. American Online, supra, 2000 WL 1210372 at *6. First, the party seeking the information must have pled with specificity a prima facie claim that it is the victim of particular tortious conduct and second, the subpoenaed identity information must be centrally needed to advance that claim.[3] Ibid. This Court agrees with the California District Court's reasoning in Seescandy.com, and will therefore apply the four limiting principals, which the Seescandy.com court set forth, to the case at hand.

I. Specific identification of missing party

Pursuant to the rule set forth in Seescandy.com, the plaintiff must first "identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court. This requirement is necessary to ensure that federal requirements of jurisdiction and justiciability can be satisfied." Seescandy.com, supra, 185 F.R.D. at 578. This principal is equally applicable in New Jersey Superior Court as well because, as a preliminary matter, the Court must be able to determine whether it has jurisdiction over the John Doe Defendants. Currently only two defendants have answered, neither of which has made a jurisdictional objection.[4] And, as yet, Dendrite has not provided the Court with any evidence in support of jurisdiction. Dendrite has, however, posed arguments in favor of a Morris County venue.

Dendrite argues that the venue is appropriately Morris County because the plaintiff is a resident of this county under R. 4:3-2(b) and because a substantial part of the events giving rise to the cause of action occurred in this county. Despite Dendrite's assertion of jurisdiction, if a defendant were not located in New Jersey, that defendant could assert that merely posting a criticism on the internet is not sufficient to subject them to personal jurisdiction in New Jersey, despite the fact that the plaintiff is headquartered in New Jersey. Cf. Barret v. Catacombs Press, 44 F. Supp. 2d 717, 731 (E.D. Pa. 1999) (holding that fact that plaintiff was a Pennsylvania resident was not enough to subject person making statements about plaintiff on a web site to jurisdiction in Pennsylvania) with Blumenthal v. Drudge, 992 F. Supp. 44, 57 (D.D.C. 1998) (upholding jurisdiction under the District of Columbia long-arm statute in similar situation). Of course, it is probable that Does 1 - 4 are Dendrite employees or insiders due to the nature of the information conveyed via the internet message board. Therefore, the assumption that this court has jurisdiction and that venue is proper is not unfounded, and, without evidence to the contrary, jurisdiction will be presumed.

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[3] Even if this Court were to analyze the instant case under the America Online analysis, the same outcome would occur. Clearly, prima facie cases have been plead only against John Does 1 and 2. See infra Section III of the Analysis Section. Obviously, because the identities of the John Does are necessary as they are the parties who have caused harm to Plaintiffs.

[4] The Court only notes the lack of objection, the Court is in no way implying that the defense has been waived.

The New Jersey Court Rules allow the plaintiff to issue process against a defendant, whose true name is unknown, stating the name to be fictitious and adding an appropriate description sufficient for identification. R. 4:26-4. Dendrite has done so, in this case, at least with regard to John Does Nos. 1 through 4. Dendrite points out that New Jersey courts have ordered the disclosure of information regarding the identities of fictitious named defendants, even where there has been a claim of privilege. See Dry Branch Kaolin Co. v. John Doe, 263 N.J. Super. 325, 330-332 (App. Div. 1993)(holding that the court must evaluate the purpose for which the attorney-client privilege exists and the reasons for it assertion in the context of the particular case in deciding whether or not to pierce the privilege to discover the client's identity[5]); Brien v. Lomazow, 227 N.J. Super. 288, 307-308 (App. Div. 1988)(a plaintiff may obtain the identity of an anonymous complainant after making a substantial showing of need, and establishing a colorable claim for malicious prosecution[6]).

These cases illustrate New Jersey's commitment to maintaining anonymity of individuals in specific situations and the need for safeguards to ensure that this anonymity is protected. The Court in Dry Branch, acknowledged that there was a two-step analysis that must be undertaken by the Court prior to piercing the attorney-client privilege. The Court in Brien, acknowledged that there was also a two-step analysis which must be undertaken prior to piercing the protection afforded individuals filing complaint against regulated professionals for unprofessional conduct. Likewise, this Court is requiring that Dendrite satisfy the four-step analysis proposed in Seescandy.com, before the Court will impinge upon a defendant's Constitutional Right to Free Speech.

II. Identify Steps Taken to Locate Defendant

"Second, the party should identify all previous steps taken to locate the elusive defendant. This element is aimed at ensuring that plaintiffs make a good faith effort to comply with the requirements of service of process and specifically identifying defendants." Id. at 579. At the Court's instruction, Dendrite posted the Order to Show Cause on the Yahoo message board where the messages in question were posted with an eye towards providing notice to the John Doe defendants. Other than the Court-directed notice, Dendrite has not provided the Court with any previously taken steps aimed at locating the defendants. Of course, to so require is somewhat unfair as this is area of the law is new and unsettled in New Jersey, and no specific test has been propounded by any court as precedent. At oral argument, Counsel for the Amicus indicated that he believed he had identified two of the John Does through his research. He may, or may not have been correct. Nevertheless, Plaintiff could not have been on notice as to how to properly proceed, and Plaintiff could not have known that it was necessary to establish the steps it has taken to identify the John Does. Presumably, however, discovering the identities of the John Does would be difficult given the privacy agreement between internet-users and the internet service providers.

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[5] Quoting Fellerman v. Bradley, 99 N.J. 493, 502 (1985).

[6] Quoting Crodjesk v. Faghani, N.J. Super. 449, 454 (App. Div. 1985), modified, 104 N.J. 89 (1986)(interpreting N.J.S.A. 45:9-19.1).

III. Suit To Withstand Motion to Dismiss

The third requirement is that Plaintiff establish that its suit against Defendant could withstand a motion to dismiss. Seescandy.com, supra, 185 F.R.D. at 579. "Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of ex parte procedures to invade the privacy of one who has done no wrong." Ibid. The Court in Seescandy.com, decided that a requirement similar to that of criminal warrants is necessary in these situations "to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant." Ibid.

In reviewing a complaint that is to be dismissed under Rule 4:6-2(e) the inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citing Rieder v. Department of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). A reviewing court is to search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim . . . ." Id. (quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). During this analysis, the plaintiff is entitled to "every reasonable inference of fact." Id. (citing Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956)).

John Does Nos. 3 and 4 allege that the claims against them are frivolous. Of the six claims contained in Dendrite's Verified Complaint, only two apply to John Doe No. 3. These two claims are for libel (the Fifth Claim) and for misappropriation of trade secrets (the Sixth Claim). Only one claim, (the Sixth Claim), for misappropriation of trade secrets applies to John Doe No. 4. (The remaining four claims are asserted against those defendants who plaintiff alleges are employees or former employees of Dendrite).

A. Defamation/Libel

Dendrite claims that John Doe No. 3 has defamed Dendrite by virtue of certain posted messages. (See Vogel Cert. at Exhibits D, E, F, G H, and I). In order to establish a prima facie case of defamation (whether denominated libel or slander), a plaintiff must show that defendant communicated to a third person a false statement about plaintiff that tended to harm plaintiff's reputation in the eyes of the community or to cause others to avoid plaintiff.[7] McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 314 (App. Div. 2000) (citing Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 164-65 (1999); Feggans v. Billington, 291 N.J.Super. 382, 390-91 (App. Div.1996)). The Court will first examine the issue of whether the statements in dispute are,

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[7] This is the same test used to determine whether a statement is defamatory. "As a general rule, a statement is defamatory if it is false, communicated to a third person, and tends to lower the subject's reputation in the estimation of the community or to deter third persons from associating with him. Restatement (Second) of Torts §§ 558, 559 (1977).

in fact, defamatory. Then, the Court will determine whether a prima facie case of defamation has been met by Plaintiff.

A defamatory statement is one that "tends so to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." W. Page Keeton, Prosser and Keeton on the Law of Torts, § 111 at 773 (5th ed. 1984). In the instant case, Dendrite alleges that John Does 1 through 3 have published defamatory messages on the internet. Those messages contained statements (a) that Dendrite's management was secretly and unsuccessfully "shopping" the company; (b) that certain Dendrite software products do not exist, © that Dendrite has a policy of depriving employees of their bonuses; (d) that Dendrite management routinely threatens to fire employees, and (e) that Dendrite has not been honest in its revenue recognition.

In deciding whether a statement is defamatory a court must examine three factors: content, verifiability, and context. McLaughlin, supra, 331 N.J. Super. at 312 (citing Lynch, supra, 161 N.J. at 167; Ward v. Zelikovsky, 136 N.J. 516, 529 (1994)). First, a statement's content must be judged by its objective meaning to a reasonable person of ordinary intelligence rather than its literal meaning. Ibid. In other words, when examining the content of the statements, it is necessary to look "to the fair and natural meaning which will be given it by reasonable persons of ordinary intelligence." Romaine v. Kallinger, 109 N.J. 282, 290 (1988). "Thus, mere insults and rhetorical hyperbole, while they may be offensive, are not defamatory." McLaughlin., supra, 331 N.J. at 312 (citing Lynch, supra, 161 N.J. at 167-68). In the instant case, the meaning of the statements made on the internet message board by the John Does is obvious, and there are no hidden meanings. For example, John Doe No. 3's statement which provided that Dendrite's management was secretly and unsuccessfully "shopping" the company and that Dendrite has not been honest in its revenue recognition[8] clearly would be taken to mean just that--that management is trying to sell the company and it is lying about its revenue recognition. Similarly, the other allegedly defamatory statements by John Does 1 through 3 are clear as to their meaning to the person of ordinary intelligence. Furthermore, the facts asserted in the allegedly defamatory messages are not favorable to Dendrite's reputation.

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[8] John Doe No. 3 posted the following message:

> John's got his contracts salted away to buy another year of earnings-and note how they're changing revenue recognition accounting to help it. However, the analysts have caught on to the lack of prospects here. That's why the stock has plunged and no short term tweaking is going to help, much. DRTE simply does not appear to be competitive moving forward. John knows it and is shopping hard. But Siebel and SAP already have turned him down. Hope Oracle does want in bad (and that's what they'll get). But it doesn't help job prospects in Morristown any does it?

(Vogel Cert. at Exhibit G).

Second, only verifiable statements can be defamatory. McLaughlin, supra, 331 N.J. Super. at 312. "The higher the 'fact content' of a statement, the more likely that the statement will be actionable." Ward, supra, 136 N.J. at 531-32. Opinions and name-calling cannot be proven true or false; therefore they are not actionable. McLaughlin, supra, 331 N.J. Super. at 312. Recovery is limited to defamatory false statements of fact; the truth of the statement is a complete defense to a defamation action. Id. (citing Ward, supra, 136 N.J. at 530-31). Here, the statements at issue are verifiable as they are statements of fact, not merely opinions.

Third, a statement's meaning can be affected by its context. McLaughlin, supra, 131 N.J. Super. at 312 (citing Lynch, supra, 161 N.J. at 168). For example, accusations made during a heated political campaign are likely to carry less credibility for the average person than they would in a less emotional context. Id. at 313. The context must play a heavy hand in this analysis because the forum in which the statement was made is a message posting board on the internet. The internet has become a forum for vast discussion reaching many individuals with diverse backgrounds and opinions, and it has brought together the global community in a manner otherwise not seen before. These four individuals were utilizing that forum to voice their opinions and engage in discussion regarding issues important to them. They were doing so under the protection of anonymity, which, as discussed below, encourages the free flow of ideas. Allowing this protection to be stripped away would stifle that free discussion.

Nevertheless, given the nature of the internet and its vast audience, false messages posted on the internet could potentially cause a great deal of harm to those targeted by the false postings. This is especially true for financial message boards, which

> provide an avenue for citizens to converse with one another and to seek consensus about topics that affect their lives. But the boards also serve as a kind of informal education for investors and noninvestors alike about the behavior of a particular corporation, about the workings of the stock market (footnote omitted), and about economic matters in general.

Lyrissa Barnett Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace, 49 Duke L.J. 855, 900 (February 2000). Furthermore, "by providing a forum for discussion of financial matters and by contributing to citizens' store of knowledge about such matters, the boards help to shape public opinion." Lidsky, supra, 49 Duke L.J. at 900. Therefore, because the context of the statements in the instant case is the internet, and more specifically financial message boards, false postings could easily be considered defamatory in nature as people look to such postings for informal education on specific matters. Taking into consideration, then, the content, verifiability and context of the alleged defamatory statements, this Court concludes that the statements at issue could easily be considered defamatory in nature.

Plaintiff has, for the most part, met the requirements for a prima facie case of defamation. It is obvious from the nature of the forum involved that the messages have reached a third party–quite possibly even multitudes of third parties. Therefore, the first element of a prima facie case of

defamation has been met. The second element is whether a false statement about plaintiff was communicated. This element has also been met, at least in part.

In reference to the issue of falsity, John Doe No. 3 points out that each of the postings that he made regarding the potential sale of the company or posting related to Dendrite's change in its revenue recognition policy were in response to an earlier posting on the Yahoo Dendrite message board by other anonymous posters. (See Defendant's Brief at p. 10; Certification of Eugene G. Reynolds. Esq. at Exhibits F, G, and I). Furthermore, Dendrite's changes in revenue recognition were referenced in certain reports identified in these earlier postings. (Id. at Exhibit H which is entitled CFRA report; Exhibit J which is an article on The Street.com). However, John Bailey has certified that he is not shopping the company, and therefore, John Does No. 3's statement is technically false.

Dendrite also acknowledges that its revenue recognition policies were questioned by the CFRA Report and that they responded to such. Even assuming that the CFRA Report was false, and Dendrite was not altering its revenue recognition, Dendrite would not be relieved of showing the essential element of harm. This information has been readily available to the public in sources other than these message boards and postings. The truth being an absolute defense to a defamation claim, Dendrite has provided the Court with evidence to demonstrate the falsity of only two of the contested statements.

Finally, to prove a prima facie case of defamation, the plaintiff must have been harmed by the alleged defamation. McLaughlin, supra, 331 N.J. Super. at 313 (citations omitted). In McLaughlin, the court held that the *per se* exception to proof of damages applies to oral, not written communications. Id. at 309. Additionally, that court held that a uniform rule for both libel and slander actions is necessary. Id. at 320. That rule is that "a plaintiff must prove actual reputational injury, either pecuniary or non-pecuniary." Ibid. In the instant case, the allegedly defamatory statements are written, and therefore, proof of actual reputational injury is necessary.

It is not obvious that the statements at issue are false or that Dendrite has been harmed. Dendrite has failed to show that the messages in question in any way harmed Dendrite. Although Dendrite alleges that it has been harmed and that it will continue to be harmed by the defendants' statements, saying it is so does not make the alleged harm a verifiable reality. In his reply certification, Michael Vogel, Dendrite's counsel, attempts to link the messages posted in this case to a drop in Dendrite's stock price. Dendrite argues that since its inception, the internet as become a haven for posting of false information in effort to reek havoc on a company's stock price. Attached to Mr. Vogel's reply certification are numerous articles on this point. The Court, however, is not interested in the conduct of other internet posters. The Court is concerned only with messages posted by John Does Nos. 3 and 4. Although the Court is aware of the ramifications of this decision, the Court is not taking up the crusade to end falsehoods or rumors spread via the internet. Furthermore, Mr. Vogel has not purported to be an expert in the field of stock valuation and analysis, thus, he cannot draw the conclusion that the fluctuations in Dendrite's stock prices are anything more than coincidence.

Despite the fact that Plaintiff is entitled to every reasonable inference of fact in this analysis of whether a case against John Doe No. 3 could survive dismissal, the Court will not take the leap to linking messages posted on an internet message board regarding individual opinions, albeit incorrect opinions, to a decrease in stock prices without something more concrete. Between March 1, 2000, and July 1, 2000, Dendrite's stock price fluctuated from $26 to $14. (See Vogel Reply Cert. at Exhibit C). No messages were posted on the day of Dendrite's highest asking price, nor were they posted on Dendrite's lowest asking price. Mr. Vogel's certification and the articles alleging that an individual poster may manipulate the market, evidences that this is the case here.[9] The inference sought by Plaintiff is clearly unreasonable, and this Court is unwilling to acknowledge any nexus between the posting of allegedly defamatory messages on the internet and a drop in stock prices.

Once a plaintiff establishes that there was a defamatory statement, he or she then must prove an additional element of a prima facie case: that the defendant was at fault in publishing the defamation. McLaughlin, supra, 331 N.J. Super. at 314 (citing Feggans v. Billington, 291 N.J. Super 382, 391 (App. Div. 1996); Salek v. Passaic Collegiate Sch., 255 N.J. Super. 355, 361 (App. Div. 1992)). Typically, there are two fault standards. If the plaintiff is a private person, he or she need show only that the defendant was negligent. McLaughlin, supra, 314 N.J. Super. at 314. If, however, the plaintiff is a public figure, he or she need prove that the defendant was motivated by "actual malice"–that the defendant either knew the statement was false or recklessly disregarded its falsity. Id. (citing Costello v. Ocean County Observer, 136 N.J. 594, 612 (1994); Fortenbaugh v. New Jersey Press, Inc., 317 N.J. Super. 439, 455 (App. Div. 1999)). The fault issue need not be reached if there was no defamation to begin with. Lynch, supra, 161 N.J. at 169; Salek, supra, 255 N.J. Super. at 361. Thus, as noted in Salek: "The issue of fault in a defamation case arises only after a defamatory communication . . . has been established." 255 N.J. Super. at 361.

This Court feels that it is necessary to address the issue of fault in the instant case. In Curtis Publishing Co. v. Butts, 388 U.S. 130, 162 (1967), the United States Supreme Court held that public figures must prove actual malice. Obviously, then, the most important issue in determining fault is whether Dendrite is considered a private or public figure. The United States Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), 94 S. Ct. 2997, 41 L. Ed. 2d 789, __ (1974) provides some guidance on the issue of whether a corporation is considered a public or private figure. There, the Supreme Court held that the two most important determinants of public figure status are (1) whether the plaintiff has access to channels of effective communication to rebut the defamatory falsehood, and (2) whether the plaintiff voluntarily assumed a prominent role in a public controversy and the attendant risk of enhanced public scrutiny that accompanies it. Id. at 344-45, 94 S. Ct. at 3009, 41 L. Ed. 2d at __. Obviously, a corporation such as Dendrite would have access to channels of effective communication to rebut the allegedly defamatory statement at issue in the instant case. Dendrite could have posted a rebuttal message on the financial message board on which the messages first appeared.

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[9] Quote the SEC Commissioner's speech here regarding cybersmear and the potential effect it may have on stock pricing.

The second determinant set forth in Gertz is somewhat difficult to apply to a corporation because John Doe cases do not tend to involve a "controversy" but rather a subject of discussion. Lidsky, supra, 49 Duke L.J. at 910. Lidsky notes that "despite the lack of true 'controversy,' the justifications for treating a publicly held corporation as a public figure for purposes of internet discussions of its financial well-being are compelling (footnote omitted)." Id. at 911. As justification, Lidsky notes that when a corporation makes the decision to go public, it seeks and often obtains national attention. Ibid. Additionally, a corporation voluntarily submits itself to extensive legal regulation and public scrutiny to obtain the benefits of corporate structure. Ibid. In the instant case, Dendrite is a publicly held corporation that provides goods and services for the pharmaceutical and consumer package goods industries. Because of its status as a publicly held corporation and the nature of the area of business in which Dendrite participates, treating Dendrite as a public figure for the purposes of this action would not be unjustified.

Similarly, the New Jersey Supreme Court has held that while the actual malice standard applies to defamation claims asserted by businesses whose activities intrinsically implicate public interest, e.g., matters of public health or safety, consumer fraud, or industry heavily regulated by government, such standard is not appropriate or necessary with regard to businesses such as the sale and repair of lawnmowers, repair of shoes, cleaning of clothes, and other local businesses that involve everyday products or services that do not intrinsically involve legitimate public interest; as to latter type of businesses, negligence standard applies. See Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, cert. denied, 516 U.S. 1066, 116 S.Ct. 752, 133 L.Ed.2d 700 (1995).

Additionally, in Rocci v. L'Ecole Secondaire MacDonald-Cartier, 165 N.J. 149, 160 (2000), the Supreme Court of New Jersey held that a teacher failed to provide evidence of a chaperone's actual malice so as to prevail on her defamation claim. The court so held because the letter written by the chaperone regarding a teacher's inappropriate behavior was entitled to substantial First Amendment protection because it involved a matter of public concern–the welfare of children entrusted to the care of a teacher. Ibid. As such, the teacher's reputational or pecuniary harm could not be presumed absent a showing of actual malice as that term is defined under New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964). Rocci, supra, 165 N.J. at 152. The teacher failed to show harm and alleged no facts sufficient to demonstrate actual malice. Ibid.

Moreover, in her article, Lidsky notes that a publicly held corporation by definition avails itself of the capital markets to raise funds from investors. Lidsky, supra, 49 Duke L.J. at 908. Therefore, it is fair to conclude that a corporation should be treated as a public figure when the alleged defamation appears in a forum dedicated to the discussion of the corporation's management and operation and is reasonably related to that subject. Id. at 908-09.

In the instant case, Plaintiff Dendrite should be considered a public figure because its business activities include providing "highly specialized integrated product and service offerings for the pharmaceutical and consumer package goods industries." Clearly, such activities involve a legitimate public interest, and cannot be considered every day products or services.

Because Dendrite would most likely be treated as a public figure for the purposes of the instant litigation, it bears the additional burden of proving actual malice. Actual malice is defined as knowledge that a statement is false or with reckless disregard of whether it is false or not. New York Times, supra, 376 U.S. 254, 280, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964). See also, Lynch, supra, 161 N.J. at 165 (to satisfy actual-malice standard applicable in defamation action brought by public official or figure, plaintiff must show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth). "To prove publication with reckless disregard for the truth, a plaintiff must show that the publisher made the statement with a 'high degree of awareness of [its] probable falsity' (citation omitted), or with 'serious doubts' as to the truth of the publication (citation omitted)." Lynch, supra, 161 N.J. at 165. To be actionable, the recklessness in publishing material of obviously doubtful veracity must approach the level of publishing a "knowing, calculated falsehood." Id. (citing Lawrence v. Bauer Publishing & Printing Ltd, 89 N.J. 451, 466 (1982)).

In the instant case, John Doe No. 3 alleges that he did nothing more than participate in a discussion of subjects raised by others. Dendrite, on the other hand, alleges that significant evidence of malice exists. To require Dendrite to prove actual malice is difficult because John Doe No. 3's state of mind is at issue. Due to Dendrite's inability to identify John Doe No. 3, it is certainly not possible for it to know what John Doe No.3's state of mind was without deposing him. Therefore, this Court is not as concerned with the extent to which Dendrite has proved actual malice. The fact that Dendrite has plead actual malice shall suffice for the purposes of this stage of the litigation.

B. Misappropriation of Trade Secrets

Dendrite also alleges that John Does. Nos. 3 and 4 have misappropriated trade secrets. To prevail in New Jersey upon a claim for misappropriation of a trade secret, a trade secret owner must establish that:

(1) a trade secret exists;
(2) the information comprising the trade secret was communicated in confidence by plaintiff to the employee;
(3) the secret information was disclosed by that employee and in breach of that confidence;
(4) he secret information was acquired by a competitor with knowledge of the employee's breach of confidence;
(5) the secret information was used by the competitor to the detriment of plaintiff; and
(6) the plaintiff took precautions to maintain the secrecy of the trade secret.

Rycoline Products, Inc. v. Walsh, 334 N.J. Super. 62, 71 (App. Div. 2000) (citing Rohn and Haas Co. v. Adco Chem. Co., 689 F.2d 424, 429-30 (3d Cir. 1982); Stone v. Goss, 65 N.J. Eq. 756, 759-60 (E. & A. 1903)). To establish the first element of a misappropriation claim, plaintiff is required to show the existence of a trade secret. A trade secret may consist of "a formula, process, device or compilation of information" which one uses in his business and which gives him an opportunity to

obtain an advantage over competitors who do not know or use it. National Tile Board Corp. v. Panelboard Mfg. Co., 27 N.J. Super. 348, 351 (Ch. Div.1953) (citing 4 Restatement of Torts, § 757, p. 5 (1939)). Matters of general knowledge within the industry cannot be classified as trade secrets or confidential information. Whitmyer Bros., Inc. v. Doyle, 34 N.J. 25, 34 (1971). "Although a substantial measure of secrecy must exist, the secrecy need not be absolute and disclosure to employees involved in its use will not ordinarily result in loss of the employer's protection." Sun Dial Corp. v. Rideout, 16 N.J. 252, 257 (1954) (citing Restatement of Torts, supra, at 6).

Plaintiff cannot prove misappropriation of a trade secret in the instant case because it has failed to prove that a trade secret exists. Dendrite argues that John Doe No. 4 has posted information regarding certain accounts within hours of the company learning of such information. (Vogel Cert. Exhibit I). Dendrite fails to identify exactly what trade secrets it alleges these John Does revealed in their message postings. The postings do not seem to consist of "a formula, process, device or compilation of information" used in business to maintain an edge over competitors. Furthermore, Dendrite alleges that John Doe No. 4 has posted information within hours of the company learning of such information. Mr. Savage certified that John Doe. No. 4 posted messages regarding the Siebel contract within hours of Dendrite learning that Siebel had decided not to contract with Dendrite. Although, John Doe No. 4 posted the message within hours of Siebel's decision, the Court fails to see how the denial of a contract is a trade secret. The contents of the deal Dendrite offered Siebel may arguably be classified as a trade secret, given the requisite proofs, but the mere fact that Siebel did not choose to contract with Dendrite certainly does not rise to the level of a protectable trade secret.

Additionally, in reference to the classification of statements as trade secrets, the Court is left to assume that Dendrite is speaking of John Doe No. 3's reference to Dendrite's contracts which provide for price increases during their term, i.e., escalation in revenues. John Doe No. 3 points out that this concept is common to contract law and is not a trade secret. Furthermore, John Doe No. 3 includes Dendrite's publicly available annual report which outlines this concept. (See Reynolds Cert. at Exhibit K). Clearly, information that is publicly available cannot be considered a trade secret. Absent some evidence that trade secrets exist and are at issue, the Court is left to find that John Does Nos. 3 and 4 have not misappropriated any trade secrets. This is not to say, of course, that proprietary information, such as that posted on the internet message board, cannot be classified as a trade secret. In fact, such information could, potentially, rise to the level of being a trade secret. Dendrite, however, has failed to so prove.

Because Dendrite fails on its claim for misappropriation of a trade secret as it cannot prove that a trade secret exists, it is not necessary to proceed any further into the trade secret misappropriation analysis. Should this court find that a trade secret does exist, however, the second prong of the analysis, which involves the communication of the trade secret in confidence by plaintiff to the employee, must be examined. Again, Dendrite fails to prove this portion of the misappropriation of the analysis. Both John Does Nos. 3 and 4 state that they are neither currently Dendrite employees, nor were they once employed by Dendrite. Therefore, they have not been exposed to Dendrite's trade secrets during the course of their employment. Dendrite alleges that

John Doe No. 3 has revealed details of the working of confidential contracts with third parties. (Reynolds Cert. at Exhibit H). However, there is no indication that information on contracts, confidential or not, constitute trade secrets. Furthermore, knowledge of such contracts does not, in and of itself, prove that the person possessing such knowledge is an employee of Dendrite.

Again, should this Court choose to further analyze the misappropriation issue, it must examine the third prong of the misappropriation analysis, which involves the breach of the confidence in which the allegedly secret information was received. Because John Does 3 and 4 have stated that they are not employed by Dendrite and have not previously been employed by Dendrite, Plaintiff fails to prove this prong of the analysis with respect to John Does 3 and 4.

Therefore, Dendrite cannot prove misappropriation of trade secrets because there is no evidence that the information posted on the internet message boards constitutes trade secrets as previously defined. Additionally, John Does Nos. 3 and 4 are not employees of Dendrite, and as such, information consisting of the alleged trade secrets, could not have been communicated to them.

C. Breach of Employment Agreements & Free Speech Considerations

In addition to the above claims, Dendrite also asserts John Does Nos. 1 and 2 have violated their respective employment Agreements with Dendrite by virtue of their postings on the message board. In their internet messages, John Does Nos. 1 and 2 state that they are current or former employees of Dendrite. (Verified Complaint at ¶ 11; Vogel Cert. at Exhibit C and Exhibit F). As such, John Does Nos. 1 and 2 are allegedly under a contractual obligation not to disclose Dendrite's proprietary or confidential information without permission, not to induce Dendrite employees to terminate their employment and not to engage in activities that are adverse to the interests of Dendrite, for a period of two years from departure. (Verified Complaint at 10; Exhibit B to Vogel Cert., at ¶¶ 6, 10 and 11).

Dendrite claims that by virtue of John Doe No. 1's posting regarding referral fees, John Doe No. 1 is inducing employees of Dendrite to leave their employment with the Company. (See Vogel Cert. at Exhibit C). John Doe No. 1 alleged that Dendrite has a policy of not paying bonuses and that certain software products offered by Dendrite do not exist. (Vogel Cert. at Exhibits D and E). John Doe No. 2 has posted a message which stated that Dendrite's management threatens to fire its employees on a daily basis. (Id. at Exhibit F).

As stated earlier, the Court is reviewing Dendrite's claims as it would a motion to dismiss. Thus, the Court is limited to examining the legal sufficiency of the facts alleged in the complaint in order to determine whether the fundamental cause of action may be gleaned from the facts alleged. Printing Mart-Morristown, supra, 116 N.J. at 746. During this analysis, the plaintiff is entitled to "every reasonable inference of fact." Id. Thus, Dendrite's Complaint must demonstrate the essential elements for a breach of contract: a valid contract, defective performance by the defendant, and resulting damages. See Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985)(listing elements of breach of contract).

The facts alleged in the complaint demonstrate that John Does Nos. 1 and 2 may have breached their employment Agreements with Dendrite by speaking out negatively against the company. This is, of course, assuming that John Does No. 1 and 2 signed the employment agreement. But, this premise is based upon speculation and surmise, not upon proof. In its Verified Complaint, Dendrite states that at the commencement of employment with Dendrite, employees are required to execute the standard employment Agreement. (See Verified Complaint at ¶ 9). This may be so because the assertion stands unrebutted, but does not buttress Plaintiff's argument, which remains founded on conjecture. John Does Nos. 1 and 2 have not responded in this case. They must assert a right before the Court will recognize it. As such, the Court will not assess the claims made against John Does Nos. 1 and 2. Therefore, the Court will grant Dendrite's request as to these two defendants. John Does Nos. 3 and 4, however, argue that allowing this limited discovery would be in violation of their Constitutionally protected right to free speech and privacy, which is addressed below.

The right to free speech is provided for in the First Amendment, which provides, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech." This prohibition is equally applicable to the states under the Due Process Clause of the Fourteenth Amendment. Pennekamp v. Florida, 328 U.S. 331, 349, 66 S. Ct. 1029, 1039, 90 L. Ed. 1295, __ (1946); Grosjean v. American Press Co., 297 U.S. 233, 244-45, 249, 56 S. Ct. 444, 446, 80 L. Ed. 660, __ (1936). However, that right is not absolute. See Roth v. United States, 354 U.S. 476, 483, 77 S. Ct. 1304, 1308, 1 L. Ed. 2d 1498 __ (1957)(finding that obscenity is not protected by the First Amendment); Beauharnais v. Illinois, 343 U.S. 250, 266, 72 S. Ct. 725, 735, 96 L. Ed. 919, __ (1952)(holding that libelous statements are outside the realm of constitutionally protected speech); Champlinsky v. New Hampshire, 315 U.S. 568, 573, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942)(finding that "fighting words" are outside the scope of First Amendment protections.)

Inherent in First Amendment protections is the right to speak anonymously in diverse contexts. In deciding whether compelling self-identification on all election-related writings was a violation of free speech, the United States Supreme Court found that the First Amendment protects the right to speak anonymously. McIntyre. Ohio Elections Comm'n, 514 U.S. 334, 354, 115 S.Ct. 599, 1523, 131 L.Ed. 2d 426, __ (1995). The Court noted that a written election-related document, particularly a leaflet, is often a personally crafted statement of a political viewpoint. Ibid. As such, the Court held that identification of the author against her will is particularly intrusive; it reveals unmistakably the content of the writer's thoughts on a controversial issue. Ibid. "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." Ibid. (citation omitted). "The purpose behind the Bill of Rights, and of the First Amendment in particular is to protect unpopular individuals from retaliation, and their ideas from suppression, at the hand of an intolerant society." Ibid. The Court in McIntyre, rooted its decision in the fact that the speech looking to be protected, was political speech.

The McIntyre case is factually distinguishable, but the general principal espoused in it still applies -- the First Amendment protects anonymous speech. The Circuit Court of Virginia held that

the right to communicate anonymously on the Internet falls within the scope of the First Amendment's protections, but is not absolute. See American Online, supra, 2000 WL 1210372 at *6. The Supreme Court of the United States has also noted that the right to remain anonymous, however, is abused when it is used to shield fraudulent conduct. Ibid. See also Buckley v. American Constitutional Law Found., 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed. 2d 599 (1999)).

The Circuit Court of Virginia dealt with the specific issue of whether a subpoena would unreasonably burden the First Amendment rights of the John Does who post allegedly defamatory messages on the internet. See America Online, supra, 2000 WL 1210372 at *5 (Va. Cir. Ct. Jan. 31, 2000).[10] That court defined the issue as "whether a state's interest in protecting its citizens against potentially actionable communications on the Internet is sufficient to outweigh the right to anonymously speak on this ever-expanding medium." Ibid. That court held that held that "those who suffer damages as a result of tortious or other actionable communications on the internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights. Ibid.

The America Online Court cited the United States Supreme Court Case Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed. 2d 874 (1997). In Reno, the Supreme Court noted that "through the use of internet chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." Reno, supra, 521 U.S. at 870, 117 S.Ct. at 2344, 138 L.Ed. 2d at ___. "Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." Ibid. The Reno Court found that the internet is as diverse as human thought and previous cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium. Ibid.

The New Jersey Supreme Court has decided that the right of free speech in New Jersey is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities. New Jersey Coalition Against War in the Middle East v. JMB Realty Corp., 138 N.J. 326, 352 (1994) (citing State v. Schmid, 84 N.J. 535, 560 (1980)). Thus, the protection afforded speech by the New Jersey Constitution is broader than that provided by the United States Constitution.

Dendrite has failed to provide this Court with ample proof from which to conclude that John Does Nos. 3 and 4 have used their constitutional protections in order to conduct themselves in a manner which is unlawful or that would warrant this Court to revoke their constitutional protections. Defendants were voicing their opinions in a public forum. They were utilizing the soapbox that the internet provides in order to express their personal opinion.

Dendrite argues that the Court should grant its request for disclosure of Defendants' true

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[10] The court in Seescandy.com also dealt with issue of the propriety of the issuance of a subpoena, but that court focused on the procedural propriety of allowing discovery before service of process was effected, not on the First Amendment issue.

identities as such a request is routinely granted in similar cases involving subpoenas to internet service providers. Dendrite provides the Court with the following cases to support this decision: Itex Corp. v. John Doe, No. 980906393 (Multnomah County. Cir. Ct. Ca.); Biomatrix v. John Doe, No. 00670 (Bergen County Ct. N.J.); Hyde v. John Does, No. 99-2831 (Miami-Dade County. Circ. Ct. Fla.). In Biomatrix, the court ordered that a subpoena duces tecum be issued on the anonymous Doe defendants.[11] Dendrite also alleges that the case of Xircom, Inc. v. John Doe, No. 188724 (Super. Ct. Ventura County. Ca.) also provides support for its contention. The Judge in Xircom, did not rule on the merits of the defendants motion to quash the subpoenas, but rather allowed a subpoena to be issued. (Vogel Reply Cert. at Exhibit G).

Dendrite also looks to the holding in Stone & Webster, Inc. v. John Does, NO. 99MS-0713, (Franklin Cty. Ct. Feb. 7, 2000), where the Ohio Court of Common Pleas denied a motion to quash a similar subpoena. (Vogel Reply Cert. at Exhibit H, p. 1). The Ohio Court reasoned that the First Amendment protected against governmental action, rather than private conduct. (Id. at p. 6). As CompuServe, the internet provider, was a private actor, the guarantee of free speech did not protect against this private encroachment. (Ibid.). Furthermore, the Ohio Court reasoned that the defendant voluntarily gave his true identity to CompuServe. (Id. at p. 7). The Ohio Court stated that absent any contractual prohibitions that restricts CompuServe's ability to reveal the defendant's identity, the defendants had no reasonable expectation of privacy that would prohibit its release. (Ibid.) (citing United States v. Hambrick, 55 F. Supp. 2d 504 (W.D. Va. 1999)). The New Jersey Constitution, as stated previously, provides greater protection for the right to free speech. New Jersey protects infringement by private actors.

Dendrite argues that the John Doe Defendants accepted a diminished amount of privacy when they agreed to utilize Yahoo's services, thus they are not entitled to having their identities protected. Dendrite looks to United States v. Hambrick, supra, 55 F. Supp. 2d at 504, and United States v. Simons, 206 F.3d 392 (4th Cir. 2000), in support of this argument. Both cases dealt with warrantless searches and Fourth Amendment protections. Both Courts were applying the test articulated in Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576, __ (1967). The Court in Katz held that the capacity to claim Fourth Amendment protection depends on whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. Ibid.

In Hambrick, prosecutors obtained the defendants identity from his internet provider, MindSpring. Hambrick, supra, 55 F. Supp. 2d at 508. In reasoning that the defendant did not have

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[11] The court later granted the plaintiff's motion for summary judgment on the issue of defamation. In that case, the alleged defamatory messages accused plaintiffs of being Nazis, producing a medical product that has killed many patients, and stated that members of upper management have been indicted. The court found that these statements were clearly libelous. The court further found that despite the fact that plaintiffs did not prove damages, such statements could lead a person to question plans to unite with such a company (the harm alleged by plaintiffs).

a reasonable expectation of privacy in this information, the Court noted that "there was nothing in the record to suggest that there was a restrictive agreement between the defendant and MindSpring that would limit the right of MindSpring to reveal the defendant's personal information to nongovernmental entities." Ibid. Without such, there could be no reasonable expectation of privacy. Ibid.

In Simons, the defendant's employer turned over to the authorities, his computer hard drive which contained numerous downloaded pictures of child pornography without a search warrant. Simons, supra, 206 F.3d at 11. In deciding that the warrantless search of the defendant's computer did not violate his Fourth Amendment rights, the Court stated that the defendant did not have reasonable expectation of privacy in the downloaded files due to his employer's internet policy. Ibid. The employer had an internet policy which clearly stated that the employer would "audit, inspect, and/or monitor" employees' use of the internet, including all file transfers, all websites visited and all e-mail messages, "as deemed appropriate." Ibid. The Court reasoned that this policy put the employees on notice that they could not reasonably expect that their internet activity would be private. Ibid.

Yahoo's Privacy Policy puts the user on notice that absent some exceptional circumstance, Yahoo intends to protect the privacy of its users. Yahoo lists as exceptional circumstances legal proceedings, situations required by law, or situations to prevent harm to Yahoo, its user, or others. Yahoo does state in its Privacy Policy, that the user's information is tracked internally and such information is shared with third party data under confidentiality agreements, with business partners & sponsors (this is usually limited to the e-mail address only, if more information is to be shared, the user will be notified), with Yahoo! stores and shopping in order to complete the transaction (these entities have separate privacy policies), with Yahoo! auctions and Yahoo! GeoCities (in order for the user to become a merchant on their own personal home page). (See Vogel Reply Cert. at Exhibit L). From this information sharing, it could be argued that Yahoo users should have a compromised expectation of privacy in the information given to Yahoo. A user could reasonably expect from the Privacy Policy, that Yahoo will not be sharing his information without some form of permission or special circumstance. Furthermore, the above cited cases were based upon the protections afforded by the Fourth Amendment, rather than the First Amendment. The United States Supreme Court, however, has determined that for First Amendment purposes, "there is no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Reno, supra, 521 U.S. at 870, 117 S.Ct. at 2344, 138 L.Ed.2d at ___. Thus, despite any degree of privacy that the John Doe Defendants may have sacrificed due to the Yahoo Privacy Policy, there is no basis upon which to deprive the John Doe Defendants of their First Amendment protection.

Based on the above, this Court hereby grants Dendrite's request as to John Doe Nos. 1 and 2, and denies its request as to John Doe Nos. 3 and 4.

IV. Justification of Discovery Sought

Finally, the Court in Seescandy.com, held that the plaintiff should 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 or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible." Seescandy.com, supra, 185 F.R.D. at 580. Obviously, this discovery process would lead to the identification of the defendants, as they give Yahoo their names and addresses for billing purposes. The Court need not address this issue, however, as the Court has decided the case upon the above stated basis.

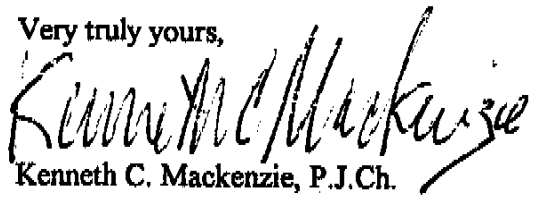
CONCLUSION

The Court has been called upon to balance an individual's right to anonymously voice their opinions against a plaintiff's right to confront his accusers. The Court has found that the principals outlined in the Seescandy.com case are applicable to the instant matter and provide the parameters to be used in this balancing of interests. Dendrite has not made a prima facie case of defamation against John Doe No. 3, as Dendrite has failed to demonstrate the falsity of each of the alleged defamatory statements and/or Dendrite has failed to demonstrate that it was harmed by any of the posted messages. Dendrite has also failed to provide this Court with ample proof from which to conclude that John Does Nos. 3 and 4 have used their constitutional protections in order to conduct themselves in a manner which is unlawful or that would warrant this Court to revoke their constitutional protections. Therefore, Dendrite's request for limited expedited discovery, including the issuance of a commission to take discovery out-of-state is denied.

As stated previously, the Court will not address the rights of John Does Nos. 1 and 2, as they have not responded in this case. John Does Nos. 1 and 2 must assert a right before the Court will recognize and assess it. Therefore, the Court will grant Dendrite's request as to these two defendants.

Mr. Vogel will submit a form of order under the "five-day" Rule to memorialize this opinion.

Very truly yours,



Kenneth C. Mackenzie, P.J.Ch.

KCM/lf