Case No. 03-1671

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EQUIDYNE CORPORATION,

Appellee,

v.

JOHN DOES 1-21, et al.,

JOHN DOE NO. 9, a/k/a "AESCHYLUS_2000"

Appellant.

Appeal from the United States District Court
For the District of Delaware
Civil Action No. 02-430 (JJF)

ANSWERING BRIEF OF APPELLEE EQUIDYNE CORPORATION

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Dated: July 7, 2003

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 03-1671

EQUIDYNE CORP.

V.

JOHN DOES 1-21

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Equidyne Corp. makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

(Signature of Counsel or Party)

Dated: March 20, 2003

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COUNTER-STATEMENT OF JURISDICTION

1. **District Court Jurisdiction:** The District Court is vested with subject matter jurisdiction over this action pursuant to Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aa, and 28 U.S.C. § 1331(a).

2. **Appellate Jurisdiction:** The orders from which appellant John Doe No. 9, a/k/a "Aeschylus_2000" ("Doe No. 9"), appeals do not satisfy the jurisdictional requirements of either 28 U.S.C. § 1291 or 28 U.S.C. § 1292 and do not fall within the "collateral order" exception. Accordingly, for the reasons set forth fully in its Memorandum Concerning Appellate Jurisdiction, dated April 22, 2003, appellee Equidyne Corporation ("Equidyne" or the "Company") respectfully submits that the Court lacks appellate jurisdiction over this appeal.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. There are no other cases or proceedings that are in any way related, completed, pending or about to be presented before this Court or any other court or agency, state or federal.

COUNTER-STATEMENT OF THE CASE

On May 16, 2002, Equidyne filed the complaint in this action alleging claims against Doe No. 9 and twenty other anonymous defendants who made numerous postings to Internet message boards related to the Company. A22-46. In particular, Equidyne's complaint alleged that the posting of these messages by defendants, done while using pseudonyms, either (i) breached one or more contracts between defendants and Equidyne, and/or (ii) violated provisions of the Exchange Act, and the rules and regulations promulgated thereunder, related to the solicitation of proxies and the misappropriation and dissemination of non-public information.

However, because the identities of these defendants was unknown, Equidyne was unable to effect service of process upon the defendants. Accordingly, Equidyne filed with its complaint a Motion to Exempt Plaintiff From Compliance with the Meet and Confer Requirements of Fed. R. Civ. P. 26(d) and 26(f) For Limited Third Party Discovery. A47-58. In this motion, Equidyne requested leave to undertake limited discovery of Yahoo! Inc. ("Yahoo!") and Lycos Inc. ("Lycos"), the entities that maintain the message boards, in order to obtain information concerning the identity of the defendants, who had created user accounts with Yahoo! and Lycos in connection with the use of their websites.[1] The District Court

[1]In order to post messages to the Message Boards, each defendant would have been required to open an account with either Yahoo! or Lycos and, in doing so, would have provided certain personal information to those entities. Accordingly, Equidyne sought third-party discovery of Yahoo! and Lycos in order to discover the personal information provided by the defendants in

granted Equidyne leave to conduct limited discovery of Yahoo! and Lycos on June 5, 2002. A59-60. On June 12, 2002, a subpoena to Yahoo! seeking production of information concerning defendants' identities was issued and served on Yahoo!'s registered agent in Delaware. A61-65.

On July 8, 2002, Doe No. 9 filed a Motion to Quash the third-party subpoena issued to Yahoo! by Equidyne to the extent it requested information concerning his[2] identity. A66-90. On November 1, 2002, the District Court issued a memorandum order denying Doe No. 9's Motion to Quash. A4-10.[3] Doe No. 9 filed a

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registering and opening their accounts. This information, which could include the user's name, address and e-mail address, could then be used by Equidyne to identify the defendants and serve them with process.

[2]According to his personal profile on Yahoo! (*http://profiles.yahoo.com/Aeschylus_2000*), Doe No. 9 identifies himself as a male. *See* A115.

[3]While Doe No. 9 claims that the District Court did not permit him an opportunity to submit a reply brief in support of the Motion to Quash, in actuality Doe No. 9 failed to file that brief in accordance with the deadlines established by the Local Rules of the District Court. The Motion to Quash was originally filed by out-of-state counsel for Doe No. 9 located in Ohio (*see* A88), and the Clerk of the District Court accordingly sent Doe No. 9's Ohio counsel a Notice of Compliance requesting that Delaware counsel enter an appearance by August 7, 2002. Pursuant to Local Rule 7.1.2(a), Doe No. 9's reply brief in support of the Motion to Quash was due to be filed and served on or before July 29, 2002. However, Doe No. 9 and his Ohio counsel neither filed a brief by that date nor contacted counsel for Equidyne to request an extension of the briefing schedule to permit Doe No. 9 to retain Delaware counsel. It was not until August 23, 2002 - nearly one month after the reply brief was due - that Delaware counsel for Doe No. 9 entered an appearance and requested leave to file a reply brief. *See* A164. Given Doe No. 9's disregard for the Local Rules, the District Court rightly denied his request to file belatedly a reply brief.

motion for reargument of the District Court's decision on November 7, 2002 (A177-84), which was denied by the District Court in a memorandum order dated February 12, 2003 (A11-12). On February 28, 2003, Doe No. 9 filed a Notice of Appeal of the Court's denial of the Motion to Quash and Motion for Reargument. A1-3. To date, Yahoo! has refused to produce any information concerning the 21 defendants pending resolution of Doe No. 9's Motion to Quash. *See* A171 (July 16, 2002 letter from Yahoo!).

COUNTER-STATEMENT OF FACTS

A. The Parties.

Equidyne is a Delaware corporation with its principal place of business located in San Diego, California. A23 (Complaint ¶ 2). Equidyne, through its wholly owned subsidiary, Equidyne Systems, Inc., is engaged in the development, manufacture and sale of needle-free drug delivery systems. *Id.* Common stock of Equidyne is traded publicly on the American Stock Exchange under the ticker symbol "IJX".

Doe No. 9 is one of 21 "John Doe" defendants in this action, anonymous individuals who have published statements on Internet message boards relating to Equidyne and its business. A23 (Complaint ¶ 3).[4] A number of the messages posted by the defendants contained non-public, confidential and proprietary information concerning Equidyne and solicited proxies in support of an opposition slate of nominees to the Company's board of directors in connection with its annual meeting of stockholders that was held May 28, 2002 (the "Annual Meeting"). Based on certain of the information contained in the messages, Equidyne believes that some of the defendants may be current or former employees of Equidyne or

[4]In response to a separate subpoena, Lycos produced information identifying five defendants who, pursuant to an order of the District Court (A59-60), were then served with process based on the information provided by Lycos. Three of the defendants - Kenneth Jackson (a/k/a "fu_jrn"), Thomas Coughlin (a/k/a "sunstroke"), and James Cooper (a/k/a "fplnobs10") - were subsequently dismissed from the action, while a fourth - Henry Rhodes (a/k/a "majorfixit") - moved to dismiss Equidyne's claims against him. Mr. Rhodes' motion is currently pending before the District Court.

current or former consultants to Equidyne who have breached agreements with the Company that expressly prohibit the disclosure of confidential information concerning the Company. *See* A24-25 (Complaint ¶¶ 6-13).

B. **Doe No. 9's Internet Message Board Postings.**

The Internet world wide web sites Yahoo! (*http://www.yahoo.com*) and Lycos (*http://www.lycos.com*) maintain a variety of message boards dedicated to various topics to which users can post information, including message boards related to public companies. Yahoo! and Lycos both have message boards dedicated to topics concerning Equidyne (the "Message Boards"), located at the Uniform Resource Locator ("URL") Internet addresses *http://messages.yahoo.com/?action=q&board=IJX* and *http://ragingbull.lycos.com/mboard/boards.cgi?board=AMEX:IJX*. Equidyne has no affiliation with, and exercises no control over, the Message Boards. A26 (Complaint ¶ 14).

Beginning at least as early as November 2, 2001, certain of the defendants made postings to the Message Boards which improperly disclosed certain proprietary and confidential information of Equidyne that would only have been known to certain employees of Equidyne or consultants to Equidyne. *See* A26-28 (Complaint ¶ 16). In addition, some defendants also posted messages to the Message Boards in which they solicited stockholder support for an insurgent slate of directors at the Annual Meeting. A31 (Complaint ¶ 32).

Beginning in late February 2002, Doe No. 9 and other users of the Yahoo! Message Board began posting messages opposing Equidyne's board of directors and soliciting support for a possible opposition slate of directors. On February 28, 2002, defendant John Doe No. 1, a/k/a "newdirectorsrequired" ("Doe No. 1"), posted two messages to the Yahoo! board asking Equidyne stockholders who "would like to seek a new board of directors qualified to run this company" to send an e-mail to Doe No. 1's e-mail address. A118-19. Later that day, Doe No. 9 posted a message encouraging stockholders to respond to Doe No. 1's requests:

> The messages posted by newdirectorsrequired to replace the Equidyne board of directors is a serious effort with a high likelyhood [*sic*] of success. Your shares are needed! Please send an email to:
>
> newdirectorsrequired@yahoo.com

A120. On March 1, 2002, an individual identifying himself as Jeff Miller and purporting to own shares of Equidyne stock posted a message in response to Doe No. 9's request. A121. Doe No. 9 then requested that Mr. Miller send his name, the number of Equidyne shares he held and his contact information to the e-mail address contained in Doe No. 9's earlier message. A122. At the same time, Doe No. 1 posted another message again requesting that Equidyne stockholders contact him about the opposition movement. A283.

Throughout March 2002, users of the Yahoo! Message Board continued to encourage Equidyne stockholders to vote against the incumbent board and support an anticipated slate of opposition director candidates. *See* A284-85. Then, on or about March 26,

2002, Equidyne received a notice from Henry Rhodes, a stockholder and former employee of the Company, concerning Mr. Rhodes' intent to nominate an alternate slate of directors to run for election at the Annual Meeting. *See* A229-31, A233. No proxy statement supporting Mr. Rhodes' nominees or describing their qualifications was ever filed with the Securities and Exchange Commission ("SEC") or provided to Equidyne's stockholders. Nonetheless, a number of the messages posted by Doe No. 9 and other defendants on the Message Boards sought to solicit support for Mr. Rhodes' slate of directors and discredit the incumbent directors who stood for re-election at the Annual Meeting.

Word of Mr. Rhodes' nomination reached the Yahoo! Message Board shortly after it was delivered to the Company, particularly from users such as Doe No. 1 who appeared to have inside knowledge of the nomination. *See* A286-88, A291-94. On March 29, 2002, defendant John Doe No. 3, a/k/a "fplnobs10", confirmed to the readers of the Yahoo! Message Board that Mr. Rhodes had submitted his nominations for directors to Equidyne:

> In fact an alternate slate of Directors has been sent to the company. This slate consists of "heavy hitters", who make the current Board look like kindergartners. I believe they do have to make a public announcement of this event??? At any rate, this is our only and last opportunity to get our money back. Talk it up with any shareholders you know and vote your proxies.

A123. On the same day, Doe No. 9 posted a message in which he voiced support for the insurgent slate of directors and

specifically solicited proxies from Equidyne's stockholders in favor of those nominees:

> I have been into this company since 1998 with a fair number of shares at $1.53 average cost. I have been very disappointed with the way things have gone but have tried to be patient. My patience has ended and I'm sure all of you feel the same way.
>
> The new slate of directors is certainly a positive development. If elected, they will hopefully get this company on the right track. Obviously, there are a lot of challenges but at least we will have a shot at success. The chances with the current board are nil!
>
> *Please be sure to vote your shares for the new slate when you receive your proxy statement.*

A124 (emphasis added). Other defendants posted similar messages to the Yahoo! Board soliciting proxies from Equidyne stockholders in support of the insurgent slate of directors. *See* A125-28.

On April 9, 2002, the Company announced that Mr. Rhodes' notice was invalid because it failed to meet various applicable state and federal legal requirements. *See* A117. Equidyne's press release was immediately posted to the Message Board by Doe No. 9, who described it as "a bunch of lying b.s." A299. Doe No. 9 later made additional postings supporting Mr. Rhodes and monitoring the Annual Meeting. *See* A301-02.

SUMMARY OF ARGUMENT

1. To date, a small number of courts have considered when plaintiffs should be entitled to discover the identities of anonymous individuals who use the vast communication opportunities of the Internet to disseminate harmful or unlawful speech. The courts that have examined the First Amendment implications of such discovery - including the District Court here - have considered, *inter alia*, whether the plaintiff has established sufficiently the elements of its claim to justify the disclosure of a defendant's identity and the infringement upon the defendant's right to remain anonymous. None of these jurisdictions, however, have required evidence of harm before compelling the identification of an anonymous defendant.

2. In this case, Equidyne produced evidence establishing a prima facie claim against Doe No. 9 under the Exchange Act and demonstrated a compelling need to disclose his identity. In anonymous postings to the Message Board, Doe No. 9 solicited proxies in violation of Section 14(a) of the Exchange Act and federal regulations governing proxy solicitations. Accordingly, in denying Doe No. 9's Motion to Quash, the District Court correctly weighed Doe No. 9's limited First Amendment right to anonymity against the necessity of disclosing his identity to permit Equidyne to pursue its claims.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED DOE NO. 9'S MOTION TO QUASH AND MOTION FOR REARGUMENT.

A. Scope and Standard of Review.

Review of the District Court's interpretation and application of legal precedent is plenary. *Fotta v. Trustees of United Mine Workers of Am.*, 319 F.3d 612, 615-16 (3d Cir. 2003).

B. The District Court Applied the Proper Standard in Denying Doe No. 9's Motion to Quash.

Equidyne does not challenge the protection afforded by the First Amendment to an individual's right to anonymous speech from unjustified intrusion by state action - in this case, by a court-issued subpoena seeking the disclosure of Doe No. 9's identity. Certainly the right of individuals to speak anonymously is one that has a long-honored tradition within the United States' history and has been protected by the Supreme Court. *See, e.g., Talley v. California*, 362 U.S. 60, 64 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). However, it is equally well-established that not all forms of expression are entitled to the protections of the First Amendment, *see, e.g., Roth v. United States*, 354 U.S. 476, 483 (1957) (obscenity is not protected by the First Amendment); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (libelous statements fall outside the realm of constitutionally protected speech), and the Supreme Court has acknowledged that the right to speak anonymously is not absolute. *See McIntyre*, 514 U.S. at 353 (recognizing that a state's interest in preventing harmful

or unlawful speech might justify the identification of anonymous speakers). Thus, the First Amendment right to anonymous speech must be balanced against the right of those harmed by unlawful speech to seek relief against defendants who use anonymity to shield their identity.

As some courts have recognized, the rapid spread of the Internet, and its ability to permit untold numbers of individuals to engage in anonymous discourse easily and inexpensively, have raised novel issues concerning the application of traditional First Amendment doctrines to the unique medium for speech that the Internet offers. To date, a small number of those courts have considered what standards should govern the anonymous use of Internet message boards to engage in unlawful speech and when plaintiffs should be granted access to the identity of the authors of such speech. These courts, like the District Court in this case, have attempted to balance the Internet user's First Amendment right to anonymity against the plaintiff's right to pursue its claims for relief. In this appeal, Doe No. 9 contends that the District Court improperly tipped this balance in Equidyne's favor. An examination of prior opinions and the District Court's decision, however, demonstrates that the District Court properly considered all relevant factors in denying Doe No. 9's Motion to Quash Equidyne's subpoena.

In evaluating Doe No. 9's Motion to Quash, the District Court thoughtfully considered prior opinions of other courts that "provided useful guidance in determining what standards should

govern the compelled disclosure of anonymous speakers on the Internet." A6. For example, in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), the U.S. District Court for the Northern District of California noted that "the need to provide injured parties with an [*sic*] forum in which they may seek redress for grievances ... must be balanced against the legitimate and valuable right to participate in online forums anonymously." 185 F.R.D. at 578. The court then identified four requirements that should be satisfied by a plaintiff before he is entitled through discovery to uncover the identity of an anonymous defendant: (1) identify the missing party with sufficient specificity such that the court can determine that the defendant is a real person or entity who could be sued in federal or state court; (2) identify previous steps taken to locate the defendant; (3) establish that plaintiff's claims could withstand a motion to dismiss; and (4) identify the reasons justifying discovery as well as a limited number of persons or entities on whom discovery might be served and for which there is a reasonable likelihood that the discovery will lead to identifying information concerning the defendant that would permit service of process. *See id.* at 578-80.

In *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Jan. 31, 2000) (attached as Exhibit A), *rev'd on other grounds sub nom. America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001), the Virginia Circuit Court similarly recognized that the First

Amendment right to communicate anonymously "is not absolute." 2000 WL 1210372, at *6. As the court noted:

> In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communications with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored. 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. In performing this balance, the *America Online* court developed a two-part test under which an Internet service provider would be ordered to produce information identifying an anonymous user upon a demonstration by the plaintiff that: (1) it 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 (2) the information sought concerning the user's identity is centrally needed to advance plaintiff's claims. *Id.* at *8.[5]

Finally, the District Court considered the opinion of the Superior Court of New Jersey, Appellate Division, in *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). In *Dendrite*, the court considered a request by Dendrite

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[5]In *Doe v. 2TheMart.com Inc.*, 140 F. Supp.2d 1088 (W.D. Wash. 2001), cited in Doe No. 9's opening brief, the U.S. District Court for the Western District of Washington adopted a test, stricter than those articulated in *Seescandy.com* and *America Online*, to govern the disclosure of the identity of an anonymous non-party witness. *See* 140 F. Supp.2d at 1095. Thus, the holding of *2TheMart.com* is inapplicable to the present case, where the identity of a defendant is being sought and is necessary for claims against the defendant to continue.

International, Inc. ("Dendrite") to seek discovery of Yahoo! to determine the identity of four anonymous defendants who had posted defamatory statements and confidential information on Yahoo!'s message board concerning Dendrite. The trial court, after considering the *Seescandy.com* and *America Online* opinions, adopted the four-part *Seescandy.com* test and applied those factors to the plaintiff's request to seek discovery of Yahoo! *See* A147. After applying this test, the trial court granted Dendrite's request with respect to two defendants who Dendrite claimed had disclosed confidential information, but denied the request as to two defendants who had allegedly defamed Dendrite. *See* A161.

On appeal, the New Jersey appellate court affirmed the trial court's denial of Dendrite's request for discovery concerning the identity of the defendants to its defamation claims. In its opinion, the court modified the test used by the trial court and attempted to further define the boundaries of the First Amendment as it applies to anonymous Internet users:

> We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

> We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application....
>
> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.
>
> The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted ..., the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite, 775 A.2d at 760-61.

Applying this test, the appellate court affirmed the trial court's holding that Dendrite's claims of defamation did not justify disclosure of the anonymous defendants' identity. *See id.* at 772. The test was also applied by the same court in *Immunomedics, Inc. v. Doe*, 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001), where, as here, the plaintiff corporation sought to subpoena Yahoo! to determine the identity of anonymous individuals who had posted confidential information on a Yahoo! message board. In *Immunomedics*, the court denied the defendant's motion to quash, finding that the plaintiff's claims that the defendant had breached a confidentiality agreement satisfied the standards of *Dendrite* and justified disclosure of the defendant's identity. *Id.* at 777.

Using these decisions "as a guidepost" (A8), the District Court considered five factors that, the court concluded, weighed in favor of denying Doe No. 9's Motion to Quash. First, the District Court was satisfied that Doe No. 9 is a real person who is subject to being sued. *Id.* Second, the District Court considered whether efforts were undertaken to notify Doe No. 9 that he was the subject of a subpoena, finding that Yahoo!'s 15-day waiting period and the posting of information to the Message Board provided sufficient notice. *Id.* Third, the District Court found that Equidyne had sufficiently identified the unlawful postings by Doe No. 9 that form the basis for Equidyne's Exchange Act claims and the subpoena. A8-9. Fourth, the District Court examined Equidyne's claims against Doe No. 9 under Section 14(a) of the Exchange Act and the

relevant proxy rules promulgated by the SEC, finding that Equidyne "advanced sufficient grounds to state a claim for a violation of the Exchange Act" against Doe No. 9. A9. Finally, the District Court balanced Equidyne's need to enforce the subpoena against Doe No. 9's First Amendment rights, concluding that discovery of Doe No. 9's identity "is centrally important to [Equidyne's] continued ability to prosecute its claims." A10.

The District Court's test mirrors substantially the analysis developed in *Dendrite*, which at least one commentator has recognized as "a seminal decision in the field of anonymous Internet speech ... that is likely to become an 'influential' decision for other trial courts." Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745, 2769 (2002). Doe No. 9 contends that the District Court deviated from the standards set by *Dendrite* and the other opinions considered by the court by improperly weighing Equidyne's claims against Doe No. 9's First Amendment rights. However, an analysis of the factors examined by the District Court demonstrates that the court struck the proper balance in denying the Motion to Quash.[6]

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[6]Doe No. 9 does not dispute that Equidyne satisfied the first two parts of the *Dendrite* test – *i.e.*, Doe No. 9 was adequately notified of Equidyne's subpoena and provided an opportunity to oppose the motion, and Equidyne identified for the District Court the specific messages giving rise to Equidyne's claims under the Exchange Act – or that the District Court incorrectly applied these factors. Accordingly, Equidyne's argument is limited to the third and fourth parts of the *Dendrite* test discussed by Doe No. 9 in his

1. Equidyne Established a Prima Facie Case Against Doe No. 9 under Section 14(a) of the Exchange Act.

The *Dendrite* court suggested that "[t]he complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants." *Dendrite*, 775 A.2d at 760. Here, the District Court considered the evidence put forward by Equidyne and concluded correctly that Doe No. 9's solicitation of proxies, without the prior filing of a proxy statement with the SEC or the distribution of a proxy statement to Equidyne's stockholders, constituted a prima facie violation of the Exchange Act and SEC rules.

Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), governs the solicitation of proxies from stockholders of publicly-traded companies. Section 14(a) provides, in pertinent part, that "[i]t shall be unlawful for any person, by the use of the mails or any means or instrumentality of interstate commerce ... in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit ... any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title." 15 U.S.C. § 78n(a). Since Equidyne's stock is registered and publicly traded, the Company is governed by the provisions of Section 14(a).

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opening brief.

Pursuant to Section 14(a), the SEC has promulgated a number of rules governing proxies and proxy solicitation.[7] Among these is Rule 14a-3, which prohibits the solicitation of proxies "unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A ... or with a preliminary or definitive written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S-4 or F-4 ... or Form N-14 ... and containing the information specified in such Form." 17 C.F.R. § 240.14a-3(a) (citations omitted). No proxy statement was ever

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[7]While Doe No. 9 contends that his postings did not constitute "solicitations," Rule 14a-1 broadly defines "solicitation" as:

> (i) Any request for a proxy whether or not accompanied by or included in a form of proxy;
>
> (ii) Any request to execute or not to execute, or to revoke, a proxy; or
>
> (iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

17 C.F.R. § 240.14a-1(*l*)(1). (Pursuant to Fed. R. App. P. 28(f), the relevant SEC rules are attached as Exhibits B through E.) In addition, "solicitation" includes not only direct requests for proxies, but also "communications which may indirectly accomplish such a result or constitute a step in a chain of communications designed ultimately to accomplish such a result." *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 795 (2d Cir. 1985) (citing *SEC v. Okin*, 132 F.2d 784, 786 (2d Cir. 1943)). The messages posted by Doe No. 9 to the Yahoo! Message Board constitute proxy solicitations within these definitions and, accordingly, are subject to the applicable SEC regulations.

filed on behalf of *any* opposing slate of directors, including those nominated by Mr. Rhodes, by Doe No. 9 or anyone else. As the District Court found, Doe No. 9's solicitation of proxies on behalf of nominees, in the absence of a prior distribution of a proxy statement to the Company's stockholders, constituted a prima facie violation of Rule 14a-3. *See* A9.

Nonetheless, Rule 14a-12 provides certain limited exceptions to the requirements of Rule 14a-3:

> (a) Notwithstanding the provisions of § 240.14a-3(a), a solicitation may be made before furnishing security holders with a proxy statement meeting the requirements of § 240.14a-3(a) if:
>
> (1) Each written communication includes:
>
> (i) The identity of the participants in the solicitation (as defined in Instruction 3 to Item 4 of Schedule 14A (§ 240.14a-101)) and a description of their direct or indirect interests, by security holdings or otherwise, or a prominent legend in clear, plain language advising security holders where they can obtain that information; and
>
> (ii) A prominent legend in clear, plain language advising security holders to read the proxy statement when it is available because it contains important information. The legend also must explain to investors that they can get the proxy statement, and any other relevant documents, for free at the Commission's web site and describe which documents are available free from the participants; and
>
> (2) A definitive proxy statement meeting the requirements of § 240.14a-3(a) is sent or given to security holders solicited in reliance on this section before or at the same time as the forms of proxy, consent or authorization are furnished to or requested from security holders.

> (b) Any soliciting material published, sent or given to security holders in accordance with paragraph (a) of this section must be filed with the Commission no later than the date the material is first published, sent or given to security holders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14A (§ 240.14a-101) and the appropriate box on the cover page must be marked. Soliciting material in connection with a registered offering is required to be filed only under § 230.424 or § 230.425 of this chapter, and will be deemed filed under this section.

17 C.F.R. § 240.14a-12(a)-(b). None of these requirements were satisfied by Doe No. 9. The messages posted by Doe No. 9 were anonymous and did not provide his identity, a description of his holdings or interests, or a prominent legend advising stockholders where such information was available. Doe No. 9 did not – prominently or otherwise – advise the users of the Message Board to read the Rhodes nominees' proxy statement if and when it became available, nor did he inform them that the proxy statement would be available for free at the SEC's website. In fact, no proxy statement was ever filed or distributed, as required by Rule 14a-12(a)(2). Finally, the proxy solicitations by Doe No. 9 were never filed with the SEC in compliance with Rule 14a-12(b). Considering these facts, the District Court concluded correctly that Doe No.

9's solicitation of proxies did not fall within the exceptions to Rule 14a-3 provided by Rule 14a-12.[8]

a. The District Court Held Correctly That Equidyne Need Not Demonstrate Harm to Justify Enforcement of its Subpoena.

Doe No. 9's primary challenge to the District Court's decision is his claim that the court failed to require an evidentiary showing of harm in evaluating the sufficiency of Equidyne's claims against Doe No. 9. Specifically, Doe No. 9 argues that the *Dendrite* test, which Doe No. 9 suggests this Court should follow, requires that a plaintiff seeking to discover the identity of an anonymous internet user establish that the plaintiff has suffered harm as a result of the defendant's conduct. A close reading of the *Dendrite* opinion, however, reveals that that opinion imposed no such requirement and shows that the District Court correctly did not require evidence of harm.

Dendrite suggests that a plaintiff should establish a prima facie claim against an anonymous defendant before the court orders disclosure of the defendant's identity. In particular, the

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[8]Nor are Doe No. 9's postings exempt under Rule 14a-2(b)(2), which excludes from the proxy statement requirements solicitations in which the total number of persons solicited is not greater than ten. *See* 17 C.F.R. § 240.14a-2(b)(2). Doe No. 9's messages were unquestionably posted with the intent that they be seen and read by all users of the Message Board, which number far more than ten. Additionally, as the District Court correctly found in denying reargument (A12), Rule 14a-2(b)(1), which exempts solicitations "by or on behalf of any person who does not ... seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder," 17 C.F.R. § 240.14a-2(b)(1), likewise does not apply to Doe No. 9. *See* A188-89 (Equidyne's Mem. in Opp. to Doe No. 9's Motion for Reargument).

Dendrite court counseled that a plaintiff, "[i]n addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted ... must produce sufficient evidence supporting *each element of its cause of action*, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant." *Dendrite*, 775 A.2d at 760 (emphasis added). The court further opined that this review goes beyond simply a motion to dismiss standard and should be "a flexible, non-technical, fact-sensitive mechanism for courts to use as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Id.* at 771.

The *Dendrite* court did *not*, however, require an independent showing of harm in addition to its requirement that a plaintiff demonstrate each element of its claim. This is appropriate, of course, because not every claim for relief requires proof of harm to state a prima facie case. For example, the plaintiff in *Dendrite* alleged claims of defamation against the anonymous defendants whose identity was sought through a subpoena. In evaluating whether the plaintiff had established a prima facie claim of defamation, the *Dendrite* court considered whether the plaintiff had demonstrated harm because that is one of the requisite elements of defamation under New Jersey law. *See id.* at 771-72. The *Dendrite* court affirmed the trial court's order

quashing the subpoena because the plaintiff had not stated a prima facie claim for defamation, *not* because the plaintiff had failed to make an independent showing of harm.

This is confirmed by *Immunomedics*, a companion case decided by the same court on the same day as *Dendrite*. In that opinion, the court affirmed the disclosure of an Internet user's identity after finding under the *Dendrite* test that the plaintiff had established a prima facie cause of action for breach of a confidentiality agreement. *See Immunomedics*, 775 A.2d at 777. In doing so, the court made no determination of whether the plaintiff had demonstrated harm from that breach. *See id.* The *Dendrite* and *Immunomedics* opinions are entirely consistent with the District Court's conclusion that, while a finding of harm should not be *required*, "harm could or could not be relevant in the circumstances of a specific case." A12.

Here, the District Court found correctly that the evidence put forward by Equidyne established a prima facie claim against Doe No. 9 under Section 14(a) of the Exchange Act without requiring a separate demonstration of harm. *See Berman v. Thomson*, 312 F. Supp. 1031, 1033 (N.D. Ill. 1970) (recognizing that "a plaintiff who can prove a violation of [Section 14(a)] is entitled to a judgment regardless of financial injury" or whether the violation "actually had a decisive effect on the voting"). While Doe No. 9 challenges Equidyne for failing to produce evidence of harm in opposition to the Motion to Quash, neither the District Court nor

any of the opinions cited in briefing required it to do so. In any event, as the District Court noted (*see* A12), Equidyne identified specific harm it suffered at the hands of Doe No. 9 and the other defendants who used the Message Boards in violation of the Exchange Act and proxy rules. Specifically, the actions of Doe No. 9 and the other defendants forced Equidyne to retain counsel at considerable expense to evaluate the nominations and solicitations, communicate with the SEC, and prepare the Company's proxy materials. The postings also had an adverse impact on the morale of Equidyne's employees and diverted substantial amounts of time and effort by Equidyne's executive management from the day-to-day business of the Company. While Doe No. 9 criticizes these damages as "flimsy" and "unsubstantiated," Equidyne certainly could have supported them with evidence had it needed to do so before the District Court.

Finally, Doe No. 9 ignores the importance of the Federal proxy rules and the policies they are intended to promote. Regardless of whether or not Equidyne's incumbent directors were re-elected at the Annual Meeting, the Company faced harm to its stockholders - to whom Doe No. 9's internet postings were directed - considering how to vote their shares at the Annual Meeting while confronted with solicitations from Doe No. 9 and other defendants against the incumbent directors. As a result of the defendants' actions, Equidyne conducted its 2002 election of directors against a backdrop of misinformation and proxy solicitations that failed to provide the essential information required by SEC Rules 14a-3 and

14a-12. While Doe No. 9 belittles the impact of his postings on the stockholder voting franchise, courts have long recognized that a corporation may assert claims under Section 14(a) of the Exchange Act arising from unlawful proxy solicitations directed to its stockholders. *See, e.g., GAF Corp. v. Milstein,* 453 F.2d 709, 719 (2d Cir. 1971); *General Time Corp. v. Talley Indus., Inc.,* 403 F.2d 159, 161 (2d Cir. 1968); *Studebaker Corp. v. Gittlin,* 360 F.2d 692, 695 (2d Cir. 1966). Thus, even if harm was a relevant factor for the District Court to consider, the significant harm to Equidyne's stockholders would justify enforcement of the subpoena.

2. The District Court Properly Balanced Doe No. 9's First Amendment Rights With the Necessity of Identifying Doe No. 9 to Permit Equidyne's Claims to Proceed.

As the last part of its four-part test, *Dendrite* suggests that "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Dendrite,* 775 A.2d at 760-61. Contrary to Doe No. 9's claims, the District Court undertook this analysis in denying the Motion to Quash, finding that "the discovery sought from Yahoo! may well be the *only* way for [Equidyne] to obtain the identify of ... Doe No. 9 and serve process on him" and that Equidyne "established that the identity of ... Doe No. 9 is centrally important to its continued ability to prosecute its claims." A10 (emphasis added). "Taking

these factors in total," the District Court concluded, "they weigh in favor of preserving the subpoena directed to Yahoo!." *Id.*

The District Court's analysis struck the proper balance between Doe No. 9's limited right to anonymous speech and Equidyne's need for Doe No. 9's identity to pursue its claims. Applying the *Dendrite* test, the court in *Immunomedics* aptly noted that "[a]lthough anonymous speech on the Internet is protected, there must be an avenue for redress for those who are wronged. Individuals choosing to harm another ... through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment." *Immunomedics*, 775 A.2d at 777-78. Doe No. 9, through the Message Boards, attempted to solicit support for an insurgent slate of nominees to Equidyne's board of directors without complying with the laws and regulations that ensure that the stockholders of public companies can make a fully-informed voting decision, free from misinformation or misleading statements. Doe No. 9's anonymous use of Yahoo! to circumvent these laws ran contrary to the public interest in maintaining complete disclosure of material information concerning public corporations and the integrity of the country's capital markets. On the other hand, discovery of Yahoo! concerning the identity of Doe No. 9 is the *only* means by which Equidyne can serve Doe No. 9 with process and is absolutely necessary to the prosecution of its claims. Accordingly, the District Court appropriately found that Doe No. 9's anonymity is not entitled to the protections normally afforded by the First Amendment.

CONCLUSION

For the reasons stated above, Equidyne respectfully requests that the Court affirm the District Court's denials of Doe No. 9's Motion to Quash and Motion for Reargument.

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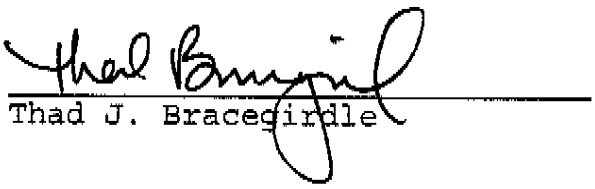
Dated: July 7, 2003

CERTIFICATE OF BAR MEMBERSHIP

Thad J. Bracegirdle hereby certifies that he is a member in good standing of the United States Court of Appeals for the Third Circuit.



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