

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CLERK U.S. DISTRICT COURT
DISTRICT OF DELAWARE
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EQUIDYNE CORPORATION,

Plaintiff,

v.

JOHN DOES 1-21, a/k/a
"NEWDIRECTORSREQUIRED,"
"SANTOSOTELO," "FPLNOBS10,"
"PBHCLAN," "CATMANZEKE,"
"WARTHOG2837," "PAINLESSINNJ,"
"TSUKIJIKID1," "AESCHYLUS 2000,"
"HEMAN8700," "MAJORFIXIT,"
"HLPONWAY," "LOUCARO,"
"SPESHULUST," "BIRD_OVO,"
"FALLON30," "SUNSTRÖKE,"
"PERSPICACIOUS12001,"
"PSEUDONYM022002," "PHARMGUY,"
and "FU_JRN,"

Defendants.

Civil Action No. 02-430-JJF

MEMORANDUM ORDER

Before the Court is a Motion To Quash Third-Party Subpoena To Yahoo! Inc. filed by one of the Defendants, John Doe No. 9, in the above-captioned action. The Plaintiff, Equidyne Corporation, has identified Defendant John Doe No. 9 by his Internet user name, "Aeschylus_2000" and has issued a subpoena to Yahoo! Inc. ("Yahoo!") seeking production of information related to the identity of the Defendants, including John Doe No. 9. Defendant John Doe No. 9 has filed the instant Motion To Quash contending that the subpoena violates his First Amendment right to speak anonymously on the Internet.

In response to the Motion, Plaintiff contends that its third-party subpoena is necessary to allow it to identify the twenty-one John Doe Defendants that it has sued. As alleged in

its Complaint, Plaintiff contends that the John Doe Defendants, using pseudonyms, have: (1) breached one or more contracts between themselves and Plaintiff, and/or (2) violated provisions of the Securities Exchange Act of 1934 (the "Exchange Act") and the rules and regulations promulgated thereunder concerning the solicitation of proxies and the misappropriation and dissemination of non-public and/or false and misleading information. With respect to John Doe No. 9 specifically, Plaintiff contends that John Doe No. 9 posted messages on the Yahoo! Message Board related to Equidyne in which he solicited proxies from other shareholders in support of an alternate slate of directors sponsored by a stockholder and former employee of Equidyne, Mr. Henry J. Rhodes. According to Equidyne, this solicitation violates the Exchange Act for several reasons, including that no proxy statement supporting the alternate nominees or describing their qualifications was ever filed with the Securities and Exchange Commission ("SEC") and John Doe No. 9 did not comply with the relevant provisions for proxy solicitation.

The First Amendment protects an individual's right to anonymous speech, however, that interest must be balanced against the rights of those harmed by unlawful speech to seek relief against a defendant who uses anonymity to shield his or her identity. See e.g. Immunomedics, Inc. v. Jean Doe, 775 A.2d 756, 776 (N.J. Super. App. Div. 2001). Although this jurisdiction has

not yet considered this issue in the context of Internet speech, other courts have provided useful guidance in determining what standards should govern the compelled disclosure of anonymous speakers on the Internet. For example, in Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578-579 (N.D. Cal. 1999), the court identified four requirements that the injured party must satisfy before being entitled 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 the 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 that would allow service of process on the anonymous individual.

Echoing justifications similar to those embodied by the Seescandy.com four part test, the Circuit Court of Virginia set forth two requirements that the plaintiff must satisfy to obtain the anonymous user's identity: (1) that plaintiff has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where the suit was filed, and (2) the information sought concerning the user's

identity is centrally needed to advance the plaintiff's claims. In re Subpoena Duces Tecum to America Online, Inc., 2000 WL 1210372 (Va. Cir. Jan. 31, 2000), rev'd on other grounds sub nom. America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E. 2d 377 (Va. 2001).

Examining both of these opinions, the Superior Court of New Jersey adopted the more stringent Seescandy.com four part test, which was later refined by the Appellate Division of the New Jersey Superior Court. As refined by the Appellate Division of the New Jersey Superior Court, the test requires: (1) the plaintiff to show that efforts were taken to notify the anonymous poster that he or she is the subject of a subpoena and withhold action to afford the fictitiously-named defendant a reasonable opportunity to respond; (2) the plaintiff to identify and set forth the exact statements purportedly made by the anonymous poster that constitute actionable speech; (3) the court to evaluate the complaint and all information before it to determine if the action can withstand a motion to dismiss and plaintiff has set forth a prima facie cause of action against the fictitiously-named defendant; and (4) the court to balance the defendant's First Amendment right of anonymous free speech against the prima facie case presented and the necessity for the disclosure of the anonymous person's identity to allow the plaintiff to proceed. Dendrite International, Inc. v John Doe No. 3, 775 A.2d 756, 760-761 (N.J. Super. App. Div. 2001); see also Immunomedics, Inc.,

775 A.2d at 776 (reiterating the Dendrite test). These factors must be analyzed on a case-by-case basis in light of the equities and rights at issue. Dendrite, 775 A.2d at 761.

Using these decisions as a guidepost, the Court concludes that the balance of the interests and equities in this case weigh in favor of allowing the subpoena to stand and denying the Motion To Quash. The Court is satisfied that Defendant John Doe No. 9 identified by the user name "Aeschylus_2000" is a real person who may be sued in court. (D.I. 20, Ex. A (identifying "Aeschylus_2000" in user profile as a male)).

The Court is also satisfied that efforts were undertaken to notify Defendant John Doe No. 9 that he was the subject of a subpoena. Yahoo! notified each John Doe Defendant by e-mail, and users of the Message Board posted messages informing all users of the subpoena and listing those anonymous defendants whose identity was being sought. (D.I. 20, Ex. B, Ex. N, O, P.). In addition, Yahoo! indicated that it would respond to the subpoena within 15 days, unless a motion to quash was filed or the matter was otherwise resolved. Plaintiff did not seek information before this 15 day period expired, and Defendant John Doe No. 9 filed the instant Motion To Quash, which suggests that Defendant John Doe No. 9 was provided with ample time to object to the disclosure of his identity.

Although not specifically identified in its Complaint, Plaintiff has identified for the Court those statements by

Defendant John Doe No. 9 which it contends are actionable as violations of the Exchange Act. Evaluating these statements in light of the law pertaining to Section 14(a) of the Exchange Act and related Rules 14a-3, 14a-9 and 14a-12, the Court concludes that at this early stage of the litigation, Plaintiff has advanced sufficient grounds to state a claim for a violation of the Exchange Act against Defendant John Doe No. 9. Whether Plaintiff will be able to sustain its claim in the later stages of this litigation is another matter entirely; however, in the Court's view, Plaintiff has demonstrated a good faith basis to believe that the statements made by Defendant John Doe No. 9 on the Message Board constitute proxy solicitations which violate the Exchange Act and its rules. Specifically, Defendant John Doe No. 9 requested shareholders to vote their proxies for an alternate slate of directors, even though a proxy statement for those directors was never filed with the SEC or distributed to Plaintiff's shareholders. 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-3(a) (prohibiting solicitation of proxies unless each person solicited has been furnished with a publicly-filed preliminary or definitive written proxy statement). In addition, Defendant John Doe No. 9 never identified himself, never provided a description of his holdings or interests, never prominently posted a legend advising users of the Message Board where such information would be available, and never advised users of the Message Board to read the proxy statement for the alternate slate

of directors, if one ever became available. 17 C.F.R. § 240.14a-12(a)-(b) (providing exceptions to Rule 14a-3 if certain requirements are met, including but not limited to, identifying the participants in the solicitation and advising shareholders to read the proxy statement).

Further, Plaintiff has established that it is likely that its subpoena will produce identifying information from Yahoo!. Indeed, the discovery sought from Yahoo! may well be the only way for Plaintiff to obtain the identity of Defendant John Doe No. 9 and serve process on him. Thus, Plaintiff has also established that the identity of Defendant John Doe No. 9 is centrally important to its continued ability to prosecute its claims. Taking these factors in total, the Court concludes that they weigh in favor of preserving the subpoena directed to Yahoo!.

NOW THEREFORE, IT IS HEREBY ORDERED, this 1st day of November 2002, that the Motion To Quash Third-Party Subpoena To Yahoo! Inc. is DENIED.


UNITED STATES DISTRICT JUDGE