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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

FIRST CASH FINANCIAL SERVICES, INC., Plaintiff, v. JOHN DOE A/K/A KNOWFCFS, et al., Defendant.	**CASE NO.: 1-03-CV002135** **DEFENDANT JOHN DOE'S REPLY MEMORANDUM IN SUPPORT OF SPECIAL MOTION TO STRIKE, PURSUANT TO C.C.P. § 425.16** **BY FAX** Date: November 20, 2003 Time: 9 a.m. Dept.: 2 Judge: Hon. William J. Elfving

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DEFENDANT JOHN DOE'S REPLY MEMORANDUM IN SUPPORT OF SPECIAL MOTION TO STRIKE

INTRODUCTION.

Plaintiff, a publicly-traded company, has sued defendant, a John Doe, in Texas, alleging a single cause of action for breach of contract based solely on defendant's posts about matters of public significance on a Yahoo! financial message board.

Plaintiff has invoked the authority of this Court to compel Yahoo! via a deposition subpoena to provide plaintiff with information regarding defendant's identity. However, plaintiff has provided no evidence to support any of the elements of its claim – including damages. Indeed, defendant's declaration establishes that defendant is not an employee of plaintiff and never signed a confidentiality or employment agreement with plaintiff and therefore plaintiff can not prove that any contract was breached.

Thus, plaintiff's deposition subpoena is a fishing expedition spawned by a meritless lawsuit, arising from defendant's exercise of constitutionally-protected free speech rights. This is the kind of abuse of the California courts that the California anti-SLAPP law is designed to prevent. Defendant's special motion to strike should be granted.

I. THE DEPOSITION SUBPOENA IS COVERED BY C.C.P. SECTION 425.16, BECAUSE IT ARISES ENTIRELY FROM DEFENDANT'S ACTS IN FURTHERANCE OF THE FIRST AMENDMENT RIGHT TO SPEAK OUT ON A PUBLIC ISSUE.

Defendant John Doe's original motion demonstrated that the California anti-SLAPP law was enacted to protect the fundamental constitutional rights of petition and speech and is to be construed broadly, and set forth the procedure and standards for determining applicability of the anti-SLAPP statute. (SMTS 4:12-6:14.) Defendant also established that plaintiff First Cash Financial Services is a publicly-traded corporation, and that messages posted on an Internet financial message board website about a publicly-traded corporation, such as those posted by defendant, are covered under the anti-SLAPP statute. (SMTS 6:15-2:18.)

Plaintiff does not dispute any of this. Rather, plaintiff argues that the anti-SLAPP statute may not be applied to a lawsuit pending in Texas, and therefore this Court may not strike the subpoena which

is directed to a non-party witness, Yahoo!. (Opp. 7:14-9:11.) However, defendant's special motion to strike does not seek "the dismissal of a lawsuit pending in Texas state court," or to strike pleadings filed in Texas, as plaintiff asserts. (Opp. 2:6-8; 7:22-8:1.) Rather, it seeks to strike only what plaintiff has sought in California, in Santa Clara Superior Court: plaintiff's deposition subpoena, issued by the clerk of the Santa Clara Superior Court, which requires Yahoo! to reveal defendant's private identifying information to plaintiff. (See SMTS 2 fn. 2.) As discussed below, this is entirely proper and is consistent with the purpose of the California anti-SLAPP law.

A. The California Anti-SLAPP Law Is to Be Construed Broadly, and It Applies to Discovery Sought under the Authority of a California Court when It Arises from any Act in Furtherance of the Rights of Speech or Petition.

The California anti-SLAPP law was enacted to prevent the chilling of public participation on matters of public significance by "abuse of the judicial process." (Code Civ. Proc. 425.16(a).)[1] Under a broad construction of the anti-SLAPP law, which is mandated by the statute (§ 425.16(a)), the ability to strike a cause of action pending in a California court certainly encompasses the ability to strike discovery pending in a California court which is conducted pursuant to a cause of action arising from petition or speech activity covered by section 425.16.[2] If the underlying action had been filed in this Court, defendant would have been entitled to the protections of the anti-SLAPP law, including the prevention of the discovery sought by plaintiff. Defendant should not lose this protection against discovery in a California court merely because the underlying action was filed in another state.

The California Supreme Court has made clear that the anti-SLAPP law is to be construed broadly, as mandated by the Legislature, to protect First Amendment rights, and that it is not limited to

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[1] Statutory section references herein are to the Code of Civil Procedure, unless otherwise indicated.

[2] The principle that the "greater includes the lesser" applies to the court's statutorily granted authority. When given broad power, courts may exercise it more narrowly than the specific language of the statute provides. For instance, in *Beavers v. Allstate Insurance Co.* (1990) 225 Cal.App.3d 310, 322-23, the court concluded that a judgment notwithstanding the verdict may be granted as to only some, not necessarily all, of the issues, even though section 629 only referred to "the verdict" and not parts thereof. Similarly, a court may declare a partial mistrial and reserve judgment on some, but not all, causes of action pending a second trial, even though section 616 refers only to a jury's inability to render a "verdict" and authorizes that "the action" may be retried. (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1475-77.)

any particular form of action. Earlier this year, the California Supreme Court issued a unanimous opinion in *Jarrow Formulas v. LaMarche* (2003) 31 Cal.4th 728. In holding a malicious prosecution action subject to section 425.16, *Jarrow* noted that the anti-SLAPP law must be construed broadly, and held that "[n]othing in the statute itself categorically excludes any particular type of action from its operation." (*Id*. at p. 735.) Citing three of its previous anti-SLAPP opinions, the Court stated that the statute protects defendants who have been sued for exercising their constitutional rights, regardless of the nature or form of the action: "[I]n choosing comprehensive language for the anti-SLAPP statute's 'arising from' prong, [t]he Legislature recognized that all kinds of claims could achieve the objective of a SLAPP suit. . . . Under the remedial scheme the Legislature crafted, therefore, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights." (*Id.* at p. 739 [citations and internal quotation marks omitted]; see also *Equilon Enterprises v. Consumer Cause* (2002) 29 Cal.4th 53, 60 [same]; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92-93 [same].) *Jarrow* also noted that the Legislature has created a single exemption to section 425.16, in subdivision (d), for public prosecutor enforcement actions, and courts are not free to add additional exemptions. (*Id*. at p. 735.) Plaintiff's deposition subpoena is based on its lawsuit against defendant, which is based upon defendant's posts on the Yahoo! FCFS message board. These posts are acts in furtherance of defendant's First Amendment rights and are covered by section 425.16. (*ComputerXpress v. Jackson* (2001) 93 Cal.App.4th 993, 1005-10; *Global Telemedia International v. Doe 1* (C.D.Cal. 2001) 132 F.Supp.2d 1261, 1265-66.) The anti-SLAPP law, broadly construed, covers litigation arising from these acts.

B. The Doctrine of Comity Has No Impact Here, Because Section 425.16 Is a Procedural Statute and Because Texas and California Substantive Law Do Not Materially Conflict in this Case.

Plaintiff argues that under the doctrine of comity, the substantive law of Texas, not California, applies to this case. (Opp. 8:2-20.) However, the California anti-SLAPP law, section 425.16 of the Code of Civil Procedure, is a procedural, not a substantive, statute. In *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 356, the court held that section 425.16 was a procedural statute, and therefore was applicable to a libel claim which arose before the effective date of the statute. The court stated that section 425.16 "merely is a procedural screening mechanism for determining whether a plaintiff can

demonstrate sufficient facts to permit the matter to go to a trier of fact." In *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119, fn. 7, the Supreme Court noted that section 425.16 is a procedural statute, citing *Robertson v. Rodriguez*. (See also *People v. Health Laboratories of North America* (2001) 87 Cal.App.4th 442, 449 [same]; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 21 [section 425.16 is "a mere rule of procedure"].)

California courts apply California procedural law for proceedings in California, even when foreign substantive law is applicable. (*Roberts v. Home Ins. Indem. Co.* (1975) 48 Cal.App.3d 313, 318.) This Court has complete control over the discovery process which is conducted through the authority of this Court. In *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1973) 33 Cal.App.3d 503, 506, cited by plaintiff, the court states: "An important distinction is that the commission is entirely under the control of the court issuing it; *as to the letter rogatory, the procedure is under the control of the foreign tribunal whose assistance is sought* in the administration of justice." [Citations omitted; emphasis added.]

Further, there is no material difference in the substantive law of contract as it pertains to this case. Texas[3] and California[4] both provide that for a claim for breach of contract, the plaintiff must establish the existence of a contract, plaintiff's performance, a breach by defendant, causation, and damages.[5] As discussed below, plaintiff has not presented any evidence to establish any of the elements

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[3] "The essential elements in a suit for breach of contract are: (1) the existence of a valid contract; (2) that plaintiff performed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of that breach." (*Hussong v. Schwan's Sales Enterprises, Inc.*, (1995) 896 S.W.2d 320, 326 (Tex. App. Houston [1st Dist.], no writ).) (For a copy of the Texas authorities cited herein, see defendant's Supplemental Compendium of Non-California Authorities, filed herewith.)

[4] "A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance of the contract or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

[5]As discussed below, even though plaintiff's Petition contains a single cause of action – for breach of contract –, plaintiff asserts that it also has a defamation or disparagement claim against defendant. Even if this were true, Texas and California both require the plaintiff to show that defendant

(continued...)

of its claim.

C. Public Policy Requires Application of the Anti-SLAPP Law to Plantiff's Deposition Subpoena.

Plaintiff also argues that it is not against California public policy to permit it to conduct discovery based on a Santa Clara Superior Court subpoena. (Opp. 8:21-9:9.) This is not true. The public policies of protecting individuals' rights of privacy and free speech are so important to the State of California that they are specifically set forth in our Constitution. Article 1, Section 1 of the Constitution of the State of California provides: "All people are by nature free and independent and have inalienable rights. Among those are . . . pursuing and obtaining safety, happiness, and *privacy*." [emphasis added] Article 1, section 2(a) provides: "Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The California Legislature and Supreme Court have both stressed that it is against public policy to allow abuse of the judicial process which chills participation in matters of public interest. (C.C.P. § 425.16(a); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119 [courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner favorable to the exercise of freedom of speech, not to its curtailment"].)

When the identities of anonymous speakers are sought, "[c]ourts carefully balance the 'compelling' public need to disclose against the confidentiality interests to withhold, giving great weight to fundamental privacy rights." (*Rancho Publications v. Superior Court* (1999) 68 Cal.App.4th 1538, 1549 [subpoena seeking names of non-party anonymous authors of "advertorials"].) The United States Supreme Court has repeatedly upheld the First Amendment right to speak anonymously and remain

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[5](...continued)
published false statements about plaintiff, which plaintiff has not done here. **Texas:** "[T]o prevail at trial [on a claim for defamation], a plaintiff must show the defendant made a false and defamatory statement of fact without knowledge that it was false or with reckless disregard of whether it was true or false." (*Simmons v. Ware* (1996) 920 S.W.2d 438, 443 (Tex. App. Amarillo).) See also Opp. 5:11-14, citing Texas authority that falsity is an element of the tort of business disparagement. **California:** "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civil Code § 45; *Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 802-803.)

anonymous. *(Buckley v. American Law Foundation* (1995) 525 U.S. 182, 197-200; *McIntyre v. Ohio Elections Commission* (1995) 514 U.S. 334, 341-42.) Speech on the Internet is entitled to the highest degree of First Amendment protection. *(Reno v. ACLU* (1997) 521 U.S. 844, 870.) "The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously." (*Doe v. 2TheMart.com, Inc.* (W.D. Wash. 2001) 140 F.Supp.2d 1088, 1093.) A court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." (*NAACP v. Alabama ex rel. Patterson* (1958) 357 U.S. 449, 461.) Abridgment of the rights to free speech and press, "even though unintended, may inevitably flow from varied forms of governmental action," such as compelling the production of names. (*Ibid*.)

In *Columbia Ins. Co. v. Seescandy.com* (N.D. Cal. 1999) 185 F.R.D. 573, 578-580, the court considered whether a subpoena to learn the true identity of Doe defendants should issue pursuant to the Federal Rules of Civil Procedure: "[B]efore a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made." The court adopted a balancing process similar to that conducted when the identity of a reporter's anonymous source is sought. The court's observations and reasoning are equally appropriate to the instant situation. "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*. at p. 578.)

II. PLAINTIFF HAS FAILED TO MEET ITS BURDEN UNDER SECTION 425.16 BECAUSE IT HAS SUED DEFENDANT ONLY FOR BREACH OF CONTRACT BUT HAS PROVIDED NO EVIDENCE OF THE EXISTENCE OF A CONTRACT BETWEEN THE PARTIES OR OF DAMAGES.

As noted in defendant's moving papers, once a defendant has made a prima facie showing that the lawsuit arises from petition or speech activity covered by section 425.16, as defendant has here, the burden shifts to the plaintiff to establish a probability of prevailing on its claims, which must be done by competent and admissible evidence. (SMTS 11:3-7; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88;

Church of Scientology v. Wollersheim (1994) 42 Cal.App.4th 628, 646.)

Plaintiff has not even attempted to meet its burden. Plaintiff has filed a lawsuit in Texas with a single cause of action – for breach of contract. (See Petition, *First Cash Financial Services v. John Doe*, ¶¶ 9-11, attached as Exhibit C to plaintiff's opposition.) Without presenting a shred of evidence, plaintiff asserts that it believes that defendant Doe is a current or former employee and therefore, "may also be in breach" of a confidentiality agreement with plaintiff. (Opp. 6:1-4.) Plaintiff provides no evidence in support of this claim, merely two assertions in its opposition, that Doe "makes reference to frequency of preparation of board minutes, of which only an employee would be aware" (Opp. 6:7-8) and that for many of Doe's assertions, "the general context of which could only be obtained by an employee." (Opp. 6:10-11.) Obviously, frequency of board minutes is not confidential information. As for the other claim, plaintiff's failure to provide any specific allegations, much less evidence or facts, renders this assertion insufficient to support First Cash's burden of demonstrating a probability of success in proving the existence of a contract between plaintiff and defendant. Since breach of contract is the only cause of action in its lawsuit, its subpoena must be stricken.

Even if plaintiff's failure to demonstrate evidence of a contract were not sufficient to support granting the motion to strike, defendant's declaration in this case is. Defendant Doe's declaration, filed herewith, confirms that defendant is not, and was not at the time of defendant's posts, employed by FCFS or any of its subsidiaries or competitors. (Doe Decl., ¶ 3.) Defendant never signed any employment agreement or any confidentiality agreement with FCFS. (Doe Decl., ¶ 4.) At the time of defendant's posts, defendant was a shareholder of FCFS stock and has never been in a position to benefit from a decrease in the price of FCFS stock. (Doe Decl., ¶ 5.)[6]

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[6] In its opposition to defendant's motion to file a record under seal, plaintiff argues that it is not proper for defendant to submit new evidence, such as defendant's declaration, with defendant's reply papers. (Opp. to Motion to File Record under Seal, 1:25-27, 2:11-13, 9:15-12:12.) However, plaintiff's argument ignores that under the two-step process under section 425.16, once defendant has met his burden to show that the statute applies, plaintiff has the burden to show a probability of prevailing in its opposition papers, and defendant is entitled to reply on that issue in its reply papers. In *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 775, the court rejected a similar argument made by the plaintiffs in that case: "[W]here, as here, the motion to strike meets the 'arising from' prong of the anti-SLAPP test, the plaintiff must satisfy the second prong of the test and establish *evidentiary* support for [its] claim. . .

(continued...)

Additionally, plaintiff has failed to meet its burden of proving damages. Plaintiff has not produced a shred of evidence showing that it suffered any damages from defendant's posts. Indeed, it is clear that defendant's posts did not damage plaintiff. From the first of defendant's posts in early July 2002, First Cash's earnings and profitability have increased phenomenally. First Cash's own press release touts its "record-setting performance." (Clifford Decl., ¶¶ 2-5 and Exhibits A-D thereto.) Further, plaintiff's stock price has generally tracked the trends of its competitor's stock prices and the NASDAQ, Dow Jones and Standard & Poor's indexes. (Clifford Decl., ¶¶ 6-10 and Exhibits E, G, H, and I thereto.) Plaintiff's failure to show any damages is fatal to its contract claim. (*Navellier v. Sletten, supra,* 106 Cal.App.4th at p. 769 ["the breach of contract cause of action . . . fails because plaintiffs presented no evidence of damages from the breach"].)

Finally, plaintiff's opposition references two other legal claims that are not included as causes of action in the Texas action, for defamation and business disparagement. (Opp. 3:12-5:28.) However, these arguments are irrelevant. Under the California anti-SLAPP statute, as well as basic common sense, plaintiff's discovery demands must relate to the claims it has actually made. (*1-800-Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 593 [to justify discovery, plaintiff must show that a witness possesses evidence needed by plaintiff to establish a prima facie case].) If plaintiff had believed that it had legitimate causes of action for defamation or business disparagement, it could have included those causes of action in its Texas lawsuit. It did not. "[A] plaintiff cannot use an 11th-hour amendment to plead around a motion to strike under the anti-SLAPP statute." (*Navellier v. Sletten, supra,* 106 Cal.App.4th at p. 773.) Instead, the belated addition of these two other issues demonstrates that the demand for Doe's identity is merely a fishing expedition and an attempt to frighten Doe into silence, rather than a serious attempt to address injuries through litigation. The mere statement that First Cash "may also sue" for other claims (Opp. 5:7) is insufficient to support discovery when the only cause of

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[6](...continued)
. That defendant raised legal issues in his motion did not relieve plaintiffs of their burden of presenting a sufficient showing of facts to sustain a favorable judgment, and after plaintiffs' opposition was filed defendant could properly point to the failure to meet that burden, regardless of any other theories he may have advanced in his original moving papers." [Citations and internal quotation marks omitted; emphasis in original.]

action in its lawsuit, for breach of contract, is plainly unsupportable. In any case, even if the two unpled claims could serve as a basis for discovery, they fail, because the plaintiff has produced no evidence to show that any of the statements in defendant's posts are false.

Therefore, since plaintiff has not shown a probability of prevailing on its claim, defendant's special motion to strike must be granted under section 425.16 and the deposition subpoena must be struck.

III. PLAINTIFF'S REQUEST FOR ADDITIONAL TIME TO CONDUCT DISCOVERY MUST BE DENIED BECAUSE PLAINTIFF HAS NOT COMPLIED WITH THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS IN C.C.P. SECTION 425.16(g).

In its opposition, First Cash asks in the alternative for additional time to conduct unspecified discovery "concerning this dispute." (Opp. 9:13-25.) This request should be denied, for at least five reasons. First, the purpose of section 425.16 is to provide a mechanism for speedy and low-cost dismissal of meritless proceedings implicating First Amendment rights. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 826 [section 425.16 is designed to result in "the speedy and low-cost termination of abusive litigation"].) The additional delay and expense which would result from plaintiff's request would undermine this purpose. Second, in the stipulation and order changing the briefing schedule and hearing date, First Cash expressly agreed that it "will not seek to lift the automatic stay in discovery in California in matter 01-03-CV-002135 before the Superior Court rules on defendant's Special Motion to Strike." (Stipulation, 1:24-26.) Third, such a request is untimely and procedurally improper, when made, as here, in plaintiff's opposition papers, rather than by a noticed motion. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 357 [request to lift discovery stay must be made by noticed motion]; *Braun v. Chronicle Publishing Company* (1997) 52 Cal.App.4th 1036, 1052 [same].) Fourth, plaintiff has not set forth good cause to pursue specified discovery, as required by the statute. (§ 425.16(g); *Tuchscher Development Enterprises v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219, 1248 ["the statute requires *both* a timely motion and a showing of good cause"]; *1-800 Contacts, supra* [discovery may not be obtained merely to "test" the opponent's declarations].) Finally, plaintiff is already conducting discovery in Texas on its lawsuit.

CONCLUSION.

Plaintiff is attempting to use the power of this Court to strip the defendant of the First Amendment right to speak anonymously. Plaintiff's deposition subpoena, and the underlying lawsuit upon which it is based, arise from defendant's speech in a public forum about a matter of public interest, which is protected by the California anti-SLAPP statute. Plaintiff has not established any of the elements of its claim for breach of contract, the sole cause of action alleged in its underlying lawsuit. Defendant's special motion to strike should be granted and the deposition subpoena should be struck.

Dated: November 14, 2003

Respectfully submitted,

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Defendant John Doe a/k/a "knowfcfs"