

CASE

FILED

JAN 18 2005

RICHARD W. WIEKING  
CLERK U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HIGHFIELDS CAPITAL MANAGEMENT  
L.P.,  
  
Plaintiff,  
  
v.  
  
JOHN DOE,  
  
Defendant

No. C 04-00176 MISC MMC (WDB)-  
**ORDER GRANTING DEFENDANT'S  
MOTION TO QUASH SUBPOENA;  
DENYING MOTION TO STRIKE  
OBJECTION; VACATING HEARING**

Before the Court is plaintiff Highfields Capital Management L.P.'s objection to and motion for de novo review of Magistrate Judge Wayne D. Brazil's Report and Recommendation ("Report"), filed October 28, 2004, in which Magistrate Judge Brazil recommends that the Court grant defendant John Doe's motion, filed pursuant to Rule 45(c)(3)(A) of the Federal Rules of Civil Procedure, to quash the subpoena plaintiff served on non-party Yahoo!. Defendant has filed opposition to plaintiff's objection, and included therein a motion to strike the objection on grounds of untimeliness, to which plaintiff has filed a reply.

Having considered the Report, the papers filed in support of and in opposition to the objection and motion for de novo review, and the papers filed in support of and in opposition to defendant's motion to quash, the Court deems the matter suitable for decision on the papers, VACATES the hearing scheduled for January 21, 2005, and rules

United States District Court

For the Northern District of California

1 as follows:

2 1. The deadline to file an objection to the Report is ten court days after October 28,  
3 2004, the date of service of the Report, see Fed. R. Civ. P. 6(a), 72(b), i.e., November 11,  
4 2004, to which date three days are added to account for the service of the Report by mail,  
5 see Fed. R. Civ. P. 6(e), thus extending the deadline to November 14, 2004, to which date,  
6 because November 14, 2004 was a Sunday, one court day is added, see Fed. R. Civ. P.  
7 6(a), thus extending the deadline to November 15, 2004. Because plaintiff filed its  
8 objection on November 15, 2004, the objection is timely. Accordingly, defendant's motion  
9 to strike the objection is DENIED.

10 2. Contrary to plaintiff's argument, Magistrate Judge Brazil did not err by requiring  
11 plaintiff to show, with respect to its claims against defendant,<sup>1</sup> that "there is a real  
12 evidentiary basis for believing that the defendant has engaged in wrongful conduct that has  
13 caused real harm to the interests of the plaintiff." (See Report at 7:25 - 8:2.) Indeed, the  
14 case upon which plaintiff primarily relies, as well as the case on which the Magistrate  
15 Judge primarily relies, both require such a showing. See Sony Music Entertainment Inc. v.  
16 Does 1-40, 326 F. Supp. 2d 556, 564-65 (S.D. N.Y. 2004) (holding plaintiff must make  
17 "concrete showing of a prima facie claim of actionable harm"; denying motion to quash  
18 subpoena to undercover identity of doe defendants where, inter alia, plaintiff offered  
19 sufficient evidence to show it could establish prima facie claim); Columbia Ins. Co v.  
20 Seescandy.com, 185 F.R.D. 573, 580 (N.D. Cal. 1999) (holding "plaintiff must make some  
21 showing that an act giving rise to civil liability actually occurred"; finding plaintiff entitled to  
22 conduct discovery to learn identity of defendant where plaintiff offered evidence "sufficient  
23 to demonstrate [defendants] committed an unlawful act").

24 3. The Court, having reviewed the file de novo, adopts Magistrate Judge Brazil's  
25 recommendation and, accordingly, finds that plaintiff has failed to make a sufficient

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27 <sup>1</sup>Plaintiff's complaint against defendant is pending before the United States District  
28 Court for the District of Massachusetts, Highfields Capital Management L.P. v. Doe, Civil  
Action No. 04-11684. (See Def.'s Req. for Judicial Notice, filed August 17, 2004, Ex. A.)

1 showing that defendant has engaged in wrongful conduct causing harm to plaintiff.

2 The context in which the statements were made plainly indicates the statements  
3 were, as Magistrate Judge Brazil aptly put it, "sardonic commentary." (See Report at 6:23.)  
4 Read literally, the statements suggest that plaintiff and plaintiff's "investor friends" have  
5 benefitted from recent fluctuations in the price of the stock. Given that the price previously  
6 had dropped precipitously, that the recent increase was minuscule, and that the stock  
7 actually again decreased in value immediately thereafter, it is obvious that the speaker is  
8 advancing, by sarcasm, the opinion that plaintiff is not knowledgeable enough to put its  
9 clients and/or itself into favorable investments. In short, plaintiff has failed to demonstrate  
10 that a reasonable person perusing the message board at issue would understand the  
11 statements as having been made by plaintiff itself, which is plaintiff's theory in support of its  
12 defamation and commercial disparagement claims, or as statements made in connection  
13 with commercial services being offered by defendant, which is plaintiff's theory in support  
14 of its claims sounding in trademark.<sup>2</sup>

15 4. Alternatively, because defendant's motion to quash the subpoena could be  
16 characterized as a non-dispositive motion, the Court has also reviewed the Report as a  
17 non-dispositive order under the "clearly erroneous or contrary to law" standard. See 28  
18 U.S.C. § 636(b)(1)(A). Although resolution of the motion will conclude the miscellaneous  
19 proceeding in this district, plaintiff's complaint against defendant will remain pending before  
20 the District of Massachusetts, irrespective of resolution of the miscellaneous proceeding.  
21 See, e.g., Channelmark Corp. v. Destination Products Int'l, Inc., 2000 WL 968818 (N.D. Ill.  
22 2000) (holding motion to enforce subpoena filed in district court where plaintiff served  
23 subpoena was nondispositive, because resolution thereof would not dispose of complaint

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26 <sup>2</sup>The Court further agrees with, and thus adopts, Magistrate Judge Brazil's findings  
27 that plaintiff has not made a sufficient showing it has been harmed by the statements and  
28 that, with respect to its breach of contract claim, plaintiff has failed to show it can establish  
the parties to the Yahoo! service agreement, i.e., Yahoo! and defendant, intended that  
plaintiff benefit from that agreement.


1 pending in other district court).<sup>3</sup> Having reviewed the file, the Court concludes that  
2 Magistrate Judge Brazil's order is neither clearly erroneous nor contrary to law.

3 **CONCLUSION**

4 For the reasons expressed, defendant's motion to quash the subpoena is hereby  
5 GRANTED.

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7 **IT IS SO ORDERED.**

8 Dated: **JAN 18 2005**

  
MAXINE M. CHESNEY  
United States District Judge

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28 <sup>3</sup>The fact that plaintiff suggests it may dismiss its complaint if this Court grants the motion to quash does not serve to transform the motion into a dispositive motion.

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

Highfields Capital Management,  
Plaintiff,

Case Number: CV04-00176 MMC

**CERTIFICATE OF SERVICE**

v.

Doe,

Defendant.

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 18, 2005, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

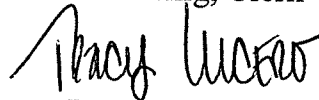
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Magistrate Judge Wayne D. Brazil  
U.S. District Court  
1301 Clay Street, Suite 400S  
Oakland, CA 94612-3530

Dated: January 18, 2005

Richard W. Wieking, Clerk



By: Tracy Lucero, Deputy Clerk