IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

INTELLIGENDER, LLC,	§	
	§	
Plaintiff	§	
	§	
V.	§	
	§	
ADRIAN SORIANO, VERONICA LORAY, HELLOBABY, LLC D/B/A BEST BABY GENDER, AND FARMACIAS AHUMADA, SA,	§	**Civil Action No. 2:10-cv-00125-TJW**
	§	
	§	**JURY TRIAL DEMANDED**
	§	
Defendants.	§	
	§	
	§	
ADRIAN SORIANO,	§	
	§	
Third-Party and Counter-Plaintiff,	§	
	§	
V.	§	
	§	
FARMACIAS AHUMADA, SA,	§	
	§	
Third-Party Defendant.	§	

NON-PARTY JOHN OR JANE DOE'S REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA TO VERIZON ONLINE, LLC

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:

Non-Party John or Jane Doe ("Doe") hereby files this Reply in Support of Motion to Quash Subpoena to Verizon Online, LLC.

Plaintiff IntelliGender, LLC's ("IntelliGender" or "Plaintiff") Response to Non-Party John or Jane Doe's Motion to Quash Subpoena to Verizon Online, LLC ("Plaintiff's Response"), disputes that the Court must exercise any scrutiny before ordering the disclosure of an anonymous party's identity. That position plainly ignores the First Amendment right to

anonymous speech.[1] As explained in Non-Party John or Jane Doe's Motion to Quash Subpoena to Verizon Online, LLC ("Doe's Motion to Quash"), other courts have required a party seeking to unveil an anonymous speaker to pass either a motion to dismiss standard or a summary judgment standard. The one district court within the Fifth Circuit that has entertained this issue—the Western District of Louisiana in *In re Baxter*, required a showing of a "reasonable probability" of success on the asserted claim.[2]

Plaintiff fails all of these tests because the one speech-related claim that Plaintiff asserts in this lawsuit—business disparagement—is simply not viable because Plaintiff has neither pled nor shown any specific damages, which is a required element of a business disparagement claim.[3] While Plaintiff alleges that the emails at issue were seen by Plaintiff's banker, Rebecca Griffin's employer, and members of her country club, there is no indication of any specific damage—such as the bank closing the bank account, Ms. Griffin losing her job, or Ms. Griffin being kicked out of her country club. These allegations also suffer from being inadmissible hearsay.[4] Further, any damages to Ms. Griffin are not relevant because she is not a party to this lawsuit. And to the extent that Plaintiff claims that Doe's identity is relevant to "its independent

[1] *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

[2] *In re Baxter*, Misc. No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001, *38 (W.D. La. December 20, 2001) ([T]he proper standard should be, depending on whether the statements involve public concern or private concern, a showing of at least a reasonable probability or a reasonable possibility of recovery . . .").

[3] *See Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 134 (D. D.C. 2009) ("Where the viability of a plaintiff's case is so seriously deficient, there is simply no basis to overcome the considerable First Amendment interest in anonymous speech on the Internet.").

[4] Doe hereby incorporates by reference as if fully set forth herein Non-Party John or Jane Doe's Motion to Strike the Affidavit of Rebecca Griffin, filed contemporaneously with this Reply.

claims against Doe related to the emails,"[5] those claims are outside this lawsuit and therefore outside the bounds of permissible discovery.

Plaintiff's claim for business disparagement further fails because Plaintiff has not demonstrated that Doe made any false statements of fact. Plaintiff claims the emails are inherently false because the emails were sent from the addresses "rebeccagriffin75093@gmail" and "rebeccagriffin75093@mail.com"—addresses that suggest the emails were sent by one of Plaintiff's principals. However, not all falsity is actionable. Here, choosing to send the emails from those accounts was an act of parody by Doe as well as part of Doe's constitutionally-protected sardonic commentary of IntelliGender. The right to "anonymous speech" includes the right to "pseudononymous speech,"[6] which extends to cover speech under the cover of another person's name. In a similar case, an anonymous party posted critical statements on the Internet about a company called "Highfields Capital Management, LP," and used the screen name "highfieldscapital" to do so.[7] The court observed that using the name of the party that is the subject of the criticism at issue was an essential element of parody.[8] The court further explained:

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[5] Plaintiff's Response at 4.

[6] *See Doe v. 2TheMart.com, Inc.*, 140 F.Supp.2d 1088, 1090 (W.D. Wash. 2001) ("By using a pseudonym, a person who posts or responds to a message on an Internet bulletin board maintains anonymity."); *Columbia Ins. Co. v. SeesCandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) ("[T]his need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudononymously."); *Art of Living Foundation v. Does 1-10*, Case No. 10-CV-05022-LHK, 2011 U.S. Dist. LEXIS 129836, *27 (N.D. Cal. November 9, 2011) ("Insofar as Skywalker may communicate his message more openly or garner a larger audience by employing a pseudonym, unveiling his true identity diminishes the free exchange of ideas guaranteed by the Constitution.").

[7] *See Highfields Capital Management, LP v. Doe*, 385 F. Supp. 2d 969, 972 (N.D. Cal. 2004)

[8] *See Highfields Capital Management, LP v. Doe*, 385 F. Supp. 2d 969, 979 (N.D. Cal. 2004) ("Plaintiff emphasizes that the name defendant chose to use is virtually identical to plaintiff's registered mark. True. But the use of that name was necessary to effect the parody.

> [E]nforcing a subpoena in this kind of setting poses a real threat to chill protected comment on matters of interest to the public. Anonymity liberates. More to the present point, commentary is likely to attract considerably more attention when the commentator selects a screen name either that is famous (in the pertinent circles) or humorous or ironic. In other words, being able to use screen names that have some message-related resonance or cachet contributes to the First Amendment ends of enriching the substance of the speech and of getting the message to a wider audience.
>
> A person like defendant has a real First Amendment interest in having his sardonic message reach as many people as possible -- and being free to use a screen name of the kind he used here carries the promise that more people will attend to the substance of his views.[9]

Further, none of the statements Plaintiff alleges are false constitute statements of fact rather than opinion. The emails are plainly a parody and no reasonable person would interpret them as coming from Plaintiff's Rebecca Griffin.

Finally, Plaintiff incorrectly asserts that Doe's emails constitute "commercial speech." Plaintiff cites no case law and provides no analysis as to how the emails can be classified as "commercial speech." Indeed, the emails are not advertisements, the emails do not refer to a specific product or service, and there is no indication that Doe had an economic motivation to send the emails.[10] Further, the emails do not concern the economic interests of either the speaker

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Moreover, it was the use of that name that made it so obvious that the messages were sardonic and not real.").

[9] *Highfields Capital Management, LP v. Doe*, 385 F. Supp. 2d 969, 980 (N.D. Cal. 2004).

[10] *See Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001) ("In *Bolger*, the Court recognized three factors that help determine whether speech is commercial: (i) whether the communication is an advertisement, (ii) whether the communication refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech. If all three factors are present, there is 'strong support' for the conclusion that the speech is commercial.") (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983)).

(Doe) or the audience.[11] In fact, the audience that Plaintiff identifies—Plaintiff's banker, Griffin's employer, and members of Griffin's country club—are not consumers of Plaintiff's products, they the personal acquaintances of Plaintiff's members. Hence, the lower standard applied to commercial speech is inapplicable.

Accordingly, Doe's Motion to Quash should be GRANTED.

Respectfully submitted,

HUTCHERSON LAW

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[11] *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience.").

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was electronically filed with the clerk of court for the U.S. District Court, Eastern District of Texas, Marshall Division, using the electronic case filing system of the court on the 3rd day of May, 2012. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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I further certify that on May 3, 2012, I sent the foregoing document via fax to Verizon Online, LLC at (325) 949-6919.

Signed: May 3, 2012

/s/ Kenton J. Hutcherson
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