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, Defendants.	§	CIVIL ACTION NO. 2:10-cv-00125-TJW JURY TRIAL DEMANDED
ADRIAN SORIANO, Third-Party and Counter-Plaintiff, v. FARMACIAS AHUMADA, SA, Third-Party Defendant.	§	

INTELLIGENDER, LLC'S RESPONSE TO NON-PARTY JOHN OR JANE DOE'S MOTION TO QUASH SUBPOENA TO VERIZON ONLINE, LLC

Plaintiff, IntelliGender, LLC ("IntelliGender") files its Response to Non-Party John or Jane Doe's (hereinafter "Doe") Motion to Quash Subpoena to Verizon Online, LLC as follows:

I.

SUMMARY OF RESPONSE

Counsel for Doe seeks to quash a subpoena for the production of documents that may reveal the name and address of the individual(s) responsible for false, defamatory and disparaging emails which purport to be on behalf of Rebecca Griffin, one of the principals of IntelliGender based upon an alleged First Amendment protection of free and "anonymous"

speech. This defense fails as a matter of law as the speech is neither anonymous nor protected. Instead, Doe purports to be a principal of Plaintiff and publishes inaccurate and disparaging statements to Plaintiff's banker, employer, fellow employees and various other third-parties who believed the statements came from Ms. Griffin. There is no First Amendment protection for falsely assuming the identity of another and publishing defamatory and disparaging comments. Doe's request to remain anonymous while speaking as Plaintiff or its representative should be denied.

Further, Plaintiff served the subpoena to determine the identity of Doe. To the extent that Doe is one of the Defendants, then claims are already asserted against Doe.[1] However, Plaintiff cannot know whether Defendants are responsible without knowing the identity of Doe.

II.

RESPONSE

In support of his assertion of the First Amendment, Doe asserts that he has a right to anonymous speech. The speech he seeks to protect is contained in emails he acknowledged sending to Plaintiff's banker, its principal's employer and third-parties (**Griffin Aff** [2]**, Exs. 1 & 2**) and to Rebecca Griffin's neighbors and additional third-parties (**Griffin Aff, Ex. 3**). Further, in his emails, he speaks not as himself, but as if he is Rebecca Griffin—one of the principals of Plaintiff. The speech at issue in this case is commercial speech—(1) in an email sent by Doe to Plaintiff's banker purporting to be from Plaintiff's principal and (2) an email to third-parties related to litigation in California. See, Griffin Aff., Exs. 1, 2 & 3. Even absent any other facts, in this case, the act of speaking as someone else—which Doe admits he did as the author of the

[1] In their Objection to Attorneys Motion to Withdraw (Dkt. 99), Defendants attached the emails purportedly sent by IntelliGender's principal, Rebecca Griffin, as Exhibits 3 and 4. Therefore, the emails are already before the Court--published by Defendants.

[2] Rebecca Griffin's Affidavit is attached as Exhibit A to this Response.

emails—makes the speech misleading.

Specifically, Doe sent an email pretending to be Rebecca Griffin, from rebeccagriffin75093@gmail.com, creating the false impression that Rebecca Griffin from Plano, Texas (zip code 75093) transmitted the email, and the email was received by and distributed to Bill Rolley, IntelliGender's banker at Amegy Bank. Griffin Aff, ¶ 3-4; Ex. 1. The email was also distributed to Bill Lacy and other executives at Newmark Knight Frank, Ms. Griffin's employer, who knows her personally, and would reasonably believe that she authorized and transmitted the email. Griffin Aff, ¶ 3-4; Ex. 1.

Further, Doe sent an email from rebeccagriffin75093@mail.com to Ms. Griffin's neighbors and members of the Glen Eagle Country Club in Plano, Texas. Griffin Aff, ¶ 6-7; Ex. 3. The email states the following:

> **Neighbors and Club Members,**
>
> **Sorry to request your assistance again but after our recent $2.5m Settlement on the class action suit, our IntelliGender venture has become a lawsuit magnet and attracted yet another suit!!!! Our product was "just for fun" and we were simply trying to get rich quick!**
>
> **Any assistance you can offer Teresa Garland and I greatly appreciated!**
>
> **Rebecca**

This email is false, misleading, and deceptive because it purports to be from Rebecca at rebeccagriffin75093@gmail.com, falsely creating the impression that Rebecca Griffin from Plano Texas (zip code 75093) transmitted the email. Griffin Aff, ¶ 8; Ex. 3. The email was

received by Ms. Griffin's neighbors and club members at the Glen Eagles Country Club, who recognize her personally, and would reasonably believe that she authorized and transmitted the email. Griffin Aff, ¶ 8; Ex. 3.

The email also falsely asserts that IntelliGender paid $2.5 million to settle a class action when it did not. Griffin Aff, ¶ 8; Ex. 3. The email falsely asserts that IntelliGender has become a "lawsuit magnet" when it is not; that the Class action settlement attracted another lawsuit, which is false; and that IntelliGender's principals were "simply trying to get rich quick," which is false. Griffin Aff, ¶ 8; Ex. 3. The email then requests assistance for Teresa Garland and Rebecca Griffin when no such assistance was requested. Griffin Aff, ¶ 8; Ex. 3.

Therefore, even if the First Amendment was implicated—if it protected the impersonation of another in its protection of anonymous speech—Plaintiff has made a prima facie showing to support a claim against Doe. Doe has made false statements and impersonated a principal of Plaintiff. Doe's identity is relevant and material to Plaintiff's claim against Defendants for business disparagement (if Doe is determined to be a Defendant) and its independent claims against Doe related to the emails. Therefore, even if the First Amendment was implicated, the facts and evidence before the Court require the conclusion that Doe's constitutional right, if any exists in this case, are outweighed by the discovery needs of Plaintiff. Plaintiff has specifically shown that the statements were false and misleading and published to third parties. See, e.g., *Granada BioSciences v. Barrett*, 958 S.W.2d 215, 222 (Tex. App.—Amarillo 1997, pet. denied); *Abbott v. Pollock*, 946 S.W.2d 513, 520 (Tex. App.—Austin 1997, writ denied).[3]

None of the cases Doe cites support the position that one may pretend to be a principal of a third party while anonymously speaking or that a heightened relevance standard applies to this

[3] Cited in Motion, P. 10, Footnotes 24-25.

type of speech.

For example, John Doe cites *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, (1995) for the proposition that an author's decision to remain anonymous, like other decisions concerning the content of a publication, is an aspect of the freedom of speech protected by the First Amendment. In that case, Petitioner distributed anonymous campaign literature in violation of an Ohio statute which prohibited such distribution. In invalidating the statute because it was not narrowly tailored to serve an overriding state interest, the Supreme Court reasoned that respondent's interest in providing voters with additional relevant information was insufficient to support the constitutionality of the statute. *Id.* The Court explained the motivation for anonymity caused by fear of economic or official retaliation, citing, as examples, famous authors, historical figures and persecuted groups who have throughout history have been able to criticize oppressive practices and laws either anonymously or not at all, including, as a specific example, the authors of The Federalist Papers.

Clearly, sending emails pretending to be a principal of Plaintiff does not give rise to the protections cited by the Court in *McIntyre*. Instead, Doe seeks to prevent criminal and civil liability for falsely representing himself to be another, but the First Amendment does not insulate such actions from liability.

2TheMart.com, Inc. is also cited by Doe to say that a higher standard of relevancy is imposed where the First Amendment is at issue and that under that standard, only when information sought is directly and materially relevant to a core claim can the need for the information outweigh the First Amendment right to speak anonymously. *See Doe v. 2TheMart.com, Inc.*, 140 F.Supp.2d 1088, 1091-1092 (W.D. Wash. 2001). In *2TheMart.Com*, the Washington court, after noting the decisions of the California court in *seescandy.com* and of

the Virginia court in *America Online*, adopted a four-part test for determining whether a subpoena to an internet service provider seeking identification of anonymous posters would be allowed. The four factors the court set forth are:

1. Whether the subpoena seeking the information was issued in good faith and not for an improper purpose;

2. Whether the information sought relates to a core claim or defense;

3. That the identifying information is directly materially relevant to the claim or defense; and

4. That information sufficient to establish the claim or defense is unavailable from any other source.

The First Amendment is not at issue based on Doe's type of speech. However, even if the First Amendment was implicated, the test formulated in *2TheMart.com, Inc.* has not been adopted by and has been criticized within the Fifth Circuit. See, e.g., *In re Baxter,* No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001(W.D. La. Dec. 19, 2001)(The requirement set forth, for example, in *2TheMart.Com* that the information must relate to a core claim or defense and be directly materially relevant is simply a rote exercise in a case such as the present one where the information is obviously needed to identify the defendant in the case. The exercise accomplishes nothing. . . Finally, the standard set forth in the cases which cast the inquiry as whether or not the subpoena was issued 'in good faith,' such as *2TheMart.Com* and America Online is an inadequate standard for the determination.).

Although also not adopted by the Fifth Circuit, Doe again attempts to impose a heightened relevance standard in this case, citing *In re Anonymous Online Speakers*, 661 F.3d 1168, 1175 (9th Cir. 2011) in support. In that case, which is not cited by any Fifth Circuit Court, the Ninth Circuit denied a petition for mandamus in which petitioner requested an order to the district court to vacate its order to disclose the identity of anonymous online speakers in a

business dispute. Again citing The Federalist Papers as the type of speech on which an author has a right to remain anonymous, the Court then evaluated whether commercial speech was entitled to the same protection, saying:

> Given the importance of political speech in the history of this country, it is not surprising that courts afford political speech the highest level of protection. *Meyer v. Grant*, 486 S. 414, 422, 425, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988)(describing the First Amendment protection of 'core political speech' to be 'at its zenith'). Commercial speech, on the other hand, enjoys 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.' *Bd. of Trustees of SUNY v. Fox*, 492 U.S. 469, 477, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989), as long as 'the communication is neither misleading nor related to unlawful activity.'

Two other circuit courts have addressed analogous situations. The Sixth Circuit, in *Midland Daily News*, noted that as long as commercial speech is about lawful activity and is not misleading, it is protected. *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir.). In *Lefkoe*, the Fourth Circuit reiterated that commercial speech enjoys only limited First Amendment protection and held that "the Doe Client's claimed First Amendment right to anonymity [wa]s subject to a substantial governmental interest in disclosure so long as disclosure advance[d] that interest and [went] no further than reasonably necessary." action. *Lefkoe v. Jos. A. Bank Clothiers, Inc*., 577 F.3d 240, 248-49 (4th Cir. 2009). The court highlighted the balance between discovery under Federal Rule of Civil Procedure Rule 26 and protection of anonymous speech: "the substantial governmental interest in providing Jos. A. Bank a fair opportunity to defend itself in court is served by requiring the Doe Client to reveal its identity and provide the relevant information."

Finally, Doe cites *Reno v. ACLU*, 521 U.S. 844, 870 (1997) for the Supreme Court's recognition that speech on the Internet is protected by the First Amendment. The case concerned whether provisions of the Communications Decency Act of 1996 were unconstitutional (because

vague and over inclusive) under the First Amendment. Again, the case does not address the facts present here—where a party is not seeking to protect his own thoughts and ideas—but holding them out to be another's and speaking as if he were that person.

III.

CONCLUSION

Doe admits that he is the individual who was assigned the Internet Protocol made the subject of the Subpoena and that he authored and sent the email in which Doe pretended to be a principal of Plaintiff. Without the identity of Doe being revealed, Plaintiff cannot determine whether Doe is a Defendant in this case or a third-party. Therefore, the information sought is relevant to such determination.

Further, no heightened relevance standard requires Plaintiff to show summary judgment-type evidence in support of the narrowly-tailored request to identify Doe. Likewise, Doe has made no showing that the First Amendment protects anonymous speech when the speaker represents the speech to be of another person. However, even if some heightened standard were applicable, Plaintiff has presented prima facie evidence to support a claim against Doe. Based on the foregoing, Doe's Motion to Quash should be denied and the identity of Doe revealed.

Respectfully submitted,

/s/ JOHN T. PALTER

JOHN T. PALTER
Texas Bar No. 15441500
jpalter@rineypalter.com
KIMBERLY M.J. SIMS
Texas Bar No. 24046167
ksims@rineypalter.com
RINEY PALTER PLLC
5949 Sherry Lane, Suite 1616
Dallas, TX 75225-8009
Phone: (214) 461-1200
Facsimile: (214) 461-1210

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served upon the following in accordance with the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Eastern District of Texas, on this the 26th day of April 2012.

VIA FACSIMILE: (214) 866-0010
Thomas G. Jacks, Esq.
Scott A. Meyer, Esq.
CHALKER FLORES LLP
14951 N. Dallas Parkway, Suite 400
Dallas, TX 75254

VIA FACSIMILE: (214) 740-1499
Karen L. Hart, Esq.
Bell Nunnally & Martin LLP
3232 McKinney Avenue
Suite 1400
Dallas, TX 75204

VIA FACSIMILE: (212) 709-0248
Kathleen Kundar, Esq.
Fox Horan & Camerini LLP
825 Third Avenue
New York, NY 10022

VIA FACSIMILE: (214) 443-4210
Kenton J. Hutcherson, Esq.
HUTCHERSON LAW
10000 North Central Expressway
Suite 800
Dallas, TX 75231

/s/ JOHN T. PALTER

JOHN T. PALTER