IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

JOAN MELVIN,

Plaintiff,

v.

JOHN DOE, ALLEN DOE, BRUCE DOE, CARL DOE, DAVID DOE, EDWARD DOE, FRANK DOE, GEORGE DOE, HARRY DOE, IRVING DOE, KEVIN DOE, LARRY DOE and JANE DOE,

Defendants.

CIVIL DIVISION

No.: G.D. 99-10264

Issue No.:

Code: 008

BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND MOTION TO BIFURCATE ISSUES

Filed on Behalf of All Defendants

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BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND MOTION TO BIFURCATE ISSUES

Introduction

Defendant John Doe,[1] by and through his attorneys, submits this motion for a protective order and motion to bifurcate issues in this case, pursuant to Rule 213(b) of the Pennsylvania Rules of Civil Procedure, which states:

> The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of

[1]John Doe is a pseudonym for the webmaster of AGrant Street 99,@ an Internet website located at http://members.col.com/grantst99/politics/, which on February 1999 was moved to http://www2.crosswinds.net/pittsburgh/ grantst99/.

> action, claim or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits or issues.

Pa.R.C.P. 213(b). A[T]he decision to bifurcate *vel non* is a matter to be decided on a case-by-case basis and must be subject to an informed discretion by the trial judge in each instance.@ *Lis v. Robert Packer Hospital*, 579 F.2d 819, 824 (3d Cir. 1978) *cert. denied*, 439 U.S. 955 (1978).[2]

Defendant Doe asserts that his expression at issue in this case is protected by the First Amendment and is not libelous, and that he has a right to engage in such speech anonymously. As discussed more fully below, bifurcation of the issues and discovery in this case is appropriate and necessary in order to avoid prejudice to defendant=s First Amendment right to communicate anonymously; indeed, without bifurcation, defendant=s right would be lost entirely since plaintiff is certain to use broad discovery in order to determine defendant=s identity. To prevail on her libel claim, plaintiff must prove the defamatory nature of the communication, its falsity, the resulting harm done to plaintiff, and actual malice. See 42 Pa.C.S.A. s. 8343; *New York Times v. Sullivan*, 376 U.S. 254 (1964). Defendant=s identity is unquestionably irrelevant to all elements of plaintiff=s claim except actual malice. Identity may become relevant to actual malice because plaintiff may inquire into

[2] Because the Fed. R. Civ. Pro. contain an identical provision, federal cases are instructive. Rule 42(b).

defendant=s subjective state of mind. Defendant thus asks the Court to divide the case into two stages in order to protect defendant=s anonymity at least until a later phase of the case. In Stage One, the parties would litigate all issues relevant to the elements of plaintiff=s claim and defendant=s affirmative defenses, except the issue of defendant=s state of mind at the time of publication. Defendant asks the Court to enter a protective order during Stage One that prevents plaintiff from seeking to discover defendant=s identity. If plaintiff does not prevail in proving the elements litigated during Stage One, the suit would be dismissed without disclosure of defendant=s identity. If plaintiff prevails in Stage One, the parties would proceed with Stage Two of the case. In Stage Two, the parties would litigate the issue of defendant=s state of mind. During this phase, given the facts learned thus far and the briefing of the parties on the issue, the Court would consider the question of disclosure of defendant=s identity. In sum, defendant asks the Court: 1) to bifurcate the issue of state of mind from all other issues in the case; 2) to stay any discovery on state of mind until plaintiff has prevailed on all other issues; and 3) to enter a protective order preventing plaintiff from any discovery to determine defendant Doe=s identity, at least until plaintiff has prevailed on all issues except defendant=s state of mind. This procedure would preserve defendant=s anonymity without unfairly prejudicing plaintiff=s right to proceed.

I. History of the Case

This case involves the repeated attempts of a sitting Pennsylvania Superior Court judge, Joan Orie Melvin, to use court process to discover the identity of defendant Doe, a pseudonymous political website operator. On March 15, 1999, Plaintiff Melvin filed a three paragraph complaint in the Circuit Court of Loudoun County, Virginia, asserting that Doe=s statements were defamatory. Joan Orie Melvin v. John Doe, Law No. 21942. Plaintiff alleges that Doe=s website says that plaintiff lobbied Governor Tom Ridge to appoint an unnamed lawyer to a judicial vacancy in Allegheny County. Pursuant to the Loudoun County action, Plaintiff Melvin had served a subpoena on America Online (AOL), the Internet Service Provider where Doe=s web page was located, seeking information identifying Doe.

In response to the request for subpoena, attorneys from the American Civil Liberties Foundation of Virginia entered a special appearance on behalf of Doe in the Loudoun County Circuit Court to challenge the Court=s jurisdiction over the matter and to prevent AOL from disclosing documents identifying defendant Doe. On June 24, 1999, the Honorable Thomas D. Horne of the Twentieth Judicial Circuit Court of Virginia granted Doe=s motion, thereby dismissing Plaintiff Melvin=s action for lack of jurisdiction.

On July 2, 1999, Melvin filed in the Allegheny County Court of Common Pleas a Praecipe for Writ of Summons in a Civil Action, which was issued on the same date. On July 23, 1999, Plaintiff Melvin=s attorneys presented to this Court, ex parte, a Petition for Issuance of a Commission to authorize the Virginia courts to issue subpoenas to AOL and the Clerk of the Loudoun County Circuit Court for

documents identifying John Doe. This Court granted the ex parte application, signing an Order Directing Issuance of Commission to Issue Subpoena. On August 13, 1999, John Doe=s attorney filed a Motion to Quash Subpoenas and Request For Stay Pending Hearing. On August 17, 1999, Melvin served a subpoena on AOL. On August 19, 1999, Allegheny County Judge Ronald W. Folino granted Doe=s motion to quash the subpoenas until September 3, 1999, at which time the matter was set down for hearing. At that hearing, the Judge again granted the motion to quash, and ordered no discovery until the complaint was filed.

Melvin filed the complaint in this case on October 7, 1999 alleging libel; on ___, this Court designated the case as complex because of the important and novel issues related to anonymity. We now submit this motion for protective order and motion to bifurcate issues.

II. The First Amendment Protects the Right to Communicate Anonymously.

The First Amendment protects anonymous speech both in our society at large and on the Internet specifically. As described in the Supreme Court=s most recent anonymous speech case, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the United States has a strong tradition of anonymous speech in both literary and political contexts.[3] For example, the Court notes that AAmerican names

[3] The Supreme Court has long recognized the importance of anonymity. In *Talley v. California*, 362 U.S. 60, 65 (1960), the Court decided that a municipal ordinance preventing the distribution of handbills without the name and address of the author was void on its face, and stated, AIdentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.@

such as Mark Twain (Samuel Langhorne Clemens) and O. Henry (William Sydney Porter) come readily to mind. Benjamin Franklin employed numerous different pseudonyms.@ 514 U.S. at 341, n. 4. Politically, A[t]hat tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed >Publius.= Publius= opponents, the Anti-Federalists, also tended to publish under pseudonyms: prominent among them were >Cato,= believed to be New York Governor George Clinton; >Centinel,= probably Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan,@ among others. And ultimately, A[a] forerunner of all of these writers was the pre-Revolutionary War English pamphleteer, >Junius,= whose true identity remains a mystery.@ 514 U.S. at 343, n. 6.

McIntyre struck down an Ohio law that prohibited the distribution of anonymous campaign literature, holding that the law encroached upon the First Amendment freedom to publish anonymously. The Court stated:

> The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one=s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author=s decision to remain anonymous, like other decisions concerning

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More generally, the Court added: AAnonymous pamphlets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.@ *Id.* at 64.

> omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.[4]

See also *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that the NAACP could not be forced to disclose its membership list).

This strong tradition is equally important on the Internet. The Supreme Court has recognized that the Internet is a Avast democratic fora,@ *Reno v. ACLU*, 521 U.S. 844, 867 (1997), that allows anyone to become Aa pamphleteer@ or Aa town crier with a voice that resonates farther than it could from any soapbox.@ *Id*. at 870. The use of pseudonyms contributes to the robust nature of disclosure and debate online. As one commentator explains,

> Many participants in cyberspace discussions employ pseudonymous identities, and even when a speaker chooses to reveal his or her name, he or she may still be anonymous for all practical purposes. . . . This unique feature of Internet communications promises to make public debate in cyberspace less hierarchical and discriminatory than real world debate to the extent that it disguises status indicators such as race, class, gender, ethnicity and age that allow elite speakers to dominate real-world discourse.

Lyrissa Barnett Lidsky, A*Silencing John Doe: Defamation & Discourse in Cyberspace,*@ at 56 (forthcoming Duke L.J. Feb. 2000).

[4] 514 U.S. at 342.

Recognizing the value of anonymity online, the Tenth Circuit, as well as district courts in Georgia and New Mexico, found that state laws that would have prohibited anonymous and pseudonymous communications over the Internet violate the free speech protections of the First Amendment. In *ACLU v. Miller*, 977 F.Supp. 1228 (N.D. Ga. 1997), the court struck down a Georgia law that would have made it a crime to Afalsely identify@ oneself online. The court reasoned that Abecause >the identity of the speaker is no different from other components of [a] document=s contents that the author is free to include or exclude,= the statute . . . constitutes a presumptively invalid content-based restriction.@ 977 F. Supp. at 1232 (citing *McIntyre*, 514 U.S. at 340-42). See also *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998); ***affirmed***, 10th Cir. on 11/2/99 (holding that state Aharmful to minors@ law violated the First Amendment Abecause it prevents people from communicating and accessing information anonymously,@ and citing *McIntyre* for the principle that anonymity is Aan honorable tradition of advocacy and of dissent@). Both *Miller* and *Johnson* are rooted in the Supreme Court=s 1997 decision in *Reno v. ACLU*, 521 U.S. __, 138 L Ed 2d 874 (1997).[5]

[5] In *Reno*, the Supreme Court struck down the Communications Decency Act, finding Congress=

legislative attempt to regulate Adecency@ on the Internet an unconstitutional burden on First Amendment speech. *Reno*, concentrating on the overbreadth of the statute as fashioned, did not directly address the role of anonymity in a defamation context. The Court did, however, address the burdens posed by an age verification system that would force users to provide identification before accessing Aindecency.@ The Court stated that the requirement A*would discourage users from accessing their sites*.@ *Id*. at 888 [ital. added]. Elsewhere the Court noted that A>There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password.:@ *Id*. at 888, n. 23. The *Reno* Court thus reasoned that the inability to access speech anonymously would have a chilling effect on protected speech.

Like the courts, current legal scholars have also been advocating greater protections for anonymity on the Net. Because the medium is such a new one, scholars have often drawn comparisons to other areas of the law where courts have developed tests to protect anonymity. See e.g., George P. Long, III, A*Comment: Who Are You?: Identity and Anonymity in Cyberspace,*@ 55 U. Pitt. L. Rev. 1177, 1205-06 (1994) (noting that under federal wiretap standards, it is only with an initial showing of probable cause that a judge may authorize the interception of wire, oral, or electronic communications, and stating that the showing is necessary in order to avoid Acapricious disclosures of identity@); David Post, A*Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*,@ 1996 U. Chi. Legal F. 139, 166-67 (arguing that online standards for disclosure of identity should be constructed like corporate shareholder inspection laws, allowing access to private user information only after a plaintiff=s showing of probable success); Lyrissa Barnett Lidsky, A*Silencing John Doe: Defamation & Discourse in Cyberspace*,@ at 126 (forthcoming Duke L.J. Feb. 2000) (arguing that the best way to fight the chilling effect of suits being brought against John Doe defendants is to invoke the opinion privilege -- Athe privilege for statements that do not imply assertions of objective facts.@).

III. A Protective Order and Bifurcation of Issues Will Avoid Prejudice to Defendant Do

A protective order and bifurcation of issues in this case would preserve

defendant Doe=s right to communicate anonymously, while allowing plaintiff to go forward with her claim. While bifurcation is primarily used to separate liability and damages[6], it may be used in any case to Aavoid prejudice.@ Rule 213(b), Pa. R. Civ. Pro. Bifurcation is particularly appropriate where disclosure of confidential documents is a potential threat during discovery; it is in this context specifically that litigation should be structured so as to avoid prejudice. See e.g., *Industrias Metalicas Marva, Inc. v. Lausell*, 172 F.R.D. 1 (D. Puerto Rico 1997) (holding that bifurcation was appropriate because Aif the defendant prevails on the issue of liability, its asserted interest in protecting its confidential documents from discovery on the issue of damages would be vindicated@). In this case, bifurcation is necessary for precisely this reason; because defendant=s right to speak anonymously is at risk, plaintiff must do more than simply allege harm before gaining access to confidential material. Defendant thus asks the Court to bifurcate the issues, and to require plaintiff to prevail on all other issues in the case before considering disclosure of defendant=s identity. Because plaintiff may go forward with

[6] See *Pascale v. Hechinger Co. of Pa.*, 426 Pa. Super. 426, 438 (1993) (noting that A[b]ifurcation is strongly encouraged where separation of issues facilitates the orderly presentation of evidence and judicial economy.@); *Stevenson v. General Motors Corp*., 513 Pa. 411, 414 (1987) (bifurcating trial into liability and damages portions); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, 2390 (1971); *Emerick v. U.S. Suzuki Motor Corp*., 750 F.2d 19 (3d Cir. 1983) (affirming decision to bifurcate trial into liability and damages stages); *Miller v. N.J. Transit Authority Rail Operations*, 160 F.R.D. 37 (D.N.J. 1995) (holding bifurcation appropriate where jury considered both

her case without forcing disclosure of defendant=s identity, the bifurcation procedure would avoid any prejudice to defendant=s First Amendment right of anonymity until absolutely necessary.

The Supreme Court has imposed numerous hurdles on plaintiffs seeking to punish speech through defamation actions. Because the ability to criticize public officials is a First Amendment right essential to a functioning democracy, the burdens of public official defamation plaintiffs -- like Judge Melvin in this case -- are even higher. See *New York Times v. Sullivan*, 376 U.S. 254 (1964). Plaintiff Melvin must prove that the defendant defamed her with Aactual malice.@ Courts since *Herbert v. Lando*, 441 U.S. 153 (1979), have defined the actual malice standard narrowly, finding very few statements that actually fall within the definition. Thus, defamation plaintiffs should not be given automatic access to confidential information. As one court explained, Adisclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of state libel laws.@ *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The *Southwell* Court thus held that summary judgment for defendant in a defamation case may be Aproper even without disclosure of a confidential source, if

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the nature and severity of plaintiff=s injuries).

the plaintiff fails to produce evidence that the article in question is either 1) inherently improbable, or is 2) published with serious doubts about the truth of its contents.@ *Id.* at 1311.

Several courts have required defamation plaintiffs to prove the strength of their claim before allowing access to confidential information. For example, the Eighth Circuit has noted the importance of keeping the identities of journalists= sources shielded in defamation cases. In balancing the need for confidentiality versus discovery, the Court must consider

> the strength of the movant=s case for libel. AAs a threshold matter, the court should be satisfied that a claim is not frivolous.@ *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583, 597 (1st Cir. 1980). If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names of informants.

Missouri ex rel Classic III, Inc. v. Ely, 954 S.W.2d 650, 659 (1997). See also *Cervantes v. Time, Inc*., 464 F.2d 986, 994 (8th Cir. 1972) (AThe point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error.@). Similarly, the *Southwell* Court held that

> [E]specially [in cases] involving public figure plaintiffs, courts must inquire into the substance of a libel allegation before ordering disclosure of confidential sources . . . . [A]llowing plaintiffs carte blanche to depose every defendant=s confidential source anytime they otherwise lack evidence of actual malice in a libel suit . . . would swallow the rule cautioning against disclosure in the absence of compelling evidence that such disclosure would be relevant to the issue of malice. Under such a regime, even plaintiffs who suspected their ultimate case would fail on the merits, could bring lawsuits simply as a

> harassment device to pester publishers and try to discover who was leaking the information they found damaging.

Id. at 1313.[7]

In another case involving the right to communicate anonymously on the Internet, the Court said:

> Th[e] ability to speak one=s mind without the burden of the other party knowing all the facts about one=s identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. 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

[7] In *Adams v. Frontier Broadcasting Co*., 555 P.2d 556, 557 (Wyo. Sup. Ct. 1976), the Court stated: Awe are compelled to reject the requirement of censorship in favor of safeguarding the fundamental right of free speech even though this result forecloses the individual from recourse for defamation.@ In *Adams*, a radio station was deemed not to be liable in a defamation claim for failing to use an electronic Adelay system@ during an open-mike show (the Adelay system@ being a means of curbing an anonymous caller=s defamatory comments). In *Adams*, the fact that the broadcast was defamatory and that the plaintiff was a public figure were not disputed, but the Court nonetheless concluded that Athe commitment to >uninhibited, robust, and wide-open= public debate must, in the balance, outweigh the common law right of an individual who is a public official or public figure to be free from defamatory remarks.@ 555 P.2d at 567.

> frivolous lawsuit and thereby gain the power of the court=s order to discover their identity.

Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

Deferring disclosure of confidential information is especially warranted where the plaintiff has less intrusive means of going forward with the case. Specifically, before a plaintiff is allowed to compel defendant=s identity from a third-party, she must show that no discovery short of disclosure will be sufficient to meet her legitimate ends. See e.g., *Hatchard v. Westinghouse Broadcasting*, 516 Pa. 184, 192-93 (1987) (discussing restrictions on discovery to protect confidential news informants); see also, *In re Marriage of Lewis duPont Smith*, 50 D&C 3d 591 (Chester County 1987) (in assessing a proposed protective order aiming to prevent disclosure of a party=s political associations, court must consider Awhether the precise material sought by discovery was truly >relevant= to the gravamen of the complaint,@ and whether the discovery Ais the means least inclusive and intrusive for gathering the information to which the party has been entitled.@).

In the present case, issuing a protective order and bifurcating the issues provide a simple means of preserving defendant=s anonymity and avoiding prejudice while considering the merits of plaintiff=s libel claim. If plaintiff is unable to prove all other issues separate from defendant=s requisite state of mind, there is no reason to allow disclosure of defendant=s identity. Thus, defendant Doe respectfully requests that the Court: 1) bifurcate the issue of state of mind from all other issues

in the case; 2) stay any discovery on state of mind until plaintiff has prevailed on all other issues[8]; and 3) enter a protective order preventing plaintiff from any discovery to determine defendant Doe=s identity, at least until plaintiff has prevailed on all issues except defendant=s state of mind.

Respectfully submitted,

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[8] See, e.g., *Rohm and Haas Co. v. Mobil Oil Corp.,* 654 F. Supp. 82 (D. Del. 1987) (granting motion to stay discovery on willfulness of patent infringement until after trial on liability issues).