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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JEFFREY VERNON MERKEY

Plaintiff,

vs.

YAHOO SCOX members atul666 and saltydogmn; PAMELA JONES a.k.a GROKLAW.COM, a.k.a. OSRM and GROKLAW.NET; GRENDEL a.k.a. PAGANSAVAGE.COM; MATT MERKEY a.k.a MERKEY.NET; BRANDON SUIT a.k.a. MERKEY.NET; JOHN SAGE a.k.a. FINCHHAVEN.COM; MRBUTTLE a.k.a. IP-WARS.NET; JEFF CAUSEY a.k.a. IP-WARS.NET; AL PETROFSKY a.k.a. SCOFACTS.ORG; DOES 1 through 200

Defendants.

No. 2:05-CV-521 DAK

AMICUS BRIEF OF ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF UTAH IN OPPOSITION TO PLAINTIFF'S *EX PARTE* MOTION TO CONDUCT EXPEDITED DISCOVERY

Date: August 17, 2005
Time: 11:30 a.m.
Rm: 248
Judge: Hon. Samuel Alba

Trial Date: Not set
Complaint Filed: July 20, 2005

INTRODUCTION

Plaintiff Jeffrey Vernon Merkey's Motion for Expedited Discovery and Amended Complaint, which may generously be described as overreaching and far-fetched, invite this Court to wade into a substantive and procedural thicket that will unnecessarily tie up the resources of both the Court and the over 200 potential Defendants contemplated by the Plaintiff. While the Amended Complaint and Motion for Expedited Discovery are ripe for challenge on multiple grounds – and Amici assume that such challenges will be forthcoming – it is of particular importance that this Court protect the First Amendment and due process rights of the anonymous Defendants at this stage of the litigation. Unable to challenge Plaintiff's allegations on their own as they have yet to be properly informed of the very existence of the lawsuit, the anonymous Defendants have a Constitutional right to have their identities protected by the Court until the Plaintiff can meet minimal pleading and evidentiary requirements.

STATEMENT OF ISSUES AND FACTS

Plaintiff's Amended Complaint, which includes allegations ranging from treason to murder conspiracies, appears to gravitate around claims of libel, infliction of emotional distress, and invasion of privacy. Amended Complaint ("Complaint") at ¶¶ 102-134. His Motion to Expedite Discovery, by contrast, turns on an alleged violation of an order from this Court to permit Plaintiff to file under seal a settlement agreement from a prior litigation. Plaintiff's *Ex Parte* Memorandum of Points and Authorities In Support of Motion to Conduct Expedited Discovery ("Motion") at pp. 4-9. Following Plaintiff's apparent failure to follow local rules regarding filing exhibits under seal (see Order attached as Addendum A), these documents were made available to the public for a brief period of time during which they were reproduced and posted on a variety of Internet web sites. Comments critical of Plaintiff regarding the settlement agreement and other issues were apparently posted on a variety of web sites by a variety of individuals. Plaintiff subsequently amended his Complaint to briefly refer to this distribution.

Four of the Defendants, drawn into the alleged conspiracy on the basis of posting on public web sites comments critical of Plaintiff, are anonymous, appear to have no relationship to each other or the named Defendants, and are identified only by their online screen names. These Defendants are identified in the Caption as atul666, saltydogmn, and Grendel a.k.a. PaganSavage.com, and MrButtle. Plaintiff has moved the Court, *ex parte*, for leave to issue subpoenas to Internet service providers (and "other attorneys") for the purpose of locating and identifying the anonymous Defendants, presumably so that they can be served with summons and be subject to further discovery proceedings.[1] Motion at 9.

Plaintiff provides no admissible evidence that in any way substantiates his allegations regarding the anonymous Defendants. Plaintiff provides no admissible evidence that demonstrates any effort to identify and serve the Defendants. Plaintiff now comes before the Court, with little more than conjecture, seeking to override their First Amendment interests.

ARGUMENT

I. Plaintiff Cannot Meet the Applicable Standard for Expedited Discovery.

Plaintiff's allegations fall short of meeting applicable standards for expediting discovery.

A. Plaintiff Cannot Meet Either the *Notaro v. Koch* or Good Cause Tests for Expedited Discovery.

Courts generally apply one of two tests for expedited discovery. *See In re Fannie Mae Derivative Litigation*, 227 F.R.D. 142, 142-43 (D.D.C. 2005) (citing a range of courts who have applied both tests). The *Notaro v. Koch* test requires plaintiffs to demonstrate (1) irreparable injury; (2) some probability of success on the merits; (3) some connection between the expedited discovery and the avoidance of the irreparable injury; and (4) some evidence that the injury that will result without expedited discovery outweighs the injury that the defendant will suffer if the

[1] Plaintiff also seeks expedited discovery of the identities and location of the named defendants. Amici appear here solely in support of the right to anonymous speech put at risk by Plaintiff's discovery request.

expedited relief is granted. *See* 95 F.R.D. 403, 405 (S.D.N.Y. 1982) (denying motion for expedited discovery given, *inter alia,* significant gaps in the plaintiff's legal claims); *see also Irish Lesbian & Gay Org. v. Giuliani*, 918 F. Supp 728, 730 (S.D.N.Y. 1996) (motion for expedited discovery denied; organization's document request was not reasonably tailored to two-week time constraints presented by case, need for discovery was questionable in light of similarities to prior case brought by organization, and both sides would have full opportunity to explore issues at forthcoming evidentiary hearing).

The more liberal "reasonableness" test calls for courts to decide motions for expedited discovery based on the "reasonableness of the request in light of all of the surrounding circumstances . . . ." *Entmn't Tech. Corp. v. Walt Disney Imagineering*, 2003 W.L. 22519440, No. A. 03-3546, *3 (E.D.Pa. Oct. 2, 2003) (internal quotation marks omitted) (attached as Addendum B); *see also Qwest Communications Int'l Inc. v. WorldQuest Networks, Inc.,* 213 F.R.D. 418, 419-20 (D. Colo. 2003) (denying expedited discovery where plaintiff had not filed for preliminary injunction, had yet to serve defendant with modified or original complaint, and sought a large quantity and range of documents). Among the factors to be considered are: (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made. *See Entmn't Tech.* at *3-5.

Plaintiff has not addressed, much less established, the elements of either test, particularly with respect to the anonymous Defendants. Applying the *Notaro* test, Plaintiff does not contend that he will be irreparably injured if discovery is not expedited. As for the "reasonableness" test, there is no preliminary injunction pending and the discovery requests are vague and therefore overbroad (for example, Plaintiff apparently wishes to subpoena not only information pertaining to the identified and locations of Defendants, but also "evidence collected" by unnamed ISPs and

"other attorneys"). Motion at 9. Plaintiff's motion could be denied solely on this basis.

There is another, more fundamental, reason to deny Plaintiff's motion. Both the *Notaro* and "reasonableness" tests invite consideration of the burden that the requested discovery will place on defendants. Here, that question is crucial. Plaintiff seeks, *inter alia*, the power to issue subpoenas to identify anonymous Defendants because of their alleged wrongful speech. Numerous courts have held that such a request necessarily implicates the right to speak anonymously and, therefore, must be carefully scrutinized. As set forth below, Plaintiff's request cannot pass that scrutiny.

B. Plaintiff Cannot Meet the Heightened Standard Required by the First Amendment.

1. Subpoenas Seeking the Identities of Anonymous Speakers Are Subject to a Qualified Privilege.

Plaintiff's wide-ranging allegations defy easy summary, but the core of the dispute turns on whether Defendants have engaged in wrongful, but anonymous, speech on the Internet. It is well-settled that the First Amendment shelters the right to speak anonymously. *See Buckley v. Am. Constitutional Law Found.,* 525 U.S. 182, 200 (1999) (invalidating, on First Amendment grounds, state statute requiring initiative petitioners to wear identification badges); *Talley v. California*, 362 U.S. 60, 65 (1960) (holding anonymity protected under the First Amendment because forced "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance"). These cases celebrate the important role played by anonymous or pseudonymous writings through history, from the literary efforts of Shakespeare and Mark Twain through the explicitly political advocacy of the Federalist Papers. As the Supreme Court has held, "Anonymity is a shield from the tyranny of the majority," that "exemplifies the purpose" of the First Amendment: "to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995) (holding that an "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"). Courts must "be vigilant . . . [and] guard against undue hindrances to political conversations and the exchange of ideas." *Buckley*, 525 U.S. at 192. This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. A.D. 2001). Moreover, that review must take place whether the speech takes the form of political pamphlets or Internet postings. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment protection that should be applied to" the Internet).

Because the First Amendment protects the right to speak anonymously, a subpoena for anonymous speakers' names and addresses is subject to a qualified privilege. And, just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery. *See Sony Music Entmn't v. Does,* 326 F.Supp.2d 556, 565 (S.D.N.Y. 2004) ("Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns.").

2. To Protect the Qualified Privilege, the Court Should Require Notice to Defendants, Review of the Complaint, and Presentation of Argument and Evidence Before Issuing a Subpoena to an Anonymous Defendant.

The specific tension between this qualified privilege to speak anonymously and the interest of a plaintiff in obtaining information from an Internet service provider in order to pursue litigation has been considered by a variety of federal and state courts over the past several years. *See, e.g., Doe v. 2theMart.com*, 140 F.Supp.2d 1088 (W.D. Wash. 2001) (granting, on First Amendment grounds, motion to quash subpoena to Internet service provider seeking identification of anonymous posters of messages critical of defendant); *Dendrite*, 775 A.2d at771 (requiring strict procedural safeguards be imposed "as a means of ensuring that plaintiffs do not

use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet"); *Columbia Ins. Co., v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D.Cal.1999) (balancing plaintiff's desire to seek redress for injury against the legitimate and valuable right to participate in online forums anonymously or pseudonymously). These courts have repeatedly noted that, at the outset of the litigation, the plaintiff has done no more than allege wrongdoing, and a privilege is generally not overcome by mere allegations. They have further recognized that a serious chilling effect on anonymous speech would result if Internet speakers knew they could be identified by persons who merely allege wrongdoing, without necessarily having any intention of carrying through with actual litigation. *See, e.g., Seescandy.com*, 185 F.R.D. at 578 ("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."); *see also 2theMart.com,* 140 F.Supp.2d at 1093 *(*"If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny by the courts.").

Recognizing the competing interests of plaintiffs and anonymous defendants, courts have adopted multi-part balancing tests to decide whether to compel the identification of an anonymous Internet speaker. Thus, in *Seescandy.com*, one of the first cases to address this issue, the court required the plaintiff to (1) identify the missing party with sufficient specificity that the court could determine whether the defendant could be sued in federal court; (2) make a good faith effort to communicate with the anonymous defendants and to provide them with notice of the suit – thus assuring them an opportunity to defend their anonymity; and (3) demonstrate that it had viable claims against such defendants. 185 F.R.D. at 579.

More recently, in *Doe v. 2theMart.com*, the court found that the Constitution requires a balancing of four factors before a subpoena can be used to identify anonymous Internet speakers:

> [W]hether: (1) the subpoena . . . was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) [adequate] information . . . is unavailable from any other source.

140 F.Supp.2d at 1092. Since the petitioner had "failed to demonstrate that the identity of these Internet users is directly and materially relevant to a core defense in the underlying securities litigation," the court granted the speakers' motion to quash the subpoena. *Id.* at 1090. As the court noted, "[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously." *Id.* Similarly, all other federal courts to address the issue have held that the First Amendment demands a heightened evidentiary showing to justify such subpoenas. *See, e.g., Sony Entmn't* 326 F. Supp. 2d at 564-65 (denying motion to quash subpoena to Internet service provider seeking identifying information for anonymous defendant; summarizing and applying a five-factor balancing test).[2]

In the immediate case, Plaintiff would like to use the power of a civil subpoena to

[2] State courts have set forth similar requirements of notice, review of the complaint, and presentation of argument and evidence before an ISP will be compelled to identify an Internet speaker. In *Dendrite,* 775 A.2d 756 (N.J. Super. A.D. 2001), which remains the only appellate opinion in the country to face the question squarely, the court required the would-be plaintiff to: (1) use the Internet to notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the allegedly actionable online speech; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation; and (5) show the court that, on balance and in the particulars of the case, the right to identify the speaker outweighs the First Amendment right of anonymous speech. 775 A.2d at 760-61; *see also La Societe Metro Cash & Carry France v. Time Warner* Cable, 2003 WL 22962857, No. CV030197400S, at *5-6 (Conn. Super. Dec. 2, 2003) (applying a balancing test and considering evidence that allegedly defamatory statements were false and caused injury before deciding to allow discovery concerning the identity of the speaker) (attached as Addendum C); *In Re Subpoena to America Online*, 52 Va. Cir. 26, 34 (Vir. Cir. 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001) (requiring the introduction of the allegedly actionable Internet speech and that the court be "satisfied by the pleadings or evidence supplied" that the subpoenaing party had a legitimate basis to contend that it was the victim of actionable conduct, "and . . . the subpoenaed identity information [must be] centrally needed to advance that claim") (attached as Addendum D).

identify and locate anonymous speakers, presumably through their Internet service providers. These anonymous speakers are sheltered by the First Amendment. To avoid chilling Internet communication, the Court should carefully scrutinize Plaintiff's request, balancing his litigation interests in pursuing this litigation against the anonymous Defendant's free speech interests.

3. Plaintiff Has Not Met the Heightened Standard Required by the First Amendment.

Plaintiff's underlying Complaint is full of extraordinary accusations, from conspiracy to murder to identity theft and defamation. His Motion, however, focuses almost entirely on one specific issue that has little to do with the central allegations of the Complaint – the public distribution of a document that was filed with the original Complaint. Even taken together, his Complaint and Motion for Expedited Discovery fall far short of meeting the heightened standards for expedited discovery of the identities of anonymous defendants.

Plaintiff cannot meet the balancing test set forth in *Columbia v. Seescandy.com*. As an initial matter, he has not shown that there is an actual person behind the alleged wrongful acts that would be amenable to suit in federal court. In *Seescandy*, the plaintiff established the first element by submitted a list of aliases for the person whose identity was sought, as well as email messages by the anonymous defendant that were directly germane to the lawsuit. Here, Plaintiff has provided no such evidence. Further, he has not identified any steps taken to identify the anonymous defendants. In *Seescandy*, by contrast, the plaintiff submitted a detailed account of its efforts to locate and serve the persons whose information was sought. Finally, Plaintiff has not shown that his suit could withstand a motion to dismiss. This element is crucial because it helps prevent plaintiffs from filing frivolous lawsuits solely in order to obtain information about personal enemies. In *Seescandy*, the litigant submitted exhibits supporting central elements of their cause of action against the anonymous defendant. Here, Plaintiff submits little more than bare allegations. The exhibits to the Complaint appear to pertain to his discrimination claims

against Novell Corporation, which is not a defendant in this case.[3] In addition, the exhibits to the Motion, even if they were admissible, pertain almost entirely to the narrow issue of the alleged public distribution of a sealed document. Plaintiff has not alleged that the anonymous Defendants had anything to do with that distribution.

Neither can Plaintiff satisfy the *2themart.com* factors. First, he has not demonstrated that his request for subpoena was made in good faith. In *2theMart.com*, the court found that the party seeking the information could reasonably believe that some of the information sought was relevant to one of its defenses, but noted that the subpoena also sought entirely irrelevant private information. That overbreadth demonstrated a disregard for the privacy and First Amendment rights of online users that, the court held, "while not demonstrating bad faith per se, weighs against [the subpoenaing party] in balancing the interests here." 140 F.Supp.2d at 1096. Similarly, even if the information Plaintiff seeks here may be relevant to one small portion of his Complaint – the distribution of the settlement agreement – he has not alleged that the anonymous Defendants had anything to do with that distribution. Any subpoena request that seeks their information is overbroad and demonstrates an improper disregard for privacy and free speech rights.

Second, Plaintiff has not shown that the information sought relates to a core claim or defense. In *2theMart.com*, this factor weighed against the subpoenaing party where the requested information related to just one of twenty-seven affirmative defenses, a generalized assertion of lack of causation. Here, the bulk of Plaintiff's Complaint concerns allegations of online threats, violent language, identity theft, intentional infliction of emotional distress, and defamation. He devotes just three paragraphs of the Complaint to the online distribution of the settlement agreement, yet that appears to be virtually the entire basis of his Motion. Lacking some showing

[3] Amici refer here to the exhibits to the first Complaint, which Amici has reviewed for the sake of completeness. The Amended Complaint refers to but does not attach these exhibits.

that the information sought relates to a more central claim, this factor weighs against him.

Third, Plaintiff has not bothered to explain the material relevance of the identities of the anonymous Defendants. Given the fundamental importance of the free speech rights at stake, he should be required to do so before the factor be given any weight.

Finally, Plaintiff has not shown that the information he seeks is unavailable from any other source. For example, he has not offered a shred of evidence of any attempt to locate the anonymous Defendants. He simply asserts, without evidentiary support, that he attempted to email *one* of the anonymous Defendants, pagansavage.com, and that this Defendant does not have an identifiable address of service. Motion at 6. He says nothing about his efforts to locate the remaining Defendants.

Plaintiff cannot meet either of the leading federal balancing tests. His wild accusations and sloppy investigation cannot justify burdening the anonymous Defendants' fundamental right to anonymous speech. The Court should not authorize a subpoena until individualized, admissible evidence is presented about each anonymous Defendant.

II. If Discovery Is Permitted, Additional Protections Should Be Put In Place.

While judicial economy is best served by denying the request for discovery of the identity of anonymous speakers in this proceeding, if the Court determines that the right to speak anonymously should be litigated through individual motions to quash, Amici respectfully request the following procedures to ensure notice and an opportunity to assert these rights: (1) to direct any subpoena recipients to provide notice, within seven days of their receipt of the subpoena, to each person whose personal information is sought; (2) to allow the Defendants fourteen days from the time notice was received to file a motion to quash; and (3) to preclude any disclosure pending the disposition of any motion to quash.

CONCLUSION

Amici strongly believe that Plaintiff's suit is far too premature, his allegations far too speculative, and his evidence far too weak to permit him to intrude upon the First Amendment protections that have defended anonymous speakers since the foundation of this country. Online speakers who exercise their right to speak anonymously on the Internet increasingly find themselves at risk of unwarranted legal proceedings, in part because of the difficulty speakers have countering – or even learning of – claims against them. Without adequate procedural safeguards, necessary to take into account the uneven litigation playing field, lawsuits designed to intimidate, to harass, and to chill anonymous speech will remain attractive to those who dislike Constitutionally protected criticism.

The immediate case provides a clear example of the fundamental unfairness that could result from an uncritical application of liberal discovery rules. Plaintiff's Motion does not meet any recognized standard for obtaining expedited discovery, much less the heightened standard that must be applied when fundamental free speech rights are at stake. It should be denied.

Dated: August 15, 2005 Respectfully submitted,

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Electronic Frontier Foundation

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