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7 IN THE CIRCUIT COURT OF THE STATE OF OREGON
8 IN AND FOR THE COUNTY OF CLACKAMAS

9 DOE,

10 Plaintiffs,

11 v.

12 Individuals, whose true names are unknown,
13 using the following pseudonyms: TS,
14 RONALD, KRIS and BILL,

15 Defendants.

CASE NO. CV 0803 0693

16 THIRD-PARTY *THE PORTLAND*
17 *MERCURY'S* OPPOSITION TO
18 PLAINTIFF'S MOTION TO COMPEL
19 *TELEPHONIC HEARING REQUESTED*

20 I. REQUEST FOR TELEPHONIC HEARING

21 1.

22 Third-party *The Portland Mercury* requests that the hearing on Plaintiff's Motion to
23 Compel Production of Documents from Webhosts ("Motion to Compel") be heard by
24 telecommunication. This request is being served on Daniel Skerritt (503.802.2024), Rodney
25 E. Lewis Jr. (503.241.2300), and Jonathan Maus (503.706.8804). The office of the
26 undersigned counsel is more than 25 miles from the courthouse.

THIRD-PARTY THE PORTLAND MERCURY'S
OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL - 1

cc: DHS/Client/Docketing

DOCKETED 8/15/08

SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682
Telephone: (206) 676-7000
Fax: (206) 676-7001

1 II. FACTUAL BRACKGROUND

2 A. *The Mercury's* Blog

3 2.

4 *The Portland Mercury* is a weekly newspaper. It hosts an Internet blog called
5 "Blogtown, PDX" where the newspaper's reporters post articles and members of the public
6 may post comments about the articles.¹ To post a comment on Blogtown, members of the
7 public sign up by identifying only an e-mail address and self-assigning a "screen name."
8 (Goldman Decl., Ex. A.) *The Mercury* has no way of confirming the accuracy of the e-mail
9 address input in the sign-up form and the screen names usually do not identify the person
10 posting a comment. (Crocker Decl. ¶ 2.) The only information *The Mercury* has about
11 someone posting a comment is the list of numbers representing the IP (Internet protocol)
12 address. (*Id.*) An IP address, such as "192.168.100.1," for example, generally identifies the
13 Internet service provider from which an e-mail is sent but does not specifically identify the
14 individual sender. http://en.wikipedia.org/wiki/IP_address.

15 3.

16 The newspaper's Privacy Policy is published on its website and provides in relevant
17 part:

18 When you register on this website or use services on the site, we
19 collect some personal information directly from you, typically
20 just your e-mail address.... The privacy policy below explains
how we deal with your information.

21 **We won't provide your information to third parties without
your consent, unless ...**

22 We are required to do so by law, court order, or subpoena; or
23 There's an emergency involving the risk of serious personal
harm.

24
25 ¹ A "blog" is a publication on the Internet of frequent, chronological comments regarding the personal thoughts
and opinions of Internet users for other Internet users to read.
26 <http://encarta.msn.com/encyclopedia/701713240/Blogging.html>.

1 In any of these cases, we would provide information only to the
2 extent that the situation demands, and never for marketing
3 purposes or other commercial use.

3 (Goldman Decl., Ex. B.)

4 4.

5 On January 31, 2008, *Mercury* reporter Amy Ruiz posted an article about activities at
6 City Hall. (*Id.*, Ex. C.) Ms. Ruiz did not mention or refer to Terry Beard in her post. Reader
7 comments were posted in response by "Roads are not free" and "Selling Salem Snake PetroOil
8 in PDX." The final comment, posted on February 1, 2008, was by "Ronald" who wrote:

9 Now that Sho Dozano has severed all business ties with Terry
10 Beard (cantakerous [sic], obnoxious dishonest new money pig
11 self proclaimed god) of Beard Frame Shops and of
12 TheBigBidet.com, oops, I mean Thebigday.com, I will vote for
13 him. Many business leaders in Portland feel the same way. He
14 really did himself a serious disservice [sic] when he decided to
15 trust someone like Terry Beard. After hearing of how Terry
16 Beard had mistreated so many, including his own employees, we
17 couldn't understand why Sho was doing business with him.
18 Thanks Sho for restoring out faith in you. Wow. What if Terry
19 Beard ran for Mayor. That would be a joke. He thinks he is
20 going to write a book on manners when he doesn't have any. I
21 was in the booth next to him at Ringside, and all he did was brag
22 about himself. Sad. Again, many of us are rooting for Sho here
23 in Portland after he got rid of Terry Beard.

17 (*Id.*)² There were no further comments to Ms. Ruiz' post.

18 5.

19 *The Mercury* provides access to Blogtown as a public service to permit members of the
20 public a forum to comment on matters of interest. The newspaper does not edit or fact-check
21 the public comments. Rather, as with other blogs, *The Mercury* simply provides the server
22 that passively posts the comments submitted. (Crocker Decl. ¶ 4.)

26 ² Terry Beard and his counsel in this matter, Dan Skerritt, are business partners in TheBigDay, a honeymoon registry and romantic travel service. <http://www.thebigday.com/help/ThePeople.asp>.

1 B. The Subpoena to *The Mercury*

2 6.

3 On April 25, 2008, Plaintiff served *The Mercury* with a subpoena. It requested the
4 following:

- 5 1. Documents showing generally applicable terms and
6 conditions for any individual who posts a blog or statement on
7 your web page.
- 8 2. Documents describing document retention policy relating
9 to independent content providers who post on your web page.
- 10 3. All documents of any kind concerning, pertaining to, or
11 relating to:
- 12 (a) any blog or publication on your web page that
13 mentions, refers to, or concerns Terry Beard, including but not
14 limited to matters posted by the individual content provider or
15 blogger or person using the pseudonym "Ronald" who posted
16 content that mentions or concerns Terry Beard.
- 17 (b) any registration or similar document executed by any
18 blogger or independent content provider described in 3(a) above.
- 19 (c) any document that provides any identifying
20 information of or concerning such bloggers such as name,
21 address, telephone number, email address, or internet service
22 provider used by any person identified in 3(a) above.
- 23 (d) any record of any communication between you and
24 any individual identified in 3(a) above, whether or not published
25 on your web page.
- 26 (e) any record of any investigation or review made by
you or on your behalf regarding any posting made that is
identified under 3(a) above.
- (f) any submissions of or concerning Terry Beard that
were rejected for posting on your web site.
- (g) any documents concerning the review of and
decision to reject any submissions identified under 3(f) above.

(Skerritt Decl., Ex. 3.)

7.

Pursuant to ORCP 55(b), *The Portland Mercury* timely objected to the subpoena as follows:

The Mercury objects to the subpoena based on the reporter's privilege recognized under the First Amendment, *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995), and Oregon's Shield Law, O.R.S. § 44.520. Pursuant to the Shield Law, a newspaper may not be compelled to disclose "any unpublished information obtained ... in the course of ... processing information for any medium of communication to the public." To the degree information you seek is not available on *The Mercury's* website,¹ it is not subject to compelled disclosure.

(Goldman Decl., Ex. D.) Footnote 1 stated: "For your information, you may find the documents described in request numbers 1 and 3(a) on *The Mercury's* website." (*Id.*)

8.

On July 30, 2008, three months after issuance of the subpoena, the Motion to Compel was "served" by mail on Washington counsel for *The Mercury*.

III. ARGUMENT

A. The Oregon Shield Law Protects *The Mercury* From Compelled Disclosure.

9.

The Shield Law is "so named because it shields certain items from discovery by providing that their disclosure cannot be compelled by subpoena or otherwise" and allows a newspaper "to assert that certain types of information are privileged." *State v. Pelham*, 136 Or. App. 336, 344, 901 P.2d 972 (1995). The statute provides in relevant part:

(1) No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise:

(a) *The source of any published or unpublished information obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public; or*

1 (b) *Any unpublished information obtained* or prepared
2 by the person *in the course of* gathering, receiving or
3 *processing information* for any medium of
4 communication to the public.

5 ORS 44.520(1) (emphasis added). So, a newspaper may not be compelled to identify the
6 source of information or produce any “unpublished information” the newspaper has obtained
7 in the course of “receiving” or “processing” information for a “medium of communication.”
8 “Unpublished information” refers to “any information not disseminated to the public” and
9 includes “all ... data of whatever sort not themselves disseminated to the public.” ORS
10 44.510(5). “Processing” and “receiving” must mean something other than the alternative verb
11 that accompanies these words, “gathering ... information,” and “processing” is defined by the
12 statute to have “its ordinary meaning and *includes, but is not limited to*, the compiling, *storing*
13 and editing *of information.*” ORS 44.510(3) (emphasis added). “Medium of
14 communication,” in turn, means “any newspaper, magazine, or other periodical, book,
15 pamphlet, news service, wire service, news or feature syndicate, broadcast station or network,
16 or cable television system.” ORS 44.510(2).

17 10.

18 The information Plaintiff seeks from *The Mercury* is protected by the Shield Law. The
19 statute protects a newspaper from compelled disclosure when the newspaper is “gathering ...
20 information,” “receiving ... information,” or “processing information.” That means that a
21 newspaper is protected in its conduct beyond mere gathering of information and includes the
22 passive receipt or processing of information without any requirement that the information have
23 been solicited or edited by the newspaper. Thus, Plaintiff is mistaken in his belief that “the
24 Shield Law only protects the media’s ability to gather news,” (Mot. to Compel at 4:10; *accord*
25 *id.* at 5:13), and his conclusion that “[h]osting a web-site is not specific to any newsgathering
26 function,” (*id.* at 3:8-9), is beside the point. Plaintiff points to *Pelham* where the court held
that a cameraman could be required to testify to incidents that occurred when he was out in
public and not filming. While Plaintiff is correct that the court in *Pelham* discussed

1 information obtained in the course of newsgathering, the discussion concerned the context of
2 the facts presented there and the court said nothing to suggest that the other protections of the
3 statute should be excised. *Pelham*, 136 Or. App. at 344 (“Here, the trial court correctly ruled
4 that the ‘information obtained’ in the course of cameraman Wernick's newsgathering did not
5 include Wernick's personal observations, to the extent that those observations were of events
6 that took place in public, were made with the naked eye, and did not relate to work product,
7 informants or confidential sources.”). The fact that the few cases to address the Shield Law
8 have occurred in the context of newsgathering is, of course, not surprising and do not restrict
9 the broad protections set forth in the statute.

10 11.

11 There can be no dispute that the unpublished information requested here – “Ronald’s”
12 e-mail and IP addresses³ -- were obtained by *The Mercury* in the course of receiving and
13 processing “Ronald’s” comment on Blogtown. It is possible, though unlikely, that the
14 requested information will identify “the source” of the information “Ronald” posted under the
15 first prong of the Shield Law, but it plainly is “unpublished” information under the Shield
16 Law’s second prong.

17 12.

18 The Shield Law has a limited exception that does not apply here.

19 The provisions of ORS 44.520(1) do not apply with respect to
20 the content or source of allegedly defamatory information, in [a]
21 civil action for defamation *wherein the defendant asserts a*
defense based on the content or source of such information.

22 ORS 44.530(3) (emphasis added). Mr. Beard is the Plaintiff in this lawsuit, not the defendant
23 and no defendant has “assert[ed] a defense based on the content or source of” the information
24 Plaintiff seeks here. The Court of Appeals has been clear that the Shield Law’s limited
25 exception will be strictly applied. In *McNabb v. Oregonian Publishing Co.*, 69 Or. App. 136,

26 ³ The other types of information requested by Plaintiff either may be found on *The Mercury*’s publicly-
accessible website or do not exist.

1 685 P.2d 458 (1984), the court rejected a defamation plaintiff's request for documents from the
2 defendant newspaper because "[t]he defense in this case was not based on the content or
3 source of the unpublished information." *Id.* at 144. The court explained:

4 [E]xcept for constitutional limitations, to the extent that a state
5 authorizes a claim for defamation, it may also limit a party's
6 ability to prove the claim in order to promote other social
7 purposes. Plaintiff has made no state constitutional challenge,
8 and the trial court was not wrong in applying the statute in the
9 face of the challenge that plaintiff made.

10 *Id.* at 144-45 (fns. omitted).

11 **B. California Law Is Significantly Different From Oregon's Shield Law and Does
12 Not Support Compelled Disclosure Here.**

13 13.

14 Plaintiff's reliance on non-binding California law is in error. He points to the
15 California Shield Law and its interpretation in *Rancho Publications v. Superior Court*, 68 Cal.
16 App. 4th 1538 (1999). In *Rancho Publications*, the court held that the California Shield Law
17 did not protect a newspaper from compliance with a subpoena seeking the identity of the
18 author of a paid advertisement. California's journalist privilege law is based on a statute and a
19 provision in the California Constitution both of which are materially different than the Oregon
20 Shield Law. The California Constitution provides in relevant part

21 A publisher, editor, reporter, or other person connected with or
22 employed upon a newspaper, magazine, or other periodical
23 publication, or by a press association or wire service, or any
24 person who has been so connected or employed, shall not be
25 adjudged in contempt by a judicial, legislative, or administrative
26 body, or any other body having the power to issue subpoenas,
27 for refusing to disclose the source of any information procured
28 while so connected or employed for publication in a newspaper,
29 magazine or other periodical publication, or for refusing to
30 disclose any unpublished information obtained or prepared in
31 gathering, receiving or processing of information *for*
32 *communication to the public.*

33 Cal. Const, art. I, § 2(b) (emphasis added). The Shield Law is identical to the constitutional
34 provision in all relevant respects including that the information at issue be "for communication
35 to the public." Cal. Evid. Code § 1070(a). Oregon's Shield Law is different. It applies to

1 “gathering, receiving or processing information *for any medium of communication to the*
2 *public.*” ORS 44.520(1) (emphasis added). While the California law focuses on information
3 gathered, received or processed “for communicating to the public,” the Oregon Shield Law
4 more broadly protects information gathered, received or processed “for any medium of
5 communication to the public,” *i.e.*, information gathered, received or processed for the
6 newspaper.

7 14.

8 Not only is the Oregon Shield Law significantly broader than its California counterpart;
9 but we are concerned here not with an advertisement as was the case in *Rancho Publications*
10 but anonymous speech about Terry Beard’s relationship with mayoral candidate Sho Dozano.
11 The *Rancho Publications* court, itself, restricted the extent of its decision.

12 We do not go as far as the hospital in arguing that the shield law
13 is limited to “news” or “newsgathering.” Other courts have
14 extended the shield laws to cover a variety of editorial functions
15 of a newspaper. (See, e.g., *Gastman v. North Jersey*
Newspapers Co. (1992) 254 N.J. Super. 140 [603 A.2d 111]
[applying New Jersey shield law to unsigned letter to the
editor].)

16 *Id.* at 1546 (emphasis). As with the case of the unsigned letter to the editor – distinguished by
17 the *Rancho Publications* court – providing a forum for anonymous speech is a critical function
18 of newspapers going back to the earliest days of this country.

19 C. “Ronald” Has a First Amendment Right to Speak Anonymously.

20 15.

21 Courts have long recognized the constitutional right to publish anonymously. *McIntyre*
22 *v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995) (“an author’s decision to remain
23 anonymous ... is an aspect of the freedom of speech protected by the First Amendment”);
24 *Krinsky v. Doe*, 159 Cal. App. 4th 1154, 1163 (2008). The importance of this bedrock
25 principle has been reaffirmed in the context of the unique speech capabilities of the Internet.

26 As Internet technology has evolved over the past two decades,
computer users have encountered a proliferation of chat rooms

1 and websites that allow them to share their views on myriad
2 topics from consumer products to international diplomacy.
3 Internet bulletin boards, or "message boards," have the
4 advantage of allowing users, or "posters," to express themselves
5 anonymously, by using "screen names" traceable only through
6 the hosts of the sites or their Internet Service Providers (ISPs).

7 *Krinsky*, 159 Cal. App. 4th at 1158. The *Krinsky* Court explains:

8 The use of a pseudonymous screen name offers a safe outlet for
9 the user to experiment with novel ideas, express unorthodox
10 political views, or criticize corporate or individual behavior
11 without fear of intimidation or reprisal. In addition, by
12 concealing speakers' identities, the online forum allows
13 individuals of any economic, political, or social status to be
14 heard without suppression or other intervention by the media or
15 more powerful figures in the field.

16 *Id.* at 1162.

17 16.

18 It is noteworthy, that the *Rancho Publications* court, on which Plaintiff relies, went on
19 to protect the subpoenaed information under the First Amendment. "Compelled source
20 disclosure runs afoul of the First Amendment because some speakers may be chilled into
21 silence without the cover of anonymity." 68 Cal. App. 4th at 1547.

22 While anonymity could be used to conceal dirty tricks, "... the
23 interest in having anonymous works enter the marketplace of
24 ideas unquestionably outweighs any public interest in requiring
25 disclosure as a condition of entry." Despite the unpalatable
26 consequences of free speech, "... our society accords greater
weight to the value of free speech than to the dangers of its
misuse."

27 *Id.* (quoting *McIntyre*, 514 U.S. at 342, 357).

28 17.

29 The First Amendment protects the identity of the anonymous speaker from compelled
30 disclosure unless the plaintiff can first establish a *prima facie* case of defamation. *Id.* at 1172.
31 "Requiring at least that much ensures that the plaintiff is not merely seeking to harass or
32 embarrass the speaker or stifle legitimate criticism." *Id.* at 1171. To be actionable as
33 defamation, "a communication must be both false and defamatory." *Reesman v. Highfill*, 327

1 Or. 597, 603, 965 P.2d 1030 (1998). Statements of opinion are not defamatory. *Hickey v.*
2 *Settlemer*, 141 Or. App. 103, 110, 917 P.2d 44 (1996). Plaintiff has not established a *prima*
3 *facie* case that the statements by "Ronald" are false and not mere opinion. Consequently, the
4 First Amendment *also* bars compelled disclosure here.

5 **D. Plaintiff Is Not Entitled To Costs and Fees.**

6 18.

7 Plaintiff contends he is entitled to fees and costs pursuant to ORCP 46A(4). (Mot. to
8 Compel at 9:4.) Rule 46(A)(2) defines the specific types of motions to compel to which it
9 applies:

0 If a party fails to furnish a report *under Rule 44 B or C*, or if a
1 deponent fails to answer a question propounded or submitted
2 *under Rules 39 or 40*, or if a corporation or other entity fails to
3 make a designation *under Rule 39 C(6) or Rule 40 A*, or if a
4 party fails to respond to a request for a copy of an insurance
5 agreement or policy *under Rule 36 B(2)*, or if a party in
6 response to a request for inspection submitted *under Rule 43*
7 fails to permit inspection as requested, the discovering party may
8 move for an order compelling discovery in accordance with the
9 request. Any motion made under this subsection shall set out at
0 the beginning of the motion the items that the moving party
1 seeks to discover. When taking a deposition on oral examination,
2 the proponent of the question may complete or adjourn the
3 examination before applying for an order.

4 19.

5 It is, instead, Rule 55 that governs here where a subpoena for documents is issued to a
6 third party. That Rule provides in relevant part as follows:

7 A person commanded to produce and permit inspection and
8 copying of designated books, papers, documents or tangible
9 things but not commanded to also appear for deposition, hearing
0 or trial may, within 14 days after service of the subpoena or
1 before the time specified for compliance if such time is less than
2 14 days after service, serve upon the party or attorney designated
3 in the subpoena written objection to inspection or copying of any
4 or all of the designated materials. If objection is made, the party
5 serving the subpoena shall not be entitled to inspect and copy the
6 materials except pursuant to an order of the court in whose name
the subpoena was issued. If objection has been made, the party
serving the subpoena may, upon notice to the person

