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## **DOES' MOTION TO QUASH THIRD-PARTY SUBPOENA TO YAHOO! INC.**

Pursuant to Federal Rule of Civil Procedure 45(c) and Local Rule 7.2, John/Jane Does 1 and 2, through their undersigned counsel, move to quash plaintiff's third party subpoena to Yahoo! Inc., and notice this motion for hearing before Magistrate Judge Infante on Monday, March 12, 2001 at 2:00 PM. Does 1 and 2, referred to in the complaint and in the subpoena by their Internet pseudonyms "iamcashman2525 " and "southernemptyall" ("Does"), ask this Court to quash plaintiff's subpoena as it relates to Does, because the subpoena violates their First Amendment right to speak anonymously.

### **INTRODUCTION**

Plaintiff Rural/Metro Corporation has issued a third-party subpoena to an online service provider Yahoo! Inc. requiring Yahoo to reveal the identities and portions of the online correspondence of defendants Jane or John Does 1 through 4, individuals who participated in a public discussion concerning Rural/Metro's business held on a Yahoo message board. Without setting forth a single message, or indeed a single fact, Rural/Metro alleges the conclusions that Does posted "false, misleading and/or deceptive information" about Rural/Metro, that Does may possibly sometime in the future reveal unspecified trade secrets belonging to Rural/Metro, and that Does may be current or former employees. Based on these unsubstantiated suspicions, Rural/Metro subpoenaed not only the identities of the anonymous Does, but also documents related to confidential communications between Does and Yahoo. *See* Exhibit A to Subpoena to Yahoo p. 2 (copy attached as Exhibit A). Rural/Metro's attempt to take advantage of this Court's discovery process to intimidate its critics into silence violates Does' right to engage in anonymous speech. Accordingly, this Court should quash the subpoena.

### **STATEMENT OF ISSUES TO BE DECIDED**

The question before the Court is whether plaintiff Rural/Metro should be permitted to use the procedures of this Court to force disclosure of the identities of individuals who spoke anonymously on an Internet message board, where Rural/Metro has made no

showing that the anonymous speakers acted unlawfully or in any way violated Rural/Metro's rights.

## **STATEMENT OF FACTS**

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be to all who choose to read them. As the Supreme Court opined in *Reno v. ACLU*, 521 U.S. 844, 870 (1997), "[f]rom the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer."

To organize these town criers and pamphleteers so that interested people can find each other, Yahoo has created public outlets for the expression of opinions about various topics. These outlets, called message boards, are essentially electronic bulletin boards where individuals freely discuss the issues related to topic of the message board by posting comments for others to read and respond to. Yahoo maintains a series of message boards focusing on major companies, including a message board for every publicly-traded company, and permits anyone to post messages to these boards. While nothing prevents individuals from using their real names, most individuals who post messages on these boards generally do so under pseudonyms -- similar to the old system of truck drivers using "handles" when speaking on their CBs. Those who choose one of these colorful monikers do so to protect their identity; such privacy generally encourages the uninhibited exchange of ideas and opinions. Such exchanges are often very heated and, as seen from the various messages and responses on the message board at issue in this case, they are sometimes filled with invective and insult. Most, if not all messages are taken with a grain of salt.

An important aspect of message boards that distinguishes them from almost any other form of published expression is that, because any member of the public can use a message board to express his point of view, a person who disagrees with something that is said on a message board for any reason -- including the belief that a statement contains false or misleading statements about himself -- can respond to those statements immediately at little or no cost, and that response will have the same prominence as the offending message. A message board is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Publ'g. Co. v. Tornillo*, 418 U.S. 241 (1974). Corporations and individuals can reply immediately to criticisms on a message board, providing facts or opinions to vindicate their positions, and thus, potentially, persuading the audience that they are right and their critics wrong. And, because many people regularly revisit the same message boards, the response is likely to be seen by much the same audience as the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the

courtroom, provides the best forum for resolution of disagreements about the truth of disputed propositions of fact and opinion.

One of Yahoo's message boards pertains to Plaintiff Rural/Metro Corporation. The opening page of the Rural/Metro message board explains the ground rules:

This is the Yahoo! Message Board about [Rural/Metro Corporation], where you can discuss the future prospects of the company and share information about it with others. This board is not connected in any way with the company, and any messages are solely the opinion and the responsibility of the poster.

<http://messages.yahoo.com/bbs?.mm=FN&board=7083832&tid=rurl&sid=7083832&action=m&mid=1>.

Each and every page of message listings which follows is then accompanied by a similar warning that all messages should be treated as the opinions of the poster, and taken with a grain of salt:

Reminder: This board is not connected with the company. These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose.

*Id.*

Many members of the public regularly turn to the Yahoo message board as one source of information about Rural/Metro. To date, almost 4,000 messages have been posted on the Rural/Metro board, covering an enormous variety of topics and posters. Investors and members of the public discuss the latest news about the company, what new businesses it may develop, the strengths and weaknesses of the company's operations, and what its managers and employees might do better. Many of the highly opinionated messages praise Rural/Metro, some criticize it, some are neutral.

Does are among many other members of the public that have visited the Yahoo message board for Rural/Metro and participated in the ongoing discussion. Using the screen names "iamcashman2525" and "southernemptyall," Does 1 and 2 have posted messages on the board. Unlike messages from other posters, Does' messages do not suggest that either may be an employee of Rural/Metro. Although some of these messages are critical of Rural/Metro or its executives, others are complimentary. None are unlawful.

## **PROCEDURAL BACKGROUND**

Although it is a Delaware corporation located in Arizona, and although Rural/Metro does not know where the Does reside, Rural/Metro filed this complaint in the Northern District of California, the home of Yahoo.<sup>11</sup> The complaint and subpoena list four pseudonyms of persons whose messages have appeared on Yahoo's Rural/Metro message

board: iamcashman2525, southernemptyall, hotmedicaz, and smilelikeyoulikeit, referred to in the complaint as Jane or John Does 1 through 4. *See* Subpoena to Yahoo (copy attached as Exhibit A).

In its bare-boned complaint, Rural/Metro summarily asserts the conclusion that the Does posted messages containing "false, misleading and/or deceptive information about Rural/Metro's business and its key employees," (Complaint ¶ 10) without identifying *any* such information. It does not identify, quote, or even refer to any message to support its general claims, nor does it identify even generally what information is false or misleading. Similarly, although it asserts that the messages suggest the posters may be former or current employees of Rural/Metro (*id.* ¶¶ 11, 23 & 23[sic]), Rural/Metro does not identify, quote, or refer to *any* messages from Does 1 and 2. Moreover, although Rural/Metro alleges "on information and belief" that Does possess or have access to confidential business information (presumably based on the unsupported allegations about employment status), Rural/Metro never alleges that any confidential business information has been disclosed, nor does it specify what confidential business information it believes may imminently be revealed, or why it so believes. And, although Rural/Metro claims that the allegedly false statements are statements of fact, as opposed to non-actionable opinion (*id.* ¶ 15), the complaint fails to identify, quote, or refer to a single example of such false factual statements. Finally, although Rural/Metro summarily asserts that it has suffered special damages, including generally "decline of business, loss of goodwill and injury to business reputation" (*id.* ¶ 35), it does not specify the nature of these damages or explain how they were caused by Does' messages. Indeed, the complaint is far more significant for what it does not do than for what it does:

- It does not attach a single message it alleges is actionable.
- It does not identify, quote, or refer in any way to *any* message from Does 1 or 2.
- It does not quote, include, or refer to any specific language from any message posted by Does 1 or 2.
- Of the only two specific messages referenced in the entire complaint, the complaint wholly misstates them both. Indeed, although it purports to quote two words from a message from Doe 4, that quote does not appear on the message board for that date, and indeed, the message appears to contradict the description of the message in the Complaint.<sup>[2]</sup> Similarly, although the Complaint alleges that Doe 3 ("hotmedicaz") requested the disclosure of "confidential and proprietary business information," the only posting on that date consists of one sentence: "does anyone know what kind of impact possible OSHA fines in Scottsdale will do to the stock???"<sup>[3]</sup>

Based on this conclusory and fact-free complaint, Rural/Metro obtained a subpoena from this Court and served it upon Yahoo, claiming a right to force Yahoo to reveal not only identifying information about the Does but other information and communications Yahoo may have about or with the Does. *See* Subpoena to Yahoo (Exhibit A). Yahoo then informed Does by e-mail of the subpoena and warned them it will disclose their identities unless they file a motion to quash the subpoena. *See* E-Mail Message to Does from Yahoo (copy attached as Exhibit B). Accordingly, Does 1 and 2 move to quash the

subpoena to Yahoo because its enforcement would violate their rights under the First Amendment of the United States Constitution and their right to privacy under the California Constitution.<sup>[4]</sup>

## **SUMMARY OF ARGUMENT**

This motion presents the Court with the issue of what standard should be applied to determine whether, in a particular case, the right to obtain redress from an allegedly libelous statement outweighs the speaker's First Amendment right to make anonymous statements. Although few courts have addressed this question, it is becoming a crucial one, particularly in light of the increasing number of cases where those who have been criticized on the Internet seek to use court processes to unmask their critics.<sup>[5]</sup> As a court in this District recently observed, "[p]eople 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 identities." *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (discussing the standards for discovery of a defendants' identity in a domain name/trademark dispute).

To decide this question of free speech and privacy rights, a balancing test may be borrowed, by analogy, from the standard that has been developed over the years to decide whether to compel the identification of anonymous sources in libel litigation. Under that test, the Court will balance the harm to the defendant speaker against the plaintiff's need for discovery to pursue an otherwise viable claim. On the facts of this case, there can be no doubt that Does' right to speak anonymously should prevail.

## **ARGUMENT**

### **I. The First Amendment Protects Does' Rights to Speak Anonymously.**

There is no question that the First Amendment protects not only the right to speak, but the right to speak anonymously. Indeed, the Constitution and the Bill of Rights were framed by authors who publicly debated its virtues anonymously (or pseudonymously) in the letters published later as the Federalist Papers. And the First and Fourth Amendments were born, at least in part of the colonists' experience with the sedition laws of England which forbade anonymous writing and which allowed warrantless invasion of any home to root out the true identity of anonymous authors. Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 37-50 (1937). The Supreme Court has repeatedly upheld this right. *Buckley v. American Constitutional Law Found. Inc.*, 525 U.S. 182, 197-200 (1999); *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases reflect the important role of anonymous writing in our country's history:

[A]n author is generally free to decide whether or not to disclose his or her true identity. 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, . . . 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 omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

\* \* \*

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent.

*McIntyre*, 514 U.S. at 341-42, 357 (footnote omitted). *See also Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (finding unconstitutional a requirement that recipients of Communist literature notify the post office that they wish to receive it, thereby losing their anonymity); *Talley*, 362 U.S. at 64-65 (holding unconstitutional a state ordinance prohibiting the distribution of anonymous handbills); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (striking down a Georgia statute that would have made it a crime for Internet users to "falsely identify" themselves online). The California Constitution protects the same right. *Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538, 1440-41 (1999) ("The right to speak anonymously draws its strength from two separate constitutional wellsprings: the First Amendment's freedom of speech and the right to privacy in Article I, section I of the California Constitution"). Consequently, the causes of action alleged in the complaint "hav[ing] as their gravamen the alleged injurious falsehood of a statement . . . must satisfy the requirements of the First Amendment." *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1045 (1986).

The Supreme Court has clearly held that speech on the Internet is entitled to the full array of First Amendment protections. Recognizing the Internet is a medium for public discourse that is more accessible and that reaches more people than any medium thus far, the Court noted that "content on the Internet is as diverse as human thought." *Reno*, 521 U.S. at 870. Given the vast and dynamic scope of communication on the Internet, the Court held there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* at 868.

Numerous lower court decisions have further upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *ACLU of Georgia*, 977 F. Supp. at 1232-33; *see also ApolloMEDIA Corp. v. Reno*, 526 U.S. 1061 (1999), *aff'g* 19 F. Supp. 2d 1081 (N.D. Cal. 1998) (protecting anonymous speakers on web site at [www.annoy.com](http://www.annoy.com), a site "created and designed to annoy" legislators through anonymous communications). But the technology that offers the opportunity to speak anonymously on the Internet also creates the capacity to monitor every speaker and discover his or her identity. Unlike the sender of an anonymous letter or flyer, anyone who sends an e-mail or visits a website inevitably leaves tracks that can be followed directly back to the speaker if all parties, including the internet service provider, can be compelled to disclose the identifying information in their possession. *See* Lawrence Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-05 (1999). For this reason, many commentators have suggested that the

law provide special protections for anonymity on the Internet. *E.g.*, David G. Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Lee Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Or. L. Rev. 117 (1996).

## **II. To Overcome Does' Right to Speak Anonymously, Rural/Metro Must Demonstrate it Has Viable Claims.**

Given that Does' anonymous speech is presumptively protected, Rural/Metro's demand to discover the identity of Does on the strength of its purely conclusory complaint must be rejected. Indeed, enforcement of the subpoena would obliterate Does' constitutional right to speak anonymously.

A subpoena is a court order which constitutes state action and is subject to constitutional limitations, including the First Amendment. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). And a court order to compel production of an individual's identity when that identification would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Indeed, even when those rights are curtailed by means of private retribution following such court-ordered disclosures, the state action must still be analyzed in the same terms. *Bates*, 361 U.S. at 524; *NAACP*, 357 U.S. at 461-63. Thus, a plaintiff must show a "subordinating interest which is compelling" where, as here, enforcing the subpoena sacrifices a fundamental right. *Bates*, 361 U.S. at 524; *NAACP*, 357 U.S. at 463.

Accordingly, the First Amendment creates a qualified privilege against disclosure. While the law relating specifically to subpoenas to internet service providers is still developing, there is ample analogous law upon which to draw to develop an appropriate test for this situation. For example, courts have long handled requests to compel a libel defendant to identify the anonymous sources upon which the libel defendant relied in making the allegedly libelous statements. There, courts require the person seeking to compel the disclosure to show: (1) the issue on which the material is sought is not just relevant, but goes to the heart of the case; (2) the disclosure of the source is "necessary" to prove the issue because the party seeking to compel disclosure can prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 390-91 (N.D. Cal. 1976). Applying this test, the Fifth Circuit noted:

the plaintiff must show substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources has been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.

*Miller v. Transamerican Press Co*, 621 F.2d 721 (5th Cir.), as amended on rehearing, 628 F.2d 732 (5th Cir. 1980).

Drawing on these principles, several recent decisions establish that the compelled disclosure of Internet speakers' identity is also subject to limiting principles. The most significant case in this District is the recent decision in *Columbia Ins. Co. v. seescandy.com*, *supra*. Although that case involved a dispute over whether registration of a trademarked name as a domain name violated trademark rights, rather than speech critical of another party, the court recognized the First Amendment values at stake. There, the trademark holder of See's Candy Shops sought a temporary restraining order and a preliminary injunction against the person who had registered the domain names "seescandy.com" and "seescandys.com." The domain registrant had actually emailed the trademark holder with evidence that customers were seeking See's Candy, and offered to sell the seescandy.com domain name. Although the case did not involve critical or unflattering speech like that at issue here, the court briefly referred to the right to speak anonymously, and noted that the need to provide injured parties with a forum

must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. . . . 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 true identity.

185 F.R.D. at 578. To achieve that balance in the context of a trademark dispute over a domain name, the court required the plaintiff who sought pre-service discovery to (1) identify the missing party with sufficient particularity for the Court to determine that the defendant is a real person or entity who could be sued in federal court; (2) identify all previous steps taken to locate the missing party; (3) prove that an act giving rise to civil liability actually occurred and that the discovery will identify the person who committed the act; (4) provide the Court with a statement of reasons justifying the specific discovery requested. *Id.* at 578-80.

Significantly, the Court did not rely on plaintiff's conclusions to determine whether plaintiff had met the test. Rather, it engaged in an independent analysis of evidence to conclude that the trademarks had substantial secondary meanings, that plaintiff and defendant were using the same marketing channel, that the marks defendant was using were identical to plaintiff's both textually and stylistically, and that plaintiff had demonstrated actual confusion based on the 31 emails defendant had sent to plaintiff showing that customers were seeking See's Candy catalogs from the "seescandy.com" site. 185 F.R.D. at 579. The court also noted it could infer bad faith simply from the similarity of the marks. *Id.* at 580.

Because the elements and context of a trademark violation are quite different from the elements and context of a defamation and/or confidentiality claim, like this one, the *seescandy.com* test is not squarely applicable in this case. The anonymous speech at issue

here -- speech critical of a company in the context of an online discussion -- is not susceptible to the objective comparison of domain name to trademark. Moreover, such critical anonymous speech is extremely vulnerable to the chilling effect of a subpoena aimed at disclosing the identity of the critics.<sup>61</sup> For these reasons, the test for unmasking critics based solely on the critical content of their speech should be more stringent than the test for unmasking domain name registrants who have tried to sell the domain name to the trademark holder.

Indeed, other courts have applied a more stringent test in these circumstances. The Virginia Circuit Court has held that plaintiffs seeking to compel identification of anonymous speakers on the Internet must do more than file a complaint. *In re Subpoena Duces Tecum to American Online, Inc.*, Misc. Law No. 40570 (Va. Cir. Ct. Fairfax Cty. 2000) (copy attached as Exhibit C), the Court required the filing of the actual Internet postings on which the defamation claim was based, *id.* at 2, and then held that the Court must be

satisfied by the pleadings or evidence supplied to the court . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed, and . . . the subpoenaed identity information [must be] centrally needed to advance that claim. *Id.* at 5.

Most recently, the New Jersey Superior Court adopted the *seescandy* approach, but noted that the *America Online* approach was also satisfied on the facts before it. *Dendrite Int'l v. John Does, et als.*, No. MRS C-129-00 (N.J. Super. Ct. Ch. Div. November 28, 2000), published unofficially at <http://www.citizen.org/litigation/briefs/dendrite.pdf>. (Copy attached as Exhibit D). In that case, like this one, Dendrite sued four anonymous posters on the Yahoo message board relating to Dendrite, alleging that some were current or former employees who had violated confidentiality agreements, and that some had defamed the company. Two Does moved to quash the subpoena. The court carefully examined the posted statements, which had been described in and attached to the complaint, and concluded that Dendrite "failed to provide this Court with ample proof from which to conclude that John Does 3 and 4 have used their constitutional protections in order to conduct themselves in a manner which is unlawful or that would warrant this Court to revoke their constitutional protections." *Id.* at 19. *See also, Melvin v. Doe*, Civil Division, No. GD99-10264 (Court of Common Pleas, Allegheny County, Pa. Nov. 15, 2000) (copy attached as Exhibit E) (because of the right to speak anonymously, a plaintiff may not enforce a subpoena identifying an Internet speaker unless "the complaint on its face set[s] forth a valid cause of action and . . . the plaintiff offer[s] testimony that will permit a jury to award damages").

In each of these decisions, the courts weighed the plaintiffs' interest in obtaining redress for illegal actions against the speakers' fundamental right to speak anonymously. Because that right raises a qualified privilege against disclosure, the court is required to review the potential plaintiff's claims and the evidence supporting them to be absolutely sure the plaintiff is justified in shearing the speaker of anonymity.

Based on these cases, defendant Does suggest the following steps a court faced with this question should follow and then explain how those steps apply to the facts of this case.<sup>171</sup>

**1. Precise Statements of Speakers Must be Identified.**

As a preliminary matter, the Court should require a plaintiff seeking the identity of an anonymous speaker to set forth the precise statements that form the bases for the allegations in the complaint. In many cases, particularly those in which a plaintiff seeks only a speaker's identity rather than to pursue a legitimate legal claim, the complaints do not contain a single quote from any of the posted messages. Not surprisingly, the complaint filed here does not quote from or refer to specific language from a single message on the Yahoo message board relating to Rural/Metro. Nor does it attach any copies of any posting. Indeed, the complaint refers only generally to two postings, neither of which is attributed to Does 1 or 2. Thus, neither Does nor this court can evaluate the actual content of *any* message Rural/Metro considers actionable, let alone one sent by either Doe 1 or Doe 2.

**2. The Court Must Review Each Statement to Determine Whether It Is Actionable.**

Second, the Court should review each statement to determine whether it is actionable. Since Rural/Metro has not identified *any* statements made by Does 1 and 2, such a review is impossible. However, we will set forth below each cause of action pled in the complaint to evaluate whether Rural/Metro has even alleged any actionable conduct.

**A. Lanham Act Claim.**

In its only federal claim, Rural/Metro alleges a violation of the Lanham Act, which provides a cause of action for "false or misleading representations of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of another person's goods, services or commercial activities." 15 U.S.C. § 1125(a). To make this claim, Rural/Metro must be able to demonstrate that messages posted on the message board are "in commercial advertising or promotion." *Id.* Courts have long held that section 1125(a) "does not have boundless application . . . but is limited to false advertising as that term is generally understood." *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974). Where statements, like the ones on the message board here, do not fall neatly into a paid promotional campaign category, courts must determine whether the statements were "advertising in effect," and must find that the statements are:

(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendants' goods or services, . . . [and they] (4) must be disseminated sufficiently to the relevant purchasing public to constitute advertising or promotion within the industry.

*Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999) (adopting test set forth in *Gordon & Breach Science Publishers, SA v. American Institute*

*of Physics*, 859 F. Supp. 1521, 1528 (S.D.N.Y. 1994)); *see also*, *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996).

Here, Rural/Metro's own allegations as well as the anonymous nature of the message board dictate that the speech is not actionable under the Lanham Act. First, Rural/Metro repeatedly alleges that the Does are former or current employees of Rural/Metro. (Complaint ¶¶ 11, 23, 23 [sic], 24). If Does are current employees, they obviously cannot be in commercial competition with Rural/Metro. Moreover, even if the Does are former employees, and even if they were competitors, the fact that they are posting information under a pseudonym negates any purpose to influence consumers to buy defendant Does' goods and/or services because consumers reading the message board (if any) will not know who Does are, and thus could not be influenced to purchase Does' goods and services. There is clearly no basis for a Lanham Act claim.<sup>[8]</sup>

Finally, even if Rural/Metro could properly allege a violation of the Lanham Act in this case, the wholly conclusory complaint filed here surely does not do so in a way that justifies overcoming Does' constitutional right to speak anonymously. Again, it is worth reiterating that Rural/Metro fails to point anywhere in the complaint to even a single statement of Does 1 and 2 that it alleges is actionable. Indeed, the most that can be gleaned are allegations "[o]n information and belief," that the "Does posted . . . false misleading and/or deceptive information about Rural/Metro's business and its key employees," (Complaint ¶ 10). To these vague and non-specific allegations Rural/Metro adds the wholly conclusory statement that Does' activities constitute a violation of the statute, and that they "have caused and will cause further irreparable injury" without a hint of what that injury might be. (Complaint ¶ 17). As the *seescandy.com* court noted, "[a] conclusory pleading will never be sufficient to satisfy [the requirements to justify disclosing an anonymous internet speaker's identity]." 185 F.R.D. at 579. Plainly the complaint does not, and cannot, as a matter of law, allege a violation of the Lanham Act. Thus, there is no federal claim at issue.

Moreover, Rural/Metro is a resident of Arizona. Although it alleges, as a matter of sheer speculation that all defendant Does are "current or former Rural/Metro employees whose residences are unknown at this time, but outside the State of Arizona," this allegation borders on the frivolous since Rural/Metro readily admits it does not know who Does are, and therefore cannot know whether they live outside Arizona or not. Thus, without a federal claim, and without any indication whatsoever that diversity of citizenship exists between all defendants and plaintiff, it is highly unlikely that this Court even has subject matter jurisdiction over this case.<sup>[9]</sup>

#### B. Arizona Law -- Misappropriation of Trade Secrets.

Rural/Metro claims that Does' messages constitute actual or threatened misappropriation of Rural/Metro's trade secrets under Arizona law. Complaint ¶¶ 19-28. Again, Rural/Metro has failed to identify a single statement attributable to Does 1 or 2, so this Court cannot evaluate the statements to determine whether they are actionable under Arizona law, even assuming Arizona law would apply to this action.

But plaintiff's claim fails for other reasons as well. To establish a prima facie case of misappropriation of trade secrets under Arizona law, a plaintiff must show that: (1) plaintiff possessed information or a technique or process which derives independent economic value from not being generally known and is not readily ascertainable by proper means and plaintiff used reasonable efforts under the circumstances to maintain its secrecy;<sup>[10]</sup> and (2) a person used plaintiff's secret information without plaintiff's consent and while knowing or having reason to know that the secret was acquired by improper means. A.R.S. § 44-401(2)(1) & 4(a)(4)(b) (2000); *Durel Corp. v. Osram Sylvania, Inc.*, Civ. 95-1705 PHX BMV, 1998 U.S. Dist. LEXIS 2259 (D. Ariz. Oct. 16, 1998). Moreover, the statute does not permit a cause of action for *threatened* misappropriation, but only for misappropriation that has already occurred.

Rural/Metro failed even generally to identify what trade secrets it alleges Does revealed or threatened to reveal in their postings. *See Dendrite* at 17 (rejecting trade secret claim because no evidence was presented that information posted on the Internet message board constitutes trade secret). Indeed Rural/Metro's single allegation that the "internal business activities and financial data of Rural/Metro represent the confidential information and trade secrets of Rural/Metro," Complaint ¶ 20, simply recites the element without including a single factual assertion. Further, Rural/Metro failed to state how it allegedly safeguarded its alleged trade secret. Again, Rural/Metro's conclusory statement that it has taken "more than adequate measures to maintain the secrecy," *id.* ¶ 22, does not make it so. These conclusory assertions are insufficient to justify violating Does' First Amendment rights.<sup>[11]</sup>

### C. California Law -- Unfair Competition.

Rural/Metro asserts that Does violated California's unfair competition statute, Cal. Bus. & Prof. Code § 17200 *et seq.* As used in this section "unfair competition" means any unlawful, unfair or fraudulent *business practice*. Cal. Bus. & Prof. Code § 17200. Once again, because Rural/Metro has failed to identify a single statement attributable to Does 1 or 2, neither this Court nor Does can evaluate whether Does' statements are actionable. Regardless of what statements are alleged, however, Rural/Metro's claim must necessarily fail as a matter of law.

California Business and Professions Section 17200 was designed to protect consumers from unfair business practices. On the basis of the vague allegations in the complaint, it is difficult to discern Rural/Metro's theory of Does' liability under this section. The law requires, however, that a plaintiff claiming injury from a competitor's unfair act allege conduct that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cal-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). For reasons set forth above in Section II (2)(A) regarding Rural/Metro's claim under the Lanham Act, a statement or statements of opinions about a company by individual anonymous speakers on an Internet message board cannot possibly meet this test. Furthermore, to meet the "business practice" requirement, the violation must involve more than a single transaction: "on-going conduct, a pattern of behavior, or a course of

conduct is required." *Barquis v. Merchants Ass'n.*, 7 Cal. 3d 94, 108, 111, 113 (1972). Isolated and unrelated statements on a message board cannot rise to this definition.

Further, even assuming *arguendo*, that California law would apply here, this statute was not intended to regulate business practices that are not connected to the State of California. *Northwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 220-25 (1999). Nothing alleged in the complaint suggests that either Rural/Metro or Does' actions are sufficiently connected to California to be actionable under California's unfair business practices law. Rural/Metro is incorporated in Delaware and its principle place of business is in Arizona. Complaint ¶ 1. The location of the Does is undisclosed. The mere act of posting an Internet message on an Internet bulletin board managed by an Internet service provider located in California cannot possibly be considered a business practice connected to California. *Cf. Callaway Golf Corp. v. Royal Canadian Golf Ass'n*, SA CV 00-445 AHS (ANx), 2000 U.S. Dist. LEXIS 19032 (C.D. Cal. Dec. 21, 2000) (defendant's maintenance and operation of a commercial interactive Web site accessible to California residents insufficient to establish jurisdiction).

#### D. California Common Law -- Trade Libel.

Rural/Metro's fourth and final claim against Does is for common law trade libel. A trade libel is an intentional disparagement of the *quality* of property which results in pecuniary damage. 5 Witkin, Summary of California Law Torts § 573 (9th ed. 2000). Plaintiff must prove special damages in the form of pecuniary loss. *Guess v. Superior Court*, 176 Cal. App. 3d 473, 479 (1985). Truth is not a defense; the plaintiff bears the burden to prove falsity. Witkin, *supra*, at § 574.

Rural/Metro has failed to identify a single statement made by Does, so it is impossible to evaluate whether any statement they made is actionable as trade libel. Further, Rural/Metro has failed to even allege that any statements were false, much less provide support for this claim. Complaint ¶ 33 (alleging "false and/or disparaging" statements). In addition, although Rural/Metro has summarily alleged that it has suffered special damages resulting from Does' statements, (*id.* ¶ 35), "saying it is so does not make the alleged harm a verifiable reality." *Dendrite*, at 12. Rural/Metro's statement that it has suffered a "decline in business, loss of goodwill and injury to business reputation," (Complaint ¶ 35), does not come close to meeting the stringent test of special damages under California's trade libel law. Rural/Metro must show that the statement or statements "played a *material* and *substantial* part in inducing others not to deal with him." *Erlich v. Etner*, 224 Cal. App. 2d 69, 73 (1964) (quoting Prosser). "It is nearly always held that it is not enough to show a general decline in business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived." *Id.* It would take a great inferential leap to connect any alleged damage to Rural/Metro's business with the Does' statements on the Yahoo message board. *See Dendrite* at 12 (rejecting as unreasonable plaintiff's argument that a nexus could be shown to exist between the posting of allegedly defamatory messages on the internet and a drop in stock prices).

### **3. Court Must Balance the Harm of Disclosure Against Its Value.**

Even after the Court has satisfied itself that an anonymous speaker on the Internet has made at least one statement that is potentially actionable,

the final factor to consider in balancing the need for confidentiality verses discovery is the strength of the movant's case . . . . If the case is weak, the 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 . . . . On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.

*Missouri ex rel. Classic III, Inc. v. Ely*, 954 S.W. 2d 650, 659 (Mo. Ct. App. 1997). Because the injury that disclosure would inflict would be an irreparable violation of Does' fundamental rights, this balancing of the harms is necessary to determine whether the equitable relief should be awarded to plaintiff at the outset of the case. If Rural/Metro cannot come forward with particular evidence sufficient convince this Court that it is likely to prevail on all elements of at least one of its claims, it would be premature to deprive Does of their constitutional right to speak anonymously. *Bruno & Stillman, Inc. v. Global Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). This balancing is part of the requirement that disclosure be "necessary" to the prosecution of the case, and that the identification "goes to the heart" of Rural/Metro's case. If the case can be dismissed on factual or legal grounds that do not involve revealing Does' identities, there is simply no need for the identification.

## **CONCLUSION**

None of Rural/Metro's claims can survive even a preliminary review. The fact that Rural/Metro brought this case here, in the Northern District of California, where none of the alleged injury occurred, but where the Internet service provider is located, suggests that Rural/Metro's true goal in filing this complaint was simply to expose the identities of Does and to coerce them into silence. In addition, its attempt to invoke the subpoena power of this Court, based on a complaint devoid of any factual allegations strengthens that suggestion. This Court should not countenance the unabashed abuse of its powers to trammel the right of Rural/Metro's critics to remain anonymous. The motion to quash the subpoena should be granted.

Respectfully submitted,

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February 2, 2001

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### ***FOOTNOTES***

[1] The choice of venue suggests Rural/Metro's real interest in this case is simply finding out, with a minimum of effort and time, who Does are. This conclusion is bolstered by plaintiff's completely candid admission in its Opposition to Does' Motion for Enlargement of Time that it needs the identities of Does to defend itself in a completely different proceeding. *Id.* at 2 and 3.

[2] Although the Complaint alleges that "smilelikeyoulikeit" suggested that he or she had confidential information and "suggested that he/she might discuss the matter in a 'more appropriate' forum," Complaint ¶ 13, in fact, the entire posting for that day from that poster is as follows: "The whole Tammy Brogan thing is pretty messed up. Big scandal that I not only don't feel comfortable talking about, but don't think it's appropriate in this forum. There was actually some press regarding Tammy's old sidekick (Zahar), do the investigating yourself if you want."

<http://messages.yahoo.com/bbs?.mm=FN&action=m&board=7083832&tid=rurl&sid=7083832&mid=3462> or

<http://messages.yahoo.com/bbs?.mm=FN&action=m&board=7083832&tid=rurl&sid=7083832&mid=3470>.

[3]

<http://messages.yahoo.com/bbs?.mm=FN&action=m&board=7083832&tid=rurl&sid=7083832&mid=3449>.

[4] The Does have not been served with the complaint and, accordingly, are under no obligation to respond under Rule 12 at this time. This Motion is in the nature of a limited appearance filed solely for the purpose of opposing the subpoena. If, however, this Court disagrees and should deem this motion an appearance for purposes of establishing jurisdiction over Does, then Does hereby raise and preserve the following defenses: lack

of subject matter jurisdiction; lack of personal jurisdiction; improper venue; insufficiency of process; insufficiency of service of process; failure to state a claim upon which relief can be granted; and failure to join a party under Rule 19. In addition, Does preserve their right to invoke the protections of California Code of Civil Procedure Section 425.16, California's anti-SLAPP provision.

<sup>[5]</sup> Records from the Circuit Court in Loudoun County, Virginia, the home of America Online suggest the burgeoning scope of this practice. As of April, 1999, 70 of the 107 applications filed with the court since that January were directed to AOL information. Indeed, serving warrants on AOL is "almost a full-time job" for the Sheriff's process server. Stephen Dinan, *Search Warrants Keep AOL Busy*, Wash. Times, April 27, 1999 at C4.

<sup>[6]</sup> Indeed that chilling effect is quite obvious in this very case. On January 22, 2001, "smilelikeyoulikeit," Doe 4 in this case, announced on the Rural/Metro message board the news of his or her subpoena.  
<http://messages.yahoo.com/bbs?.mm=FN&action=m&board=7083832&tid=rurl&sid=7083832&mid=3834>. After that posting, activity on the message board decreased substantially, with only 13 messages posted in 10 days.  
<http://messages.yahoo.com/?action=q&board=RURL>.

<sup>[7]</sup> Does 1 and 2 do not know whether Does 3 and 4 will or can participate in this matter. Although it appears that Doe 4 is at least aware of the subpoena, it is entirely possible that Does 3 is not. Lost or undeliverable email or a residence far from California could easily account for silence as could the initial subpoena return date of January 14. A waiver of constitutional rights should not be presumed from this silence, and certainly not in the absence of a more certain notice. Accordingly, in light of the constitutional issues and the extremely conclusory complaint, Does 1 and 2 urge this court to protect the rights even of absent anonymous posters. This Court should not enforce the subpoena it as relates to all of the Does, without making some determination that Rural/Metro has a legitimate right to trump their First Amendment rights.

<sup>[8]</sup> If Does knew what statements were at issue, they would likely raise other arguments as to why Rural/Metro can allege no Lanham Act claim, including but not limited to whether the statements are fact or opinion. Does do not waive those arguments, but will raise them if and when particular statements are identified.

<sup>[9]</sup> It may also be the case that this Court lacks personal jurisdiction or that venue is improper. Does 1 and 2 cannot raise these issues, however, without disclosing information regarding their state or states of residence. Does are obviously aware of their state or states of residence, but believe that those facts are part of the anonymity to which they are entitled. As noted earlier, in footnote 4, Does cannot address those issues without compromising their anonymity, but they raise those objections to preserve them.

<sup>[10]</sup> To meet its burden, Rural/Metro is required to show the existence of a trade secret. A trade secret may consist of "information, including a formula, pattern, compilation,

program, device method, technique or process, that both: (a) derives independent economic value, actual or potential, from not being generally known to, and not be readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." A.R.S. § 44-401(4). "[N]ot every commercial secret qualifies as a trade secret. Only those secrets affording a demonstrable competitive advantage may properly be considered a trade secret." *Enterprise Leasing Co. Of Phoenix v. Ehmke*, 3 P.3d 1064, 1070 (Ariz. Ct. App. 1999). Further, "a trade secret is not simply information as to single or ephemeral business events." *Id.* at 1068.

[\[11\]](#) The fact that Rural/Metro believes that it "may [have] an independent legal obligation to maintain the secrecy of said [sic] information in order to protect its employees," Complaint ¶ 20, bears no relevance to any of the causes of action raised against Does.