IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SPX CORPORATION dba STOCK EQUIPMENT COMPANY	)	Case No. 1:02 CV 919
Plaintiff,	)	Judge Manos
v.	)	Magistrate Judge Baughman
JOHN DOE,	)	**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO QUASH AND FOR PROTECTIVE ORDER**
Defendant.	)	

INTRODUCTION

This libel suit stems from messages posted anonymously by John Doe, aka neutronb", on an Internet message board dedicated to Plaintiff SPX Corporation ("SPX"). SPX, a publicly-traded company headquartered in Chagrin Falls, Ohio, that provides technical and industrial products and services, alleges that the messages defame the company. Neutronb and numerous other anonymous participants have posted messages

on SPX's message board complaining that SPX's stock has not performed well and questioning the competency of SPX's management team.

Immediately after filing this suit in state court, SPX issued a subpoena to Yahoo!, Inc. ("Yahoo!"), the Internet service provider of the message board, to determine the identity of, and other personal information about, neutronb. SPX issued the subpoena without notice to the court or any defendant. In fact, discovering John Doe's identity appears to be the sole purpose of this lawsuit. Yahoo! did, however, notify John Doe of the subpoena, prompting him to remove this action to this Court in order to protect his First Amendment rights.

John Doe now moves to quash the Yahoo! subpoena and seeks a protective order against future similar discovery. The subpoena should be quashed because it has been issued as part of an untenable lawsuit in a transparent effort to intimidate Internet users and chill constitutionally protected speech. As a California district court ruled, "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." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999). Furthermore, all discovery aimed at identifying John Doe should be stayed pending resolution of these issues. In the event SPX continues its prosecution of this action, John Doe is prepared to file a Motion to Dismiss Plaintiff's Complaint.

The relief requested in this Motion will not prejudice SPX.

STATEMENT OF FACTS

A. Yahoo! Message Boards.

The Internet is a democratic institution in the fullest sense. The United States Supreme Court has described it as "vast democratic fora" and "the most participatory form of mass speech yet developed" that "is entitled to the highest protection." Reno v. ACLU, 521 U.S. 844, 863 (1997). The Internet is the modern equivalent of Speakers' Corner in England's Hyde Park, where the common man may voice his opinion -- however, silly, profane, or brilliant it may be -- to all who choose to listen. "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." Id. at 853.

Knowing that people have personal and economic interests in the corporations that shape our world, and in the stocks that will hopefully provide for a secure future, and knowing, too, that people love to share their opinions with anyone who will listen, Yahoo! organized a section of its website as an outlet for the expression of opinions on these topics. This section, called the "Yahoo! Finance", is an electronic bulletin board system with hundreds of financial message boards where individuals freely discuss major companies. Yahoo! maintains a message board for every publicly-traded company, and anyone can post messages to it, whether to share ideas, express opinions or ask questions about the subject company.

Most individuals post messages on the message boards under a "handle" or "screen name" -- similar to the old system of CB's with truck drivers. Nothing prevents

the individual from using his real name, but most choose to remain anonymous using a nickname. These typically colorful nicknames protect the writer's identity from those who disagree with him. The exchange of opinions is often very heated and, as seen from the various messages and the responses, is often filled with invective and insult. Most if not everything that is said is taken with a grain of salt. Companies stung by criticism on these message boards, however, have increasingly turned to litigation against "Doe" defendants to chill the negative speech.

B. **The SPX Message Board.**

The Internet address for the SPX message board is http://messages.yahoo.com/?action=q&board=spx. The messages on this board are typical of those on other message boards; some users praise the company while others disparage it. And many messages constitute colorful hyperbole and rhetoric, the type of statements that are routinely held to be nonactionable.

Many users of the SPX board recently have discussed the company's financing and its use of Arthur Andersen as an accountant. For example, on April 1, 2002, a pseudonymous writer known only as luv2talk22 wrote:

> Why did Blystone and Chuck Johnson, grandson of founder of Sealed Power/SPX and on Board of Director, sell their stock in December? Do they know something that we don't? Remember, Arther Andersen is still their Auditor according to Annual Report.

See http://messages.yahoo.com/bbs?action=m&board=7077928&tid=spx&sid 9029796&mid=2326, a true and correct copy of which is attached as Exhibit A for the Court's convenience. Another post confirms that message-board participants understand

the opinionated and often sarcastic nature of the forum. On March 23, 2002, a writer using the pseudonym "BooksNWorms" wrote:

> Why don't you write the same lecture to the idiots who drop the "short this stock" advice?
>
> Anyone who buys or sells stock based on what they read on these message boards is foolish at best or a total moron at worst. Which are you?

C. **The Neutronb Messages At Issue.**

Plaintiff's Complaint states that "Defendant's postings defame SPX by, inter alia, claiming that SPX is performing illegal accounting, wrongfully engaging in insider trading, and otherwise violating securities laws, which neutronb claims has resulted in federal investigations." Complaint, ¶ 8. Defendant, however, does not yet know which of John Doe's postings on the SPX message board are at issue in this case. John Doe has not yet been served with the Complaint. And John Doe's only copy of the complaint, received from Yahoo!, is missing Exhibit 1 which is a copy of the allegedly defamatory postings; the Complaint itself does not contain the statements at issue,[1] or identify with any specificity which statements SPX alleges to be false.

D. **SPX's Yahoo! Subpoenas and Other Legal Maneuverings To Determine Neutronb's Identity.**

SPX filed its Complaint in the Cuyahoga County Court of Common Pleas on March 1, 2002. As noted above, John Doe was never served with the Complaint. He learned of the lawsuit only after SPX attempted to subpoena Yahoo!.

SPX first issued a subpoena to Yahoo! on March 7, 2002. Yahoo! refused to comply with the subpoena since it was not issued in California. SPX then filed a second action in Santa Clara County Superior Court in order to have a subpoena issue for John

[1] A copy of the Complaint as received is attached hereto as Exhibit B for the Court's convenience.

Doe's private information. On May 31, 2002, John Doe filed a motion to quash the subpoena. Plaintiff dismissed the California action before the California court ruled on the motion to quash and issued a second Ohio subpoena to Yahoo! on May 6, 2002 (the "Subpoena"). The Subpoena requests "[a]ll documents that relate to, refer to, or pertain to, the user account and user profile of the Yahoo! user identified on the Yahoo! SPX Corporation Message Boards, also known as the SPX Message Board, as 'neutronb'." A copy of the Subpoena is attached hereto as Exhibit C.

The Subpoena must be quashed. SPX has no valid defamation claim here. Like most postings on the SPX message board, John Doe's postings are hyperbole and opinion. Moreover, there can be no damage to SPX because SPX's stock price actually went up after John Doe's posts -- for reasons that no doubt had nothing to do with John Doe or any other message on the Yahoo! message board. Rather, SPX is using this lawsuit and the Subpoena to intimidate and harass John Doe and other Internet users and to chill their constitutionally protected speech, possibly because it suspects that he is an employee or former employee of SPX.

ARGUMENT

I. The Subpoena Violates John Doe's Constitutional And Statutory Rights.

A. The Constitutional Rights to Free Speech and to Privacy Protects Anonymous Statements.

The United States Supreme Court has held that the First Amendment protects anonymous speech. In McIntyre v. Ohio Elections Commission, it explained:

> [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.

McIntyre, 514 U.S. 334, 341-42. The Court gives an impressive listing of important anonymous contributors, from Shakespeare to The Federalist Papers. Id. at 342-44. After extensive discussion, the Court concluded that anonymity "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." Id. at 357.

The Court was not blind to the possibility that anonymous speech could hide fraudulent conduct. Nonetheless, the Court determined that "our society accords greater weight to the value of free speech than to the dangers of its misuse." Id. at 357. See also Talley v. California, 362 U.S. 60 (1960) (anonymous advocacy of economic boycott); Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999) (reiterating Supreme Court's support for McIntyre's holding of First Amendment right to anonymous speech). As the McIntyre court said, quoting J. Holmes:

> Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth. Id. at 348 n.11 (citations omitted).

The courts have given great deference to the right to anonymous speech. The idea of what constitutes speech entitled to anonymity is not limited to speech regarding candidates for political office. See Ghafari v. Municipal Court, 87 Cal. App. 3d 255, 264-65 (1978) (rejecting as unconstitutional the distinction between "political" and

"unpolitical" speech). Furthermore, anonymous speech is not automatically stripped of its protection whenever it is related to a complaint for defamation.

In one recent case, the California Court of Appeal held that the right to anonymous speech was present in criticism about a large commercial hospital that was seeking to name Doe defendants in a defamation lawsuit. In Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538 (1999), a community hospital that was severely criticized after it became affiliated with for-profit insurance providers filed several defamation lawsuits. When a weekly newspaper ran a series of anonymous advertisements that were critical of the hospital, the hospital responded with a subpoena to learn the identity of the anonymous advertisers. The Court of Appeals held that the subpoena must be quashed because of a nonstatutory qualified immunity, grounded in the free speech and privacy provisions of the United States and California Constitutions, that limits what courts can compel through civil discovery. The court further held that the hospital failed to meet its burden to defeat the qualified constitutional privilege by showing a compelling need to disclose the names of the anonymous authors, even though the express intent of the hospital was to identify Doe defendants to add to its defamation claims. Id. at 1550.

As the court stated, "disclosure is 'by no means automatic in libel cases.' It depends on a weighing of a variety of interrelated factors, including ... whether plaintiffs have made a prima facie case of falsity, and whether the information sought 'goes to the "heart" of their suit.'" Id. at 1550. The fact that a plaintiff is seeking information for a defamation claim does not end the analysis. As the U.S. Supreme Court noted in McIntyre, the "ancillary benefits" of laws that "serve as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators" cannot support the disclosure of otherwise constitutionally protected information. McIntyre at 446. The Rancho court further recognized that anonymity might be used to conceal "dirty tricks" but that the public interest in having anonymous

works enter the marketplace of ideas "unquestionably outweighs any public interest in requiring disclosure..." Rancho at 1547, citing McIntyre.

Anonymity on the Internet is given particular weight. As the Supreme Court has held, the Internet is a special medium of communication, entitled to the greatest protection. Reno v. ACLU, 521 U.S. 844 (1997). Because the Internet is so easily used by anyone with a computer and modem and, thereby, empowers anyone to speak his mind and be heard, it has become the focal point for legislation aimed at controlling the outspoken masses. Such laws, however, have been uniformly struck down as unconstitutional impingements of the First Amendment. See ACLU v. Miller, 977 F. Supp. 1228, 1230 (N. D. Ga. 1997) (recognizing constitutional right to communicate anonymously and pseudonymously on the Internet, and discussing frequent practice of Internet users in falsely identifying themselves); ACLU v. Johnson, 4 F. Supp. 2d 1029, 1033 (D. N.M. 1998) (upholding First Amendment right to communicate anonymously over the Internet); ApolloMEDIA Corp. v. Reno, 119 S.Ct. 1450, __U.S.__ (1999), affirming 19 F. Supp. 2d 1081 (C.D. Cal. 1998) (Supreme Court affirms protection of the activities of the anonymous denizens of a website at www.annoy.com, a site "created and designed to annoy" legislators by sending them annoying email anonymously).

John Doe's privacy interests are significant enough to warrant careful consideration by the Court where this action is pending. Enforcement of the subpoena will arguably violate those rights before the efficacy of the Complaint has been properly resolved. Delaying compliance until after these issues have been resolved will not prejudice SPX's rights.

B **The Subpoena Violates Defendant's Privacy and Free Speech Rights Under the Constitution.**

Any subpoena that SPX serves regarding John Doe, based on the current Complaint for defamation, arguably violates John Doe's state and federal constitutional rights to privacy and free speech. This provides additional justification for delaying compliance until these issues can be resolved.

The Federal courts have recognized that discovery into anonymous speech should not be granted as a matter of course. In Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999), the plaintiff filed a lawsuit for trademark infringement and unfair competition against several Doe defendants. The key issue was whether to allow discovery into the identity of the Doe defendants who were using Internet pseudonyms. The court observed that, "As a general rule, discovery proceedings take place only after the defendant has been served; however, in rare cases, courts have made exceptions, permitting limited discovery to ensue after filing of the complaint to permit the plaintiff to learn the identifying facts necessary to permit service on the defendant." Id. at 577 (citations omitted). But the court also noted that such exceptions to the general rule are rare, and proceeded to enunciate a test to be used before allowing discovery into potentially sensitive areas. The court stated that:

> Thus some limiting principles should apply to the determination of whether discovery to uncover the identity of a defendant is warranted. The following safeguards will ensure that this unusual procedure will only be employed in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service, and will prevent the use of this method to harass or intimidate.

Id. at 578.

A key element of the test is that the plaintiff "should establish to the court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss." Id. at 579. The court analogized this test to the need for a showing probable cause before the issuance of a warrant and stated that "[a] conclusionary pleading will never be sufficient to satisfy this element." Id. As discussed in more detail below, the current SPX Complaint fails this aspect of the test.

The Columbia Ins. approach is consistent with decisions from other circuits. In National Labor Relations Board v. Midland Daily News, 151 F.3d 472 (6th Cir. 1998), the court was confronted with a newspaper's refusal to comply with a subpoena requiring it to reveal the identity of an advertiser who had posted an anonymous help wanted ad. The court was concerned that the subpoena had been issued in the first instance without any showing that a civil or criminal offense had been committed by the advertiser. The court refused to enforce the subpoena, stating that:

> Indeed, if this court permitted the board to obtain the identity of Midland's advertiser, without demonstrating a reasonable basis for seeking such information, the chilling effect on the ability of every newspaper and periodical that published lawful advertisements would clearly violate the Constitution.

Id. at 475.

Similar concerns exist here, where a publicly-traded company is attempting to unmask and punish its critics. In the absence of the showing required by Columbia Ins. Co. v. Seescandy.com and National Labor Relations Board v. Midland Daily News, the subpoena should not be enforced.

C. The Subpoena Violates the Electronic Communications Privacy Act.

Under Federal law, the content of and information concerning electronic communications, such as email or Internet postings, are strictly protected under the complex regulations of the Electronic Communications Privacy Act of 1986 (ECPA). 18 U.S.C. §§ 2501 et seq. and §§ 2701 et seq. The ECPA applies to all electronic communications, whether inter- or intra-state, and places significant limits on what information may be disclosed, and to whom. The ECPA distinguishes between instances when an electronic communications service (e.g., Yahoo!) may disclose user information and when it may disclose the contents of communications. Under Section 2703(c)(1), Yahoo! may "disclose a record or other information pertaining to a subscriber to or customer of such service" to non-governmental entities, but under Section 2702, Yahoo! cannot share the contents of communications not readily accessible to the general public.

SPX's subpoena is incredibly broad, and seeks every morsel of information that Yahoo! has about John Doe, such as "all documents" concerning the identity of John Doe and other personal information. By not limiting its subpoena to user information, as defined under the ECPA, the subpoena violates Federal law.

II. The Complaint Is Subject To A Motion To Dismiss For Failure to State A Claim.

SPX's Complaint is vulnerable to a motion to dismiss. The pro-forma allegations of defamation against John Doe are vague and inconclusive. The specific defamatory statements are not identified, nor is there any indication as to how or why they are false. See Complaint at ¶¶ 8-14. The posting, attached as an exhibit to the Complaint, is, by itself, insufficient to support a libel claim. It derides management and laments the company's financial performance, but in colorful language and through the use of hyperbole that simply is not actionable.

In Milkovich v. Lorain Journal, 497 U.S. 1 (1990), the Supreme Court held that speech "must be provable as false before there can be liability under state defamation law . . ." The Court stated that, if the statement "cannot reasonably be interpreted as stating actual facts, then it is not actionable." Id. at 20. The Court held that one must examine the language in context to determine whether it is the type of "loose, figurative or hyperbolic" speech which would negate the impression that the speaker was stating fact, given the "general tenor of the article." Id. at 21. The Court also reaffirmed earlier decisions that held that the use of invective and insult normally was not actionable.

Criticism relating to corporate management and falling stock prices is rarely actionable. Courts from a variety of jurisdictions have reached this conclusion. See Biospherics v. Forbes, 151 F.3d 180 (4th Cir. 1998); Jefferson County School District v. Moody's Investor Services, 988 F. Supp. 1341 (D.Colo. 1997); and Morningstar v. Los Angeles Superior Court, 29 Cal. Rptr. 2d 547 (1994). These cases recognize that financial analysis is inherently speculative and that criticism of management should not be constrained by defamation claims. Message board postings are necessarily statements of opinion. Their status as such is evident by their very audience, substance, organization, and the variety of policies placed by Yahoo! to preface the postings. No reasonable person can consider a statement in this message-board context to be anything more than an opinion.

The plaintiff in Biospherics had been the subject of scorn in a column published in Forbes Magazine under the headline "Sweet-Talking Guys." The column stated that Biospherics' stock price was based on "hype and hope" and that "investors will sour on Biospherics when they realize that Sugaree [its main product] isn't up to the company's claims." Biospherics, 151 F.3d at 182. The court found that this language was not actionable, in part because "the context and tenor of the article thus suggests that it reflects the writer's subjective and speculative supposition." Id. at 184.

In Morningstar v. Superior Court, 29 Cal. Rptr.2d 547 (1994), an advertisement touting the plaintiff's mutual funds was ridiculed in a column published under the headline "Lies, Damn Lies, and Fund Advertisements." The article went on to severely criticize the advertisement. Among other statements, the article observed that "it's ironic that such a misleading ad should be circulated just when the fund industry is appealing for the right to sell shares directly off the page. . ." Id. at 551. Placing these statements within the context of the commentary, the court held that the use of loose and figurative language in a forum where the reader expects subject value statements and opinion is not actionable.

In Colodney v. Iverson, Yoakum, 936 F. Supp. 917 (M.D. Fla. 1996), one of the defendants had written a letter to the editor stating, in part, that plaintiff's book would be exposed "as a fraud." The court held that, given the context of the letter (in a setting similar to a Yahoo! message board), the statement was not actionable. Similarly, in Pullum v. MacJohnson, 647 So. 2d 254 (Fla. Ct. of Appeal 1994), the court found that calling the plaintiff a "drug pusher" was not actionable because, when placed in context, it was a case of rhetorical overkill in the course of a heated debate.

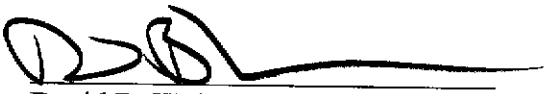
John Doe's messages fit neatly into this line of cases. They employ rhetoric in a forum where one expects expressions of opinion. The statements are hyperbolic and could not possibly be true. Overall, it is extremely doubtful that the present complaint could survive a full-fledged motion to dismiss.

CONCLUSION

In an age where society is increasingly, and helplessly, identified and tracked by computer databases, social security numbers, and insurance companies -- from the cradle to the grave -- the Constitutional protections of the channels of protest become more

crucial than ever before.[2] In such an era, the right to anonymity under the First Amendment takes on more significance. Defendant is not claiming that the right to anonymous speech is absolute. Rather, it is Defendant's position that the right to anonymity cannot be ripped away by the mere filing of a lawsuit when that lawsuit shows every indication of being no more than a bullying tactic. The Constitutional right to privacy and anonymous speech cannot be regarded so lightly, especially in a case when the supposed damage is de minimis, at best. In addition, the Yahoo! Subpoena was issued without any care given to the mandatory stay on discovery or the requirements of the ECPA. For these reasons, John Doe requests that this Court quash the Yahoo! Subpoena and issue a protective order preventing any future subpoenas in the absence of an appropriate order.

Respectfully submitted,



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[2] Bernstein v. United States Dept. of Justice, 1999 U.S. App. LEXIS 8595, *35-36 (9th Cir. 1999) (supporting anonymous speech in dicta: "In this increasingly electronic age, we are all required in our everyday lives to rely on modern technology to communicate with one another. This reliance on electronic communication, however, has brought with it a dramatic diminution in our ability to communicate in private [which must be greatly protected]").

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Motion to Quash and for Protective Order has been served by regular U.S. Mail, postage prepaid, this 21st day of May, 2002 upon the following:

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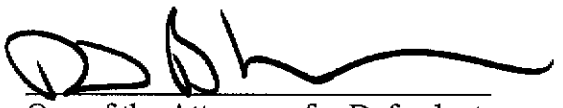

One of the Attorneys for Defendant