U.S. District Court

Southern District of Florida (Miami Division)

CIVIL DOCKET
CASE #: 03-CV-22328
Honorable Judge K. Michael Moore

Michael J. Zwebner,

Plaintiff,

v.

JOHN DOES, 1-100,

Defendants.
_____/

MEMORANDUM OF LAW IN SUPPORT OF JOHN DOE #32'S (A/K/A ME TOO TOM) MOTION TO QUASH

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I. INTRODUCTION

This Motion presents an important question of constitutional law: May the constitutionally protected speech, association, and privacy rights of non-litigant internet users be invaded by litigants without prior judicial review? John Doe #32 (a/k/a Me Too Tom) is a subscriber to the Lycos Network and participates in chats on the Lycos sponsored chat room within its internet network. The Plaintiff, Michael J. Zwebner, has filed suit to seek the true identities of those using pseudonyms, more specifically, John Doe #32, within the Lycos Network. Lycos Network hosts online message boards where third-parties may speak to each other, often anonymously, on a wide range of issues including the financial markets, publicly traded companies, and other financial topics. Lycos receives a significant volume of subpoenas from litigants who seek identity information about the anonymous authors of messages posted to these message boards.

This Motion has been filed to quash the subpoena and/or have this Honorable Court issue a protective order preventing the Lycos Network from divulging the true name of John Doe #32. John Doe #32 believes that a litigant should be required to make a threshold showing to a court of its need for the users identity information prior to seeking that information from the third-party provider, in this instance, Lycos Network. Given the important constitutional freedoms of speech and association, as well as user privacy interests that are implicated by attempts to seek those users identities, John Doe #32 urges this Court to grant its Motion based upon the pleadings as hereto filed by the parties.

II. STATEMENT OF FACTS

The Lycos Network is an internet site provider which hosts message boards where third-parties may post messages on a wide variety of topics. The message boards are the online equivalent of a bulletin board where persons may post comments for public viewing. Message board participants discuss financial information, publicly traded companies and other topics.

The exchanges on these boards are often opinionated, and the debate is robust. Although some participants identify themselves in their posts, many choose to post messages under a pseudonym "username."

The Plaintiff in this action, Michael J. Zwebner, has served a subpoena directly to Lycos Network requesting all identifying information and documents, including, but not limited to, computerized or computer stored records and logs, electronic email and postings on online message boards concerning up to 100 usernames, including the request that the pseudonym be pierced and the actual user's names be identified.

III. ARGUMENT

A. JOHN DOE #32 URGES THE COURT TO ADOPT A BALANCING TEST, REQUIRING MICHAEL J. ZWEBNER TO SHOW THAT ITS NEED FOR IDENTITY INFORMATION OUTWEIGHS THE ANONYMOUS SPEAKERS' FIRST AMENDMENT RIGHTS

1. The First Amendment Protects the Right to Speak Anonymously on the Internet.

The U.S. Supreme Court has held that the right to freedom of speech under the First Amendment encompasses the right to speak anonymously. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) ("an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment"); and Talley v. State of California, 362 U.S. 60, 65-66 (1960) (holding unconstitutional a state law prohibiting distribution of anonymous handbills).

A speaker on an internet site is the modern day equivalent of a pamphleteer, as the U.S. Supreme Court has recognized:

> Through the use of [online] 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, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Reno v. ACLU, 521 U.S. 844, 870 (1997). Thus, speech on the Internet is entitled to the highest degree of First Amendment protection. Id. See ACLU v. Johnson, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998), aff'd, 194 F.3d 1149 (10th Cir. 1999) (recognizing a First Amendment right to communicate and access information anonymously through the Internet); In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 34 (Va. Cir. 2000) ("To fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require this Court to ignore either United States Supreme Court precedent or the realities of speech in the twenty-first century"); Dendrite Int'l v. Does, No. MRS C-129-00, slip op. at 18-19 (N.J. Sup. Ct., Morris Cty., Nov. 23, 2000) ("Inherent in First Amendment protections is the right to speak anonymously in diverse contests," including on the Internet)

2. The Constitution Protects Freedom of Association on the Internet.

The Constitution protects not only freedom of speech but also freedom of association. See Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 558 (1963) (holding unconstitutional a subpoena to intended to discover alleged co-conspirators by compelling release of member identities of NAACP); NAACP v. Alabama, 357 U.S. 449, 466 (1958) (recognizing that a constitutional right to freedom of association protected privacy of NAACP's membership list).

Protection from compelled disclosure of one's private associations is a central tenet of the Constitution. As explained by the U.S. Supreme Court in Gibson.

> It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when [it] tends to impinge upon such highly sensitive areas of freedom of speech . . . freedom of . . . association, and freedom of communication of ideas.

Gibson, 372 U.S. at 558 (citation omitted).

3. The Court Should Require the Plaintiff, Michael J. Zwebner, to Show That Its Need for Identity Information Outweighs These Constitutional Rights, Prior to Issuance of a Subpoena Seeking Such Information.

As described above, speakers on the Internet have the First Amendment right to speak anonymously, and a constitutional right of freedom of association. This Court should require Michael J. Zwebner to show that its need for identifying information about such speakers outweighs those constitutional rights, before a subpoena is issued to the Lycos Network seeking that information. Several courts have recently applied such a test (with slightly different variations) in deciding whether the identity information of an anonymous online speaker should be revealed. John Doe #32 would urge this Court to adopt the opinion filed in the case of John Doe vs. 2 TheMart.com, Inc. by the United States District for the Western District of Washington at Seattle on April 26, 2001. A copy of Judge Thomas S. Zilly's opinion is attached hereto and marked Exhibit "A" for consideration by this Court.

B. MICHAEL J. ZWEBNER'S DOCUMENT REQUEST IS OVERLY BROAD AND IMPINGES ON THE PRIVACY RIGHTS OF THE LYCOS NETWORK USERS.

John Doe #32 believes that the scope of the subpoena is overly broad, and that it seeks "all identifying documents and information" with regard to 100 user names, including, but not limited to, all computer logs, records, email, and postings. Rather than just seeking basic identity information provided by Lycos' users upon registration, the Plaintiff seeks numerous other unrelated information without setting forth a reasonable basis for requesting this information. The request of the subpoena is, therefore, overly broad. The Electronic Communications Privacy Act (ECPA) prohibits disclosure of the contents of private email communications except under very limited circumstances, none of which apply here. See 18 U.S.C. § 2702. Therefore, by seeking any email communications, public or private, of the 100 usernames in the subpoena, the Plaintiff's document request is overly broad and contrary to ECPA.

IV. CONCLUSION

For the reasons set forth above, John Doe #32 (a/k/a Me Too Tom) respectfully requests that this Court issue an order quashing the subpoena as it pertains to John Doe #32, or, in the alternative, issuing a protective order prohibiting Lycos Network from divulging any information, including, but not limited to, the true username of John Doe #32. As additional support for its position, the movant would rely on the case of Global Telemedia International, Inc. et. al. v. Doe 1, et al., decided by Judge David Carter of the United States District Court for the Central District of California, a copy of his order is attached and marked Exhibit "B".

DATED: November 14, 2003

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By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished this ____ day of November, 2003, to: Michael J. Zwebner, 407 Lincoln Road, Suite 6-K, Miami Beach, Florida 33139.

By:_____
L. Van Stillman, Esq.