

No. H028699

(Santa Clara County Super. Ct. No. 102-CV-813627)

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

BARBARY COAST CAPITAL MANAGEMENT,
STEPHEN N. WORTHINGTON,

Third Parties and Appellants,

vs.

MATRIX INITIATIVES, INC., a Delaware corporation,

Plaintiff and Respondent.

Appeal From Order Of The Superior Court For The County Of Santa Clara
(Hon. James P. Kleinberg, Presiding)

APPELLANTS' REPLY BRIEF

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I.

INTRODUCTION

Anonymous speech in the United States has a long and rich history, from *The Federalist* to the thousands of colorful and vituperative postings on modern Internet bulletin boards. The founding fathers relied on anonymity in newspapers and pamphlets to garner public support for the Revolution and the formation of an independent government. Revolutionary writers chose pseudonyms such as “Common Sense,” “Farmer” or “A True Patriot” – monikers that indicated a point of view or invoked specific classical and modern references to “crusaders in an age-long struggle against tyranny.” The practice grew after the Revolution as the new country debated the adoption of the Constitution. Besides “Publisu,” Federalists signed their articles and pamphlets “An American Citizen,” “Marcus” and “Americanus.” Anti-federalists replied with “Cato” and “Brutus.” Journalists and other authors have also used pseudonyms to express their views. During the Civil War, field reporters used pen names “Mint Julep,” “Shadow” and “Dixie” to “avoid military harassment or confinement, or publishers’ proscriptions against double-dipping.”

Unmasking Jane and John Doe: Online Anonymity and the First Amendment, 8 Comm. L. and Pol’y 450 (2003).

Between 1998 and 2002 American companies filed more than 150 lawsuits against anonymous cyberposters, and the John Does Anonymous Foundation, a non-profit organization that supports anonymous online posters, estimates that the number of filed cases has increased significantly since 2002. *Id.*; Note, *Anonymous Corporate Defamation Plaintiffs: Trampling the First Amendment or Protecting the Rights of Litigants?*, 54 Fla. L. Rev. 333 (2002). Indeed, commentators who have studied this issue conclude that these defamation lawsuits are being initiated against individuals without sufficient resources to satisfy any substantial judgment, and thus are being filed for the sole purpose of silencing these anonymous Internet critics. Hence, these lawsuits are being filed to scare and

intimidate anonymous Internet posters, and never with the thought that they will reach judgment. See *Lyrissa Barnet Lidsky, Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855 (2000), and George W. Pring and Penelope Canan, SLAPP's: Getting Sued for Speaking Out, 8 (1996); See also 54 Fla. L. Rev. 333, 336 at Fn. 27.

Respondent's assertion that these Appellants are "[C]loaking themselves in the First Amendment" (See Respondent's Brief at 1), and its further assertion that:

A plaintiff is not required to allege a defamation claim against an anonymous Internet user before it can discover that person's identity. The identity can come first, with the cause of action later.

(Respondent's Brief at 2) only serve to put into perspective Respondent's total disregard for the First Amendment. Respondent would have this Court believe that it should contenance an open-ended "discovery fishing expedition" in total disregard of established precedent which holds that a defamation plaintiff must (1) first file a complaint that pleads specific facts and allegations that establish each and every element of a defamation claim and then (2) satisfy the "prima facie" motion to dismiss test before a court will disclose the identity of an anonymous speaker with First Amendment rights.

It is incumbent upon this Court to insure that Respondent is not permitted to use its purported defamation claim to "scare and intimidate anonymous Internet posters," and to insure that California continues its history of fostering and protecting anonymous free speech.

II.

THE CALIFORNIA LEGISLATURE AND COURTS HAVE ESTABLISHED THE RELEVANT TEST THAT GOVERNS THE DISCLOSURE OF AN ANONYMOUS INTERNET POSTER

Respondents have represented to this Court that there are no “published California cases” that have addressed what test a California court should apply when determining whether a party should be entitled to discover the identity of an anonymous Internet poster and thus invade his/her First Amendment rights (Respondent’s Brief at 2 and 10). Nothing could be further from the true state of the law in California. Since 1992, the California legislature and the California courts have interpreted and applied the California Strategic Litigation Against Public Participation (“SLAPP”) statute, section 425.16 of the California Code of Civil Procedure. Further, in 1997 the legislature amended section 425.16 to specifically provide that it “shall be construed broadly.” In this regard, the legislature found:

There has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

Global Telemedia International, Inc., et al. v. DOES 1 aka BUSTEDAGAIN40, et al., 132 F. Supp. 2nd 1261, 1264, 1265 (C.D. Cal. 2001).

Further, the California SLAPP statute expressly sets forth the test that must be met before an anonymous speaker's First Amendment rights are ignored. Under the California SLAPP statute, a defendant has the obligation of first demonstrating that the basis of the claims against him or her arose out of facts in furtherance of his or her right to free speech in connection with a public issue. At that point, the burden shifts to the plaintiff to establish a probability of success by making a *prima facie* showing of facts which would, if proved, support a judgment in the plaintiff's favor. *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993 (2001); *Global Telemedia Int'l, Inc., et al. v. DOES 1 aka BUSTEDAGAIN40, et al., supra* at 1265.

The California legislature and the California courts have therefore made it abundantly clear that the First Amendment rights of anonymous speakers are highly respected and valued in the State of California. Moreover, those First Amendment rights will not be violated or abridged in the absence of a *prima facie* showing that the party seeking to disclose the identity of an anonymous speaker can prove and establish the specific facts necessary to support a judgment in its favor. Failing that, the request for disclosure must be denied.

Further, the Fourth District's opinion in *ComputerXpress, Inc. v. Jackson, et al., supra* and the Central District's opinion *Global Telemedia International Inc. et al. v. DOES 1 aka BUSTEDAGAIN40, et al., supra*, both of which involved the identities of anonymous Internet posters, set forth facts that failed to make an adequate *prima facie* showing of their ability to plead and prove claims for defamation. These decisions certainly establish a California precedent that applies with equal force to the facts and circumstances of the this case. These decisions also establish, on the

facts of this appeal, that these Appellants could satisfy the initial showing under the SLAPP statute necessary to shift the burden of proof to the Respondent. It is a distinction without a difference to suggest that the instant appeal is distinguishable because this case arises out of a motion to compel deposition testimony seeking the identity of the anonymous Internet poster, as opposed to arising out of SLAPP litigation pending in the State of California. The First Amendment policy considerations established by the California legislature and followed by the California courts under the SLAPP statute provide ample precedent to support this Court's adoption of the "*prima facie*" motion to dismiss test first announced by Judge Jensen in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

Further, the California SLAPP statute is not the only pronouncement showing that the California legislature and the California courts are, as a matter of public policy, highly protective an anonymous speaker's First Amendment rights, and showing California's careful scrutinization of any circumstance which may result in an abrogation or abridgement of those rights. Another example is California's journalist's "shield law." In 1980, the California Constitution was amended to immunize journalists from being held in contempt for refusing to disclose either their sources or unpublished information obtained or prepared in the process of news gathering. See CA. CONST. Article 1, § 2(b). See *Los Angeles Memorial Coliseum Commission v. National Football League, et al.*, 89 F.R.D. 489, 495-496 (C.D. Cal. 1981); see also *Farr v. Pitchess*, 522 Fed. 2nd 464 (9th Cir. 1975), cert. denied 427 U.S. 912 (1976). The United States Supreme Court has also recognized a similar journalist's "shield law". *Branzburg v. Hayes*, 408 U.S. 665 (1972).

The broad scope of California's journalist's shield law and the fact

that it has now been embodied in one of the first articles of California's Constitution "reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment..." *Baker v. F&F Investment*, 470 F. 2d 778, 782 (2nd Cir. 1972), cert. denied 411 U.S. 966 (1973).

In light of the foregoing precedent, Respondent's representation concerning "no published California cases" is simply not accurate. On the contrary, the California SLAPP cases provide this Court with the precedential support to adopt the *Seescandy.com* "prima facie" motion to dismiss test. Moreover, this result is furthered and enhanced by Article I, section 2(b) of the California Constitution. And as more fully discussed in Appellant's Opening Brief, Respondent made absolutely no effort below to meet, let alone satisfy, the "prima facie" motion to dismiss test. On that basis alone, a remand with appropriate instructions is warranted.

III.

RESPONDENT'S COMPLETE RELIANCE ON THE *AMERICA ONLINE* "GOOD FAITH TEST" MUST FAIL

A corollary to Respondent's "no published California case" assertion is its representation to this Court that all the other courts that have addressed this issue have adopted the "good faith basis" test suggested by a Virginia trial judge in *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 36 (2000), rev'd on other grounds sub nom. *America Online, Inc. v. Anonymous Publicly Traded Co.* 542 S.E.2d 377 (Va.

2001)("America Online"):

While no published California case has addressed when courts should order disclosure of the identity of an anonymous Internet user, courts from other jurisdictions have considered this issue. Those courts have required disclosure when the plaintiff shows that it has a good faith basis to contend that it was the victim of wrongful conduct and the identity of the anonymous poster is needed to advance its claim. (Respondent's Brief at 2)

Though articulating the appropriate test in slightly different ways, courts from other jurisdictions have ordered disclosure where the requesting party has shown it has a good faith basis to contend that it was the victim of actionable conduct and the identity of the anonymous poster is needed to advance its claim. (Respondent's Brief at 10)

In arguing that Matrixx failed to allege a defamation claim against Veristaconari and Gunnallenlies, Appellants also suggest that Matrixx failed to meet a "heightened pleading requirement." But the *America Online*, *Seescandy.com*, and *Dendrite* decisions on which Appellants rely do not impose such a requirement. They simply require a plaintiff to show, based on the information and evidence available, that it has a good faith basis for its claim. (Respondent's Brief at 16-17)

It is inaccurate and misleading to suggest to this Court that these other courts have adopted the "good faith basis" test as opposed to the "*prima facie*" motion to dismiss test. Moreover, this is not a situation where these courts have articulated the test "in slightly different ways" as Respondents suggest. Indeed, in *America Online*, the only case relied upon by Respondent, AOL had specifically argued for a "*prima facie*" test and the trial judge rejected it in favor of his "good faith basis" test. More significantly, each and every court that has ruled on this issue has adopted the "*prima facie*" motion to dismiss test:

1. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-

- “ In [Internet] cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with an forum in which they may seek redress for grievances. However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously and pseudo anonymously. People are permitted to interact anonymously and pseudo anonymously so long as those acts are not in violation of the law. This ability to speak one’s mind without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. 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.”

- “Thus some limiting principals 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 in which the plaintiff has in good faith exhausted traditional avenues for identifying its civil defendant pre-service, and will prevent use of this method to harass or intimidate.”

- “First, The plaintiff should identify the missing party with sufficient specificity such that the court can determine that defendant is a real person or entity that could be sued in federal court. Second, the party should identify all previous steps taken to locate the elusive defendant. This element is aimed at ensuring that plaintiffs make a good faith effort to comply with the requirements of service of process in specifically identifying defendants. Third, plaintiff should establish to the court’s satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss. A conclusory pleading will never be sufficient to satisfy this element. Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is in part, a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant. Thus, plaintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at

revealing specific identifying features of the person or entity that committed that act. Lastly, the plaintiff should file a request for discovery with the court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying identification about defendant that would make service of process possible.”

2. *Dendrite International, Inc. v. John Doe No. 3, et al.*, 342 N.J. Super. 134, 152, 156-157 (2001).

- “Relying on *Seescandy.com* the motion judge reasoned that Dendrite did not satisfy the third prong -- the ability to withstand a motion to dismiss -- because it failed to make out a *prima facie* case against John Doe No.3. Accordingly, the judge concluded Dendrite was not entitled limited discovery to ascertain the identity of John No. 3. Specifically, the judge found Dendrite failed to show that the statements posted by John Doe No. 3 caused Dendrite any harm. Dendrite contends the motion judge imposed an excessively demanding burden of proof, generally not required when defending a motion to dismiss.”

- “Our review of *Seescandy.com* discloses that a strict application of our rules surrounding motions to dismiss is not the appropriate litmus test to apply in evaluating the disclosure issue. We conclude that the District Court envisioned this four-part test to act as a flexible, non-technical, fact sensitive mechanism for courts to use as a means of insuring that plaintiffs do not use discovery proceeds to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet.”

- “Here, although Dendrite’s defamation claims would survive a traditional motion to dismiss for failure to state a cause of action, we conclude the motion judge appropriately reviewed Dendrite’s claim with a level of scrutiny consistent with the procedures we adopt here today, and therefore, the judge properly found Dendrite should not be permitted to conduct limited discovery aimed at disclosing John Doe No. 3’s identity. Moreover, the motion judge’s approach is consistent with approach by the District Court in *Seescandy.com* and the Virginia Circuit Court in the America Online decision.”

3. *Immunomedics, Inc. v. Jean Doe, aka “moon-shine fr,” et al.*, 342 N.J. Super., 160, 166 (2001).

- “The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a *prima facie* action against the fictitiously named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss or failure to state a claim upon which relief can be granted pursuant to R.4:6-2(f), the plaintiff must produce sufficient elements supporting each element of its cause of action on a *prima facie* basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.”

4. *Rocker Management LLC v. Does*, 2003 U.S. Dist. LEXIS 16277 (N.D. Cal. 2003).

- “The [*Seescandy.com*] court set forth four requirements for pre-service discovery. Only one of those requirements is at issue on Harry’s motion to quash: the plaintiff must “establish the court’s satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss.” [citation omitted] Plaintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features or the person or entity who committed that act.”

5. *Sony Music Entertainment, Inc. et al. v. Does 1-40*, 326 F. Supp. 2d 556, 564-565 (S.D.N.Y. 2004).

- “Cases evaluating subpoenas seeking identifying information from ISPs regarding subscribers who are parties to litigation have considered a variety of factors to weigh the need for disclosure against first amendment interest. These factors include:

- (1) A concrete showing of a *prima facie* claim of actionable harm;
- (2) Specificity of the discovery request;
- (3) The absence of alternative means to obtain the subpoenaed information,
- (4) A central need for the subpoenaed information to advance the claim.”

6. *Public Relations Society of America, Inc., et al. v. Road Runner High Speed Online*, 799 N.Y.S. 2d 847, 850-851 (2005).

- ““John Doe” seeks to maintain his anonymity, contending that petitioners have not demonstrated a *prima facie* cause of the

case sounding in defamation entitling them to pre-action relief under CPLR 3102(c).”

- “CPLR 3102(c) with court order authorizes disclosure prior to a commencement of an action to “aid in bringing an action.” This includes disclosure to identify potential defendants.”

- “Before petitioner can obtain such discovery, however, he or she must demonstrate that they have “a meritorious cause of action and that the information sought is material and necessary to the actionable wrong.”

- “Based on all the foregoing, this court finds that petitioner Bolton has a cause of action for defamation that withstands John Doe’s motion to dismiss.”

The foregoing demonstrates that each of these courts adopted the four part test first announced by the United States District Court for the Northern District of California in *Seescandy.com*. That test specifically included the “*prima facie*” motion to dismiss test. Moreover, the New Jersey courts went beyond that test by demanding that the requesting party make a greater evidentiary showing than typically required to survive a motion to dismiss.

Further, in *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1093-1095 (W.D. Wash. 2001), the court specifically held that the standard for disclosing the identity of a non-party witness must be higher than that articulated in *Seescandy.com*:

- “The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a sufficient chilling effect on Internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.”

- “The standard for disclosing the identity of a non-party witness must be higher than that articulated in *Seescandy.com* or in *American Online, Inc.* When the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity. Therefore, non-party disclosure is only appropriate in the exceptional case with a compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.”

It goes without saying, therefore, that the Respondent’s representation to this Court that the “good faith basis” test articulated by the trial judge in *America Online* is the standard widely adopted by these other courts is simply not an accurate statement. If anything, the foregoing discussion demonstrates beyond dispute that the *America Online* trial judge’s analysis, at most, represents the minority view on this issue.

In this regard, it is noteworthy that the trial judge’s decision in *America Online* was reversed and remanded by the Virginia Supreme Court. See *America Online, Inc. v. Anonymous Publicly Traded Co.* 542 S.E.2d 377 (Va. 2001). Significantly, the Virginia Supreme Court did not affirm or adopt the test used by the trial judge to deny AOL’s motion to quash. Rather, the Virginia Supreme Court strongly stated, at a minimum, the plaintiff therein must first disclose its own identity as a party to that litigation before any Virginia court would entertain a subpoena to disclose the identity of the anonymous poster. As such, there is serious doubt as to the residual viability of the trial judge’s decision and serious doubt as to whether that decision should carry the precedential value and weight of the other foregoing decisions since it is no longer a viable precedent.

IV.

RESPONDENT’S SO-CALLED DEFAMATION CLAIMS ARE TOTALLY DEFICIENT

First and foremost, it is important to note that Respondent admits

that it has not asserted any claims for defamation in its Arizona complaint against the anonymous Internet poster know and referred to as “Gunnallenlies” (Respondent’s Brief at 2, 15 [“Indeed, in the trial court, Matrixx acknowledged that it had not named Gunnallenlies as a Doe defendant as it had Veritasconari”]). Therefore, it is undisputed that none of the Internet postings published by Gunnallenlies can be the subject of this appeal or the order of the lower court.

Respondent asserts that its defamation claim against Veritasconari “is spelled out in black and white in its [Complaint]” (see Respondent’s Brief at 15), citing to paragraphs 20 and 21 of its complaint:

20. John Does 1-25, using aliases published false and defamatory statements libeling Matrix and/or its officers and directors in the message boards.

21. Upon information and belief, the individual using the Yahoo! alias Veritasconari is utilizing identity-obsfucation software offered by Zero Knowledge Systems of Montreal, Canada in an effort to conceal his/her identity and to temporarily evade the United States Subpoena process.

As more fully discussed in Appellants’ Opening Brief, the foregoing bare-bones allegation is totally deficient for purposes of satisfying the *Seescandy.com* “prima facie” motion to dismiss test, and even incapable of satisfying the “good faith basis” test on which Respondent completely relies. Paragraph 20 is nothing more than a conclusory allegation that is totally devoid of any specifically alleged “defamatory statements.” Further, paragraph 21 does not even charge Veritasconari with having made any

defamatory statements, let alone identifying those statements. For these reasons alone, the Respondent's motion to compel should have been denied.

V.

**UNDER THE "TOTALITY OF CIRCUMSTANCES" TEST ALL OF
THE CHALLENGED STATEMENTS CONSTITUTE OPINION,
NOT FACT**

Respondent contends that when this Court considers the text of the Internet postings they have selectively identified in their brief, "there is no question that Matrixx has shown a defamation *per se* claim against Veristaconari and Gunnallenlies." (Respondent's Brief at 19). Respondent further argues that these select and totally out of context snippets do not constitute hyperbole or opinion, and are distinguishable from the Internet postings discussed in *SPX Corp. v. Doe*, 253 F. Supp 2d 974 (N.D. Ohio 2003); *Rocker Management LLC v. John Does 1-20*, 2003 W.L. 22149380 (N.D.C.A. 2003); *Global Telemedia Int'l, Inc. v. Doe 1 aka BUSTEDAGAIN40, et al., supra*; and *ComputerXpress v. Jackson, et al., supra*. However, a careful review of the foregoing court decisions and their analysis under the "totality of circumstances" test demonstrates that even these limited snippets of Internet postings constitute none other than statements of opinion and not statements of fact.

First and foremost, however, Respondent's effort to demonstrate that

the subject Internet postings constitute defamation per se must fail simply because their purported showing violates the principal maxim of the totality of circumstances test – since it has selected a handful of short postings that have been isolated and taken completely out of context. The totality of circumstances test mandates that the court review and consider the entire content and context of all the Internet postings in which the challenged statements appear so as to properly evaluate whether all components of the test are satisfied. Respondents have asked this court to apply the totality of circumstances test, but have asked this Court to only examine its select postings. This on its face violates the totality of circumstances test.

The handful of Internet postings selected by Respondent contain words and phrases such as “criminal brokers,” “mob connections,” “fraudulent activity,” “accounting fraud and earnings manipulations,” “accounting fraud,” “manipulated earnings and revenues,” “fraud transactions.” (Respondent’s Brief at 19-20). All of these statements occurred in the context of a heated debate between these anonymous Internet posters and others, and even a cursory review of the 50 pages of Internet postings attached to the Respondent’s motion to compel below demonstrate that, in the context of this chat room and in the context of this heated debate, the totality of these Internet postings can only qualify as statements of opinion.

Appellants submit that the following analysis of specific Internet

postings by other courts is instructive:

1. *ComputerXpress, Inc. v. Jackson, et al., supra* at 1011, 1012, 1013.

- In most cases whether a statement is fact or opinion is a question of law. [citation omitted] To decide whether a statement is fact or opinion, a court must put itself in the place of an average reader and determine the natural and probable effect of the statement, considering both the language and the context. [citation omitted] However, where a statement is ambiguous or susceptible of an innocent meaning, it is incumbent upon the plaintiff to plead the facts showing its defamatory meaning. [citation omitted]

- *ComputerXpress* failed to demonstrate how defendants' Internet postings, on which the fourth cause of action is based, were false or defamatory. In fact, it has not even identified which of the numerous postings in the record it contends were actionable. Instead, *ComputerXpress* simply refers this court to 131 pages of Internet postings contained in their record, and apparently assuming it is the court's obligation to determine how they support *ComputerXpress's* position.

- The Internet postings in this case were comparable in tone and substance to those in *Global Telemedia*. Without citing an specific postings, the complaint alleged four defamatory statements:

“That the computer product featured on plaintiff's own website was of inferior quality, that plaintiff was merely a stock “scam” certain to be out of business in 30 days, that the officers and directors of plaintiff were illegally conspiring with market makers for the company's stock to manipulate its values, that one of plaintiff's officers or directors had filed bankruptcy, etc.”

Our own review of the postings indicates the following disparaging statements:

Investors were “either swallowing complete bull” or “participating in what I think is a fraud” and should not be surprised if the *ComputerXpress* promoters “try to continue this for another 30 days (the time they have

to comply or revert to pink sheets) to suck out as much as they can...”

The *ComputerXpress* promoters acted as they did because “greed set in; and a belief that they could “operate under the radar” and get away with whatever they wanted to because there was not enough official care to be concerned about. I firmly believe that they care nothing about generating a genuine business, and everything about selling the stock....”

When *ComputerXpress* announced the intended merger with defendants business to the public it had already filed a letter with the SEC promoting a different type of affiliate program not mentioned to the public until months later. “Is that fraud?”

When the people who have... been duped into the stock realize the scam they were coaxed into my guess is there will be hell to pay.

“Will someone please tell me why Anyone would believe Anything these guys and their pump and dump supporters say?”

- It is apparent from this recitation, while the postings certainly could be considered disparaging, their tone and content identify them as statements of opinion and not fact. Like the postings in *Global Telemedia*, they were hyperbolic, informal and lack the characteristics of typical fact-based documents.

- Other statements, such as the asserted inconsistency between *ComputerXpress*'s public relations releases and its actual operations, or the assertion that its promoters only cared about selling stock and not about generating a genuine business were too vague to be taken as fact by a reasonable reader. In the few instances in which the postings did contain apparent statements of fact, such as the statement that a company owned by the former president had filed for bankruptcy, or that *ComputerXpress* had 30 days “to comply or revert to pink sheets” – *ComputerXpress* failed to present evidence that these statements were false.

2. *Rocker Management LLC v. Does, supra* at 3.

- The specific context and content of Harry's messages also suggest to the reader that his messages are statements of opinion rather than fact. Harry's messages are free flowing diatribes; he does not use proper spelling, grammar or capitalization.

- Finally, and perhaps most fatal to plaintiff's claim against Harry, plaintiff has not even attempted to show that Harry's statements are "sufficiently factual to be susceptible of being proved true or false." [citation omitted] Plaintiff has not bothered to identify the specific statements it contends are libelous; instead, it attached the complete copy of several messages to its opposition to the motion to quash. The court is left to guess exactly what statements plaintiff contends are libelous statements of fact. Moreover, plaintiff has not alleged that any of the statements are false.

- The snippets of statements plaintiff briefly identified in its complaint are not capable of being proved false. For example, Harry stated that the "SEC is sniffing around Rucker partners, and asking questions" January 31, 2003 message. Plaintiff does not explain how it would prove such a statement is false: what does "sniffing around" mean? Harry's statements are simply too vague and hyperbolic to constitute actionable libel. [citation omitted]

3. *Global Telemedia Int'l., Inc. v. Doe 1 aka BUSTEDAGAIN40, et al., supra* at 1267, 1268.

- Here, the general tenor, the setting and the format of both Readers and Kings statements strongly suggest that the postings are opinion. The statements were posted anonymously in the general cacophony of the Internet chat room in which about 1,000 messages a week are posted about GTMI. The postings at issue were anonymous as are all the other postings in the chat room. They were part of an ongoing, freewheeling and highly animated exchange about GTMI and its turbulent history. At least several participants in addition to Defendants were repeated posters, indicating that the posters were just random individual posters interested in exchanging their views with other investors.

- Importantly, the postings are full of hyperbole, invective, shorthand phrases and language not generally found in fact based documents such as corporate press releases or SEC filings.

- To put it mildly these postings as well as the others presented to the court, lack the formality and polish typically found in documents in which a reader would expect to find facts.

- In another posting on March 25, Reader posted the following: “SEC link[.] to view Jonathon Bentley Stevens violations; <http://www.sec.gov/enforce/litigrel/lr15774.txt>[.] He was busted for misrepresentation and overstatement of facts; let the truth be told...” Here, his statements about Stevens are clearly based on a public document which he provides for the readers thus, any reader may look at the same document and determine what they think of the information. By supplying the underlying document which supports his views, Reader has set forth an opinion, not fact. [citation omitted]

- On June 12, 2000 at approximately 4:37 p.m. King posted the following:

Akitaman we did get news today! Another board poster says the PR will come out tomorrow... Rolf Mayo that was funnier than some of my jokes today... another day with GTMI steering the sinking ship, but don't worry they are headed for the calmer waters of the Caribbean where your money will be safe from federal authorities,”

- In the context of the full message, King's comments are hyperbolic and figurative. The posting is also in response to another posting, making it less likely to be a statement of fact. Given the tone and context of the message, a reasonable reader would not take this to be anything more than a disappointed investor that was making sarcastic cracks about the company.

4. *SPX Corp. v. Doe, supra* at 981, 982.

- The third factor is the context of the statements, which requires consideration of the alleged defamation in the context of other accompanying statements. Cautionary terms or “language of apparency” weigh against liability. [citation omitted] Also important is the tenor, including whether the statements appear in a piece characterized by objective facts or subjective hyperbole. [citation omitted]. First, the court notes that the postings provide an investment opinion of SPX stock: “long term sentiment; strong sell.” Indeed, the purpose of that posting is to give such

an investment opinion. Further, the tenor of the postings is not consistent with professional investment advice. In describing the plaintiff, the defendant uses the term "TIMBER!!!!", clearly a figurative hyperbole. He also describes the plaintiff as having shit businesses and cooking the books, hardly the language of reliable investment advice. Even his screen name, "neutronb," diminishes his credibility. In context, a reasonable reader would view the statements as the author's subjective characterizations, and not as reliable facts.

The common elements among these decisions is as follows:

1. When all of the content and context of the total Internet postings were reviewed, it was apparent, for a variety of reasons (e.g. hyperbole, lack of formality, a response to another poster, heated debate), that no reasonable reader would understand these postings to constitute a statement of fact;
2. The plaintiff has not even identified the specific statements it contends are libelous, but left it to the court to weed through a volume of Internet postings;
3. The plaintiff has not made any effort or taken any steps to prove that the alleged defamatory statements are false; and
4. The plaintiff has made no effort or is incapable of proving causation and damages.

Each of the foregoing elements or components apply with equal and compelling force to the facts of this appeal. As more fully discussed in Appellants' Opening Brief, the Respondent (1) totally failed to specifically identify the individual Internet postings it claimed were defamatory, but only attached 50 pages of postings to its motion to compel; (2) made no effort to prove that any of these unidentified defamatory statements were false; (3) totally failed, and was incapable, of pleading and proving causation or damages; and (4) given the forum, content and context of these

postings, no reasonable reader would understand these postings to constitute statements of fact. Under the “totality of circumstances” test, Respondent’s motion to compel should be denied.

VI.

THE PROPER STANDARD OF REVIEW IS *DE NOVO* REVIEW

Despite Respondent’s argument to the contrary, the trial court’s decision is subject to *de novo* review. Although arising in the context of a discovery motion, this appeal fundamentally concerns the scope of First Amendment protection afforded to “Veritasconari” and “Gunnallenlies,” and whether Appellants may be compelled to impinge their right to speak anonymously. The Supreme Court has made clear that where First Amendment rights are fundamentally at issue, an appellate court should review the evidence independently:

This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." [citation omitted]. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." [citation omitted].

New York Times v. Sullivan, 376 U.S. 254, 284-285 (1964). *See also*, *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1159 (2004) (in SLAPP context, trial court’s determination as to whether prescriptions of the statute have been satisfied are subject to *de novo* review.)

All of Respondent's authority is inapposite or distinguishable. As a threshold matter, several of Respondent's cases do not even involve constitutional issues. See *Estate of Ruchti*, 12 Cal. App. 4th 1593 (1993) (concerning discovery sanctions; no constitutional issue presented); *Alliance Bank v. Murray*, 161 Cal. App. 3d 1 (1984) (concerning discovery related to ex parte motion applications and sanctions; no constitutional issues presented); *Venture Law Group v. Superior Court*, 118 Cal. App. 4th 96 (2004) (concerning discovery order related to attorney-client privilege issue; no constitutional issues presented); *National Football League Properties, Inc. v. Superior Court*, 65 Cal. App. 4th 100 (1998) (same).

Further, only two cases involve constitutional issues, *Montez v. Superior Court*, 5 Cal. App. 4th 763 (1992) and *Johnson v. Superior Court*, 80 Cal. App. 4th 1050 (2000), and they are distinguishable. In both *Montez* and *Johnson* the constitutional issues were tangential to the underlying actions, which did not implicate constitutional questions at all. *Montez* involved murder, robbery and assault, and the defendant sought the home addresses of several witnesses against him. 5 Cal. App. 4th at 765. Although the defendant's discovery petition did implicate the constitutional right to cross-examine witnesses, that issue was not part of the underlying action. Likewise, *Johnson* concerned a failure to disclose medical information, and the plaintiffs moved to compel a third party to sit for a deposition. 80 Cal. App. 4th at 1055. The third party opposed, in part based on his constitutional right of privacy, but his privacy rights were not at issue in the underlying action.

By contrast, "Veritasconari's" and "Gunnallenlies" First Amendment rights are at the core of the underlying motion to compel.

Consequently, the trial court's decision to strip them of their right to anonymous speech must be subject to a *de novo* standard of review.

VII.

THESE APPELLANTS HAVE STANDING TO ASSERT THE FIRST AMENDMENT RIGHTS OF VERISTONCARI AND GUNNALLENLIES

Respondent contends that Appellants do not have standing to assert the First Amendment rights of Veritasconari and Gunnallenlies since the United States Supreme Court has made it clear "that a third party has standing to assume the constitutional rights of another only when it satisfies a three-prong test." (Respondent's Brief at 8-9). However, the Respondent's reading of the United States Supreme Court cases on this issue is not only too narrow in its scope, but also totally inaccurate.

The United States Supreme Court has observed that, in order to have standing, a plaintiff must establish an injury in fact; to wit "some threatened or actual injury resulting from the putatively illegal action." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). However, the Supreme Court has also repeatedly noted that in a First Amendment context, "litigants... are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statutes very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v.*

America Booksellers Association, Inc., et al., 484 U.S. 383, 392-393 (1988). See also, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

The conclusion that these Appellants have standing is also compelled by the fact that Respondent never provided any due process notice to Veritasconari or Gunnallenlies in connection with its subpoena to the Yahoo! Internet service provider or in connection with its subpoena to these Appellants. Further, in the alternative, under these circumstances and facts, like *America Online*, these Appellants can meet and satisfy the three-pronged test discussed in *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

VIII.

CONCLUSION

For the foregoing reasons the Superior Court's Order of April 4, 2005 should be vacated and the Motion should be denied.

RESPECTFULLY SUBMITTED this 27th day of September, 2005

SHARTSIS FRIESE LLP

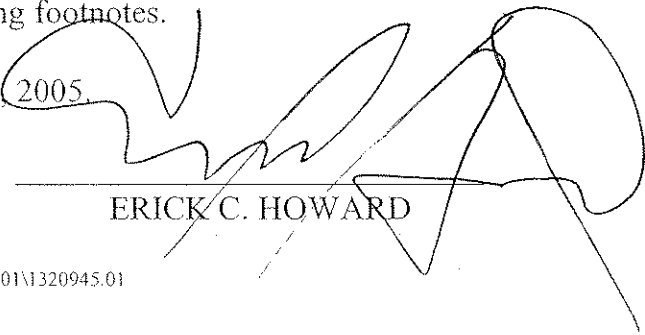
By  _____
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CERTIFICATION

Pursuant to CRC 14(c)(1), counsel for third parties and appellants
BARBARY COAST CAPITAL MANAGEMENT and STEPHEN
WORTHINGTON, Erick C. Howard, certifies that the Appellant's Opening
Brief has a word count of 6,884, including footnotes.

Dated this 30th day of September 2005.



ERICK C. HOWARD

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PROOF OF SERVICE

I, NICOLE A. BIGLEY, declare:

1. I am employed in the City and County of San Francisco, California by Shartsis Friese LLP at One Maritime Plaza, 18th Floor, San Francisco, California 94111.

2. I am over the age of eighteen years and am not a party to the within cause.

3. I am readily familiar with Shartsis Friese LLP's practice for collection and processing of correspondence and documents for mailing with the United States Postal Service, which in the normal course of business provides for the deposit of all correspondence and documents with the United States Postal Service on the same day they are collected and processed for mailing.

4. On October 3, 2005, at Shartsis Friese LLP located at the above-referenced address, I served the attached **APPELLANTS' REPLY BRIEF** on the interested parties in said cause by

Personal delivery by messenger service of the document(s) above to the person(s) at the address(es) set forth below:

Placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in accordance with the firm's practice of collection and processing correspondence for mailing to the person(s) at the address(es) set forth below:

Facsimile transmission pursuant to Rule 2008 of the California Rules of Court on this date before 5:00 p.m. (PST) of the document(s) listed above from sending facsimile machine main telephone number (415) 421-2922, and which transmission was reported as complete and without error (copy of which is attached), to facsimile number(s) set forth below:

Consigning the document(s) listed above to an express delivery service for guaranteed delivery on the next business day to the person(s) at the address(es) set forth below:

___ Electronically delivering the document(s) listed above pursuant to federal and local rules of the court on this date from electronic address sflaw.com, and which transmission was reported as complete and without error, to electronic mail address(es) set forth below:

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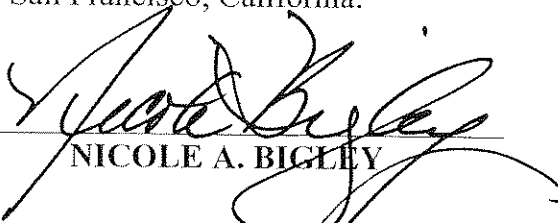
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 3, 2005 in San Francisco, California.



NICOLE A. BIGLEY