APPEAL NO. G029100
Orange County Superior Court
Case No. 00CC05951

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT DIVISION THREE

JOHN DOE a.k.a MEZZZMAN,
Defendant and Appellant,

vs.

GRANT S. KESLER,
Plaintiff and Respondent.

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR
COURT OF THE COUNTY OF ORANGE
HONORABLE DAVID C. VELASQUEZ, JUDGE PRESIDING

AMICUS CURIAE BRIEF IN SUPPORT OF

APPELLANT JOHN DOE A.K.A. "MEZZZMAN"

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ELECTRONIC FRONTIER FOUNDATION

CASES

STATUTES

MISCELLANEOUS

INTRODUCTION

"People 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 discovery their identities." *Columbia Insurance Company v. Seescandy.com* (N.D. Cal. 1999) 185 F.R.D. 573, 578 (discussing standards for allowing discovery to reveal a Defendant's identity in a domain name dispute). This case asks whether and how California's anti-SLAPP statute can be used to deter those who bring unfounded litigation in order to learn the identities of and silence their critics.

STATEMENT OF AMICUS CURIAE

The Electronic Frontier Foundation ("EFF") is a non-profit, member- supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco. EFF has members all over the United States and maintains one of the most-linked-to Web sites (http://www.eff.org) in the world.

EFF'S INTEREST IN THIS CASE

EFF believes that free speech is a fundamental human right and that free expression is vital to society. The vast web of electronic media that now connects us has heralded a new age of communications, a new way to convey speech. New digital networks offer a tremendous potential to empower individuals in an ever over-powering world. While EFF is mindful of the serious issues that may arise when information, ideas and opinions flow free, EFF is dedicated to addressing such matters constructively while ensuring that fundamental rights are protected.

Thus, EFF's interest in this case. The EFF has represented individuals involved in seven different "Doe" litigations and has advised many others, both in California state courts and in various state and federal courts nationwide. We believe that, unless protective steps are taken, including the appropriate application of California's anti-SLAPP law, these cases threaten to silence and intimidate legitimate Internet speakers. In the current case, the Superior Court's unnecessarily infringed on freedom of speech by failing to recognize Appellant's postings as statements of opinion in the context of the often free wheeling, unvarnished discussions that exist on the Internet. The Court below also failed to recognize the need to preserve the anonymity of online speakers in order to encourage open debate.

Additionally, given the growing problem of John Doe cases aimed at breaching the anonymity of Internet speakers, and the uncertainty about the legal standards applicable, Amici urge the court to adopt a test that can be used by these parties and others in this District to evaluate the application of California's anti-SLAPP law to such situations. Given the First Amendment issues at stake here, alleviation of the current uncertainty in this area of the law can give much needed clarity and breathing room to speakers.

AUTHORITY TO FILE THIS AMICUS BRIEF

EFF has filed a motion for leave to file this brief under California Rule of Court 14(c). Prior to filing that motion, EFF left several telephone messages for the attorneys for Respondent requesting consent. We finally received a response on October 22, wherein counsel for Respondent stated that he needed to contact his client. Appellants have given consent.

I. 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 listen. As the Supreme Court explained, [f]rom a publisher's standpoint, it constitutes a vast platform from which to address and hear from a world-wide audience of millions or 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." *Reno v. American Civil Liberties Union*, (1997) 521 U.S. 844, 853, 870. Thus, the Supreme Court held that the Internet is a fully protected medium of expression. *Id.*

A.Yahoo Message Boards

In line with the Supreme Court's observations about the nature of the Internet, Yahoo has organized public outlets for the expression of opinions about every publicly traded company in the U.S. These are based upon the idea that people have personal and economic interests in the corporations that shape our world, and in the stocks they hope will provide for a secure future. They also recognize that people love to share their opinions with anyone who will listen. These outlets, called message boards, are an electronic bulletin board system where individuals freely discuss publicly traded companies by posting comments for others to read and respond to.

Individuals who post messages on Yahoo message boards generally do so under a "handle" – similar to the old system of CB's with truck drivers. Nothing prevents an individual from using his real name, but, as an inspection of any message board will reveal, most people choose anonymous nicknames. These typically colorful monikers protect the writer's identity from those who disagree with him or her, and encourage 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, hyperbole and insult. Most, if not everything, said on message boards is taken with a grain of salt.

An important aspect of the message board that distinguishes it 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. Tornilllo* (1974) 418 U.S. 241.

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.

B.The Metalclad Message Board.

One of Yahoo's message boards is specifically devoted to Metalclad Corporation. Plaintiff Kesler is the President and Chief Executive Officer of Metalclad. The opening page of Yahoo's Metalclad message board explains the ground rules:

> This is the Yahoo! Message Board about [Metalclad], 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.[1]

Each and every page of message listings that 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 Metalclad. To date, over 5300 messages have been posted on the Metalclad 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 Metalclad and its management, some criticize it and some are neutral.

In order to sign up for a message board, individuals must give Yahoo their birthday, zip code, gender and an alternate e-mail address. In addition, in order to have a regular Yahoo e-mail address (which the Speakers do), Yahoo gathers a name, address, occupation and industry from each user.

Appellant Mezzzman is one of the many members of the public who have visited the Yahoo message board for Metalclad and participated in the discussion. At issue in this case are three short postings by Appellant dated May 11, 2000 (Motion to augment the record, Ex. B, at Exhibit N), June 9, 1999 (*Id.*, Exhibit O) and June 10, 1999 (*Id.*, Exhibit P). As far as amici are aware, Respondent Kesler has never sought to exercise his right to reply to Mezzzman's comments on the message board, either to correct the factual errors he now alleges or present his side of the debate. Instead, he brought this legal action and sought to require Yahoo to reveal the identity of Mezzzman.

C. Importance of This Case.

This motion presents the Court with the issue of what standard should be applied to determine when California's anti-SLAPP statute can be applied in response to an attempt to silence critical anonymous speech on a matter of public importance. While 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 are seeking to use court processes to unmask and silence their critics. While Yahoo has not

revealed the number of these requests it receives, records from the Circuit Court in Loudoun County, Virginia, the home of America Online suggest the scope of this issue. 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.

II. ARGUMENT

A.California Anti-SLAPP Statute.

This case arises out of Defendants' exercise of free speech rights and falls squarely within California's legislative prohibition on so-called strategic lawsuits against public participation, or "SLAPP" suits. California's anti-SLAPP statute provides for prompt dismissal of lawsuits that cast a pall on otherwise protected speech. *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 547-48, 46 Cal. Rptr. 2d 880. Code of Civil Procedure § 425.16 provides, inter alia, that:

> (b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

This statute codifies the Legislature's finding 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." *Id.* at section 425.16 (a) (emphasis supplied).

1.Defendants' Burden

The moving party need only show it was engaged in free speech activities with respect to an issue of public significance. Section 425.16. The expressive and petition activities that give rise to the action need not be communicated directly to a government body and it is not required that the expression actually be "constitutionally protected under the First Amendment as a matter of law." *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 820. Defendant need only make "a prima facie showing the statute applies to [it]." *Id.* at 819.

Section 425.16 defines an "act in furtherance of a person's right of petition or free speech in connection with a public issue" to include, inter alia:

> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public

> interest; (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

CCP § 425.16(e)(4).

2.Plaintiffs' Burden

Once defendants establish that CCP § 425.16 applies, the burden shifts to the plaintiff to establish "that there is a probability that the plaintiff will prevail on the claim." CCP § 425.16(b)

> Once the party moving to strike a complaint pursuant to subdivision (b) of section 425.16 has made a prima facie showing that the lawsuit arises from an act by the defendant in furtherance of his right of petition or free speech under the United States or California Constitution in connection with a public issue, the plaintiff must establish a "probability" that he will prevail on the merits of the complaint. [§ 425.16, subd.(b).] To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. [Citation.] Whether the plaintiff has done so is a question of law [.]

Matson, 40 Cal.App.4th at 548. *Accord, Wilcox,* 27 Cal.App.4th at 823. This requirement is clear. The plaintiff must meet his burden through "competent admissible evidence within the personal knowledge of the declarant, with reference to the familiar standards applied to evidentiary showings on summary judgment motions. . . . An overly lenient standard [of review] would be inappropriate, given that the statute is intended to provide a fast and inexpensive unmasking and dismissal of SLAPP suits." *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8,16, [43 Cal.Rptr. 2d 350].

B.Appellant Met His Initial Burden under § 425.16.

1.The Yahoo Message Board is A Public Forum under California's Anti-SLAPP Statute.

The Yahoo message board is a vehicle for communicating a message about public matters to a large and interested community. As such, it is a "public forum" under §425.16. As the Fourth District held recently:

> Read in the context of the entire statutory scheme, a "public forum" includes a communication vehicle that is widely distributed to the public and contains

> topics of public interest, regardless of whether the message is 'uninhibited' or 'controlled.'

Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 478. In *Damon*, this included a newsletter distributed to 3,000 members of a residential community, despite the fact that it was not balanced and served as a "mouthpiece for a small group of homeowners who generally would not permit contrary viewpoints." *Id.* at 476. More than the small, controlled newsletter in *Damon*, the Yahoo message board is open to the public and allows postings by any viewpoint. Yahoo retains control to prevent violations of its Terms of Service, but within those boundaries, the discussion is not hindered or controlled. All opinions are allowed and all have equal footing.

Mezzzman posted his opinions on the Yahoo message board for Metalclad. Thus, he plainly established that he was engaged in free speech activities with respect to an issue of public significance in a public forum.

2.Mezzzman's Speech Concerned Issues of Public Interest.

As part of his prima facie burden, Mezzzman must show that his remarks concerned an "issue of public interest." §425.16(e)(3). It is well settled that this "public interest" includes not only government matters, but also private conduct when "a large, powerful organization impacts the lives of many individuals." *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 674. In *Macias*, campaign statements made during an election in a union of 10,000 members qualified as a public interest. In *Damon,* the topic concerned the manner of governance for 3,000 members of a private homeowners community. *See also Sipple v. Foundation for National Progress* (1999) 71 Cal.App. 4th 226, 238-240 (statements that a nationally known political consultant had physically and verbally abused his former wives determined to be a matter of public interest); *Nicosia v. De Rooy* (N.D. Cal. 1999) 72 F.Supp.2d 1093, 1110 (critical statements about biographer of Jack Kerouac deemed to involve a matter of public interest).

Here, the speech concerns the activities of a large, publicly traded company, with reported revenues of over $11 million[2] and a significant number of shareholders, both direct and indirect. Metalclad has sought the pubic eye because of its dispute with Mexico, with coverage on the front page of the Business section of the *New York Times* as recently as October 19, 2001.[3] Metalclad apparently believes its general activities and financial health are a matter of public interest as well, since it has issued a press release discussing its quarterly profits.[4] In all, the company has issued five press releases since May 2001, each of which lists Mr. Kesler as the contact person and identifies him as the company president. Several of the releases contain quotes from Mr. Kesler about the company.[5] Thus, Metalclad's financial health and activities are an issue of public interest.

C.Respondent Did Not Meet His Burden of Establishing a Probability of Prevailing on Their Claims.

As noted above, once a defendant makes a prima facie showing under §425.16 that the lawsuit arises from speech covered by the statute, the burden shifts to Plaintiffs to establish a probability of prevailing on their claims. "The test is similar to the standard applied to evidentiary showings in summary judgment motions pursuant to Code of Civil Procedure §437(c) and requires that the showing be made by competent admissible evidence within the personal knowledge of the declarant." *Church of Scientology v. Wollersheim, supra,* 42 Cal.App.4th at 654.

First, Plaintiffs must show that the matters complained of were "published," i.e. that the statements were communicated to third persons who understood their defamatory meaning. *See* Witkin, Summary of California Law (9th ed. 1988), Vol. 5, §476, pp. 560-561. The publication of messages on a Yahoo message board appears to meet this element.

Second, Plaintiffs must affirmatively show that the statements at issue are false. *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 552-3 (truth is an absolute defense against civil liability for defamation). Moreover, because the statements at issue pertain to a matter of public concern, the burden rests squarely on Plaintiff to prove falsity. *Philadelphia News, Inc. v. Hepps* (1986) 475 U.S. 767, 787-788; *see Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747. Plaintiff must in addition show that statements contained or implied a "false factual assertion" about them. *Moyer v. Amador Valley Joint Union High School District* (1990) 225 Cal.App.3d 720, 724-725. Statements that cannot "reasonably [be] interpreted as stating actual facts about an individual" because they are expressed in "loose, figurative or hyperbolic language," and or the context and tenor of the statements "negate the impression that the author seriously is maintaining an assertion of actual fact" about the plaintiff are not provably false, and as such, will not provide a legal basis for defamation. *Milkovich v. Lorain Journal* (1990) 497 U.S. 1, 21.

Third, Plaintiff must show that the statements at issue are defamatory, that is whether they involve "a false and unprivileged publication . . . which exposes [them] to hatred, contempt, ridicule, or obloquy, or which causes [them] to be shunned or avoided, or which has a tendency to injury [them] in [their] occupation." Civil Code §43.

Respondent here has not met these evidentiary burdens.

1.Respondent Has Failed to Demonstrate that Mezzzman's Three Statements are Demonstrably False Statements of Fact.

First, two of the three postings by Mezzzman at issue here appear to be truthful. These arise from Mezzzman's statement that Mr. Kesler made a "misrepresentation" to him (Motion to Augment the Record, Ex. B, at Exhibit O), and later a statement that his "opinion was based on their dreadfull and deceiptfull [sic] history" (*Id.* at Exhibit Q). Specifically, these two statements arise from Mezzzman's contention that Kesler had told Mezzzman that he would not authorize a reverse stock split unless NASDAQ required Metalclad to do so and that, nonetheless, a stock split was authorized in early June, 1999, before any such requirement was issued by NASDAQ. The statements are dated June 9 & 17, 1999.

Mr. Kesler does not deny that he made such a statement to Mezzzman or anyone else. More importantly, the exhibits to Mr. Kesler's declaration appear to support the truth of Mezzzman's statement -- that there was no pending NASDAQ requirement at the time of the stock split. As of June 9 and 17, 2001, the document received by Metalclad from NASDAQ was dated April 12, 1999 and stated:

> In light of the potential dilution of common shares due to the conversion of debentures and warrants, as outlined above, there are no assurances that a reverse stock split of up to 10 to 1 will adequately remedy the bid price requirement.

[CT 110]. Nonetheless, the stock split was sought by Mr. Kesler and granted on June 2, 1999. [CT 119-120]. The letter from NASDAQ stating that Metalclad had submitted a suitable plan is dated July 14, 1999, over a month after Mezzzman's statement. [CT 122-124]. Regardless of whether these statements are actually truthful, certainly on this record Plaintiff has not met his burden to demonstrate that they were false at the time they were made.

2.Respondent has not Met His Burden To Show that Mezzzman's Statements Were Not Subjective Opinion in the Context of the Free-Wheeling Internet Message Board.

Additionally, Kesler asserts, "it is defamatory per se to charge that a person is a crook or a thief," (*citing Albertini v. Schaefer* (1979) 97 Cal.App.3d 822, 829). [CT 65: 13-14]. This is plainly not the current state of California law, which requires a more nuanced investigation into the context in which such claims were made. In the recent case of *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 278-282, the Court held that claims that an opponent was a "thief and a liar" were held protected by the First Amendment and not defamatory. The *Rosenaur* court collected the current jurisprudence on the topic, noting that no defamation claim existed for 1) characterizing a developers negotiating position as "blackmail"; 2) describing a fund advertisement as "Lies, Damn Lies and Fund

Advertisements"; 3) accusing an opponent of "ripping off" the California taxpayer; and 4) accusing another of "enter[ing] into a corrupt relationship." *Id.* (citations omitted.)

Here, Plaintiff complains specifically about Mezzzman's statement that "it stinks when the reason you lost is because you've been cheated!" (Motion to Augment the Record at Ex. B, at Exhibit P) and that Metalclad has a "dreadful and deceitful history [sic]," [*Id.*] and the following:

> …I'm still not sure even if MTLC [Metalclad] won [the NAFTA litigation] whether the shareholders would benefit given all the hands skimming of the top and then the dilution that will in fact take place when the Shaar Fund converts into common shares.

[*Id*. at Ex. B, at Exhibit N]. Taken in context, none of these, or the others highlighted by Respondent below contains provably false assertions of fact. All are expressions of subjective judgment. As Justice Swager observed in *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837-38 (citations omitted): "The issue of whether a communication was a statement of fact or opinion is a question of law to be decided by the Court. In making the distinction, the courts have regarded as opinion any 'broad, unfocused and wholly subjective comment,' such that the plaintiff was a 'shady practitioner,' 'crook,' or 'crooked politician.'"

The conclusion that Mezzzman's statements are protected opinion or rhetoric is also supported by the forum and context in which they were made. That is, in the "general cacophony of an Internet" newsgroup, "part of an on-going free-wheeling and highly animated exchange" about the company, where "the postings are full of hyperbole, invective, short-had phrases and language not generally found in fact-based documents." *Global Telemedia International v. Doe 1 aka BUSTEDAGAIN40* (C.D. Cal. 2001) 132 F.Supp.2d 1261, 1267, 1269-1270 (holding critical comments about plaintiff in Internet chat room, including that it "screwed" investors out of their money and lied to them, to be non-actionable opinion and rhetoric).

3.Respondent Has Failed to Meet His Burden to Demonstrate Actual Damages.

Finally, Respondent fails to demonstrate actual monetary damage as a result of Mezzzman's postings. While at common law compensatory damages for defamation-related injuries were available without evidence of loss, the United States Supreme Court has held that the First Amendment prohibits an award of presumed damages for false and defamatory statements involving matters of public concern. *See Gertz v. Robert Welch* (1974) 418 U.S. 323, 350. Under *Gertz*, a public figure plaintiff must produce "competent evidence of actual injury" to state a constitutional claim for defamation. *Id.* Here, as noted *supra* at pages 10-11, Mr. Kesler has served as the public face for Metalclad, with every press release stating that he is the key contact at the company and several of them

featuring quotes from him. In fact, Mr. Kesler has not denied that he is a public figure. Thus, he was clearly required to demonstrate actual monetary damage and his failure to do so should, under settled law, bar support granting of a motion under §425.16.

D.Protection of Anonymous Speech.

1.Anonymous Speech is Protected by the First Amendment and California's Constitution.

The requirement that the Plaintiff demonstrate the strength of his claim is underscored by the role of anonymity in Mezzzman's speech. There is no question that the First Amendment protects not only the right to speak, but also the right to speak anonymously. Indeed, the Constitution and the Bill of Rights were framed by authors who debated its virtues anonymously (or pseudonymously) in the letters published later as the Federalist Papers. And the First and Fourth Amendment were born 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.* (1999) 525 U.S. 182, 197-200; *McIntyre v. Ohio Elections Comm'n.* (1995) 514 U.S. 334; *Talley v. California* (1960) 362 U.S. 60. 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* (1965) 381 U.S. 301, 307 (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* (N.D.

Ga. 1997) 977 F. Supp. 1228 (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* (1999) 68 Cal. App. 4th 1538, 1540-41 ("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.* (1986) 42 Cal. 3d 1033, 1045.

Because involuntary identification of anonymous speakers encroaches on their First Amendment right to remain anonymous, the First Amendment creates a qualified privilege against disclosure. Forced identification of anonymous speakers on the Internet would create a chilling effect on the speech not only of the persons whose identity is revealed, but on many other persons as well. "The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously." *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001). Without such an ability, people may no longer participate in public message boards. "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 significant chilling effect on Internet communications and thus on basic First Amendment rights." *2TheMart.com*, 140 F. Supp. 2d at 1093.

California state courts have applied a similar First Amendment privilege to protect the privacy rights of individuals who "wish to promulgate their information and ideas in a public forum while keeping their identities secret." *Rancho Publications, supra*, 68 Cal. App. 4th at 1545. In *Rancho Publications*, the Fourth District Court of Appeal quashed a subpoena issued by a hospital in a defamation action. The subpoena sought to compel a newspaper to disclose the names of anonymous authors of nondefamatory advertorials critical the hospital based upon its belief that the authors were actually the Defendants or affiliated with them.

After first noting the long line of federal and state case law recognizing the "qualified constitutional privilege to block civil discovery that impinges upon free speech or privacy concerns of the recipients of discovery demands and innocent third parties as well" (*Rancho Publications* at 1547), the Court articulated the balancing test as adopted by California State Courts:

> Courts carefully balance the 'compelling' public need to disclose against the confidentiality interests to withhold, giving great weight to fundamental privacy rights. . . The need for discovery is balanced against the magnitude of the privacy invasions, and the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material.

Id. at 1549. Applying that test to the facts before it, the Court noted that the reason the hospital sought the names was a belief that the persons who wrote the advertorials may have also written or been affiliated with the writers of other, defamatory writings that were at issue in the litigation

2.Recent Cases Anonymous Internet Speech Support the Conclusion that Close Judicial Scrutiny Is Required.

The recent set of cases concerning the use of civil subpoenas to unmask Internet speakers demonstrates a growing judicial concern with the use of the civil litigation process to deter Internet speech. In *2TheMart*, the Federal District Court in Seattle, Washington established the appropriate standard for evaluating the merits of "a civil subpoena that seeks the identity of an anonymous Internet user who is not a party to the underlying litigation". *Id.* The *2TheMart* standard is a balancing test involving four factors, which ask "whether: (1) the subpoena . . . was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) [adequate] information . . . is unavailable from any other source." *Id.*

This test for subpoenas seeking the identity of third parties is consistent with a test recently applied where the plaintiff was seeking to identify defendants in a trademark action. *Columbia Ins. Co. v. Seescandy.com* (N.D. Cal. 1999) 185 F.R.D. 573. The court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and provide them with notice that the suit had been filed against them, thus giving them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the trademark claims made against the anonymous defendants.

Here, the California anti-SLAPP law allows a defendant to raise the critical issue of the validity of Plaintiff's claims before a subpoena is issued to his online service provider seeking his identity. Given the clear Constitutional issue of protecting his anonymity in addition to protecting his speech, judicious application of the anti-SLAPP law to such situations can help prevent a situation in which a Defendant is forced to bring a Motion to Quash (which is usually needed on much shortened time). More importantly, though, through its attorney's fees provisions, it can serve to dissuade those who might resort to use of the civil litigation process to both identify and silence their critics. This, in the end, is the goal of the anti-SLAPP law.

CONCLUSION

Based upon the foregoing, Amici respectfully request that the Superior Court file:///c|/documents and settings/owlswan/my documents/legal cases/kessler_v_doe/amicus_final.htmldecision be overturned and that the Defendants' Special Motion to strike be granted.

Dated: October 25, 2001

Respectfully submitted,

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