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UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF IDAHO

SI03, INC.,	)	
	)	MISC. CASE NO. 07-6311-EJL
Plaintiff,	)	
v.	)	(Civil Case No. 07 C 3266
	)	Northern District of Illinois)
BODYBUILDING.COM, LLC,	)	
	)	<b>PLAINTIFF'S REPLY MEMORANDUM</b>
Defendant.	)	<b>IN SUPPORT OF MOTION TO COMPEL</b>
	)	

COMES NOW Plaintiff, SI03, Inc. ("SI03"), by and through its counsel of record, and respectfully files its Reply Memorandum in Support of Motion to Compel, and states as follows:

**ARGUMENT**

The Respondent, Bodybuilding.com, LLC ("Bodybuilding.com"), fails to raise any substantive basis to warrant denying SI03's Motion to Compel ("Motion"). First, Bodybuilding.com fails to develop any of its arguments. Second, assuming the arguments have not been waived, the defenses to which Bodybuilding.com appeals are unavailing. Given this, PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL - 1

SI03 has presented sufficient evidence to survive the standards urged by either SI03 or Bodybuilding.com. Therefore, this Court must grant SI03's Motion.

**I. MOBILISA STANDARD SHOULD BE ADOPTED**

Bodybuilding.com erroneously suggests that, by urging the adoption of the standard in Doe v. Cahill, 884 A.2d 451 (Del. 2005) ("Cahill Standard"), SI03 has argued for a weak standard. See Opposition of Respondent Bodybuilding.com, LLC to Movant's Motion to Compel ("Opp. Memo."), pp. 5, 6. To the contrary, Cahill imposes a more burdensome summary judgment standard<sup>1</sup> on the party seeking disclosure than the significantly less burdensome standards adopted by other courts addressing the same or similar issues.<sup>2</sup> In any case, SI03 urges this court to adopt the most burdensome and equitable standard that, at this point, has been espoused by the Court of Appeals of Arizona.

Since SI03 filed its motion to compel, the Court of Appeals of Arizona adopted a standard that incorporated the notice and summary judgment requirements of Cahill and the balancing test of Dendrite Intern., Inc. v. Doe, No. 3, 775 A.2d 756 (N.J. Sup. Ct. App. Div. 2001). Mobilisa, Inc. v. John Doe 1, et al., 1 CA-CV 06-0521, 2007 Ariz. App. LEXIS 225 \*23 (Ct. App. Az. November 27, 2007). Under the Mobilisa Standard, the requesting party must show that 1) the speaker has been given adequate notice and a reasonable opportunity to respond

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<sup>1</sup> Cahill has recently been adopted by the Court of Appeals of Texas, In re Does 1-10, No. 06-07-00123-CV, 2007 Tex App. LEXIS 9652, (Ct. App. Tx. Dec. 12, 2007), and at least one federal court, Best Western Int'l v. Doe, 2006 U.S. Dist. LEXIS 77942 (D. Ariz. Oct. 24, 2006).

<sup>2</sup> Alvis Coatings, Inc. v. John Does One Through Ten, No. 3:04CV374-H, 2004 U.S. Dist. LEXIS 30099 (W.D.N.C. Dec. 2, 2004) (mere allegation of libel sufficient); Polito v. AOL Time Warner, Inc., 2004 Pa. Dist. & Cnty. Dec. LEXIS 340, 78 Pa. D. & C.4th 328 (Pa. Ct. Com. Pl. Jan. 28, 2004) (requiring no more than good faith allegations supported by some evidence); Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., No. 0425, 2006 WL 37020, at \* 8-9 (Pa. Ct. Com. Pl. Jan. 4, 2006) (ordinary discovery processes were sufficient to balance the relevant interests); Sony Music Entm't, Inc. v. Does 1-40, 326 F.Supp.2d 556, 563 (S.D.N.Y. 2004) (requiring plaintiff to merely set forth a *prima facie* claim); Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (requiring plaintiff to survive a motion to dismiss); Doe v. themart.com Inc., 140 F. Supp. 2d 1088, 1097 (W, D. Wash. 2001) (good faith

to the discovery request; 2) the requesting party's cause of action could survive a motion for summary judgment on the elements of the claim not dependent on the identity of the anonymous speaker; and 3) a balance of the parties' competing interests favors disclosure. *Id.* at \*23. As such, SI03 considers the Mobilisa Standard to be the most effective means of balancing the interests of all parties in determining whether to disclose information relating to pseudonymous speakers online. *See id.* While SI03 is amenable to the adoption of the Dendrite Standard, it recommends adoption of the more recent Mobilisa Standard.

## **II. BODYBUILDING.COM'S ARGUMENTS HAVE NO MERIT**

### **A. Bodybuilding.com Has Waived Arguments**

Initially, Bodybuilding.com has not sufficiently developed its arguments. As such, it has waived them. *See Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) (issues raised in a brief which are not supported by argument are deemed abandoned); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . ."). Waiver notwithstanding, its arguments are meritless.

### **B. Statements Are "Of and Concerning" SI03 and Its Products**

Bodybuilding.com contends that the defamatory statements at issue are not "of and concerning" SI03 because many of the pseudonymous postings refer to "Syntrax" and because SI03 and Syntrax Innovations, Inc. are not the same company. *See* Opp. Memo., p. 11. In doing so, Bodybuilding.com fails to recognize a fundamental distinction between "Syntrax Innovations, Inc." and the "Syntrax" brand of products. Indeed, SI03 owns the Syntrax brand of products and, at the same time, is not the same company as Syntrax Innovations, Inc., which dissolved four years ago. *See* Affidavit of Greg Davis ("Davis Aff.") (attached hereto as "Exhibit A") ¶ 6. As such, when the pseudonymous individuals refer to "Syntrax," they clearly

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and relevancy test).

refer to the entity SI03 and its Syntrax line of products.

Indeed, eight of the pseudonymous individuals use Syntrax and SI03 interchangeably in their postings.<sup>3</sup> Davis Aff. ¶ 13, Ex. A1. In fact, some even use the reference “Syntrax/SI03.” *Id.* Additionally, five individuals use the name “Syntrax” in the context of discussing products that have always been produced solely by SI03.<sup>4</sup> *Id.* ¶ 15, Ex. A2. Six individuals refer to “Syntrax” in boards dedicated specifically to SI03 products, and “uhockey” refers to “SI03” in Syntrax boards.<sup>5</sup> *Id.* ¶¶ 17, 19, Exs. A3-A4. Finally, “Bloute” reposts and responds to another individual’s explanation of SI03’s purchase of the Syntrax name, while “CanadaBBoy” explains that he has lost all respect for Syntrax due to comments made by a SI03 board representative.<sup>6</sup> Davis Aff. ¶¶ 21, Ex. A5. Clearly, from the foregoing and supporting evidence, the pseudonymous individuals at issue know about whom they speak when they refer to Syntrax. See Davis Aff., Exs. A1-A5; Compl. ¶¶ 123, 139. Thus, the defamatory statements at issue are “of and concerning” SI03. *Id.* As such, Bodybuilding.com’s argument on this has no merit.

### C. Bodybuilding.com’s Appeal to Innocent Construction Rule Unavailing

For the foregoing reasons, Bodybuilding.com’s reliance on the innocent construction rule is unavailing.<sup>7</sup> Once again, Bodybuilding.com fails to develop its innocent construction argument, and the argument should be waived. See *Acosta-Huerta*, 7 F.3d at 144. Waiver notwithstanding, Bodybuilding.com fails to accurately articulate the innocent construction rule.

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<sup>3</sup> “EMISGOD”, “Flagg3”, “Nathan158”, “RobW”, “Androgenic”, “Ingenium”, “Aoba”, and “Jkeithc82”.

<sup>4</sup> “cxm”, “deserusan”, and “Ephedra”, all of whom mention Matrix 5.0; “dwm230000”, who boasts in his signature that he is being sued by Syntrax and mentions the Syntrax product Spyce; and “Seth25”, who mentions Syntrax and “Frye”, by which he means SI03’s product Fyre.

<sup>5</sup> “Aeternitatis” (Hyper-H); “BuckeyeMuscle” (Swole V3); “Chimplico”, “ElMariachi”, “Getbusted”, and “uhockey” (Matrix 5.0); and “dito” (Fyre).

<sup>6</sup> “Bloute” and “CanadaBBoy”, respectively.

<sup>7</sup> The innocent construction rule applies only to claims for defamation *per se*. *Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899, 905 (7th Cir. 2007).

For, contrary to Bodybuilding.com's assertion, the "innocent construction rule does not apply...simply because allegedly defamatory statements are 'capable' of an innocent construction." Bryson v. News Am. Publs., 174 Ill.2d 77, 93 (Ill. 1996). Indeed, if a defamatory meaning was clearly conveyed, "the court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense" to hold them as nonlibelous. Id. "Nor does [it] require the court to espouse a naiveté unwarranted under the circumstances." Id. For, a court must "interpret the allegedly defamatory words as they appear to have been used" and must apply the rule in a "contextual, common-sense manner." Austin Eberhardt & Donaldson Corp. v. Morgan Stanley Dean Witter Trust FSB, 2001 U.S. District LEXIS 1090, \*10 (N.D. Ill. Jan. 29, 2001); Muzikowski, 477 F.3d at 905 (7th Cir. 2007).

Here, Bodybuilding.com argues only that the innocent construction rule arises because of an ambiguity as to whom the statements referred. See Opp. Memo., p. 12. As discussed above, no ambiguity exists among those who made and read the statements at issue. Supra, II.B. Given their natural and obvious meaning, and the manner in which "they appear to have been used," the statements clearly referred to Petitioner. Id. Any interpretation to the contrary reflects "a naivete unwarranted under the circumstances." As such, Bodybuilding.com's appeal to the innocent construction rule is unavailing. Bryson, 174 Ill.2d at 93.

#### **D. Opinion or Truth Defenses Unavailing**

Next, Bodybuilding.com unsuccessfully appeals to the defenses of substantial truth and opinion. See Opp. Memo. p. 13. Once again, Bodybuilding.com fails to provide any analysis supporting its contentions, and the arguments should be waived. See Acosta-Huerta, 7 F.3d at 144; Dunkel, 927 F.2d at 956. Waiver notwithstanding, Bodybuilding.com has failed to sufficiently raise substantial truth as a defense to the defamation claims. Substantial truth must be specially pleaded to be available as a defense. Kilbane v. Sabonjian, 38 Ill. App. 3d

172, 175, 347 N.E.2d 757 (Ill. App. Ct. 1976). To establish truth as a defense to a defamation action, a defendant must make a showing of the truth of the “gist” or “sting” of the defamatory imputation. Kilbane, 38 Ill. App. 3d at 175. Here, Bodybuilding.com has failed to make any showing as to the truth to any of the statements at issue. At most, Bodybuilding.com cites to litigation in which it has been alleged that SI03 infringed a patent as demonstrative proof as to the truth of the allegation. Opp. Memo, p. 18. This is preposterous and unsupported by any authority. Were this to be acceptable logic, a third party could affirmatively state as true mere allegations contained in any complaint without impunity. Additionally, Bodybuilding.com cites to SI03’s website describing a product as containing egg albumin as demonstrative proof of that SI03 used rotten eggs. Id., pp. 17-18. This is not sufficient. Absent any showing of truth as to the defamatory statements at issue, Bodybuilding.com’s use of substantial truth as a defense fails. See id. Additionally, the substantial truth of a statement is normally a question of fact for the jury. See Harrison v. Chicago Sun Times, Inc., 341 Ill. App. 3d 555, 563 (Ill. App. Ct. 2003). As such, even assuming validity to its arguments, this issue would survive summary judgment.

As to opinion, statements of opinion may be actionable as being defamatory. A statement of fact is not shielded from an action for defamation by being prefaced with the words “in my opinion.” Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993). Nor did the Supreme Court intend to create a wholesale defamation exemption for anything that might be labeled “opinion.” Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695, 2705 (1990). As a result, Bodybuilding.com’s simple argument that the defamatory postings on its message boards are “opinion” is insufficient. See id.; see Opp. Memo. p. 13. For the foregoing reasons, Bodybuilding.com’s attempts to raise substantial truth and opinion fail, and SI03’s Motion to Compel must be granted. See id.

#### **D. Special Damages Sufficiently Pled**

In a footnote, Bodybuilding.com attempts to show that special damages have not been pled for defamation *per quod*. See Opp. Memo. p. 10 n. 40. This argument is waived. See Fuji Photo Film Co. v. Jazz Photo Corp., 394 F.3d 1368, 1375 n.4 (Fed. Cir. 2005) (arguments raised in footnotes are waived as not being properly argued). Waiver notwithstanding, SI03 has pled that it has suffered damages including, but not limited to, harmed reputation, diminished employee morale, lost productivity, and lost goodwill. Compl. ¶ 126. Moreover, SI03 has alleged that the disparaging statements have significantly affected sales and the reputation of SI03 and the Syntrax brand. Id. ¶ 66. Further, SI03 has alleged a loss of business and sales, loss of customers, loss of revenue, and loss of goodwill. Id. ¶ 115. These allegations sufficiently plead special damages. See Becker v. Zellner, 292 Ill.App.3d 116, 127 (2d. Dist. 1997) (Plaintiffs' allegation that a third party stopped doing business with them as a result of Defendant's alleged statements sufficient); see also Halpern v. News-Sun Broadcasting Co., 53 Ill.App.3d 644, 653 (2d. Dist. 1977) (allegations that plaintiff lost and continued to lose income as a result of patients leaving sufficient). SI03 has sufficiently pled special damages. See id.

#### **III. BALANCE OF INTERESTS WEIGHS IN FAVOR OF DISCLOSURE**

Both the Mobilisa and Dendrite courts imposed a balancing test. Mobilisa, 2007 Ariz. App. LEXIS 225 at \*23. Here, the balance of interests favors compelling disclosure. Absent disclosure by Bodybuilding.com, SI03 will be precluded from proceeding further in the underlying litigation, despite having legitimate bases for being able to do so. For, contrary to Bodybuilding.com's suggestion otherwise, Opp. Memo. p. 9, the right to speak anonymously is not absolute. See Mobilisa 2007 Ariz. App. LEXIS 225 at \*10. As such, SI03 should not be viewed as an oppressor for seeking legal redress for defamatory statements. Indeed, by advocating a standard such as Cahill or Mobilisa (or agreeing to Dendrite), SI03 seeks

this Court to balance all of the appropriate interests. Should it succeed under such standards, it should be permitted to proceed to protect its interests. See id.

As to Bodybuilding.com, the potential hardship is not burdensome as it has already preserved and currently possesses the identifying information sought. Correction to Opposition (“Corr. Mem.”), p. 2. As to the IP addresses, SI03 does not possess this information.<sup>8</sup> And, despite Bodybuilding.com’s apparent suggestion to the contrary, no other party exists from which SI03 can obtain the information. Also, Bodybuilding.com has previously, through its agents, freely disclosed IP addresses about its users. Davis Aff. ¶ 26. Thus, Bodybuilding.com will not be burdened by disclosure of the IP addresses. Corr. Mem., p. 2.

The individual defendants have engaged in defamatory speech that serves no beneficial purpose. The postings at issue do not constitute noble efforts of whistleblowers. Rather, they constitute concerted efforts to destroy SI03’s business by engaging in defamatory commercial speech.<sup>9</sup> Mem. Supp. Mot. Compel, Exs. E1-E22. As such, public policy and the law favor disclosure. Again, the right to speak anonymously is not absolute and has limits. When an those limits are crossed, the courts and law have imposed liability. As such, a balancing of the interests clearly favors disclosure. See Best Western Int’l, 2006 U.S. Dist. LEXIS 77942 at \*18.

#### **IV. CLARIFICATION ON PROCEDURAL POSTURE**

Finally, an accurate description of the procedural history is warranted. SI03 filed the underlying action on June 11, 2007. Affidavit of Charles Lee Mudd, Jr. (“Mudd Aff.”) ¶ 3 (attached hereto as Exhibit B). On June 13, 2007, the Honorable Ruben Castillo dismissed the action without prejudice and also unambiguously granted permission to proceed with expedited

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<sup>8</sup> Although SI03 has connected certain pseudonyms as being related to identifiable competitors, this does not preclude SI03 from seeking information tending to identify the actual individuals making the statements. Bodybuilding.com has cited no authority to the contrary.

discovery to identify the appropriate defendants. *Id.* ¶ 4, Ex. B1. Beginning July 9, 2007, SI03 informally attempted to resolve issues with Bodybuilding.com relating to the production of information related to the pseudonyms. Davis Aff. ¶¶ 24-25. Upon determining that informal discussions would not succeed, SI03 decided to proceed with serving a subpoena. *Id.*

On July 18, 2007, counsel for SI03 sent a letter to Bodybuilding.com informing it of its obligation to preserve information. Mudd Aff. ¶ 5, Ex B2. SI03 also made preparations to have a subpoena served. *Id.* ¶ 6. On July 27, 2007, Bodybuilding.com was served with a subpoena. *Id.* ¶ 7, Ex B3. On August 8, 2007, counsel for SI03 received correspondence from opposing counsel that raised objections. *Id.* ¶ 8, Ex. B4. After addressing some of the minor objections and refining the pseudonyms for which it sought information, SI03 then had a second subpoena served on August 10, 2007. Mudd. Aff. ¶ 9, Ex. B5. Among Bodybuilding.com's objections, it complained that the action had been dismissed. *Id.*, Ex. B4. Counsel for SI03 made efforts to explain the dismissal to opposing counsel. *Id.* ¶ 10, Ex. B6. On August 17, 2007, Bodybuilding.com again raised the same objection. *Id.* ¶ 11, Ex. B7. Although SI03 believed the order allowing discovery to be unambiguous, SI03 sought clarification from the Court for *Bodybuilding.com's* benefit. Mudd Aff. ¶ 12, Ex. B8. The Court granted SI03's request for clarification and indicated its willingness to compel discovery.<sup>10</sup> *Id.* ¶ 13, Exs. B9-B11. Despite the Court's order, Bodybuilding.com formally objected August 23, 2007. Mudd Aff. ¶ 14, Ex.

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<sup>9</sup> A review of the defamatory statements of which SI03 complains and the posts attached as evidence in Exhibits E1-E22 to the Memorandum in Support of the Motion to Compel will demonstrate that SI03 has not used selective quotes to mislead the Court.

<sup>10</sup> There exists a distinction between the defendants against whom the underlying complaint has been filed and the pseudonyms at issue. For, a single defendant may use any number of pseudonyms. As such, the Court's order allows SI03 to seek the "production of identifying information related to those pseudonyms Plaintiff reasonably believes to be used by the defendants." Order August 22, 2007 (attached as Exhibit B10). As such, Bodybuilding.com's objection to the inclusion of pseudonyms not identified in the Complaint has no merit.

12. SI03 sought to compel disclosure.<sup>11</sup> *Id.* ¶ 15. In all cases, SI03 acted diligently. *Id.* ¶ 16.

### CONCLUSION

For the foregoing reasons and those in its Opening Brief, SI03 respectfully requests that this Court grant SI03's Motion to Compel. SI03 also moves for attorney's fees and costs pursuant to I.C. § 12-121 and Rules 37 and 45 of the Federal Rules of Civil Procedure.

DATED this 28<sup>th</sup> day of December, 2007.

TROUT JONES GLEDHILL FUHRMAN, PA

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<sup>11</sup> Since filing its Complaint, SI03 admits that it has refined and limited the number of pseudonyms for which it seeks information. For this, SI03 should not be penalized. It has not abused the subpoena power by doing so. Further, SI03 and its counsel find Bodybuilding.com's characterization of SI03's efforts as "bad faith" and "McCarthy-esque" to be objectionable and nothing more than baseless hyperbole.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28<sup>th</sup> day of December, 2007, I submitted the foregoing to the Clerk of the Court for service on CM/ECF Registered Participants as reflected on the Notice of Electronic Filing, including but not limited to, the following:

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