

1 STEINHART & FALCONER LLP
JOSHUA KOLTUN (SBN: 173040)
2 HENRY M. BURGOYNE, III (SBN: 203748)
333 Market Street, Thirty-Second Floor
3 San Francisco, CA 94105-2150
Telephone: (415) 777-3999
4 Facsimile: (415) 442-0856

5 Attorneys for Doe Defendant
6
7

8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 UNLIMITED JURISDICTION
11

12 VIROLOGIC, INC., a Delaware corporation,

13 Plaintiff,

14 v.

15 DOES 1 through 10, inclusive,

16 Defendant.
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Case No. CGC-02-407068

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF DOE
DEFENDANT'S MOTION TO STRIKE
PLAINTIFF VIROLOGIC, INC.'S FIRST
AMENDED COMPLAINT (CCP §
425.16), DEMURRER TO VIROLOGIC'S
FIRST AMENDED COMPLAINT, AND
MOTION TO QUASH VIROLOGIC'S
SUBPOENA TO YAHOO! INC. AND TO
STAY ALL DISCOVERY**

DATE: July 3, 2002

TIME: 9:30 a.m.

DEPT: 320

JUDGE: Hon. James Robertson, II

Complaint Filed: April 23, 2002

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Steinhart & Falconer, LLP
 222 MARKET STREET, SUITE 2000
 SAN FRANCISCO, CALIFORNIA 94102

Steinhart & Falconer, LLP
333 MARKET STREET, SUITE 2000
SAN FRANCISCO, CALIFORNIA 94104

1 INTRODUCTION

2 The First Amendment protects a right to communicate anonymously. *McIntyre v.*
3 *Ohio Elections Comm'n*, 514 U.S. 334, 341-343 (1995). The development of the Internet has made
4 it vastly easier for private citizens to partake of this right. One place in which such anonymous
5 communications are particularly prevalent is financial “chat rooms,” in which investors banter –
6 often quite harshly – about the prospects and performance of publicly traded companies. Many such
7 companies, stung by the often nasty tone of messages on Internet chat rooms, have resorted to filing
8 lawsuits against Doe defendants for the sole purpose of discovering the identities of their critics.
9 Most such lawsuits result in the issuance of a subpoena that the Doe defendant has insufficient time
10 or resources to oppose. The Internet service provider then identifies the Doe, and the lawsuits are
11 rarely pursued any further. As explained below, the present lawsuit has all the hallmarks of such an
12 action, except that in this case the defendant was able to obtain counsel to assist in protecting the
13 defendant’s constitutional right to anonymity. Doe respectfully specially moves the Court to strike
14 plaintiff ViroLogic, Inc.’s (“ViroLogic”) pleadings under the anti-SLAPP statute (Code of Civil
15 Procedure § 425.16), and further requests that the Court sustain Doe’s demurrer, quash ViroLogic’s
16 subpoena to third-party Yahoo! Inc. (“Yahoo!”), and stay all discovery.

17 ViroLogic sued Doe after Doe posted a series of critical messages in a chat room on
18 Yahoo! dedicated to ViroLogic. ViroLogic initially filed a boilerplate “Doe complaint” alleging
19 trade secret, defamation, trade libel, unfair competition, and intentional interference with economic
20 advantage. The complaint was entirely conclusory and did not set forth the statements alleged to be
21 actionable. Based on that complaint, ViroLogic then applied for *ex parte*, and received, expedited
22 discovery concerning Doe’s identity. Yahoo! informed Doe that Yahoo! had received a subpoena
23 seeking documents concerning Doe's identity, and Doe promptly obtained counsel. Upon learning
24 that Doe had obtained representation, ViroLogic promptly amended its complaint to drop the
25 defamation, trade libel, and intentional interference claims, and watered down the trade secret and
26 unfair competition claims. The amended complaint asserts that Doe’s messages give the *false*
27 impression that he is in possession of trade secrets. ViroLogic's First Amended Complaint, ¶ 5.

28 ViroLogic cannot show, as it must to defeat the anti-SLAPP motion, that any of the

1 messages at issue constitute the disclosure of a trade secret or unfair competition. A person *falsely*
2 claiming to have access to a trade secret cannot have committed a trade secret violation. Moreover,
3 Doe made no such claim. The innocuous messages posted by Doe would not be construed by a
4 reasonable reader, particularly in the context of the Yahoo! ViroLogic chat room at issue, as
5 anything other than idle chatter and speculation about the performance and prospects of the
6 company. Such expressions are constitutionally protected opinion, not actionable assertions of fact.
7 Moreover, even if the statements at issue were reasonably interpreted as purporting (falsely) to
8 disclose trade secrets, ViroLogic cannot show that it has suffered or will suffer any cognizable harm
9 therefrom. Thus the Amended Complaint should be stricken and Doe’s demurrer granted.

10 Even if the Court were to deny the motion to strike and overrule the demurrer, it
11 should still quash the subpoena and stay discovery. A court reviewing a subpoena to disclose the
12 identity of a Doe defendant should require the plaintiff to show “that an act giving rise to civil
13 liability occurred and that the discovery is aimed at revealing specific identifying features of the
14 person or entity who committed the act.” *Dendrite Int’l, Inc. v. Doe*, 775 A. 2d 756, 770 (N.J.
15 Super. 2001). Moreover, Code of Civil Procedure section 2019(d) requires a plaintiff to identify the
16 trade secret allegedly misappropriated with particularity *before* conducting any discovery.
17 ViroLogic has not (and cannot) show with particularity any trade secret that was disclosed in any of
18 Doe’s postings. Thus, at a minimum, discovery should be stayed. Permitting ViroLogic to identify
19 Doe would irreparably strip Doe of his or her constitutional right to speak anonymously. ViroLogic
20 has not and cannot make a sufficient showing to justify that drastic result.

21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 Third party Yahoo! is an Internet portal that maintains a series of financial chat
23 rooms, each corresponding to a publicly traded company.¹ Declaration of Henry M. Burgoyne III
24 (“Burgoyne Decl.”), ¶ 2. The chat rooms permit registered users – registration is free – to post

25 _____
26 ¹ Doe files herewith a request for judicial notice both of the billyoungwont statements attached to ViroLogic’s
27 Declaration in support of its *ex parte* Application for expedited discovery, attached as Exhibit 2 to the Appendix of
28 Record, and of Yahoo!’s ViroLogic chat room, including the messages attached as Exhibits A and B to the Burgoyne
Declaration. Yahoo!’s ViroLogic chat room is located on the Internet at “[http://messages.yahoo.com/yahoo/Business
Finance/Investments/Sectors/Healthcare/Biotechnology_and_Drugs/](http://messages.yahoo.com/yahoo/Business_Finance/Investments/Sectors/Healthcare/Biotechnology_and_Drugs/)”. ViroLogic’s ticker symbol is “VLGC.”

Steinhart & Falconer, LLP
333 MARKET STREET, SUITE 2000
SAN FRANCISCO, CALIFORNIA 94104

1 messages that any visitor to the chat rooms can read. *Id.* Most posters identify themselves not by
2 their real names, but with pseudonyms such as “delusional_hypester” and
3 “miryams_penniless_mother.” *Id.* at ¶ 2 and Exh. A. The messages posted in the chat rooms range
4 from well-reasoned commentary concerning the subject corporations to personal invective among
5 speakers. *Id.* at ¶ 2.

6 During the months of February and April 2002, someone using the pseudonym
7 “billyyoungwont” (a mocking reference to ViroLogic’s chairman and CEO, William Young) posted
8 in Yahoo!’s ViroLogic chat room a series of messages that attracted ViroLogic’s attention.
9 Appendix of Record (“Appendix”), Exh. 2.² Some of the messages criticized ViroLogic and
10 ViroLogic’s management, others speculated about ViroLogic’s financial future. *Id.* Many of the
11 messages were posted in response to – indeed, were to a large extent merely quotations from – some
12 of the 4,000 messages previously posted in Yahoo!’s ViroLogic chat room by other posters.
13 Burgoyne Decl., ¶ 3 and Exh. B.

14 On April 23, 2002, ViroLogic filed a complaint (“Complaint,” Appendix at Exh. 1)
15 alleging five causes of action – misappropriation of trade secrets, defamation, trade libel, unfair
16 competition, and intentional interference with prospective economic advantage – against the person,
17 or persons, responsible for the billyyoungwont messages. The Complaint’s boilerplate, conclusory
18 language failed to identify a single allegedly defamatory statement or a single trade secret allegedly
19 disclosed by billyyoungwont. Shortly thereafter, ViroLogic filed an *ex parte* application
20 (“Application,” Appendix Exh. 2) for expedited discovery. Both the Application and the attorney
21 declaration filed in support thereof (“Voss Declaration,” Appendix at Exh. 2) represented in
22 conclusory fashion that billyyoungwont had disclosed ViroLogic’s “confidential and proprietary
23 trade secret business information,” and had “published false and defamatory statements concerning
24 ViroLogic’s directors and officers, its business operations, products, services and finances ...”
25 Appendix, Exh. 2 at Application, 1:20-25; Voss Declaration, 2:1-7.

26
27 ² For the Court’s convenience, Doe submits along with this motion an Appendix of Record containing the Complaint and
28 all other documents filed with the Court and referenced herein.

Steinhart & Falconer, LLP
333 MARKET STREET, SUITE 200
SAN FRANCISCO, CALIFORNIA 94104

1 Although the Voss Declaration attached a series of billyyoungwont’s messages,
2 neither it nor the Application explained how any of the messages were actionable. Many of the
3 messages attached to the application papers simply quoted from messages previously posted by
4 another poster. One such message, for example, had urged management to “resign NOW ... go back
5 to school or find another profession, you want money, play lotto.” *Compare* Appendix, Exh. 2
6 (billyyoungwont message 4034) to Burgoyne Decl., Exh. B (original poster’s message 3987) .

7 On May 1, the Court granted ViroLogic’s *ex parte* application. Appendix, Exh. 3.
8 That same day, ViroLogic issued to Yahoo! a subpoena (“Yahoo! subpoena,” Appendix at Exh. 4)
9 seeking, *inter alia*, “All DOCUMENTS REFERRING to the name, mailing address, telephone
10 number, e-mail address, Internet protocol address, Internet service provider, or any other information
11 identifying ... billyyoungwont.”

12 On May 2, Yahoo! notified Doe that it had been served with ViroLogic’s subpoena.
13 Burgoyne Decl., ¶ 4. Doe promptly obtained counsel. *Id.* On May 9, Doe’s counsel informed
14 ViroLogic that if ViroLogic’s Complaint were not withdrawn, Doe would file an anti-SLAPP
15 motion. *Id.* at ¶ 5. ViroLogic agreed to extend the return date of the Yahoo! subpoena by one week,
16 to May 28. *Id.*

17 Within a week, ViroLogic filed a first amended complaint (“Amended Complaint,”
18 Appendix at Exh. 5) withdrawing the defamation, trade libel and intentional interference claims, and
19 revising the allegations relating to the trade secret and unfair business practices causes of action.
20 Unlike the original Complaint, which alleged in straightforward, albeit entirely conclusory terms,
21 that Doe had disclosed ViroLogic’s trade secrets, the Amended Complaint alleges that Doe had
22 “published what *appears to be potential* ViroLogic confidential and proprietary trade secret business
23 information ... and/or has done so with the *intent of creating the false impression* that the
24 defendant(s) have access to company confidential information.” Amended Complaint, ¶ 5 (emphasis
25 added). In response, Doe filed the instant motion to strike, demurrer and motion to quash and stay
26 discovery.

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Steinhart & Falconer, LLP
333 MARKS BUILDING, SUITE 200
SAN FRANCISCO, CALIFORNIA 94104

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II. ARGUMENT

A. The Billyyoungwont Messages Constitute Constitutionally Protected Speech in Connection With A Public Issue, and ViroLogic Cannot Show Facts Demonstrating a Probability That It Will Prevail; Thus, the Court Should Grant Doe’s Motion to Strike

After perceiving a “disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition,” the California legislature passed the anti-SLAPP statute, Code of Civil Procedure Section 425.16 (creating a special motion to strike). To invoke Section 425.16, a defendant must demonstrate that a plaintiff’s claim or claims “aris[e] from any act of [the defendant] in furtherance of [the defendant’s] right of petition or free speech ... in connection with a public issue.” *Id.* at § 425.16(b)(1). Once the defendant has made that showing, the burden shifts to the plaintiff “to establish a *probability of prevailing*, 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, 999 (2001) (emphasis added). In light of the important interest served by Section 425.16, the legislature instructed that it be “construed broadly.” *Id.* § 425.16(a).

This action is a perfect example of the type of lawsuit that Section 425.16 was intended to discourage. The First Amendment and California Constitution guarantee the right to communicate anonymously over the Internet. *Doe v. 2TheMart.Com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998); *Kasky v. Nike, Inc.*, 119 Cal. Rptr. 2d 296 (Sup. Ct. 2002) (California Constitution’s speech provision “at least as broad” as First Amendment). *See also Section III C 1, infra.* So, too, do the First Amendment and California Constitution guarantee the right to express opinions. *FCC v. League of Women Voters*, 468 U.S. 364, 375-76 (1984); *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1607 (1991) (First Amendment prohibits liability for “statements not conveying a false factual imputation”). *See also Section III A 2, infra.* Participating in pseudonymous, online debate concerning a company’s finances, management and officers is an act in furtherance of free speech in connection with a public issue under, and therefore is covered by Section 425.16. *ComputerXpress*, 93 Cal. App. 4th at 1006-08; *Global Telemedia Int’l, Inc. v. Doe*, 132 F. Supp. 2d 1261, 1264-66 (C.D. Ca. 2001).

ViroLogic’s allegations relate to statements by Doe of a type that permit Doe to

1 invoke Section 425.16. *Id.*, *ComputerXpress*, 93 Cal. App. 4th at 1006-08. Unless ViroLogic can
2 make a showing of facts demonstrating a probability that it will prevail on its trade secret and unfair
3 competition claims, the Court should grant Doe’s motion to strike. Even a cursory review of the
4 statements at issue discloses that ViroLogic cannot make such a showing. Indeed, its own Amended
5 Complaint essentially concedes as much.

6 **1. ViroLogic Fails to Identify a Single Trade Secret Disclosed by Billyyoungwont,
7 and Even Concedes that Billyyoungwont Had No Access to ViroLogic’s Trade
8 Secrets; Thus, As a Matter of Law, ViroLogic’s Trade Secret Claim Fails**

9 The California Uniform Trade Secrets Act requires a plaintiff to prove, at a minimum,
10 that the defendant acquired a trade secret by improper means, or improperly used or disclosed a trade
11 secret. Calif. Civ. Code § 3426.1(b). ViroLogic fails to identify a single billyyoungwont posting
12 that discloses a ViroLogic trade secret, and essentially concedes in its Amended Complaint that Doe
13 has not disclosed one. ViroLogic now alleges: “Defendants ... published what *appears to be*
14 *potential* ViroLogic confidential and proprietary trade secret business information ... and/or has
15 done so with the *intent of creating the false impression* that the defendant(s) have access to
16 company confidential information.” Amended Complaint, ¶ 5 (emphasis added). Counsel for Doe is
17 aware of no California authority imposing liability under Section 3426.1 for acquiring or disclosing
18 information that “appears to be potential” trade secrets, nor for “creating the false impression” that
19 one has access to trade secrets. If, as ViroLogic alleges, the impression that Doe had access to
20 ViroLogic’s trade secrets is a false one, then Doe cannot have committed an actionable violation of
21 Section 3426.1. Accordingly, ViroLogic’s trade secret claim fails, and should be stricken.

22 **2. ViroLogic’s Unfair Business Practices Claim Is a Backdoor Attempt to
23 Resurrect The Constitutionally and Factually Deficient Defamation Claim that
24 ViroLogic Voluntarily Dismissed; Thus, That Claim Should Be Stricken**

25 ViroLogic’s boilerplate unfair business practices claim fails even to hint at the
26 conduct that it alleges to violate California Business and Professions Code Section 17200. But to the
27 extent ViroLogic relies on its vague allegations that billyyoungwont’s messages “created a false
28 impression,” “injur[ed ViroLogic]’s good will, and business,” and caused ViroLogic a “loss of

1 reputation,”³ its claim fails as a matter of law. Each and every one of billyyoungwont’s messages
2 are constitutionally protected expressions of opinion, and none of them has caused or will cause any
3 cognizable harm.

4 The First Amendment and California Constitution both guarantee the right to express
5 opinions. *League of Women Voters*, 468 U.S. at 375-76; *Nike*, 119 Cal. Rptr. 2d 296 (California
6 Constitution “at least as broad” as First Amendment). Accordingly, a speaker cannot be subjected to
7 liability premised on statements of protected opinion – in other words, statements that cannot
8 “reasonably be understood as describing actual facts” – whether the liability is characterized as
9 defamation or any other cause of action. *Hustler Magazine v. Falwell*, 485 U.S. 46, 46, 56-57
10 (1988) (intentional infliction of emotional distress); *Partington v. Bugliosi*, 56 F.3d 1147, 1153 n. 10
11 (9th Cir. 1995); *Morningstar, Inc. v. Super. Court*, 23 Cal. App. 4th 676, 695-96 (1994) (speech-based
12 intentional interference claim improper where statements did not assert provably false facts); *Kahn*,
13 232 Cal. App. 3d at 1607. Assertions that are not capable of being proven true or false are protected
14 opinion. *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995).

15 In determining whether a statement is one of protected opinion, a court must look to
16 the “totality of the circumstances in which [the statement] was made.” *Id.* For example, an “Op-Ed
17 page is one of the great American forums for the free exchange of vitriolic debate, and readers can
18 be expected to discount the statements made in that context as more likely to be the stuff of opinion
19 than fact [I]t is clear that that editorial context is regarded by the courts as a powerful element
20 in construing as opinion what might otherwise be deemed fact.” *Morningstar*, 23 Cal. App. 4th at 693
21 (internal citation omitted). A court must measure the allegedly actionable speech not by the “critical
22 analysis of a mind trained in the law, but by the natural and probable effect upon the mind of an
23 average reader.” *Id.* at 688 (quoting *Edwards v. Hall*, 234 Cal. App. 3d 886, 903 n. 14 (1991)).
24 Taking the full context of the statement into account, the question whether a “challenged statement is
25 reasonably susceptible of an interpretation which implies a provably false assertion of fact” is a
26 threshold question of law. *Id.* at 686-87.

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28 ³ Amended Complaint, 2:12-13 & 18, 4:13-14 & 16-17.

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Many of the messages posted in Yahoo!’s ViroLogic chat room by billyyoungwont contain biting, sometimes personal, criticism of ViroLogic and its officers. Appendix, Exh. 2. Others join the communal speculation concerning ViroLogic’s financial prospects and future.⁴ *Id.* The *Global Telemedia* court could have been speaking of billyyoungwont’s messages and Yahoo!’s ViroLogic chat room when it observed:

The [defendants’] statements were posted anonymously in the general cacophony of an Internet chat-room ... They were part of an on-going, free-wheeling and highly animated exchange about [the plaintiff company] and its turbulent history. ... Importantly, the postings are full of hyperbole, invective, short-hand 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.

Global Telemedia, 132 F. Supp. 2d at 1267. Considered in the overheated context of Internet chat rooms, and the Yahoo! ViroLogic chat room in particular, billyyoungwont’s comments simply cannot be reasonably taken as assertions of actual facts. They are thus protected by the First Amendment.

ViroLogic cannot overcome the constitutional protection afforded statements of opinion by characterizing the claim as one of unfair competition, nor by alleging any level of wrongful intentions to Doe. *Hustler v. Falwell*, 485 U.S. at 53 (statements that cannot be understood as asserting facts do not lose First Amendment protection on account of the speaker’s intent to inflict emotional distress). Accordingly, ViroLogic’s allegation that Doe’s conduct “has been oppressive and engaged in with an intent to injure, vex, and harass ViroLogic,” even if true, would be irrelevant. Amended Complaint, ¶¶ 19 and 20. Furthermore, ViroLogic cannot show a probability of success on its claim that it “has been [suffering] and will continue to suffer irreparable harm.” Amended Complaint, 4:13-14. Because billyyoungwont’s messages constitute constitutionally protected opinion, and because ViroLogic cannot demonstrate that it suffered any cognizable harm or damage from those statements, ViroLogic cannot succeed on its unfair

⁴ As previously noted, Doe requests that judicial notice be taken of the full context of comments on the Yahoo!’s ViroLogic chat room, including, but not limited to, the messages attached as Exhibits A and B to the Burgoyne Declaration.

1 competition claim. Thus, the Court should grant Doe’s Code of Civil Procedure Section 425.16
2 motion to strike.

3 **B. ViroLogic’s Amended Complaint Fails to Allege the Existence of A Trade Secret, and**
4 **Essentially Concedes That Doe Has Not Disclosed One; Thus, the Court Should Sustain**
5 **Doe’s Demurrer Without Leave to Amend**

6 To overcome a demurrer to a cause of action for misappropriation of trade secrets, a
7 plaintiff must allege ultimate facts demonstrating that a trade secret exists. *Diodes, Inc. v. Franzen*,
8 260 Cal. App. 2d 244, 252 (1968). So, too, must a plaintiff “describe the subject matter of the trade
9 secret with sufficient particularity to separate it from matters of general knowledge in the trade or of
10 special knowledge of those persons who are skilled in the trade ...” ViroLogic’s Amended
11 Complaint alleges no ultimate facts demonstrating the existence of a trade secret, and fails to
12 describe the trade secret, much less with “sufficient particularity.” Accordingly, the Amended
13 Complaint fails as a matter of law to state a trade secret cause of action.

14 The Court should not grant ViroLogic leave to correct those defects. Where a
15 plaintiff’s allegations demonstrate that the defendant has committed no wrongdoing, leave to amend
16 “would serve no useful purpose,” and need not be granted. *Mercury Casualty Co. v. Super. Ct.*, 179
17 Cal. App. 3d 1027, 1035 (1986). By backing off the original Complaint’s affirmative (albeit
18 conclusory) trade secret allegations and inserting the allegation that billyyoungwont “published what
19 *appears to be potential* ViroLogic confidential and proprietary trade secret business information ...
20 and/or has done so with the *intent of creating the false impression* that the defendant(s) have access
21 to company confidential information” (Amended Complaint, ¶ 5), ViroLogic has essentially
22 conceded that Doe has not disclosed, indeed has not had access to, any trade secrets. Thus, the Court
23 should sustain Doe’s demurrer to ViroLogic’s trade secret cause of action without leave to amend.

24 Nor should the Court grant ViroLogic leave to amend its unfair business practices
25 claim, which fails as a matter of law. First, a court is required to examine allegedly actionable
26 statements at the pleading stage, and to decide as a matter of law whether a reasonable person would
27 understand the statements, in context, as asserting provably false facts. *Morningstar*, 23 Cal. App.
28 4th at 686-88 (overruling trial court’s refusal to examine allegedly false statements, and ordering that

1 demurrer be sustained without leave to amend). The Court should take judicial notice of the
2 allegedly injurious statements at issue and the complete context (Yahoo!'s ViroLogic chat room) in
3 which those statements were made.⁵ See Request for Judicial Notice, Appendix at Exh. 2, and
4 Burgoyne Decl. at Exhs. A and B. Since none of the billyyoungwont messages can, in that context,
5 be reasonably read as asserting provably false facts, none of them are actionable under the First
6 Amendment. See Section III A 2. Doe's Demurrer should be sustained without leave to amend.

7 **C. Even if the Court Denies Doe's Motion to Strike and/or Demurrer, It Still Should**
8 **Quash the Yahoo! Subpoena and Stay Discovery, Since Compelled Disclosure of Doe's**
9 **Identity Would Violate Doe's Constitutional Rights and CCP 2019(d)**

10 **1. The First Amendment and California Constitution Guarantee the Right to**
11 **Speak Anonymously Online; Thus, Courts Must Subject Discovery Requests**
12 **Like the Yahoo! Subpoena to Heightened Scrutiny**

13 It is well established that the First Amendment and the California Constitution protect
14 not only the right to speak, but the right to speak anonymously. *McIntyre*, 514 U.S. at 341-343;
15 *Rancho Publications v. Super. Ct.*, 68 Cal. App. 4th 1538, 1440-41 (1999). That right is
16 undiminished by the fact that speech is disseminated over the Internet, rather than through more
17 traditional media. *2TheMart*, 140 F. Supp. 2d at 1092; *Johnson*, 4 F. Supp. 2d 1029 at 1033; *Nike*,
18 119 Cal. Rptr. 2d 296 (California Constitution "at least as broad" as First Amendment).⁶

19 The right to speak anonymously over the Internet has been undermined, however, as
20 companies increasingly resort to libel and other speech-related lawsuits as a means of discovering
21 the identities of their anonymous critics in an attempt to stifle criticism. Lyrisa Barnett Lidsky,
22 *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855 (2000).⁷ As one

23 ⁵ In ruling on a demurrer, it is proper for a court to take judicial notice of factual material demonstrating the context in
24 which complained of statements were made. See *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1040, 1046-47 n.2
(1986) (taking compulsory judicial notice of other aspects of published list, excerpted statements from which were
25 alleged to be actionable under several theories, including trade libel and unfair business practices). On that basis, and as
previously noted, Doe has asked that the Court take judicial notice of Yahoo!'s ViroLogic chat room.

26 ⁶ See also *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding "no basis for qualifying the level of First Amendment
27 scrutiny that should be applied to" online communications).

28 ⁷ See also Shaun B. Spencer, *CyberSLAPP Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in*
Cyberspace, 19 J. Marshall J. Computer & Info. L. 493, 498 (2001) ("[d]espite some valid claims, many legal experts
and privacy advocates claim that companies are abusing the legal process simply to 'out' their online critics"); Joshua R.
Furman, *Cybersmear or CyberSLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits*

(Footnote continued)

1 commentator has explained:

2 In the typical cyberSLAPP lawsuit, a company files suit against John Doe for
3 posting an allegedly harmful message. The company then tries to discover John
4 Doe’s identity by subpoenaing the message board host and John Doe’s [Internet
5 services provider]. Once the company learns John Doe’s true identity, the
6 company may simply drop the lawsuit and fire or otherwise sanction John Doe, if
7 he works for the company. Indeed, only rarely have companies litigated such
8 claims to judgment. . . . John Doe often receives no notice of the lawsuit or the
9 subpoena seeking his identity. Even if John Doe receives advance notice, he may
10 not be able to afford a lawyer to challenge the subpoena.

11 Spencer, *CyberSLAPP Suits and John Doe Subpoenas*, 19 J. Marshall J. Computer & Info. L. at 495-
12 96 (footnotes omitted).

13 To protect online speakers' constitutional rights to anonymity, courts closely
14 scrutinize attempts to discover the identities of anonymous online speakers, and have required
15 plaintiffs seeking such discovery against Doe defendants to first demonstrate “that an act giving rise
16 to civil liability actually occurred and that the discovery is aimed at revealing specific identifying
17 features of the person or entity who committed the act.” *Dendrite*, 775 A. 2d at 770 (denying
18 discovery as to identity of anonymous online speaker where defamation plaintiff failed to prove that
19 it suffered damages). *See, e.g., TheMart*, 140 F. Supp. 2d at 1093 (“If Internet users could be
20 stripped of [their] anonymity . . . under the liberal rules of civil discovery, this would have a
21 significant chilling effect on . . . basic First Amendment rights”); *Columbia Insurance Co. v.*
22 *Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Ca. 1999) (“[p]eople who have committed no wrong
23 should be able to participate online without fear that someone who wishes to harass or embarrass
24 them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their
25 identity”). *See also Rancho Publications*, 68 Cal. App. 4th at 1440-41 (precluding hospital from
26 using civil subpoena to discover identities of anonymous speakers who criticized hospital in print
27 advertisement).

28 *Against Public Participation*, 25 Seattle U.L. Rev. 213, 215 (2001) (“[I]awsuits commenced for the purpose of
identifying and silencing a cybersmear detractor are reminiscent of Strategic Lawsuits Against Public Participation”);
David L. Sobel, *The Process That ‘John Doe’ Is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 Va. J.L.
& Tech. 3, 16 (2000) (“[w]hile there clearly will be cases in which aggrieved parties should be entitled to learn the
identities of anonymous Internet posters, there will be many others in which the civil discovery process may be abused.
Under current legal standards . . . [c]orporate critics can be chilled into silence, whistleblowers can be intimidated and
gay people can be ‘outed’”).

1 Yahoo!’s production of documents would have the immediate and irreversible effect
2 of piercing Doe’s constitutionally protected anonymity. Accordingly, the Court should subject the
3 Yahoo! subpoena to careful scrutiny, and should require ViroLogic to demonstrate that legally
4 actionable wrongdoing has in fact occurred, and that there is a basis for seeking discovery of Doe’s
5 identity. Here, the record not only shows that ViroLogic has no basis for its claims, but also strongly
6 suggests that ViroLogic filed its initial Compliant and *ex parte* Application for expedited discovery
7 in bad faith. ViroLogic sued Doe for posting pseudonymous messages criticizing ViroLogic’s
8 financial performance, management and officers. Appendix, Exh. 2. The claims alleged in
9 ViroLogic’s original Complaint – in particular those for defamation and trade libel – were frivolous,
10 as evidenced by ViroLogic’s failure to identify a single statement alleged to be false, let alone
11 actionable. Upon learning that Doe had retained a lawyer, ViroLogic immediately amended its
12 Complaint with a watered-down Amended Complaint that essentially concedes that Doe has not
13 disclosed any trade secrets. Amended Complaint, ¶ 5 (alleging that billyyoungwont “published what
14 *appears to be potential* ViroLogic confidential and proprietary trade secret business information ...
15 and/or has done so with the *intent of creating the false impression* that the defendant(s) have access
16 to company confidential information”) (emphasis added). Still, ViroLogic refuses to withdraw the
17 Yahoo! subpoena, despite that the Court granted it in reliance on ViroLogic’s affirmative, and now
18 withdrawn, allegations that trade secrets had been disclosed and actionable defamatory statements
19 made. Appendix, Exh. 2 at Application, 1:20-25; Voss Declaration, 2:1-7. Because the statements
20 identified by ViroLogic do not provide a sufficient basis for stripping Doe of the constitutional right
21 of anonymity, the Court should quash the Yahoo! subpoena and should stay all further discovery
22 concerning Doe’s identity.

23 **2. CCP 2019(d) Bars ViroLogic from Conducting Discovery Until It Identifies**
24 **“With Reasonable Particularity” the Trade Secret Allegedly Disclosed by Doe;**
25 **Thus, the Court Should Quash the Yahoo! Subpoena and Stay Discovery**

26 ViroLogic’s *ex parte* Application for expedited discovery argued for the issuance of a
27 subpoena under California Code of Civil Procedure Section 2025, the statute that governs
28 depositions generally. But ViroLogic failed to draw the Court’s attention to a more specific code

Steinhart & Falconer, LLP
333 MARK TAPER BLVD., SUITE 2000
SAN FRANCISCO, CALIFORNIA 94102

1 section that, at least for the present, bars ViroLogic from conducting any discovery whatsoever.

2 California Code of Civil Procedure Section 2019(d), titled “Discovery Relating to
3 Misappropriation of Trade Secrets,” states: “In any action alleging the misappropriation of a trade
4 secret ... before commencing discovery relating to the trade secret, the party alleging the
5 misappropriation shall identify the trade secret with reasonable particularity ...” Section 2019(d)
6 imposes a “a stay of discovery pending plaintiff’s identification of its alleged trade secrets.”
7 *Computer Economics, Inc. v. Gartner Group, Inc.*, 50 F. Supp. 2d 980, 988 (S.D. Ca. 1999). Among
8 other goals, Section 2019(d) was intended to “curb and deter plaintiffs from asserting unsupported
9 trade secret claims” in an effort to discover the confidential information of their adversaries. *Id.* at
10 988.

11 ViroLogic has not identified – much less with particularity – the trade secret allegedly
12 disclosed by the billyyoungwont messages. Indeed, the Amended Complaint appears to concede that
13 Doe has not disclosed a ViroLogic trade secret. Amended Complaint, ¶ 5 (alleging that
14 billyyoungwont “published what *appears to be potential* ViroLogic confidential and proprietary
15 trade secret business information ... and/or has done so with the *intent of creating the false*
16 *impression* that the defendant(s) have access to company confidential information”) (emphasis
17 added). Because ViroLogic has failed to identify with reasonable particularity any trade secret
18 allegedly disclosed by Doe, the Court should quash the Yahoo! subpoena and should stay all
19 discovery in this case.

20 **III. CONCLUSION**

21 For the foregoing reasons, the Court should grant Doe’s motion to strike ViroLogic’s
22 complaint, should sustain Doe’s demurrer, should quash the Yahoo! subpoena, and should grant
23 Doe’s attorney’s fees and costs associated with bringing this motion, in an amount to be determined
24 upon filing of a memorandum of costs.

25 Dated May 28, 2002

STEINHART & FALCONER LLP

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HENRY M. BURGOYNE, III
Attorneys for Doe Defendant